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July 8, 2015

Board of Selectmen  
Town of Hopkinton  
18 Main Street  
Hopkinton, MA 01748

Re: *61 Main Street; Proposed CVS*

15 JUL 19 PM 3:25

Dear Board Members:

As you are aware, a number of questions were posed at the last Board of Selectmen's meeting regarding Crosspoint Associates, Inc.'s lease of a portion of the building located at 61 Main Street to CVS. My responses to the questions presented are set forth below.

1. Questions Regarding Property Acquisition and Lease

The land and buildings at 61 Main Street, consisting of four lots, were conveyed to Hopkinton CP LLC (a company under common control with Crosspoint) via two quitclaim deeds. The first deed conveyed Colella Family LLC's interest in lots 1-3<sup>1</sup> to Hopkinton CP LLC for \$3.3 million. The second deed conveyed the interests of Charlotte Colella and the Daniel E. Colella Revocable Trusts in lots 1-4<sup>2</sup> to Hopkinton CP LLC for \$1. My office has reviewed those deeds and a related Right of First Refusal,<sup>3</sup> and has found no issues with those transactions that may be challenged by the Town.

Any property appraisal or zoning opinion prepared in connection with this transaction would not be a public document and is unavailable to us at this time. Hopkinton's Board of Assessors last valued the property at \$2,035,000, broken down

<sup>1</sup> Lots 1-3 contain the former Colella's Supermarket building and parking lot.

<sup>2</sup> Lots 1-3 are the same as described in the prior deed. Lot 4 is the narrow strip of land that runs north and south and protrudes into the Fire Department's abutting property.

<sup>3</sup> Colella Family LLC granted Crosspoint Acquisitions, LLC a right of first refusal with respect to the property (18 Grove Street) adjacent to 61 Main Street.

Board of Selectmen

July 8, 2015

Page 2 of 8

as \$1,312,900 for the building and \$722,100 for the land. The lease between Crosspoint and CVS is a private contract and was not recorded; it is not available to us at this time.

2. Questions Regarding Notice to the Town

The Town first became aware that CVS is the proposed tenant at 61 Main Street on June 3, 2015, when Crosspoint submitted an application for a "Fit-Out" Building Permit identifying CVS as the occupant of space at that address. There has been no correspondence between CVS and the Board of Selectmen.

3. Questions Regarding Current Conditions

At this time, I am unaware of any external changes to the building at 61 Main Street.

On April 23, 2015, the Building Inspector issued a permit for the construction of a temporary wall between the retail use and the remaining portion of the space that had housed Colella's Market. Crosspoint has confirmed that the premises have been altered in accordance with this permit. However, Colella's should have obtained the approval of the Board of Selectmen, as the local liquor licensing authority, prior to the commencement of this alteration.

As noted, a second building permit was issued on June 25, 2015, for the fit out of the portion of the building where the proposed CVS would be located. I have no knowledge of whether the permitted work has begun.

The Fit-Out Permit also anticipates the relocation of the liquor retail use to the other side of the building and reassignment of the space currently housing the liquor retail use to the CVS. The Permit does not authorize any work within this space, however. An additional Building Permit, as well as the approval of the Board of Selectmen, would be needed before such work could commence.

Colella's Board of Health retail food services permit expired on June 30, 2015, and was not renewed. Therefore, there is currently no legal authority to sell food or tobacco products on the premises.

Board of Selectmen  
July 8, 2015  
Page 3 of 8

4. Questions Regarding Actions by the Building Inspector

In total, three permits have been issued this year for work at 61 Main Street:

- On April 23, 2015, an Alteration Permit was issued for the demolition of an interior wall and construction of a new temporary wall between the liquor retail use and the remaining portion of the space that had housed Colella's Market.
- On June 2, 2015, a second Alteration Permit was issued for the installation of a Fire Sprinkler Service to the building. Each tenant will be required to pull their own permit for the installation of the sprinklers within the leased space.
- On June 25, 2015, an Interior Fit-Out Permit was issued for the portion of the building where the proposed CVS would be located. As noted, although the Fit-Out Permit includes a plan showing where the liquor store will be relocated, the Permit is clear that no construction may occur within the area labeled "liquor store." Any such construction would require an additional Building Permit and the approval of the Board of Selectmen.

