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January 14, 2026

VIA EMAIL

Windham Planning Board
Town of Windham
3 North Lowell Road
Windham, NH 03087
Attn: Julie Suech
Assistant Director/Planner
jsuech@windhamnh.gov

Re: Formal Legal Objection to Proposed Citizens Petitions and Planning Board Amendment #1

Dear Members of the Board:

This office represents Nick Arena, the owner of Arena Square LLC ("Arena Square"), which owns 30 acres of land located at 102 Indian Rock Road and 82 Range Road in Windham (the "Arena Property"). Reference is hereby made to that certain letter sent by this office to the Planning Board (the "Board") on December 3, 2025, a copy of which is attached hereto as **Exhibit A**. The Arena Property is in the Gateway Commercial Zoning District under the Town of Windham Zoning Ordinance (the "Zoning Ordinance").

This letter objects to the following proposed zoning amendments:

- Planning Board Amendment #1 – Multifamily Residential in Commercially Zoned Districts.
- Citizens Petition for the rezoning of all land in the Gateway Commercial District to Rural ("R") (Signed by Planning Board member Matt Rounds).
- Citizens Petition for a GMO (Orchestrated and signed by Planning Board Members Matt Rounds and Jack Gattinella).

The Windham Planning Board has been on a mission to stifle HB 631 since its passage and will apparently employ any means necessary to do so. HB 631 requires municipalities to allow multifamily residential development on commercially zoned land where adequate infrastructure is available or will be provided to support the development. It is a state mandated override of local zoning to create new multifamily housing to help address the crisis level shortage of housing in the state. At the August 6, 2025 Planning Board

Meeting, Chairman Jacob Cross stated: **"[HB 631] is an extinction level threat. We have to stop it. If we don't do anything it's going to wipe us out. It will fundamentally change the town...It would be a catastrophe for the town. We're building a multi-pronged defense against it. We'll work through it as a board through the fall. We will definitely have zoning changes coming to the town to change things because we have to. If we leave the default, it would leave us way too exposed. If I mention more than that, I might get into trouble. We're also openly working on a Growth Management Ordinance."**

Since then, the Planning Board, both as a Board and individually – with several members acting outside the Board process, have done exactly what Chairman Cross outlined in August. The proposed amendments, which reflect an organized effort to circumvent the clear mandate of HB 631, are the culmination Chairman Cross's commitment to build a multi-pronged defense against HB 631.

Each proposed Warrant Article is illegal on its face and, accordingly, should not be placed on the Town Warrant.

Below is a legal analysis demonstrating the illegality of each Warrant Article.

I. Planning Board Amendment #1 – Multifamily Residential in Commercially Zoned Districts

The Windham Planning Board plans to recommend a Zoning Amendment which will, in part, (1) cap multi-family residential development structures at twelve (12) units; (2) require fifty percent (50%) of residential units to be Workforce Housing; (3) require at least one-third of residential units to be one bedroom, with the remainder being two bedroom units; (4) require that multi-family development structures be not less than two (2) floors; and (5) require a minimum front yard setback from Route 111A and Range Road of 50 feet.

The proposed amendment thus imposes five categorical requirements on multifamily residential development in commercial zones. None is supported by evidence-backed findings. None is calibrated to advance legitimate municipal interests, and several are facially preempted by state housing policy and law. These are not legitimate safeguards, three are arbitrary limits on new housing. **Each of the five elements, individually, lacks a rational relationship to a legitimate public purpose and, all, collectively, function as an exclusionary and poorly disguised growth management scheme that is inconsistent with New Hampshire's Zoning Enabling Act, is preempted by HB 631 and New Hampshire's workforce Housing Law, is inconsistent with statutory requirements for growth control, and violates controlling case law, including *Britton v. Town of Chester*, 134 N.H. 434 (1991).** As the NH Supreme Court made clear in Britton, "Municipalities are not isolated enclaves far removed from the concerns of the area in which they are situated," and "do not exist solely to serve

their own residents." The Court further warned that towns may not "build [] a moat… and pull [] up the drawbridge" to avoid regional housing needs. The petitions' proposed approach—authorizing multifamily only in name while imposing restrictions that, in practice, suppress feasible multifamily production—raises the same defect *Britton* condemned: growth controls "must not be imposed simply to exclude outsiders," and each municipality must bear its "fair share" by providing a "realistic opportunity" for needed housing within the region.

