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TO: James McCarthy, Chair  
Members of the Planning Board  
FR: Lisa L. Mead, Esq. *LLM*  
Steven Sawyer, P.E.  
Thomas Hughes, BS, MA  
Jay Billings, Hydrologist  
DA: August 9, 2017  
RE: Evergreen Commons / Water Resource Protection District Criteria Further Information

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Reference is made to the above captioned matter and the prior submission for the Evergreen Commons Water Resource Protection District Special Permit and Definitive Subdivision and our initial hearing on July 5, 2017. In that connection, there were several items which the Board and Planning Office requested more information and follow up. Below we address those matters.

**Home Owners Association Trust:**

This document has been revised according to the comments from the Planning Office. Further, the Conservation Commission requested certain changes be made with respect to clarifying the applicability and enforceability of any Special Permit and Orders of Conditions through the Association. Those changes have been made and are incorporated in this redline draft.

**Board of Health and Other Departmental Comments:**

A member of the Planning Board requested clarification as to the review letter from the Board of Health and confirmation that the letter from the Board of Health was not only in relation to the Board of Health's authority under G.L. c. 41 but also under the Water Resource Protection District ("WRPD") provisions of the Newburyport Zoning Ordinance ("NZO"), specifically section XIX-J(2). On July 6, 2017 the Director of Public Health confirmed to the Planning Board that their letter of June 27, 2017 was meant to and did represent the Board of Health's review under both the General Laws and the NZO.

Along those same lines, the member inquired as to other departmental comments relative to the submission of the WRPD Special Permit Application. In accordance with section XIX-J(2) of the NZO, which provides – "Upon receipt of the special permit application and filing fee, the SPGA shall transmit one copy each to the board of water commission, sewer commission, board of health, conservation commission and the department of public works for their written recommendations. Failure to respond in writing within sixty (60) days of receipt shall indicate approval or no desire to comment by said agency. The requisite number of application copies shall be furnished by the applicant." The sixtieth day was July 23, 2017. As of that day, the Planning Office, despite repeated notices to the department heads from the Planning Office, had received comments from the Board of Health, the Tree

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Commission, the Water Distribution Manager and the Recycling and Energy Manager. Despite the expiration of time by which to make comments, on July 31 I inquired as to any other comments from any other departments and was advised that there were none. As a result, and in accordance with the NZO, the lack of response “shall indicate approval or no desire to respond” by the non-responsive agencies. In this instance, there was no written comment on the WRPD from the board of water and sewer commission, the conservation commission or the department of public works.

### **Review of Soil Testing:**

AECOM has undertaken the review of the soil sampling and risk analysis and their letter is attached with this submission. We are informed that AECOM will be present at the meeting to answer questions from the Board. Further, there was a question about the potential for modeling any potential impacts from the results of the soil sampling. Attached hereto is a letter explaining the use of modeling in this situation. This submission has been provided to AECOM for their review. (See letter dated July 30 , 2017 from Jay Billings).

### **Engineering Review:**

The plans have been revised pursuant to the comments from Christiansen & Sergi and are attached hereto for your review. Finals details may have to be resolved before the meeting on the 15<sup>th</sup> of August. We are informed that Mr. Christiansen will be present to provide his report at the meeting.

### **Other Board Questions:**

Will the excavation of the greens as part of the construction process pose a threat to the water supply given the soil sample result?

*The soil sample results reveal the presence of low concentrations of 15 compounds that are used for turf management. EnviroRisk Solutions performed a Risk Assessment of the conditions detected and determined that residents living on the property had the highest exposure potential through dermal contact and incidental ingestion of soil. EnviroRisk Solutions concluded that no significant risk of harm to human health exists from incidental ingestion of the soil. Currently there is no evidence that these compounds are present in groundwater. Excavation of the greens will not change the fate and transport characteristics of the compounds present and does not pose a threat to the water supply.*

Please clarify the drainage pattern from the entrance at Brown Avenue and show how the Brown Avenue stormwater system will not be impacted.

*The proposed drainage system directs water away from Brown Avenue. This is achieved by locating two catch basins at the end of the new road at the intersection with Brown Avenue. The water from the new road flows into the catch basins before flowing onto Brown Avenue. Once it flows into the catch basins it is then piped via a 12” diameter drainage pipe back down the new roadway into the new development area. This runoff eventually discharges to bio-retention area “F” located within the new developments drainage system and over 600 feet from Brown Avenue.*

Please show how you meet the requirement for cul-tec chambers for roof run off as set forth in the OSRD Special Permit.

*Answer: The OSRD Special Permit and Plans do not require the use of cul-tec chambers for roof run off. However, the roof run off is handled with a drip edge infiltration trench. An 18” wide by 18” deep stone diaphragm trench is located below the roof drip line where water falls and is infiltrated back into the ground.*

Will there be more opportunity for mosquitos to breed given the rejuvenation of the wetlands on site?