5. Questions Regarding the Liquor License

Currently, Colella's holds a valid "all alcohol" Section 15 (package store) liquor license. Dale Danahy is the licensed manager under the existing license. No application to transfer the license, to alter the licensed premises, or to substitute a new licensed manager has been received by the Town.

Crosspoint, through its counsel, has advised me that Colella's has agreed to transfer its license to an entity to be selected by Crosspoint, subject to the Board of Selectmen's approval of the license transfer.

As noted, the premises have been altered by the construction of a wall between the liquor retail use and the remaining portion of the space that had housed Colella's Market. Colella's has neither requested nor received the Selectmen's authorization for this change, as required by *M.G.L. c.138, §15A*. Therefore, pursuant to *M.G.L. c.138, §64*, the Board could hold a properly noticed hearing to suspend or revoke Colella's license for failure to file an application to alter the

Board of Selectmen

July 8, 2015

Page 4 of 8

licensed premises. If the Board elects to hold such a hearing, it must consider all of the evidence presented in determining whether to revoke or suspend the license.<sup>4</sup>

6. Questions Regarding Zoning

A. CVS's Classification Under the Zoning Bylaws

Questions have been raised regarding CVS's classification as a retail use on grounds that: (1) CVS's parent company has characterized itself as a "health care provider" in its marketing materials; (2) some definitions describe pharmacies as health care providers; and (3) interpretations of bylaws from other towns are contrary to CVS's classification as a retail use. As discussed below, I conclude that the proposed CVS is properly characterized as a retail use.

"Health Services Facility" is defined in Section 210-4 of the Zoning Bylaws as:

A building that contains establishments dispensing health services for health maintenance and the outpatient diagnosis and treatment of medical, dental and physical conditions, including outpatient surgery. The term health services facility shall not include hospitals, urgent medical care requiring emergency transportation, nursing homes or extended-care facilities, but may include establishments providing support to the medical profession and patients, such as medical and dental laboratories, blood banks and oxygen and other miscellaneous types of medical supplies and services.

This definition was adopted in 2012 as an update to the term "Medical Center," which covered facilities providing outpatient diagnosis, medical treatment and surgery.

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<sup>4</sup> The ABCC upheld a decision to revoke a liquor license for altering the premises without Board approval in *In re Pepper's Place*, ABCC (October 6, 1993). In those cases where the Board suspended a license for such a violation, the suspension ranged from five to 90 days. See *In re Trempe & Torres Inc.*, ABCC (February 16, 2012) (ABCC upheld suspension of liquor license for five days when licensee altered the premises without Board approval and after a warning from the Building Inspector that such approval was necessary); compare *In re Linda Caruso Enterprises, Inc.*, ABCC Decision (May 4, 1993) (ABCC upheld a three-month suspension for changing the layout of the premises without filing an application when the licensee added a "pit" area used by female dancers and served alcohol therein). In one case, the ABCC merely issued a warning to the licensee that it had violated Section 15A and cautioned future compliance. *In re Bobcon, Inc.* (June 22, 1994).

Board of Selectmen

July 8, 2015

Page 5 of 8

The definition of “Health Services Facility” explicitly excludes some uses that would otherwise clearly fall within the usual meaning of “health services,” such as hospitals, urgent care services and nursing homes. Based on information received from Town officials, Health Services Facilities have been understood not to include pharmacies under Hopkinton’s Zoning Bylaws, which have consistently been regulated as retail uses.

