MATTHEW WATSKY
ATTORNEY AT LAW
East Brook Executive Park
30 Eastbrook Road, Suite 301
Dedham, MA 02026

December 19, 2017

Medway Conservation Commission
155 Village Street
Medway, MA 02053

Re: Timbercrest Estates

Dear Members of the Commission:

As counsel to the applicant, Timbercrest Estates, LLC., I wish to address a legal issue raised by the Commission regarding the availability to the applicant to reference the limited project provisions of 310 CMR 10.53(3)(e) as the regulatory basis for approval of several wetlands crossing necessary for the project.

As I understand it, the Commission's position is that in a separate Order issued to another developer for the subdivision to the north of the Timbercrest site a wetland crossing was approved with loss of 2,550 sq ft of wetlands and replication of that area. Though there is no continuing condition in that Order and no connection between the developers, the Commission asserts that Timbercrest is limited in this subdivision to wetlands alteration to the remainder of 5,000 sq ft. minus the approved area for a road in that northern subdivision; and asserts that only one wetlands crossing is permissible under the limited project provision.

As I discuss in some detail below, Timbercrest may present this project, with all the wetlands crossings necessary to comply with the ZBA approved project, in this NOI under the limited project provisions of 310 CMR 10.53(3)(e). The provisions of 10.53(3)(e) do not restrict an applicant or a project to one crossing. The language of the regulation, the DEP Program Policy 88-2, and the Final Decisions of DEP's Commissioner ruling on adjudicatory hearings support the conclusion that multiple crossings are permissible.

First, 310 CMR 10.53)(3)(e) provides in pertinent part as follows:

> (3) Notwithstanding the provisions of 310 CMR 10.54 through 10.58 and 10.60, the Issuing Authority may issue an Order of Conditions and impose such conditions as will contribute to the interests identified in M.G.L. c. 131, § 40 permitting the following limited projects . . .

Tel. (781) 329-5009 Matt@WatskyLaw.com
Fax (781) 461-9068 http://www.watskylaw.com

> (e) The construction and maintenance of a new roadway or driveway of minimum legal and practical width acceptable to the planning board, where reasonable alternative means of access from a public way to an upland area of the same owner is unavailable. Such roadway or driveway shall be constructed in a manner which does not restrict the flow of water. Reasonable alternative means of access may include any previously or currently available alternatives such as realignment or reconfiguration of the project to conform to 310 CMR 10.54 through 10.58 or to otherwise minimize adverse impacts on resource areas. The issuing authority may require the applicant to utilize access over an adjacent parcel of land currently or formerly owned by the applicant, or in which the applicant has, or can obtain, an ownership interest. The applicant shall design the roadway or driveway according to the minimum length and width acceptable to the Planning Board, and shall present reasonable alternative means of access to the Board. The applicant shall provide replication of bordering vegetated wetlands and compensatory flood storage to the extent practicable. In the Certificate of Compliance, the issuing authority may continue a condition imposed in the Order of Conditions to prohibit further activities under 310 CMR 10.53(3)(e).

There is nothing in the above regulatory provision that limits a roadway or driveway to a single crossing. Rather, the regulation is focused on the upland, and the question is whether any reasonable means of access is available other than by crossing wetlands. If multiple crossings are needed, particularly for a larger parcel, those crossings may be permitted consistent with the regulation.

To provide guidance to Commission and the regulated public, DEP issued Program Policy 88-2, which was based on the DEP's interpretation of the regulation and reflected experience administering the regulation, including in adjudicatory hearings, over the years since its promulgation in 1983. With regard to the potential for a single project having multiple crossings, the policy is explicit that multiple crossings are permissible under a single NOI and may be approved:

> This provision does not preclude the possibility of more than one wetland crossing in certain circumstances, such as where an applicant is developing a very large parcel of land and the Planning Board has required, after a review of alternatives as discussed above, the applicant to provide multiple access points into the property.

The Policy, therefore, specifically contemplates that multiple crossing are permissible, particularly within projects located on larger parcels where multiple areas of uplands are to be accessed. DEP decisions focus on the particular area of upland for which access is sought, not the number of crossings necessary to reach it, or the total number of crossings necessary to

access the various areas of uplands on a large number of parcels combined together to form a single development.

