

September 21, 2016

Jonathan D. Eichman
jeichman@k-plaw.com

Planning Board
Newburyport City Hall
60 Pleasant Street
Newburyport, MA 01950

Re: Evergreen Valley OSRD Application

Dear Members of the Planning Board:

You have requested an opinion on several questions concerning the application of the City's Zoning Ordinance and subdivision regulations to the proposed Evergreen Valley Golf Course Open Space Residential Development (the "Development"). A special permit application to allow the Development under the Open Space Residential Development ("OSRD") zoning ordinance is presently before the Planning Board (the "Application"). I understand that the proposed site for the Development is off Boyd Drive and Laurel Road in the City, and lies within the Water Resource Protection district ("WRPD"), an overlay zoning district under the Zoning Ordinance. City Well #2 is located off Ferry Road in close proximity to the site. The OSRD concept plan submitted as part of the Application depicts the division of the site into 38 residential lots served by two cul-de-sac roadways extending from Boyd Drive into the site, and a third intra-site roadway connecting the two cul-de-sacs. Boyd Drive is a so-called dead-end street extending from Ferry Road 1,600 feet to its present terminus adjacent to the site. I understand that Ferry Road is a through public way extending in both directions from its intersection with Boyd Drive. Your specific questions and my answers are set forth separately below.

Roadway Length

Question 1: You have asked if the proposed roadways in the OSRD development as shown on the OSRD concept plan violate the requirements concerning cul-de-sacs set forth in the Planning Board Rules and Regulations Governing the Subdivision of Land (the "Regulations"). Section 6.8 of the Regulations provides that "cul-de-sacs" may have a maximum length of 600 feet. "Cul-de-Sac" is defined in Section 1.3.5 of the Regulations as "a local, dead-end street with a turnaround at the end." I understand that the applicant has argued that the proposed roadways within the Development comply with this requirement because the length of each roadway as laid out on the OSRD concept plan is less than 600 feet.

Answer: In my opinion the roadways proposed for the site as shown on the OSRD concept plan do not comply with the requirements in the Regulations governing the length of cul-de-sacs. As stated in the caselaw, the accepted purpose of limiting the length of dead-end streets, including cul-de-sacs, is to address the concern that the blocking of a dead-end street, as by a fallen tree or an automobile accident, will prevent access to the homes beyond the blockage, particularly by fire

engines, ambulances, and other emergency equipment. Nahigian v. Lexington, 32 Mass.App.Ct. 517, 521 n.3 (1992). As stated by the court in Nahigian, “[g]iven that concern, it would make no sense to measure the length of a dead-end way other than from the nearest intersecting through street.” Applying that standard here, the nearest intersecting through street is Ferry Road, approximately 1,000 feet distant along Boyd Drive from the entrance to the Development. Thus, the measured length of each of the proposed streets in the Development for purposes of determining compliance with the regulation limiting the length of dead-end streets is well over 600 feet.

Question 2: You have further asked if the Planning Board may take the length of the proposed dead-end streets in the Development into account in deciding the Application.

Answer: In my opinion, the Planning Board may take the length of the proposed dead-end streets in the Development into account in deciding the Application. As an initial matter, Section B of the OSRD zoning ordinance (Section XIV of the Zoning Ordinance) expressly provides that any OSRD special permit application involving the subdivision of land “shall also be subject to the approval of the planning board under the rules and regulations governing the subdivision of land in the City of Newburyport.” Thus, in considering an OSRD application, the Planning Board may bring to the applicant’s attention and request changes to those aspects of the proposal that do not comply with the Regulations, and which it believes would not likely warrant a waiver from those Regulations.

Further, in my opinion, the Planning Board may consider the length of the dead-end streets under the criteria for issuance of an OSRD special permit without specific reference to compliance with the Subdivision Regulations. Section XIV-C of the Zoning Ordinance provides that the Planning Board shall act on an OSRD special permit application in accordance with Section X-H.7 of the Zoning Ordinance. That section sets forth criteria for the issuance of all special permits under the Zoning Ordinance. Subsection A(6) of Section X-H.7 requires the special permit granting authority to make the following finding, among others:

The requested use will not impair the integrity or character of the district or adjoining districts, nor be detrimental to the health or welfare.

In determining whether the Application satisfies this criterion, it would be appropriate, in my opinion, to consider whether the proposed length of dead-end streets in the Development would pose a safety risk and thus be detrimental to the health or welfare of the neighborhood. If the evidence before the Board so indicates, in my opinion the Board could deny the Application upon a finding that the length of the proposed dead-end streets would be detrimental to the health or welfare of the neighborhood.

Water Supply Protection

Question 3: You have asked whether the prohibitions on use in Section F of the Water Resource Protection District zoning ordinance (Section XIX of the Zoning Ordinance) apply to the Application. In particular, subsection (10) of that section prohibits throughout the WRPD “[a]ny other activity deemed likely to cause or contribute to the contamination of the public water supply.”

Answer: In my opinion, the prohibitions in Section XIX-F apply to the Application. As set forth in Section XIX-B, the Water Resource Protection district is an overlay district, and the requirements of this district, as well as the requirements of the underlying zoning district, “shall apply” to all new construction, reconstruction, or expansion of existing buildings and new or expanded uses of land within the district. Thus the proposed OSRD development must comply with the WRPD requirements. Section XIX-E sets forth uses expressly allowed in the WRPD, while Sections XIX-F, XIX-G, and XIX-H set forth those uses that are prohibited within all or part of the WRPD, and Section XIX-I sets forth uses in the WRPD requiring a special permit. Subsection (10) of Section XIX-F prohibits “[a]ny other activity deemed likely to cause or contribute to the contamination of the public water supply” throughout the WRPD. Thus, as the OSRD project is in the WRPD, and will provide for the construction of new buildings, it is prohibited if it is “likely to cause or contribute to the contamination of the public water supply.” If the evidence before the Planning Board indicates that the Development would be likely to cause or contribute to the contamination of the public water supply, the Planning Board would be required to deny the Application, in my opinion. I recommend that a decision on this question be based on expert evidence, which may be in the form of documents or testimony.

Section XIX-E of the Zoning Ordinance, which sets forth uses permitted as of right in the WRPD, does state that “Residential development” is permitted “subject to Sections XIX-H, I, and J (prohibited uses) and Section XIX-K (special permitted uses), and can be read to indicate that the prohibitions in Section XIX-F would not apply. As organized in Section XIX, however, the sections prohibiting uses are Sections XIX-F, XIX-G, and XIX-H, while Section XIX-I concerns special permit uses. In my opinion, the section references in the quoted language are clearly meant to correlate with the specific subsections of the ordinance concerning prohibited and special permit uses, and thus should be treated as typographical errors and read to refer to the appropriate sections of the Ordinance. It would defeat the purpose of Section XIX to read it otherwise and thereby permit certain uses such as agriculture, residential development, and outdoor recreation to conduct activities detrimental to the WRPD. I note, that my opinion, on this question is consistent with the original draft of the ordinance submitted by the City’s water department to the City Planner on March 18, 1997, which allows residential and other uses as of right in the WRPD subject to those restrictions on all uses set forth in the next three sections of the ordinance. As noted in the correspondence accompanying that draft, “the overall purpose of this ordinance is to preserve and protect all existing and future water supplies for the City of Newburyport.”



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Please do not hesitate to contact me if you have any questions concerning the above.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Jonathan D. Eichman".

Jonathan D. Eichman

JDE/smm
cc: Mayor

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