The purpose and intent of HB 631 is to add new multifamily housing in the State. The purpose and intent of this zoning amendment is to minimize new housing without a legitimate public purpose.

(a) *Cap Multi-family Residential Structures at twelve (12) units.*

The imposition of a blanket, twelve-unit cap on all multifamily residential development town-wide is arbitrary, irrational, and unlawful. A zoning regulation must bear a real and substantial relationship to a legitimate public purpose within the Town's police powers. A universal numerical cap on residential unit count – completely disconnected from parcel size, infrastructure capacity, building design, environmental constraints, traffic generation, and/or service demand - has no such real or substantial relationship. There is no evidence in the record justifying this town-wide restriction. Instead, this cap would function as a pure growth-suppression device for multifamily housing and, as such, constitutes an invalid exercise of zoning power and an unlawful exclusionary restraint on housing production.

Even more fundamentally, a town-wide numeric unit cap constitutes classic disguised growth management. It is not a dimensional control, a density standard based on acreage, or a performance-based infrastructure regulation; rather, it is a blunt prohibition on scale adopted for the express (and sole) purpose of suppressing new multifamily housing. Such an approach directly conflicts with the Zoning Enabling Act and violates *Britton v. Town of Chester* ("Growth controls must not be imposed simply to exclude outsiders…." and "[E]ach municipality [should] bear its fair share of the burden of increased growth.")

Finally, a blanket cap of this nature is inherently inconsistent with state housing policy and is preempted by both the State's Workforce Housing Law and HB 631. A municipality may not lawfully enact zoning provisions that, by design or effect, frustrate the production of housing that State law expressly requires.

(b) *50% Workforce Housing Requirement*

The 50% workforce housing mandate has no evidentiary support, and is completely arbitrary, uneconomic, and confiscatory. It would render workforce housing projects financially infeasible, thereby undermining, rather than furthering, the very purpose of

the State's workforce housing laws and HB 631. The effect of this requirement is to stifle the construction of new multifamily housing. The mandate is not rationally related to a legitimate governmental purpose, exceeds the lawful subject matters authorized by the State Zoning Enabling Act, violates *Britton v. Town of Chester*, and is preempted by State law.

Furthermore, HB 631 does not have any requirement for workforce housing and adding that requirement for all multifamily projects in commercial zones is wholly inconsistent with the new law.

(c) *One and Two-Bedroom Unit Requirement*

Mr. Arena has voluntarily agreed to limit the apartments in his development to one- and two-bedroom units so this requirement would not affect his proposed project. That said, the prohibition on 3- and 4-bedroom apartments is exclusionary, unlawfully discriminates against families with children, is not rationally related to a legitimate governmental purpose, and violates both state and federal fair housing laws. A categorical ban on 3- and 4-bedroom units tends to exclude families with children and requires a substantial, evidence-based justification, which is wholly absent here.

(d) *Minimum of Two Floors Requirement*

Many one- and two-bedroom apartments do not have two floors. This requirement combined with (c), above eliminates many types of apartment project for no legitimate reason. The requirement that all multi-family residential development consist of not less than two floors is not rationally related to any legitimate governmental purpose and is, therefore, unlawful.

(e) *Minimum front yard Setback from Route 111A and Range Road of 50 feet*

Presently, the Gateway District states that: There shall be no front, side or rear lot setback requirements, except that there shall be a 20-foot setback from the Route 111 right-of way and the Route 111A right of way. More than doubling this setback requirement for multifamily housing projects in the Gateway District is not rationally related to a legitimate governmental purpose.

II. Citizens Petition for Rezoning of all Gateway Commercial Zoning District Property to be Rezoned to Rural

Under New Hampshire law, a zoning ordinance amendment is unlawful if it is inconsistent with, or frustrates the purposes of, the adopted Master Plan. Windham's Master Plan was completely updated in 2023. The Windham Master Plan states that the intent of the Gateway Commercial District ("GCD") is "to create Town center(s) that are walkable 'downtowns' with a mixed use of commercial, residential and professional structures."

Changing this entire district to R would repudiate that planning vision, is inconsistent with the Master Plan and, therefore, lack a rational planning basis and would be unlawful arbitrary and capricious.