This understanding is reinforced by the fact that the sale of medications is mentioned five times in the Zoning Bylaws and, in each instance, it is within a description of a retail use. See Zoning Bylaws, §§210-34A(11), 210-37.8A(12), 210-184N, and 210-240 (descriptions of retail uses allowed as of right in various districts); see also §210-164 (definition of “Neighborhood Retail Store”). In contrast, no mention of pharmacies or the sale of medications is made even once in connection with Health Services Facilities.<sup>5</sup>

Marketing materials produced by CVS may be relevant to determining whether CVS provides health services within the usual and generally accepted meaning of that term. However, as noted above, the Health Services Facilities separately regulated by the Zoning Bylaws are expressly more limited than what the usual and generally accepted meaning of the term might otherwise include. Consequently, even though pharmacies may generally be considered to provide health services, this fact alone is insufficient to bring them within the definition of “Health Services Facility,” as that term has been narrowly defined in the Zoning Bylaws.

To be sure, the issuance of a building permit for a retail use does not authorize any and all activities that may conceivably occur within a CVS. If any activities undertaken (such as a “Minute Clinic”) seem to fit within the definition of a Health Services Facility, then the Building Inspector may take appropriate action to enforce the restrictions of the Zoning Bylaws, and the issuance of a building permit will not preclude such enforcement.

As demonstrated by the discussion above, interpretations of zoning provisions turn largely on the specific provisions of a town’s bylaws. Therefore, comparisons to interpretations given to other bylaws are of limited use in determining how a use should be classified under Hopkinton’s Zoning Bylaws.

A person aggrieved by the issuance of the June 25 building permit may now appeal to the Board of Appeals pursuant to Section 210-146 of the Zoning Bylaws.

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<sup>5</sup> For example, Section 210-34A(10) permits health services facilities as of right in the IA District and the next subsection, Section 210-34A(11), permits certain retail stores “selling items such as...medications” as of right.

Board of Selectmen  
July 8, 2015  
Page 6 of 8

Section 210-147 provides that such appeal must be filed within 30 days after the decision from which the appeal is made.

B. Hopkinton Drug's Classification Under the Zoning Bylaw

Based on the foregoing discussion, it appears that Hopkinton Drug Store, like CVS, is a retail use, rather than a health services facility. However, if the activities actually undertaken at Hopkinton Drug Store bring that facility within the definition of a Health Services Facility, they may be protected by Section 210-127 of the Zoning Bylaws, which provides that "[n]otwithstanding any nonconformity, this Chapter shall not apply to the continued use of existing buildings or structures or of land to the extent of its lawful use at the time of adoption of this Chapter." Specifically, if such activities commenced before the Zoning Bylaws first prohibited them, and if they have continued without significant interruption until today, they would be grandfathered as pre-existing nonconforming uses.

C. Process for Sign Changes

Article XXVII of the Zoning Bylaws sets forth standards for signs. Additionally, new signs requiring a building permit are reviewed by the Design Review Board in accordance with the standards set forth in Article XXI of the Zoning Bylaws.

7. Questions Regarding Future Options

Real estate transactions between willing buyers and willing sellers, or between commercial property owners and their tenants are, in large part, private and beyond regulatory scrutiny by the Town. The Town, may, of course, scrupulously apply its liquor licensing or other permitting authority over 61 Main Street, and it can engage in the state's pharmacy licensing process<sup>6</sup> for the facility. Barring unforeseen circumstances, however, the remaining regulatory hurdles are unlikely to prevent the proposed CVS from being allowed to open.

This is not to say that the Town's concerns about this proposed retail use are without merit. As I understand them, there are four principal concerns:

- (1) CVS has exhibited a certain degree of insensitivity, by choosing to come to Town under a shroud of secrecy.

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<sup>6</sup> The proposed CVS will need to obtain a permit from the Board of Registration in Pharmacy to operate a sterile or non-sterile compounding retail pharmacy pursuant to *M.G.L. c.112, §39G or §39H*, respectively. Interestingly, although the Board of Registration may require a hearing prior to issuing its determination, it is not required to do so. 247 CMR §6.01(4).

Board of Selectmen

July 8, 2015

Page 7 of 8

- (2) Since well before the Colella's property went on the market, CVS appears to have been in a legal dispute with Hopkinton Drug Store.
- (3) The presence of CVS detracts from the "home town" character of the Downtown Business District, in which local businesses, rather than "formula businesses" predominate.
- (4) A CVS would not be some Townspeople's preference for development at a key intersection that both defines the Downtown Business District and cries out for re-alignment.