*Answer:*

*It generally takes 10 to 14 days for mosquitos to breed in standing water. Currently, with the first two basins being lined with clay, there is generally standing water present through much of the summer. The third basin is generally dry. The project plans will result in the elimination of the first two basins, the creation of a water feature, and improvements in the third basin in addition to on site treatment areas for stormwater.*

- *None of the stormwater features will retain water for more than 3 days.*
- *Water bubblers will be used to keep the surface water moving to prevent the water feature from becoming breeding habitat for mosquitos.*
- *The isolated wetland will use a rich organic soil to maintain sufficient moisture to support a wetland plant community, but will remain permeable. Surface water that enters the wetland will still infiltrate through the wetland soil and the side slopes, and the wetland generally not have standing water during summer months for a long enough period to become a mosquito problem.*

*While it cannot be ruled out that mosquitos will breed on site at times, the project will result in significantly less mosquito habitat than the existing condition.*

We look forward to discussing these matters in more detail at our meeting next week.

## **RE-DRAFT HOME OWNERS ASSOCIATION**



## PORT PLACE SUBDIVISION HOMEOWNERS ASSOCIATION DECLARATION OF TRUST

THIS DECLARATION OF TRUST is made on this \_\_\_\_ day of \_\_\_\_, 2017, by Evergreen Commons LLC, 487 Groton Road, Suite A, Westford, MA 01886 (referred to hereinafter as the “Declarant” or the “Trustee” or “Trustees”, which term and any pronoun referring thereto shall be deemed to include his or their successors in trust hereunder and to mean the Trustee or the Trustees for the time being hereunder, wherever the context so permits) owner of the property located at 18 Boyd Drive and 5 Brown Avenue, Newburyport known as the Port Place by Evergreen Commons Definitive Subdivision said definitive plan being recorded in Plan Book \_\_\_\_, Plan \_\_ on \_\_\_\_, 2017 in the Essex South Registry of Deeds (the “Subdivision” or the “Plan”) by deeds dated \_\_\_\_, 2017 and recorded in said registry at Book \_\_\_\_ Page \_\_\_\_ and dated \_\_\_\_, 2017 and recorded in said registry at Book \_\_\_\_ Page \_\_\_\_, respectively.

### ARTICLE I - Name of Trust

The Trust hereby created shall be known as the **Port Place Homeowners Association Trust** (the “Trust” or “Association”).

### ARTICLE II - The Trust and Its Purposes

2.1 General Purposes. All of the rights and powers in, to and with respect to the land and the Common Areas and Facilities (defined below) of the Port Place by Evergreen Commons Subdivision and any and all other rights and powers conferred upon or exercisable by the Trust, and all property, real and personal, tangible and intangible, conveyed to the Trustees hereunder shall vest in the Trustees as joint tenants, with right of survivorship, as Trustees of this Trust, BUT IN TRUST NEVERTHELESS, to exercise, manage, administer and dispose of the same and to receive the income thereof for the benefit of the owners of record from time to time (the “Owners,” “Lot Owners” or “beneficiaries”) of the lots shown as on the Subdivision as “Lot 1, Lot 2, Lot 3, Lot 4, Lot 5, Lot 6, Lot 7, Lot 8, Lot 9, Lot 10, Lot 11, Lot 12, Lot 13, Lot 14, Lot 15, Lot 16, Lot 17, Lot 18, Lot 19, Lot 20, Lot 21, Lot 22, Lot 23, Lot 24, Lot 25, Lot 26, Lot 27, Lot 28, Lot 29, Lot 30, Lot 31, Lot 32, Lot 33, Lot 34, Lot 35, Lot 36, Lot 37, Lot 38” (singly, a “Lot,” and, collectively, the “Lots”). All Lots contain single family dwellings or may accommodate a single family dwelling. Additionally there are the Open Space parcels consisting of 22.816 acres shown on the Plan which shall be known as the “Common Area”. There are also roads and infrastructure within those roads such as water, sewer and storm drains which shall be referred to as the “Common Infrastructure”.

The purpose of the Association is to take responsibility, in perpetuity, for the upkeep, maintenance, and repair of the Common Area. The Common Area is to serve as Open Space and Recreational Space for the Association and shall be open to the public.

It is hereby expressly declared that a Trust, and not a Partnership, has been hereby created and that the Lot Owners are beneficiaries and not partners or associates or any other relation



whatever among themselves with respect to the trust property and that they hold no relation to the Trustees other than as such beneficiaries, with only such rights as are conferred upon them as such beneficiaries hereunder.

### ARTICLE III - The Trustees

3.1 Initial Board; Subsequent Trustees; Number of Trustees. The initial Trustee shall be **Evergreen Commons LLC** (hereinafter called the "Initial Trustee"). The Initial Trustee shall serve as sole Trustee up until the earlier of (i) Five (5) years from the date this Declaration is recorded with the Registry, and (ii) when the Declarant has conveyed 75% of the Lots, or such earlier time as the Declarant may determine, in its sole discretion, by giving written notice thereof to all then Lot Owners (the "Initial Term"). The Declarant may also remove and replace the Initial Trustee at any time and for any reason during the Initial Term. Notwithstanding any other term or provision of this Trust to the contrary, the Lot Owners shall have no power or right to remove the Initial Trustee or to appoint any additional or successor Trustees until the expiration of the Initial Term as set forth above.

