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Lowrie Sargent, Vice Chair
Planning Board
Town of Camden
29 Elm Street
P.O. Box 1207
Camden, ME 04843

Re: F.H.R.E., LLC Ordinance Amendment Proposal

Dear Mr. Sargent:

This letter follows up on my July 31 letter to the Planning Board and my August 13 letter to Bill Kelly, to comment on the revised ordinance proposal submitted by Paul Gibbons. We continue to believe that the proposed ordinance amendment should be rejected by the Planning Board, for the following additional reasons.

1. Standing to Request an Ordinance Amendment

F.H.R.E., LLC does not have standing to request an ordinance amendment. According to Article II, Section 15 of Camden's Town Charter, "Any qualified voter may request the Select Board that an article be placed in the warrant and shall present in written form the substance of the article." F.H.R.E., LLC is not a qualified voter. The Planning Board should reject the pending request for this reason alone.

2. Conditional and Contract Zoning

Although the ordinance proposal is drafted as an amendment to the entire CR District, it is in effect a spot zoning contract zone proposal that must comply with Maine law governing contract zoning. The proposed ordinance does not comply with those requirements, as discussed in Exhibit A to this letter, and therefore should be rejected for this reason as well.

3. Unintended Consequences

Adopting the proposed ordinance would open the door to all types of substance abuse treatment centers in the CR District, as discussed in detail in my August 13 letter to Bill Kelly. Once Camden allows this facility in the CR District, there is nothing Camden could do to keep other substance abuse treatment facilities out, even those that do not meet the specific criteria contained in the proposed ordinance. For this reason, you should reject the

proposed amendment and limit these types of facilities to the B-2 and B-3 districts, where they are currently allowed (as "hospitals").[1]

Adopting this ordinance proposal as a conditional or contract zone, instead of as a general amendment to the CR District as proposed by F.H.R.E, would not alleviate this problem. First, as noted in Exhibit A, before this could be adopted as a conditional or contract zone, Camden would need to adopt provisions in its zoning ordinance allowing for such zoning. Camden may not adopt a conditional or contract zone without identifying the criteria it will use to determine when conditional or contract zoning is appropriate. Among other things, if it did so, this would simply highlight the lack of generally applicable, non-discriminatory siting criteria reasonably excluding treatment centers anywhere else in Camden. With no explanation anywhere in the zoning ordinance as to what general, non-discriminatory criteria are used in establishing a conditional or contract zone, the result is that there are no such criteria, and no reason apparent in the zoning ordinance why other conditional or contract zones allowing treatment centers should not be allowed throughout the town. Conditional or contract zoning is still zoning, and similarly situated entities must be treated similarly. *See Neighbors in Support of Appropriate Land Use v. County of Tuolumne*, 157 Cal. App. 4th 997, 1009 (2007) ("If the county had altered the zoning ordinance to allow commercial uses like the ones here at issue as conditional uses within the agricultural zone, it would necessarily have given other owners in the zone the opportunity to apply for conditional use permits allowing those uses.").

Use of a piecemeal zoning approach divorced of generally applicable criteria can only heighten suspicions regarding discrimination. *See Town of Rhine v. Bizzell,* 751 N.W.2d 780, P64 (Wis. 2008) (approach denying any permitted use and then only providing generalized standard for a conditional use permit "opens the door to favoritism and discrimination"). Indeed, in one decision finding equal protection violations in denying permits for low income housing, the court referenced "the County's resort to such use of conditional zoning" as a "planned contrivance." *Crow v. Brown*, 332 F. Supp. 382, 390 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972). In so noting, the court cited evidence that discrimination was being perpetuated by use of the tool of conditional zoning. *Id.* at

[1] Because this facility would be permitted in the B-2 and B-3 districts, the August 22, 2013 Economic Impact Report submitted by F.H.R.E. does not provide justification for an ordinance amendment proposal. That is, all of the economic benefits allegedly flowing from the proposed facility would be realized if the facility were located in a more appropriate location that is already contemplated and authorized by the Zoning Ordinance; the report provides no evidence that the economic benefits it discusses are tied in any way to location in the CR District. In fact, the economic benefits in another location would be even greater, because new building construction likely would be required in such a location. Further, although F.H.R.E.'s Economic Impact Report discusses potential noncommercial economic benefits that might emanate from the proposed facility, noticeably absent is any discussion of *adverse* economic impacts, such as increased demands for police and fire protection, and burdens on roads and solid waste facilities. The report itself admits that many of its conclusions are speculative: "Attempting to measure all of these indirect vendor supply and consumer spending effects individually would be virtually impossible. . . . . [T]here is no direct way to obtain an accurate measurement of these economic 'multiplier' effects." *See* Economic Impact Report, page 11.