I will address each of these concerns in turn.

First, as appealing as the concept of good corporate citizenship may be as an aspirational goal, the law does not require businesses to take the public interest, convenience or necessity into account in their decision-making. Many businesses attempt to do so as part of their effort to foster good will that may translate into improved financial performance. However, a company that chooses to come into Town without revealing its intentions until the last possible moment presumably has made the judgment that this approach is more important to its financial success than engaging with Town officials openly at an early point in time. The law does not require that a different judgment be made.

Second, on June 30, 2014, Hopkinton Drug filed a complaint against CVS Caremark, Corp. and Caremark PCS, LLC in U.S. District Court for the District of Massachusetts. The central issue in Hopkinton Drug's case appears to be whether CVS has grounds for terminating a Provider Agreement, pursuant to which Hopkinton Drug agreed to fill prescriptions for individuals covered by insurance plans managed by CVS, and CVS agreed to process insurance submissions and to remit payment to Hopkinton Drug. On January 5, 2015, the District Court held that an arbitration clause in the Provider Agreement requires the parties to submit the matter to arbitration, and enjoined CVS from terminating the Provider Agreement until the matter was submitted to arbitration.

Because arbitration is a private proceeding, the current status of proceedings is not a matter of public record. Based on the matters publicly known, it is simply not possible to judge whether the matters in dispute between CVS and Hopkinton Drug represent genuine concerns over the latter's implementation of the Provider Agreement or a stratagem by CVS to rid itself of an unwanted competitor. Either way, however, this dispute seems well beyond what the Town can reasonably expect to insert itself into.

Board of Selectmen  
July 8, 2015  
Page 8 of 8

Third, whatever concerns the Town may have for 61 Main Street as a centerpiece of its Downtown Business District, the fact remains that, according to Crosspoint's attorney, the parties have already entered into a long-term lease agreement. Any effort by the Town to destroy that contractual relationship would expose the Town to significant claims for damages.

To be sure, the Town does have significant zoning powers and can use those powers to prohibit what it currently permits. For example, the Town could adopt a Zoning change for the Downtown Business District prohibiting pharmacies specifically or "formula businesses" (chain stores)<sup>7</sup> generally; or it could amend the definition of "Health Services Facility" to include pharmacies explicitly.

Fourth, the most reliable road to transforming 61 Main Street into the centerpiece of the Downtown Business District is to acquire the parcel outright, use what is necessary to correct the operational deficiencies of the intersection of Main Street with Grove Street and Cedar Street, and pursue the development of the rest of the property in accordance with the Town's preferences. Presumably, the cost of acquiring the property (by purchase or eminent domain) would be in excess of the \$3.3 million that Crosspoint paid therefor, since Crosspoint would seek to be compensated for the lost value of its CVS lease.

Please feel free to contact me if you have further questions.

Sincerely,



J. Raymond Miyares

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<sup>7</sup> In *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844 (1<sup>st</sup> Cir. 2008), the U.S. Court of Appeals invalidated a Village's zoning ordinance that prohibited formula businesses. The Court ruled that, while preserving a small town community is a legitimate purpose for zoning, Islamorada had not demonstrated that it had any small town character to preserve. The Court also noted that Islamorada already had chain stores and stores in town that greatly exceeded the dimensional limits of the new bylaw. In reviewing similar bylaw amendments in Massachusetts, the Office of the Attorney General has repeatedly cited the *Islamorada* case and cautioned towns that such zoning could be found to lack a legitimate local purpose if challenged in court. Office of the Attorney General, *Municipal Law Unit Decision*, Case No. 6357 (Bolton, August 17, 2012); Office of the Attorney General, *Municipal Law Unit Decision*, Case No. 6339 (Orleans, August 14, 2012); Office of the Attorney General, *Municipal Law Unit Decision*, Case No. 5883 (Wellfleet, November 7, 2011); Office of the Attorney General, *Municipal Law Unit Decision*, Case No. 5461 (Provincetown, October 15, 2010). Hopkinton's Downtown Business District already contains at least two formula businesses—Curves and Subway.