The Original Trustee shall resign on the expiration of the Initial Term and the Lot Owners shall elect a Board of Trustees of the Trust consisting of at least three (3) persons and no more than five (5) persons. In the event there are three members, the initial three members shall be elected, one for a three year term, one for a two year term and one for a one year term. Should five (5) members be elected, three shall be elected to a three year term, one for a two year term and one for a one year term. The persons so elected shall be owners of Lots elected by the Owners holding at least fifty one percent (51%) of the beneficial interest of the Trust. Appropriate notices of the withdrawal of the prior Trustee(s) and the identity of the new Trustee(s) shall be recorded with the Registry. The terms of office of the Trustees so elected shall be two (2) year(s), with the first term beginning on the expiration of the Initial Term.

At each annual meeting of the Trust following the expiration of the Initial Term, there shall be elected as Trustees hereunder such number of persons as shall be necessary to fill all vacancies then occurring in the office of Trustee hereof by virtue of expiration of terms of office, resignation or otherwise.

If for any reason any vacancy in the office of Trustee shall continue for more than sixty (60) days after the occurrence of such vacancy and shall at the end of that time remain unfilled, a Trustee or Trustees to fill such vacancy or vacancies may be appointed by any court of competent jurisdiction upon the application of any Trustee hereunder or any Lot Owner and upon notice to all Trustees and to such other, if any, parties in interest to whom the court may direct that notice be given. The foregoing provisions of this Section to the contrary notwithstanding, despite any vacancy in the office of Trustee, however caused and for whatever duration, the remaining or surviving Trustees shall continue to exercise and discharge all of the powers, discretion and duties hereby conferred or imposed upon the Trustees.

3.2 Actions by Trustees. In any matters relating to the administration of the Trust hereunder and the exercise of the powers hereby conferred (a) each Trustee shall have one (1)



vote, and (b) the Trustees may act by a majority vote at any duly called meeting at which a quorum and a quorum shall consist of a majority of the Trustees. The Trustees may also act without a meeting if a written assent thereto is signed by the Trustees then in office. Any matter as to which the Trustees then in office shall be unable to decide by a majority vote shall be referred to and decided by arbitration in accordance with the then rules of American Arbitration Association.

3.3 Resignation and Removal of Trustees. Any Trustee may resign by notice in writing given to each of his co-Trustees and by recording with said Registry of Deeds or filing with said Registry District, as the case may be, at any time an instrument in writing signed and acknowledged by him.

A Trustee may be removed from office with or without cause by a vote of Lot Owners holding at least sixty percent (60%) of the beneficial interest of the Trust. A certificate signed by a majority of the Lot Owners, when recorded in the Registry of Deeds, shall be conclusive evidence of the action taken at such meeting.

3.4 Bond By Trustees. No Trustee shall be required to furnish any surety on his Bond.

3.5 Compensation of Trustees. No Trustee shall receive compensation for his services hereunder, but shall be entitled to reimbursement for all reasonable and necessary expenses paid or incurred in connection with his/her services as Trustee.

3.6 No Liability if in Good Faith. No Trustee shall be personally liable or accountable or be deprived of compensation by reason of any action taken, suffered or omitted in good faith, or for allowing one or more of the other Trustees to have possession of the Trust books or property, or by reason of honest errors of judgment, mistakes of fact or law, the existence of any personal or adverse interest, or by reason of anything except his own willful malfeasance and default.

3.7 Self-Dealing. No Trustee shall be disqualified by his/her office from contracting or dealing with the Trustees, or with one or more of the Lot Owners as vendor, purchaser or otherwise, nor shall any such dealing, contract or arrangement entered into in respect of this Trust in which any Trustee shall be in any way interested be avoided, nor shall any Trustee so dealing or contracting or being so interested be liable to account for any profit realized by any such dealing, contract or arrangement by reason of such Trustee's holding office or of the fiduciary relation hereby established, provided the Trustee shall act in good faith and shall disclose the nature of his interest in writing before any such dealing, contract or arrangement is entered into.

3.8 Indemnity. To the maximum extent permitted by applicable law, the Trustees and each of them shall be entitled to indemnity out of the trust property against any liability incurred by them or any of them in the execution of their duties hereof, including, without limiting the generality of the foregoing, liabilities in contract and in tort and liabilities for damages, penalties, and fines.



3.9 Duty of Trustee. The purpose of this Trust and the principal duty of the Trustees shall be to maintain and preserve in good repair and condition the Common Areas of the Trust.

#### **ARTICLE IV - Beneficiaries and Beneficial Interest**

4.1 Beneficial Interest. The beneficiaries shall be the Owners of the Lots shown on the Plan. The Owners of each Lot shall each have a one-thirty-eighth (1/38) interest in the Common Area and Facilities and other Trust property, and be entitled to one-thirty-eighth (1/38) vote each. Such interests shall be stated in the deed for each Lot. The beneficial interest of each Lot Owner in the Common Area and other Trust property shall be inseparable from ownership of the Lot and may not be conveyed, transferred or in any way alienated or separated from said Lot and shall be deemed appurtenant to each Lot. A person shall become a beneficiary automatically upon becoming a Lot Owner and shall cease to be a beneficiary automatically upon ceasing to be such an owner.

