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LISA L. MEAD
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September 13, 2016

James McCarthy, Chair
Planning Board
Pleasant Street
Newburyport MA 01950

RE: 18 Boyd Drive – OSRD Special Permit Application (the "Project") / Additional Information

Dear Chair and Members of the Board;

Reference is made to the above captioned matter and the opening of the public hearing on August 16, 2016. In that connection, the Applicants agreed to address a number of issues which were raised either by the Board members or by members of the public.

Traffic Report: On September 9, 2016 the Applicant provided to the Board an updated traffic report addressing an additional study of egress to Laurel Road of a 44 lot subdivision. The Applicant is awaiting at the filing hereof, the Board's Peer Review report.

Hydrological Study: The Applicant engaged Northeast Geoscience, Inc. to undertake a hydrological study of the area to determine the impacts of the proposed subdivision on the City's Well No. 2. Specifically, the Applicant engaged its expert to perform the scope of services as set forth by the Planning Office. The Applicant's expert has met with City Officials to review historical information and better understand what information the Water Department, in particular, wanted as part of the study. Pursuant to that meeting, the Applicant, at the request of its expert agreed to drill 8 monitoring wells across the property and view and test the City's monitoring wells. Given the breadth of this investigation and report, the Hydrological Study from the Applicant is not ready at this filing, but will be submitted prior to the next meeting.

Plan Changes: Based upon a number of comments heard, the Applicant has made revisions to its site plan. Specifically, you will see:

- A redesign of the cul de sac at the end of Boyd Drive and its interface with the entry to the subdivision. Improvements here include a planted island and easement restricting planting at the right corner of the cul de sac to improve sight distance at this location.
- The Applicant has made provision for an emergency access way off of Laurel Road. Such an access is presumed to be used only in the event of an emergency, but will assure, that if there is ever any blockage on Boyd, emergency responders will be able to reach the area.
- The Applicant has located monitoring wells for ongoing monitoring in accordance with its original submission.
- The Applicant is providing a plan view which shows where the headlights will be effecting properties on the southerly side of Boyd Drive when vehicles exist the new subdivision. You will see, there are several areas where headlights may impact neighbors. The Applicant is willing to provide screening for the neighbors to reduce the possibility of such an occurrence.
- The connection of the bike and walking paths to the intermodal path which is proposed to run parallel to Route 95 is included on the new plan set.
- As a clarification, we have shown those portions of the bike paths which will remain paved, as with the existing cart paths on the golf course, and the newly created paths which will consist of crushed stone.
- In response to the Christiansen and Sergi peer review comments dated August 2, 2016, The existing conditions plan has been updated to indicated primary and secondary conservation areas; a list of waivers to be requested to the Rules and Regulations Governing the Subdivision of land is added to the OSRD plan; the 15 Laurel Road land area is now included in the OSRD unit total and land area calculation. We do not agree that 16 Boyd Drive land area is required to be included where the required frontage of 125 feet is maintained on Boyd Drive.

Covenant and Golf Course Special Permit: Counsel for some of the residents of Boyd Drive make a claim regarding a Covenant put in place pursuant to G. L. c. 41, § 81U as part of a prior subdivision approval that included the Property as well as multiple abutting lots (including lots now owned by some of the Abutters located on Boyd Drive (the "Abutters"). The Abutters argue that the Covenant executed in 1985 remains applicable. We have reviewed this issue, and it is clear that the 1985 Covenant is no longer enforceable for a number of reasons.

The Newburyport Planning Board granted subdivision approval in 1985, authorizing the construction of a twenty lot residential subdivision along with a nine-hole golf course. (the "Subdivision"). In order to secure completion of the way and the infrastructure to serve the Subdivision, the original applicant Ribot Realty Trust was required to provide security in one of the manners set forth in G. L. c. 41, § 81U. This statute allows a property owner the choice of a bond, a deposit of money or securities, a

mortgage, or a covenant not to convey, or a combination of any of these methods, to secure completion of the ways and infrastructure necessary to serve the subdivision. The developer is allowed to choose which of the four statutory methods for security it wishes to use, and is allowed to change the form of security at it discretion. Upon completion of the required infrastructure, the planning board "shall release the covenant by appropriate instrument, duly acknowledged, which may be recorded."