392. In another case finding zoning relating to residential substance abuse treatment programs violative of the FHA and the ADA, the court found the use of conditional ordinances for such programs but not for comparable uses facially discriminatory, and, further, that if a program seeking a conditional ordinance is denied "because of stereotypical thinking" then "it may bring a suit in federal court under the ADA or FHA to challenge the decision not to grant a [conditional ordinance]," "even if the reason that a [Conditional Ordinance] was not obtained by a [treatment program] was the refusal of a member of the City Council to introduce legislation authorizing the [conditional ordinance.]" *U.S. v. City of Baltimore*, 845 F. Supp. 2d 640 (D. Md. 2012).

In sum, the use of a conditional or contract zone to allow this particular treatment center will not insulate the Town from the argument that other locations in Town are equally appropriate for similar conditional or contract zones.

4. <u>The Proposed Ordinance Language</u>

We have reviewed the most recent draft of the proposed ordinance language, and have numerous additional concerns, set forth in Exhibit B to this letter. Note, however, that by providing comments on the proposed ordinance language we are not suggesting that the proposed ordinance could be altered to address our fundamental, underlying concerns with this proposed ordinance amendment.

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In short, we do not believe that the proposed alcohol treatment facility is an appropriate use at Fox Hill, and we do not believe that the proposed ordinance can be altered to address our fundamental, underlying concerns with this proposed ordinance amendment. For that reason, and for the other reasons we have provided to the Planning Board, we request that the Planning Board recommend to the Camden Select Board that the Select Board not include the F.H.R.E. ordinance amendment proposal on the town meeting ballot.

Thank you for considering this additional information.

Sincerely,

Matthew D. Manahan

Enclosures
cc: Steve Wilson
William Kelly, Esq.
Leonard and Madlyn Abramson
John J. Sanford, Esq.
Paul L. Gibbons, Esq.

Exhibit A
Conditional and Contract Zoning

Although the ordinance proposal is drafted as an amendment to the entire CR District, it is in effect a spot zoning contract zone proposal that must comply with Maine law governing contract zoning. The proposed ordinance does not comply with those requirements, as discussed below, and therefore should be rejected for this reason as well.

a. Background on Conditional and Contract Zoning

Conditional or contract zoning is a zoning process in which special conditions and restrictions on the use of a parcel of property are imposed as a *quid pro quo* for re-zoning that property.[1] This is what is being proposed here. Proponents for a change to the CR District are crafting a zoning amendment with many conditions, inapplicable elsewhere in the District (or anywhere else in Camden), particularized to their own development project. The legislative record to date is indisputably clear that the proponents of this rezoning amendment are negotiating the conditions they believe are needed to allow their project to proceed. Such an amendment, with these kinds of development conditions, falls squarely into the definition of conditional or contract zoning in Maine law. *See also Nolan v. City of Taylorville*, 420 N.E.2d 1037 (Ill. App. 1981) (noting the specificity of zoning conditions struck down in *Andres v. Village of Flossmoor*, 304 N.E.2d 700 (Ill. App. 1973), with their characteristics of a contract); *Budd v. Davie County*, 116 N.C. App. 168, 172, 447 S.E.2d 449 (1994) (zoning amendment was conditional zoning when it proposed rezoning to permit one particular use proposed by zoning proponent through use restrictions).

Conditional or contract zoning is generally disfavored because, among other things, it goes against the land use planning rule of uniformity, often to benefit one property owner as opposed to the town's public welfare. *See Treadway v. City of Rockford*, 182 N.E.2d 219 (Ill. 1962) ("Such conditional amendments have not fared well in the courts of other jurisdictions, and have frequently been invalidated either because they introduce an element of contract which has no place in the legislative process or because they constitute an abrupt departure from the comprehensive plan contemplated in zoning."); *see also Oury v. Greany*, 267 A.2d 700 (R.I. 1970) (rezoning of residential property to business use on condition that land rezoned would be devoted exclusively to the business use for which application to rezone was made, otherwise to remain residential, constituted zoning without regard to public health, safety, and welfare, concern for which is basic to that comprehensiveness contemplated in the enabling act).