4.2 Persons to Vote as Unit Owners. Whenever any of said Lots is owned of record by more than one person, the several owners of such Lot shall (a) determine and designate which one of such owners shall be authorized and entitled to cast votes, execute instruments, act as Trustee, and otherwise exercise the rights appertaining to such Lot hereunder; and (b) notify the Trustee of such designation by a notice in writing signed by all the record owners of such Lot. Any such designation shall take effect upon receipt by the Trustee of such notice, and may be changed at any time and from time to time by notice as aforesaid. In the absence of any such notice of designation, the Trustee may designate any one of such owners for such purposes or disqualify all of such owners from voting until a notice of designation is received from such owners in the required form. The forgoing notwithstanding, the obligation to pay any assessment or other charge imposed by the Trustees against a Lot shall be joint and several amongst the Lot Owners and their respective estates.

#### **ARTICLE V - Bylaws**

The provisions of this ARTICLE V shall constitute the Bylaws of this Trust to wit:

5.1 Powers of the Trustees. For the purpose of carrying out the terms of this Trust, the Trustees shall have all powers and duties necessary for administration of the Common Areas and Facilities and other Trust property, including without limitation the following obligations, powers and duties which may be exercised by the Trustee without any action or consent by the Lot Owners and which shall continue after the termination of the Trust for the purpose of disposing of the Trust property and until final disposition thereof:

(i) to maintain, repair, improve, develop or preserve the Trust property, real or personal, including, without limitation, the Common Areas and Facilities;



(ii) to open bank accounts in the name of the Trust or Trustee and to appoint Trustees or other delegates to draw on such accounts;

(iii) to borrow money in the name of the Trust and to give security for the repayment of the same;

(iv) to adopt, amend and rescind reasonable rules and regulations governing the details of the operation, use and maintenance of the Common Areas and Facilities and any other Trust property;

(iv) to make contracts and other agreements in the name of this Trust which the Trustees deem convenient to the performance of its duties, including any contract for the operation and maintenance of the Common Area and Facilities;

(v) to bring suit in the name of the Trust and to compromise or submit to arbitration any claim or matter and to meet any and all legal obligations with respect to the Trust;

(vi) to buy, sell, convey, mortgage, pledge, lease, rent, hypothecate or otherwise dispose of or encumber any property, real, personal and/or otherwise upon the determination by the Trustees that such action is in furtherance or the Trust purposes;

(vii) to accept, convey, swap and grant easements, permanent and temporary, licenses and other lesser interests in real property for the installation, maintenance, repair and replacement of utilities, drainage structures and rights incidental thereto and also to grant easements;

(viii) to hire, retain and/or employ individuals, professional or non-professional, to assist the Trustees in their administration of this Trust and to assist in carrying out its terms and intent;

(ix) to exercise any other powers which may be necessary or desirable for carrying out the terms of the Trust or which the Trustees may have under any present or future statute, regulation or rule of law or which may be required of the Trustee as title holder of the personal and real property of the Trust; and to execute and deliver all appropriate instruments in connection therewith; and

(x) to enforce the obligations of the Lot Owners for all matters hereunder and including conformance with the requirements of any Special Permits and/or Order's of Conditions applicable to the Lots and the Common Area and doing anything and everything else necessary and proper for the sound management of the Association.

(xi) Notwithstanding anything herein to the contrary, the Initial Trustee may, convey, grant easements in, or otherwise transfer or reconfigure the Common Area to reduce or increase the size thereof, so long as the Initial Trustee provides notice of its action to the Unit Owner within a reasonable period of time following its actions and only



so long as any such changes are in conformance with any Special Permits, Subdivision Approval and/or Order of Conditions applicable to the Property.

(xii) to do all of the forgoing in full compliance with the Special Permit issued by the City of Newburyport Planning Board on March 15, 2017, and recorded at Book \_\_\_ and Page \_\_\_ in the Essex South Registry of Deeds, the Subdivision Approval issued by the City of Newburyport on \_\_\_\_\_, 2017, and recorded at Book \_\_\_ and Page \_\_\_ in the Essex South Registry of Deeds the Special Permit for the Water Resource Protection District on \_\_\_\_\_, 2017 and recorded at Book \_\_\_ and Page \_\_\_ in the Essex South Registry of Deeds and the Orders of Conditions issued by the City of Newburyport Conservation Commission on \_\_\_\_\_, 2017, and recorded at Book \_\_\_ and Page \_\_\_ in the Essex South Registry of Deeds.