This inconsistency with the Master Plan is magnified by the fact that, based on current land within the GCD, the Arena Property is the only vacant, privately-owned and developable parcel suitable for a mixed-use project of the type envisioned by the Master Plan and by HB 631. The economic and regulatory burdens of the rezoning fall almost entirely on a single landowner – Mr Arena. Therefore, the Citizens Petition constitutes unlawful spot zoning of the Arena Property.

Although the amendment, on its face, applies to the entire GCD, it eliminates development rights from the only privately owned, undeveloped and realistically developable parcel in the GCD. "An area is spot zoned when it is singled out for treatment different from that of similar surrounding land which cannot be justified on the bases of health, safety, morals or general welfare of the community and which is not in accordance with a comprehensive plan." *See Schadlick v. City of Concord*, 108 N.H. 319 at 322 (1967). The Citizens Petition clearly targets the Arena Property, and the practical effect of the proposed amendment singles out the Arena Property. All meaningful regulatory and economic consequences of the proposed amendment fall on a single land lower. is the proposed amendment constitutes spot zoning in substance, regardless of its form.

The amendment is also completely at odds with the existing commercial development within the GCD, as evidenced by the photographs taken of existing commercial buildings located within the GCD, attached hereto as **Exhibit B**. Not only is the proposed amendment inconsistent with the Master Plan, but it is also entirely inconsistent with the with the character of all existing development within the GCD.

Nor is the GCD in any way rural. The district is bounded by three state highways and is located within the massive, and traffic intense, Exit 3 interchange.

Also, HB 631 is a state zoning override which requires towns to allow for development of multi-family housing on *commercially zoned land*. The Arena Property, which is commercially zoned land, is ideally sized and located for a mixed-use project containing multifamily housing. Changing the zoning of the Arena Property to R would circumvent the clear legislative mandate of HB 631 and is, therefore, unlawful. Indeed, the very purpose of the proposed amendment is to circumvent the requirements of HB 631 by downzoning ideally located and developable commercially zoned land in a way that precludes multifamily housing.

At the 10/22/2026 Planning Board meeting Board member Payal Ballaya stated: "It's okay to have a reputation of being a snob town for development. It shows that we have standards, and we know what we want and what's best for the town." This isolationist and exclusionary attitude is completely at odds with *Britton v Town of Chester*

(Municipalities are not isolated enclaves far removed from the concerns of the area in which they are situated," and "do not exist solely to serve their own residents." Towns may not "build [] a moat… and pull [] up the drawbridge" to avoid regional housing needs). The proposed downzoning of the entire Gateway District is an unlawful moat. This is precisely why HB 631 was enacted.

III. Citizens Petition for Growth Management Ordinance (the "GMO")

A GMO is a temporary suspension of property rights justified by documented unusual circumstances that materially affect the ability of the municipality to provide adequate services. Adoption of a GMO by a municipality is an extraordinary remedy and strictly regulated by New Hampshire statutes. See NH RSA 674:23 (Temporary growth moratoria) and RSA 674:22 (Growth Management).

Following the adoption of HB 631 mandating multifamily housing in commercial zones, the Planning Board declared that, notwithstanding the HB 631 mandate, it would do whatever was necessary to enact a GMO in the Town of Windham prohibiting the construction of new residential housing. The text of the GMO was quickly drafted, but the Board struggled to find a capacity crisis to meet the statutory requirements. Matt Rounds decided to focus on school capacity as a possible problem from which to launch a GMO. It quickly became apparent that no school capacity crisis exists. Nevertheless, on November 21, 2025, Matt Rounds sent an email to Julie Suech asking her for assistance with respect to his draft of a GMO which included asking the School Board to assist with providing required statutory verifications. On December 9, 2025, the School Board voted to decline that request and not to participate in discussions with the Planning Board concerning a GMO. Immediately thereafter, Matt Rounds and Jack Gattinella organized, including through Facebook posts, an effort to have a citizens petition submitted for a GMO.

The proposed GMO is deficient in several material respects. The fact that the proposed GMO has been submitted by Citizens Petition, rather than being Planning Board sponsored, does not cure statutory defects.

RSA 674:22 requires that any GMO may be adopted only after preparation and adoption by a planning board of a master plan and capital improvements program and shall be based on a growth management process intended to assess and balance community development needs and consider regional development needs. The text of the Citizens Petition states, in relevant part, that "[w]ithin one year of adoption, the Planning Board shall update the Master Plan and the Capital Improvement Plan (CIP) to reflect the findings supporting this Ordinance." This is completely backwards and the opposite of what RSA 674:22 requires.