For these reasons, this circumvention of the general uniformity rule for zoning generally requires authorization via a statute expressly allowing piecemeal zoning. *See Rose v. Paape*, 157 A.2d 618 (Md. 1960), citing *Baylis v. City of Baltimore*, 148 A.2d 429 (Md. 1959); *see also Sweetman v. Town of Cumberland*, 364 A.2d 1277 (R.I. 1976) (allowing conditional zoning because permitted by statute); *see generally* P. Salkin, *Anderson American Law of Zoning* § 9:21

[1] Maine law defines "conditional zoning" as "the process by which the municipal legislative body may rezone property to permit the use of that property subject to conditions not generally applicable to other properties similarly zoned." 30-A M.R.S. § 4301(4). "Contract zoning" is defined as "the process by which the property owner, in consideration of the rezoning of that person's property, agrees to the imposition of certain conditions or restrictions not imposed on similarly zoned properties." 30-A M.R.S. § 4301(5).

(updated through May 2013) (contract zoning "is unlawful except in the unusual situation where a statute authorizes agreements between governmental units.").

b. The Proposal's Non-Compliance with Maine's Conditional and Contract Zoning Law

Maine has passed a statute on conditional and contract zoning, 30-A M.R.S. § 4352(8), and, therefore, the amendment proposed for Fox Hill must comport with these statutory requirements. *See, e.g., Mayor and Council of Rockville v. Rylyns Enterprises*, 814 A.2d 469 (2002) (striking down re-zoning because it exceeded the authority given to municipalities by statute). While the proposed Fox Hill ordinance proposal remains a moving target, its current iteration would violate the Maine conditional and contract zoning law.

i. Local Ordinance Authorization

The first requirement under Section 4352(8) is the need for inclusion within a municipality's ordinance of provisions allowing for the conditional or contract zoning process. A municipality "may" include provisions to allow conditional or contract zoning, or it can choose not to do so. *See* 30-A M.R.S. § 4352(8) ("A zoning ordinance may include provisions for conditional or contract zoning"). When municipalities in Maine do choose to include such provisions, these provisions announce the adoption and authorization of the process, subject to the conditions placed on its application that the municipality chooses to impose generally. *See, e.g., Pike Industries, Inc. v. City of Westbrook*, 2012 ME 78, ¶ 38, n.11, 45 A.3d 707 (citing Westbrook's Zoning Ordinance, which provides: "[C]ontract zoning is authorized where, for such reasons as the unusual nature or unique location of the development proposed, the City Council finds it necessary or appropriate to impose, by agreement with the property owner or otherwise, certain conditions or restrictions relating to the physical development or operation of the property, which are not generally applicable to other properties similarly zoned. All rezoning under this section shall establish rezoned areas, which are consistent with the existing and permitted uses within the original zones. All such rezoning shall be consistent with the City's Comprehensive Plan."); *see also Golder v. City of Saco*, 2012 ME 76, ¶ 13 45 A.3d 697 (citing Saco's ordinance provision authorizing contract zoning).

As I noted in my August 13 letter, Camden has no such ordinance. To authorize contract zoning would effect a major change in Camden zoning policy. There is nothing in the Comprehensive Plan authorizing or otherwise approving the use of such a zoning process, so such a change in itself would present consistency issues. Before a conditional or contract zoning process can be used, a municipality's ordinance must contain provisions allowing this process, and the application of the process must follow the rules adopted by the municipality as a part of that authorization.

It is not permissible to adopt conditional or contract zoning only for a single property, because such limited authorization would be inconsistent with the legislative requirement to "include provisions for conditional or contract zoning" in the zoning ordinance. If Camden desires to allow conditional or contract zoning, it must go through the process to determine under what circumstances it makes sense, in Camden, to allow it. Only then can it appropriately consider a conditional or contract zone proposal. To combine the authorization process with a specific

conditional or contract zone proposal would be putting the cart before the horse, and would be bad planning.

ii. Consistency with the Comprehensive Plan

Section 4352(8) also requires that conditional or contract zoning must be consistent with the Comprehensive Plan. 30-A M.R.S. § 4352(8)(A). As I noted in my July 31 letter, the proposal for a commercial-scale residential treatment facility for alcohol and alcohol related substance abuse disorders goes well beyond the limited intensity uses in the CR District, and the Bay View Street area in particular, contemplated by the Comprehensive Plan. The kind of "light commercial" uses contemplated for this area by the Comprehensive Plan – such as nursery schools and daycare centers – are not open year-round, 24 hours a day, 7 days a week, and thus would not have the same negative impacts as the proposed alcohol treatment center. As I noted in my August 13 letter, the test for determining consistency is whether the zoning classification "is in basic harmony" with the Comprehensive Plan. *Bog Law v. Town of Northfield,* 2008 ME 37, ¶ 18. The proposed facility is not in basic harmony with the non-commercial nature of the CR District contemplated by the Comprehensive Plan.