5.2 Authority to Assess. The Trustees, in order to maintain the Common Areas and Common Infrastructure and to carry out the purposes of the Trust as set forth in Sections 2.1 and 3.9, shall make assessments upon the Lot Owners for the common expenses of the Association. Such assessments, and the total budget and expenditures of the Trust, shall expressly include any and all expense and charges related to the operation, maintenance, repair and replacement of the Common Areas and Common Infrastructure. There shall be an initial contribution of \$ \_\_\_\_\_.00 to be paid into the Trust at the time each Lot is conveyed from the Declarant.

The Declarant has established initial accounts in the following amounts and for the following purposes: a. Open Space Maintenance Fund: \$5,000.00. b. Stormwater Management Systems Maintenance Fund: \$6,000.00 and c. Landscaping & Lawn Maintenance Fund. \$3,000.00.

At the closing of the initial sale of each lot, the Buyer shall be required to pay two months of Home Owners Association Fees as assessed by the Declarant. One month shall be paid to the Declarant to reimburse the Declarant for the initial account funding in the immediately preceding paragraph and one month shall be paid into the fund reserve account.

Each Lot Owner, by accepting a deed to any Lot, covenants to pay to the Trust any assessments established by the Trust, including any initial contribution and annual or monthly contributions. One-thirty-eighth (1/38) of the cost of maintaining the Common Areas and Facilities including Common Infrastructure shall be borne by the owner of each Lot in the subdivision. The recording of a statement by the Trustees indicating a Lot Owner's name, the location of the property and the Lot Owner's title reference shall be sufficient to give the Trustees a lien against the property described in an amount equal to the charges set forth in the statement. Any person relying on a statement signed and acknowledged by a Trustee and duly recorded in the Registry as to the amount of any outstanding charge or the fact there is no outstanding charge shall be fully protected. Each such assessment, together with such interest thereon and costs of collection, shall also be the personal obligation of the Lot Owner.

At least thirty (30) days prior to the commencement of each fiscal year of the Trust, the Trustees shall estimate the common expenses expected to be incurred during such fiscal year, together with reasonable provision for reserves, and shall determine the assessment to be made



for that fiscal year. The Trustees shall promptly furnish copies of the budget and render statements to the Lot Owners for the respective shares of such assessment, and each Lot Owner thereafter shall pay such amount in full within sixty (60) days after the notice from the Trustees. The Trustees shall not be obligated to render monthly assessments. In the event that the Trustees shall determine that an assessment so made is less than the common expenses actually incurred, or reasonably expected to be incurred, including but not limited to provisions for proper reserve funds, the Trustees shall make a supplemental assessment(s) and render statements therefore in the manner aforesaid, and such statements shall be payable and shall take effect as set forth in such statements. The Trustees may in their discretion provide for payments of such supplemental assessment statements in monthly or other installments. The Trustees shall have the authority and the duty to levy and enforce the collection of general and special assessments for common expenses.

The amount of each statement for regular or supplemental assessments, together with interest thereon, if not paid when due, together with all costs and expenses, including attorneys' fees, incurred by the Trustees in any proceeding brought to collect such unpaid common expenses and assessments, delinquent fees, charges, penalties and interest charged to a delinquent Lot Owner, shall constitute a lien on the Lot. Such amount shall also constitute a personal debt of the Owner who is the owner of such Lot on the date of the assessment by the Trustees. The Trustees shall take prompt action to collect any common expenses and assessments due from any Lot Owner that remain unpaid for more than thirty (30) days from the due date thereof. If the common expenses and/or assessment is not paid within said thirty (30) day-period, the amount of the unpaid common expenses and/or assessment shall bear interest from the date due at the highest rate allowed by law, and the Trustees may, seven (7) days after giving written notice to an institutional mortgagee, if any, holding a mortgage covering the Lot in question, bring an action at law against the Owner to collect amounts due or bring an action to foreclose the lien against such Lot and the improvements thereon. There shall be added to the amount of such common expense and/or assessment the costs of preparing and filing the complaint in such action; and in the event a judgment is obtained, such judgment shall include interest as provided above and reasonable attorney's fees together with the costs of the action and any other collection costs.

In the event the Trustee fails to maintain any portion of the Trust Property in reasonable order and condition, in accordance with the terms and conditions at forth in the Open Space Residential Subdivision Special Permit dated March 15, 2017 or the Definitive Subdivision Approval dated \_\_\_\_\_, 2017 or the Water Resource Protection District Special Permit dated \_\_\_\_\_, 2017, the City of Newburyport by and through \_\_\_\_\_ may serve written notice of such failure upon the Trustee or Lot Owners and shall include a demand for correction within a reasonable time period of the delivery of such notice and shall state the date, time and place of a hearing thereof which shall be held within thirty (30) days of the notice. If the deficiencies are not corrected or the City's demand modified, the City, acting through \_\_\_\_\_, may, but shall not be required to, enter upon the Trust Property and maintain the same for a period of up to one (1) year. Before the expiration of one (1) year, a second public hearing shall be held by \_\_\_\_\_, at which time the Trustee or the Lot Owners shall show cause why such maintenance should not continue for a succeeding year. If the \_\_\_\_\_ determines that the need for the City maintenance no longer exists, the City shall cease to maintain the Trust Property. Reasonable costs incurred by the City shall be



assessed against the Trust and/or the Lot Owners and shall become a lien on all lots which may be collected and enforced by any remedy available under the law, unless paid within thirty (30) days. The City by and through \_\_\_\_\_ shall have the right to enforce this provision.