On April 14, 1987, as recorded in the Southern Essex Registry of Deeds in Book 8905, at Page, 120, the Newburyport Planning Board executed a Release of Covenant that states that the ways and infrastructure work had been completed "to the satisfaction of the Planning Board of the City of Newburyport as to the following enumerated lots[.]" This document releases multiple lots in the subdivision, but does not release Lot 21, the golf course lot. Subsequently, in 1998, a Certificate of Vote releasing lots 20T, 20G, 20H and 20I was recorded at Book 14560, at Page 474. This instrument appears to have been recorded as the result of a Consent Judgment dated June 23, 1997, between the City of Newburyport (and its various boards) and the original developer. The Consent Judgment is recorded in Book 15262, at Page 254, along with a letter from the Newburyport City Clerk dated November 13, 1998, indicating that the conditions of the Judgment requiring completion of the ways and infrastructure for the subdivision had been met, resulting in the acceptance of Boyd Drive as a public way. The City Council accepted Boyd Drive as a public way on September 28, 1998. The express language of the Consent Judgment required the City to "take all necessary steps to accept the Subdivision and release any and all lots therein." While the release issued by the Planning Board at Book 1562, at Page 254 does not specify Lot 21, it is clear from the language of the Consent Judgment that this lot was required to be released along with all of the other lots in the subdivision, and therefore must be considered to have been so released. Even if Lot 21 had not been release from the Covenant, based upon the Consent Judgment it should be immediately released by the Planning Board upon a written request to the City Clerk and the Planning Board.

While the Covenant recorded pursuant to G. L. c. 41, § 81U securing the completion of ways and infrastructure that have long-since been completed should be considered released (or alternatively released upon request), it is also clear that such Covenant is no longer enforceable. Pursuant to G. L. c. 184, § 23, "[c]onditions or restrictions, unlimited as to time, by which the title or use of real property is affected, shall be limited to the term of thirty years after the date of the deed or other instrument or the date of the probate of the will creating them, except in cases of gifts or devises for public, charitable or religious purposes." While there are limited exceptions to the provisions of G. L. c. 184, § 23 (such as those for agricultural, historic or affordable housing restrictions, which are allowed to remain in place in perpetuity), they are not applicable in this instance. Furthermore, pursuant to G. L. c. 184, § 27, restrictions unlimited as to time are not allowed to be extended, unlike restrictions that are limited to a specific period of time greater than thirty years. Because the Covenant was executed on November 26, 1985, and contained no limitation on time, it is no longer enforceable.

The Abutters' letter also addressed conditions contained in a special permit issued by the Newburyport Zoning Board of Appeals dated September 25, 1985, which contains a condition relating to compliance with recommendations contained in a Report of Findings dated September 17, 1985 prepared by M. Anthony Lally Associates (the "Lally Report"). The conditions contained in the Special Permit remain applicable, and are not subject to the thirty-year limitation on restrictions. Killorin v. Zoning Bd. of Appeals of Andover, 80 Mass. App. Ct. 655, 658 (2011). However, the Special Permit conditions are applicable only insofar as the property remains operating as a golf course. In the event a new use is made of the Property, any new conditions from any new Special Permit would apply, or if the new use was by right, no conditions would apply.

From review of the prior permitting history, the records available on the Essex Registry of Deeds and the applicable statutes and case law, it is clear that the 1985 Covenant recorded pursuant to G. L. c. 41, § 81U is no longer applicable or enforceable.

Board of Health Letter dated September 6, 2016: While the letter to the Planning Board dated September 6, 2016 purports to be from the Board of Health, indeed it is from the Director. The Board of Health last met on July 21, 2016. There is nothing on the agenda for the Board of Health that would have indicated that this subdivision was a topic for discussion. Upon review of the draft minutes, it appears as though the Director brought the matter of "Evergreen Common" to the attention of the Board, following the technical review meeting the Applicant had with various city departments. If one were to review the Draft Minutes (See attached) it is readily apparent, that not only are the basic facts about the proposed subdivision incorrect, at no time did the Board of Health actually have the proposed subdivision application available to review. The letter provided to the Planning Board from the Board of Health is not based in fact. The Applicant requests the Board disregard this letter until the Board of Health has discussed the Application with all of the facts in front of them including the results of the hydrological tests and recommended conditions and controls which have been suggested by the Applicant. Finally, it should be pointed out that the Board of Health, according to the Draft Minutes, did not actually vote on this letter, as suggested in the letter. Rather, the Director suggested that he write the letter to the Planning Board.

We look forward to presenting the revised plans and discussing the additional studies the Applicant has undertaken.

Respectfully submitted,
Evergreen Commons LLC
By Its Counsel

Lisa L. Mead

cc: Client