iii. Consistency with Existing and Permitted Uses

Section 4352(8) next requires that zones established through conditional or contract zoning must be "consistent with the existing and permitted uses within the original zones." 30-A M.R.S. § 4352(8)(B). Thus, a conditional / contract zone may not spot zone in a way that introduces a use not just inconsistent with the comprehensive plan, but inconsistent with uses both permitted and then existing in the underlying zoning district. *See Morrill's Corner Neighborhood Ass'n v. City of Portland,* 2005 WL 2727085 *5 (Me. Super. Ct. 2005) (rejecting motion to dismiss claim that zone violated Section 4352(8)(B) because statute requires new uses to be consistent with existing and permitted uses in the district). *Cf. Vella v. Town of Camden,* 677 A.2d 1051, 1053 (Me. 1996) (discussing illegal "spot zoning" as "the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners"), *quoting Rodgers v. Village of Tarrytown,* 302 N.Y. 115, 96 N.E.2d 731, 734 (N.Y. 1951).

With respect to existing uses in the CR District, I noted in my August 13 letter that there are no commercial uses in the CR District around Bay View Street and there have been none for over 100 years. Since the adoption of the Zoning Ordinance 21 years ago, there have been no new commercial uses allowed in the CR District.

With respect to permitted uses in the CR District, the Zoning Ordinance does not permit any uses even remotely consistent with the proposed alcohol treatment center. Rather, permitted commercial uses are limited to outdoor storage of boats and storage within barns, and institutional and commercial uses permitted by special exception are limited to nursery schools, day care centers, and limited expansions of certain existing hotels and motels. Zoning Ordinance Art. VII, §§ 5(B) and 5(C).

Thus, the proposed use does not meet this requirement, either.

iv. Conditions Relating to Development or Operation of the Property

Finally, the conditional or contract zone must "[o]nly include conditions and restrictions that relate to the physical development or operation of the property." 30-A M.R.S. § 4352(8)(C). *See Golder*, 2012 ME 76, 45 A.3d 697. This requirement echoes limitations in zoning conditions found both in the constitution and the common law.

Constitutionally, conditions for development must substantially advance a legitimate governmental objective in a "roughly proportional" way. *See Koontz v. St. Johns River*, Docket No. 11-1447 (U.S. Jan. 15, 2013); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Curtis v. Town of South Thomaston*, 1998 ME 63, 708 A.2d 657. Under the common law, because zoning focuses on property and its use, conditions must relate to the property itself, and cannot be individual to the owner. *See, e.g., Dexter v. Town of Gates*, 324 N.E.2d 870 (N.Y. 1975) (condition limiting use to retail supermarket for Wegman Enterprises, Inc. invalid because conditions must "relate only to the real estate involved without regard to the person who owns or occupies it"); *see also St. Onge v. Donovan*, 522 N.E.2d 1019 (N.Y. 1988) (zoning boards may not impose conditions unrelated to zoning purposes, such as conditioning variance upon owner's agreement to dedicate land not subject to variance or imposing condition that seeks to regulate details of operation of the proposed use rather than the use of the land on which the enterprise is located); *Treisman v. Town of Bedford* (N.H. 1989) (striking down condition in ordinance that helicopter owners make helicopters available for use of the town's police and fire departments); *PMC Realty Trust v. Town of Derry*, 480 A.2d 51 (N.H. 1984) (town lacked authority to give landowner a variance changing land from industrial to residential use or any form of immunity from future zoning changes in exchange for grant of land for a water tank).

Maine has expressly affirmed these principles in statutory text: by express statutory language, Maine requires a nexus between the conditions being extracted and the development and operation of the specific piece of property being re-zoned.

Some of the conditions included or under discussion do not appear to have a "roughly proportional" nexus to the property use that would be allowed. As previously explained, we strongly believe that a use of this type, as a treatment center, is wholly incompatible with the CR District. But if one concludes to the contrary by enacting an amendment that does permit such centers within the CR District, then many of the various conditions proposed become suspect – not only under federal discrimination law, as we have explained previously, but given these nexus zoning principles as well. Why, for example, are ten acres of land needed for a treatment center? Even if these particular owners (whomever they are) agree to this condition now, they or a successor owner can later claim that this condition was an unconstitutional exaction and litigate to have that particular condition stricken.