5.3 Meetings of Lot Owners. There shall be an annual meeting of the Lot Owners on the first Monday of March in each year at 7:30P.M. at such reasonable place and time as may be designated by the Board of Trustee by notice given to all Lot Owners at least fourteen (14) days prior to the date so designated. Special meetings of the Lot Owners may be called at any time by the Board of Trustees and shall be called by them upon the written request of Lot Owners entitled to more than fifty percent (50%) of the beneficial interest hereunder. Written notice of any such meeting designating the place, day and hour thereof shall be given by the Board of Trustees to the Lot Owners at least fourteen (14) days prior to the date so designated. At the annual meeting of the Lot Owners, the Board of Trustees shall submit reports of the management and finances of the Trust. Whenever at any meeting the Board of Trustees proposes to submit to the Lot Owners any matter with respect to which approval of or action by such owners is necessary or appropriate, the notice of such meeting shall so state and reasonably specify such matter.

Every notice to any Owner required under the provisions hereof, or which may be deemed by the Trustee necessary or desirable in connection with the business of the Trust created hereby or which may be ordered in any judicial proceeding shall be deemed sufficient and binding if a written or printed copy of such notice shall be given by one or more of the Trustees to said Owner by leaving such notice with him at his residence or by mailing it, postage prepaid, and addressed to such Owner at his address as it appears upon the records of the Trustees, at least seven (7) days prior to the date fixed for the happening of the matter, thing or event of which such notice is given.

5.4 Meeting of Board of Trustees. The Board of Trustees shall meet annually on the first Thursday in December. Other meeting may be called by any Trustee and in such other manner as the Trustees may establish, provided, however, that written notice of each meeting stating the place, day and hour thereof shall be given at least four (4) days before such meeting to each member of the Board of Trustees.

## **ARTICLE VI - Rights and Obligations of Third Parties Dealing with the Trustees**

6.1 Dealing With Trustees. No purchaser, mortgagee, lender or other person dealing with the Trustees as they then appear of record in the Registry of Deeds need inquire further as to the persons who are then Trustees hereunder. The receipts of the Trustees for monies or things paid or delivered to them shall be effectual discharges therefrom to the persons paying or delivering the same. No person from whom the Trustees or any one or more of them shall receive any money, property or other credit shall be required to see to the application thereof. No purchaser, mortgagee, lender or other person dealing with the Trustees or with any real or



personal property which then is or formerly was trust property shall be bound to ascertain or inquire as to the existence or occurrence of any event or purpose in or for which a sale, mortgage, pledge or charge is herein authorized or directed, or otherwise as to the purpose or regularity of any of the acts of the Trustees purporting to be done in pursuance of any of the provisions or powers herein contained.

6.2 Recourse Against Trustees. No recourse shall at any time be had under or upon any note, bond, contract, order, instrument, certificate, undertaking, obligation, covenant or agreement, whether oral or written, made, issued or executed by the Trustees or by any agent or employee of the Trustees or by reason of anything done or omitted to be done by or on behalf of them or any of them against the Trustees individually, or against any such agent or employee or against any beneficiary either directly or indirectly, by legal or equitable proceeding, or by virtue of any suit or otherwise, and all persons extending credit to, contracting with or having any claim against the Trustees, shall look only to the trust property for payment under such contract or claim or for the payment of any debt, damage, judgment or decree or of any money that may otherwise become due or payable to them from the Trustees so that neither the Trustees nor the beneficiaries, present or future, shall be personally liable therefore.

6.3 Instruments Subject to Trust Terms. Every note, bond, contract, order, instrument, certificate, undertaking, obligation, covenant or agreement, whether oral or written, made, issued or executed by the Trustees or any two or more of them or by any agent or employee of the Trustees shall be deemed to have been entered into subject to the terms, conditions, provisions and restrictions hereof, whether or not express references shall have been made to this instrument.

6.4 Certifications by Trustees for Recording. This Declaration of Trust and any amendments hereto and any certificate herein required to be recorded or filed and any other certificate signed or sworn to by said Trustees or any two or more of them which it may be deemed desirable to record or file may be recorded or filed, as the case may be, with the Registry and such record shall be deemed conclusive evidence of the contents and effectiveness thereof according to the tenor thereof; and all persons dealing in any manner whatsoever with the Trustees, the trust property or any beneficiary hereunder shall be held to have notice of any alteration or amendment of this Declaration of Trust, or change of Trustee or Trustees, when the same shall be recorded or filed with said Registry. Any certificate signed by the Trustees in office at the time setting forth as facts any matter affecting the Trust, including statements as to who are the beneficiaries, as to what action has been taken by the beneficiaries, and as to matters determining the authority of the Trustees to do any act, when duly acknowledged and recorded or filed with said Registry shall be conclusive evidence as to the existence of such alleged facts in favor of all third persons, including the Trustees, acting in reliance thereon. Any certificate executed by the Trustees hereunder or, setting forth the existence of any facts, the existence of which is necessary to authorize the execution of any instrument or the taking of any action by the Trustees or any one or more of them, as the case may be, shall, as to all persons acting in good faith in reliance thereon, be conclusive evidence of the truth of the statements made in such certificate and of the existence of the facts therein set forth.