The Citizens Petition states that it is to take effect upon passage notwithstanding the noted absence of supporting Master Plan or CIP for up to a year. Furthermore, there is

no guarantee that the Master Plan and/or the CIP can or will be updated as mandated by the Ordinance since each requires a regulatory process that cannot be superseded by Town Meeting vote.

The GMO completely lacks any growth management process that balances community development needs with regional development needs as expressly required by RSA 674:22. There is no mention of regional development needs in the Citizens Petition and this is a separate and additional failure under RSA 674:22.

RSA 674:22 also requires a study based on competent evidence performed by or for the planning board or the governing body or submitted with a petition of voters presented under RSA 675:4. No such study exists other than unsubstantiated "findings" submitted with the Citizens Petition. Furthermore, those inadequate, unsubstantiated findings have not been endorsed by the Planning Board and, more importantly, the School Board. Also, the definition of "Functional Capacity" appears to be wholly made up and is inconsistent with New Hampshire law and practice.

The Citizens Petition is flawed in other respects too numerous to include in this letter. In sum, it is the deficient and incomplete product of an unprofessional and unlawful race to fabricate a crisis to justify stopping multifamily development authorized by HB 631. As such, it is also preempted by state Law.

IV. Conclusion

Based on the above, we respectfully request the Board take such action as is necessary to terminate the above-referenced Citizen Petitions, which are illegal on their face and wholly lack any supported findings. The Board cannot adopt or recommend unlawful measures. This hearing represents a final opportunity for the Board to abandon its unlawful, coordinated and targeted effort to circumvent the provisions of HB 631. Should the Board persist in these unlawful efforts, Arena Square continues to reserve and preserve all rights and remedies and waives none.

Respectfully submitted,

John H. Sokul
Hinckley Allen

cc: Nick Arena (*via email*)

Exhibit A

December 3, 2025 Letter to Windham Planning Board

[See next page]

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December 3, 2025

VIA EMAIL

Windham Planning Board
Town of Windham
3 North Lowell Road
Windham, NH 03087
Attn: Julie Suech
Assistant Director/Planner
jsuech@windhamnh.gov

Re: Formal Legal Objection to Proposed Growth Management Ordinance

Dear Members of the Board:

As you know, this office represents Nick Arena, the Manager of Arena Square LLC ("Arena Square"), which owns 30 acres of land located at 102 Indian Rock Road and 82 Range Road in Windham (the "Arena Property"). The Arena Property is located in the Gateway Commercial Zoning District under the Town of Windham Zoning Ordinance (the "Zoning Ordinance").

Item 6 on tonight's Planning Board agenda (Old Business/New Business – a. Growth Management Ordinance) is a proposed growth control ordinance ("GMO") drafted, it appears, by Matt Rounds.

I am unable to attend tonight's meeting due to an unavoidable conflict. I have reviewed the draft text and associated materials and want to state clearly for the record that the proposed GMO materially fails to comply with clear and well-established procedures and legal requirements for the enactment of a growth control ordinance and is legally deficient and defective on its face.

The proposed GMO is unsupported by the Town's own adopted planning record. The 2023 Master Plan contains no finding of any municipal service, infrastructure, or public facilities crisis requiring growth suppression, and the 2024 Capital Improvements Plan (the "CIP") contains no funded or programmed corrective initiative tied to any alleged capacity limitation. These two documents represent the Town's official and controlling planning determinations. Neither identifies a condition requiring growth caps or any coordinated municipal remedy. Therefore, the legal nexus required by RSA 674:22 and

New Hampshire Supreme Court precedent does not exist as a matter of law. A municipality may not invent an emergency outside of its own adopted planning framework to justify caps on residential growth.

Under RSA 674:22 and controlling decisions, including Becksted v. Bartlett, Blue Jay Realty v. Franklin, and Britton v. Chester, a growth control ordinance must be grounded in documented existing conditions, proportional regulatory response, a funded municipal remedy, and an independent study or report verifying the need for a GMO. Windham satisfies none of these mandatory prerequisites. The fact that the proposed draft recognizes that both the Master Plan and the CIP would need to be updated to reflect the need for the GMO is completely backwards and nullifies the GMO.