I also refer you to the DEP Commissioner's Final Decisions issued after these kinds of issues have been adjudicated. In an appeal of a 40B project in which the Town's ZBA served as the permitting authority, In the Matter of ROGER LeBLANC, OADR Docket No. WET-2008-051, (January 9, 2009), the DEP noted that where a comprehensive permit has issued, the ZBA is the approving authority rather than the Planning Board. Another case, cited by the Leblanc decision as authority, addressed the extent to which the DEP or a Commission could second guess the project design once approved by the local planning authorities. The DEP ruled in In the Matter of Sugrue, the:

> Department does not assume the role of a superagency for land use planning so as to second-guess decisions made by the local Planning Board or Zoning Board of Appeals. [The Town's] zoning authorities have ruled on the proposed subdivision twice, making it sufficiently plain in the process that subdivision approval is based upon lot size of at least an acre and that an undersized lot, as was shown in the earlier plan, is unacceptable. 310 CMR 10.53(3)(e) gives the Department no leeway to second-guess this local decision making, e.g., by entertaining such collateral attacks upon it as the petitioners level. Nor does either CMR 10.53(3)(e) or Wetlands Program Policy 88-2 contemplate that the applicant will be sent back to the local zoning authorities ad infinitum for review of every possible permutation of alternative access, or to renew the review of a subdivision concept (such as a substandard-sized lot) that has already been rejected under the local zoning bylaw.

In the Matter of RICHARD SUGHRUE, Docket No. 93-019, 1 DEPR 79 (1994)

The LeBlanc decision refers throughout to wetlands crossings, in the plural, which consistent with the language of the Program Policy 88-2 indicates that where more than one crossing is necessary to access developable uplands, and the land use permitting authority (whether Planning Board for a conventional subdivision or the ZBA for a 40B project) has required that access and determined the minimum width it will accept for the crossings, that commissions and DEP must abide by that land use decision. The DEP in LeBlanc ruled:

> The Wetlands Access Roadways Policy, must be read together with the language of 310 CMR 10.53(3) in order to determine whether wetlands crossings comply with the requirement that there be no other reasonable alternative means of access and with respect to the minimum width that is acceptable to the local municipal board charged with authority over roadway issues. The language of 310 CMR 10.53(3) requires applicants to present alternative means of access and designs for wetlands crossings to both the Conservation Commission and the local Planning

> Board to assist in reconciling the competing dictates of the Wetlands Protection Act and the public safety and other mandates of zoning and municipal land use law.
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> Once a decision has been made by the municipal authority, after presentation of such alternatives, as to access locations and minimum widths of access roadways, neither the Department nor any other issuing authority should "assume the role of a superagency for land use planning so as to second guess decisions made by the local Planning Board or Zoning Board of Appeals."

Though an applicant, such as Timbercrest, could legally divide its project into multiple NOIs (and commonly would do so for the individual building lots or phases of construction of the lots) it is not obligated to do so. It is entirely feasible, therefore, for a project on a larger parcel to include multiple wetlands crossings to access different areas of uplands.

Finally, I understand that the Commission has suggested that an Order issued for construction of Homestead Drive back in the 1990s has imposed limits on the current developer. That is not correct. I have reviewed that Order, and it contains no such limiting, continuing condition; and it clearly has no bearing on the current project.

First, for an Order issued under 10.55(4)(b) to have such an effect, it must include specific language in it that clearly limits the extent of further wetlands alteration and puts the future owners in the chain of title on notice of the limit. The Order for Homestead included no such language and it therefore cannot have had that effect.

Second, an Order that does contain such a limiting continuing condition can only have an effect on the specific parcel for which it is recorded. The area of Homestead Drive was not on the same parcel as the currently proposed development and is not in the chain of title for the current project. Indeed, the parcels of land that are now owned and are part of the current development, were not acquired until after many years after the issuance of the Homestead Development Order. As you can see from the attached Exhibit, Parcel 102 was acquired on December 9, 2014; Parcel O-R was acquired on February 11, 1993; and Parcel 165 was acquired on August 12, 2016.

Third and finally, the wetlands crossings proposed now were in no way affected by the permitted Homestead crossing. The Homestead crossing did not facilitate the current project, and the uplands to which the current applicant seeks access would have needed the proposed access crossings independent of the existence of the Homestead crossing.

In summary, I conclude that the proposed crossings are permissible under 10.53(3)(e), and are not limited either factually or as result of an enforceable condition in the Order permitting Homestead Drive.

Sincerely,

Matthew Watsky