## **ARTICLE VII - Amendments and Termination**



7.1 Amendment of Trust. The Trustees, with the consent in writing of a eighty percent (80%) of the Lot Owners, may at any time and from time to time, amend, alter, add to or change this Declaration of Trust in any manner, provided however, that no such amendment, alteration, addition or change that would (a) render this Trust contrary to or inconsistent with any requirements or provisions of applicable law or any permit or approval issued by a board or officer of the City of Newburyport, or (b) alter, amend or revoke the obligations of the Trustees as set forth in Sections 2.1 and 3.9 hereof.

7.2 Termination of Trust. No termination shall be permitted unless an alternative means of discharging the Trust's obligations under Sections 2.1 and 3.9 has been approved by the Owners.

## **ARTICLE VIII NOTICE OF WATER RESOURCE PROTECTION DISTRICT AND LIMITATIONS OF USE OF LOTS AND COMMON AREAS**

8.1 Notice: The subject property is located above the City of Newburyport's public water supply (an underground aquifer). See Homeowners Association documents, Covenants and Restrictions, as well as the original OSRD Special Permit decision (on record at the Registry of Deeds) for additional information on uses and activities regulated or expressly prohibited in order to protect the public water supply. All activities of the homeowners shall be conducted in a manner which respects and protects the water resource protection district and public water supply.

8.2 Prohibited Uses: The Subdivision is located within the Zone II of the Water Resource Protection District. The following uses are prohibited in Zone II:

8.2.1. Individual sewage disposal systems, ~~that are designed and located in accordance with 310 CMR 15.000 to receive more than one hundred ten (110) gallons of sewage per quarter acre under one ownership per day, or four hundred forty (440) gallons of sewage on any acre under one ownership per day, whichever is greater, except the replacement or repair of an existing system that will not result in design capacity above the original design.~~

8.2.2. Storage of animal manure unless covered or contained so as to prevent the generation and escape of contaminated runoff or leachate.

8.2.3. Earth removal, consisting of the removal of soil, loam, sand, gravel or any other earth material (including mining activities) to within six (6) feet of historical high groundwater as determined from monitoring wells and historical water table fluctuation data compiled by the United States Geological Survey, except for excavations for building foundations, roads, or utility works.

8.2.4. Facilities that generate, treat, store, or dispose of hazardous waste subject to M.G.L.A. c. 21C and 310 CMR 30.00, except the following:

- a. Waste oil retention facilities required by M.G.L.A. c. 21C, § 52A.
- b. Water remediation treatment works approved under 314 CMR 5.00.



8.2.5. Treatment works that are subject to 314 CMR 5.00, including privately owned sewage treatment facilities, except the following:

- a. Replacement or repair of an existing treatment works that will not result in a design capacity greater than the design capacity of the existing treatment works.
- b. Replacement of existing subsurface sewage disposal system(s) with waste treatment works that will not result in a design capacity greater than the design capacity of the existing sewage disposal system(s).
- c. Treatment works designed for the treatment of contaminated surface water and groundwater, approved by the Massachusetts Department of Environmental Protection.

8.2.6. Industrial and commercial uses which discharge process wastewater on site.

8.2.7. Alteration of any bordering vegetated wetland.

8.2.8. Incinerators.

8.2.9. Storage of liquid petroleum products, except the following:

- a. Normal household use, outdoor maintenance, and heating of a structure.
- b. Waste oil retention facilities required by statute, rule, or regulation.
- c. Emergency generators required by state regulations.
- d. Treatment works approved under 314 CMR 5.00 for treatment of ground or surface waters.

Provided that such storage, listed in items a. through d. above, is in freestanding containers within buildings or above ground with secondary containment adequate to contain a spill the size of one hundred ten (110) percent [of] the container's total storage capacity.

8.2.10. Commercial repair, servicing, washing, and rebuilding of vehicles, boats, and other large motorized equipment other than for normal household or farming activities.

8.2.11. Storage of commercial fertilizers, as defined in M.G.L.A. c. 128, § 64, unless such storage is within a structure designed to prevent the generation and escape of contaminated runoff or leachate.

8.2.12. Private Wells

## **ARTICLE IX - Improvements, Care and Maintenance of Common Areas and Lawns**

9.1 Landscaping Changes: Prior to any changes to the initial landscaping on each lot the Owner shall be required to present a plan to the Trustees and receive approval of all proposed changes from the Trustees. Said proposal shall be in writing. The Trustees shall have 21 days to review the plan and meet with the Owner as needed. At the end of 21 days, in the event the Trustees do not respond to the Owner, the Owner may proceed with the proposed revisions to the landscaping, so long as all proposed revisions are undertaken in conformance with this document. In the event the Trustees require changes to the plan; the changes shall be incorporated prior to any changes being undertaken by the Owner.