This GMO also must be viewed in its factual context. The only meaningful material change in any relevant facts and circumstances since adoption of Windham's Master Plan and CIP is the enactment of RSA 674:77–80 (HB 631), which now mandates municipal accommodation of multifamily use on commercial land and prohibits local regulations that functionally obstruct, hinder or delay muti-family and workforce housing. Local governments may not do indirectly through growth caps what they are forbidden to do directly through zoning.

In sum, Windham's proposed GMO is unlawful because it:

1. Violates **RSA 674:22**;
2. Violates **binding New Hampshire Supreme Court precedent**; and
3. Is **preempted by RSA 674:77–80 (HB 631)**.

Proper, thoughtful planning for new growth is essential. That is the legitimate and proper role of the Planning Board, the CIP committee, and the Select Board. A significant amount of work would be needed to satisfy state law requirements of a growth management ordinance, especially considering recently enacted HB 631. This would take months, if not years, and it is likely that no amount of time or study will ever justify anything like what has been proposed by Matt Rounds. The manic efforts to jam anti-HB 631 measures through this town meeting cycle fall far beyond the legal authority of the Planning Board and must stop.

The Planning Board should immediately terminate further action on this proposed ordinance. There is no legal justification for it. It reflects the open hostility of many Planning Board members to HB 631 and is plainly a pretext to circumvent HB 631. I expect you will be similarly advised by your own counsel.

Lastly, this constitutes formal notice that the Board's efforts to circumvent HB 631 not only fall far beyond the boundaries of lawful governmental functions but also appear to be willful, intentional and undertaken in bad faith. Should the Board persist in these

unlawful efforts, Arena Square continues to reserve and preserve all rights and remedies and waives none.

Respectfully submitted,

John H. Sokul
Hinckley Allen

cc: Nick Arena (*via email*)

Exhibit B

Gateway Commercial District Visual Tour (Photos taken Jan. 11, 2026)

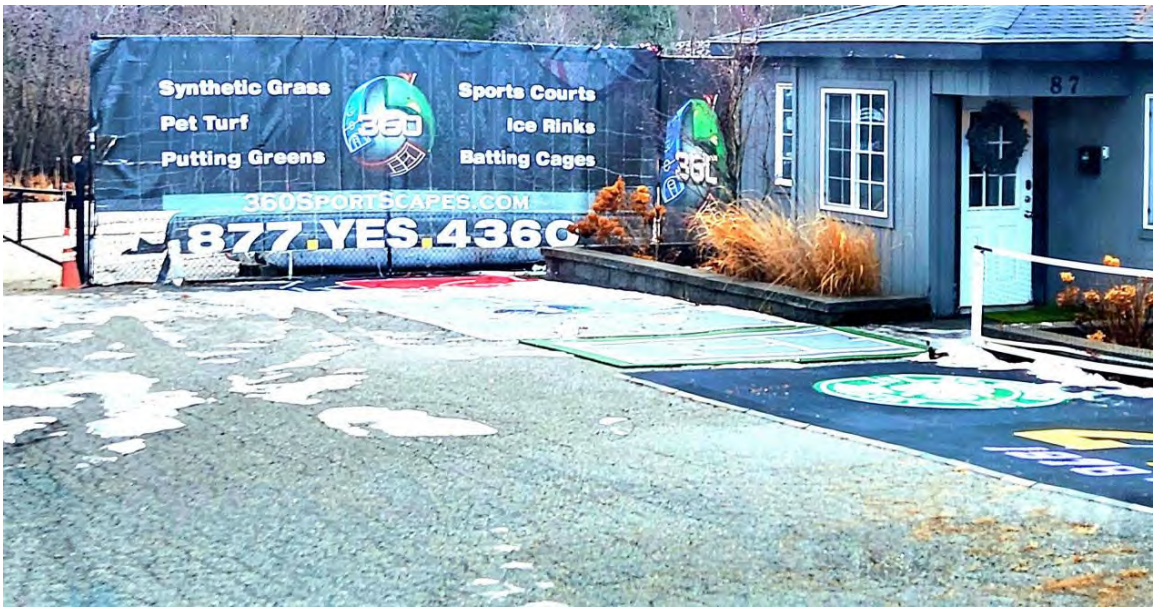
[See next page]

Gateway Commercial District

a picture tour from January 11, 2026

Gateway Commercial District

a picture tour from January 11, 2026



Gateway Commercial District

a picture tour from January 11, 2026

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