Other conditions are equally challengeable as unrelated to the physical development and operation of "the property." Whether a treatment center accepts court-ordered patients or not seems unrelated to the development and operation of property itself. Whether or not the owner of the property pays taxes seems also unrelated to that issue. Indeed, the same development and

operation could occur, with the same impacts on the surrounding area, whether the parcel remains in the town's tax base or not.

Thus, the proposed ordinance would also violate this requirement in state law.

Exhibit B
Specific Concerns with the Proposed Ordinance Language

1. How the Proposal Fits with the Ordinance

First, the proposed ordinance language is confusing. How is it intended to fit in the Zoning Ordinance? It does not reference any particular section of the Ordinance, and it is hard to know how it would integrate with the Ordinance. For example, the "Special Exception" page states that "in the Coastal Residential Zone, Private Residential Treatment Facility must meet the following criteria." If this language is intended to be located only in the CR District section of the Ordinance, why does it include a reference to the CR District? If not, is the intent to allow Private Residential Treatment Facilities elsewhere, with other standards applicable to them in those locations?

2. Appropriate Clients

The definition of "Private Residential Treatment Facility" states that "A Private Residential Treatment Facility . . . provides a comprehensive recovery program for alcohol and other substance abuse disorders . . . ." This suggests, contrary to the representations of F.H.R.E., that the facility may accept clients who have substance abuse disorders but may not also have alcohol abuse disorders. Is that what is intended?

The definition also states that "All clients . . . must agree to sign a written contract with the operator of the facility that indicates the client's willingness to actively participate in the rehabilitative services provided." How is the Planning Board to judge the appropriateness of the contract? What are the standards?

Also, the definition of "Private Residential Treatment Facility" states that "the operator shall carefully screen and evaluate all potential clients to determine that their rehabilitative needs are appropriate for the services provided by the facility." How is this determination to be made? What are the standards? How is the Planning Board to review whether this has been done appropriately? How will the Town ensure that this is done appropriately on an ongoing basis? Must the Town offer relevant training to the Code Enforcement Officer, and provide for oversight? If the facility accepts a client who is not appropriate, what is the Town's recourse?

3. Length of Stay

The definition of "Private Residential Treatment Facility" states that "All clients served by the Private Residential Treatment Facility must reside full-time on site at the facility for a minimum stay of 21 days." The prior draft of the ordinance proposal also stated that "the facility will have an average stay for its clients of at least 30 days per year." Why has that provision been removed?

4. Setbacks

The proposal states (#3) that "All buildings occupied in part or in whole for residential dwelling purposes within the facility shall be set back from the road a minimum of 100 feet and set back from side lines a minimum of 50 feet." Why is this restriction limited to residential dwellings?

5. Normal Business Hours

The proposal states (#6) that "With the exception of heating oil and gas, all commercial deliveries must be made during normal business hours." The facility will be operational 24-hours a day. What are its "normal business hours"?

6. Traffic

The proposal states (#6) that "Traffic Flow in and out of the facility shall have a daily maximum trip generation passenger car equivalent per bedroom." What is that daily maximum? Traffic on Bay View Street is a significant concern, given its narrow width and residential character.

Also, the prior draft of the ordinance proposal included an unspecified maximum peak vehicle flow per hour. (Although the written draft referred to a maximum peak flow per day, Mr. Gibbons clarified at the August 15 meeting that he intended to refer to a maximum peak flow per hour.) Why has this provision been removed?

7. Site Plan Review

The proposal states (#7) that "The Private Residential Treatment Facility must meet the standards for Site Plan review set forth in this Ordinance as determined by the Planning Board." This language leaves unclear whether site plan approval would be required for the Fox Hill proposal, because it may be dependent on whether the proposal will trigger the Site Plan review section of the Zoning Ordinance (although it seems likely that at least Art. XII, Section 1(5) – change of use from residential to non-residential – would be triggered). It should be clear that Site Plan approval will be required.

8. Operational History

The proposal states (#10) that "The operator of this facility must . . . demonstrate, to the satisfaction of the Planning Board, a five-year history of successfully operating a residential facility." How is the Planning Board to measure "success"? What are the standards?

9. Staffing

The proposal states (#11) that "The rehabilitation facility shall provide care and supervision with a staff on site 24 hours a day, all year." This could allow only one staff member on duty overnight; there should be a requirement for a sufficient number of nighttime staff members to ensure that all patients are supervised.