9.2 Single Landscaping and Lawn Care Professional and Use of Chemicals: Notwithstanding any other provision herein to the contrary, the Homeowners Association shall hire a single licensed landscaping and lawn care professional to establish a single program to maintain lawn and other vegetation on each Lot and any Common Area. Any contract with the lawn care professional shall require that each year, on or before February 15, the designated landscaping and lawn care professional shall submit a written copy of the proposed maintenance program to the City of Newburyport DPS, Water Division for review. The DPS Water Division may require modifications to the proposed maintenance program for the purposes of protecting the City's public water supply, including but not limited to limitations on the type and quantity of any lawn and landscape care products (including but not limited to herbicides, pesticides, fungicides and/or other chemicals/substances). Application of any such products shall be prohibited for the subsequent year until the DPS Water Division has approved the proposed maintenance program, which approval shall not be unreasonably withheld and may be reasonably revised as necessary. The Proposed Maintenance program shall include a signed letter of commitment that the landscaping and lawn care professional agrees to abide in every respect with the approved maintenance program.

9.3 Maintenance of Driveways and Roadway Infrastructure: The Homeowner's Association shall be responsible for ongoing maintenance of the roadways (including plowing), street lights, and street trees – Common Infrastructure - until such time as the proposed ways are accepted by the City of Newburyport.

No salting may be undertaken on roadways or driveways within the Subdivision without prior written approval from the City of Newburyport DPS Water Division.

Each year, on or before September 15, until City acceptance of the proposed ways, the Homeowners Association or its designated consultant/contractor shall submit a written copy of the proposed snow and ice maintenance program to the DPS, Water Division for review and approval and which is consistent with the DPS standard practices for snow plowing and street treatment within Zone II areas. The DPS Water Division may require modifications to the proposed maintenance program for the purposes of protecting the City's public water supply, including but not limited to limitations on the type and quantity of any chemicals/substances to be applied so long as any limitations are consistent with the DPS standard practices for snow plowing and street treatment within Zone II areas. Application of any chemicals/substances shall be prohibited for the subsequent year until the DPS Water Division has approved the proposed maintenance program (revised as necessary) and a signed letter of commitment has been provided to the DPS Water Division that the Homeowners Association or its designated consultant/contractor agrees to abide in every respect with the approved maintenance program

9.4 Maintenance of Drainage System: The Homeowner's Association shall be responsible for hiring a licensed professional to keep the storm drainage system in a clean and well-functioning condition as approved by the City of Newburyport Planning Board and as set forth in the Definitive Subdivision Plan, and shall do nothing that would alter the drainage patterns or characteristics as indicated on approved Subdivision Plans. Upon acceptance of the proposed roadways by the City of



Newburyport, the Homeowners Association responsibility shall be limited to those drainage systems and areas outside of the accepted layout (Right of Way).

9.5 Maintenance of Street Trees: Street trees within the subdivision shall be drip-watered for two growing seasons following the completion on initial planting. Street trees that do not survive these first two seasons shall be replaced, in-kind, by the Association. On-going maintenance of the street tress shall be the responsibility of the Association until such time as the City of Newburyport accepts the ways as Public Ways.

9.6 Trash and Recycling: The Association and the Owners shall be responsible for engaging their own private licensed trash removal company to service the homes fronting on the subdivision road ways until such time as the City accepts the roadways as Public Ways. Notwithstanding the foregoing, the Association may petition the appropriate City officials responsible for trash and recycling services, who in exchange for the appropriate indemnification agreement and access agreement may permit trash and recycling services to be performed by the City of Newburyport agents and/or contractors.

## **ARTICLE X - Miscellaneous**

10.1 Trustees' Books, Records. Books, accounts and records of the Trustees shall be open to inspection by any one or more of the Trustees and the Lot Owners at all reasonable times. The Trustees shall as soon as reasonably possible after the close of each fiscal year, submit to the Lot Owners a report of the operations of the Trustees for such year, which report shall include financial statements in such summary form and only in such detail as the Trustees shall deem proper. Any person who has been furnished such report and shall have failed to object thereto by notice in writing to the Trustees given by registered mail within a period of one (1) month of the date of such notice shall be deemed to have assented thereto.

10.2 Signing of Checks. Checks, notes, drafts and other instruments for the payment of money drawn or endorsed in the names of the Trustees or of the trust may be signed by any Trustee, or by any person or persons, to whom such power may at any time or from time to time be delegated. Notwithstanding the above, any check exceeding \$1,000.00 must be signed by two Trustees if the Trust at that time has two Trustees.

10.3 Fiscal Year. The fiscal year of the Trust shall be the year ending with the 31 day of July or such other date as may from time to time be determined by the Trustees.

10.4 Binding Effect. The rights and obligations herein created and confirmed shall inure to and be binding upon the respective parties, their successors, heirs, representatives and assigns.

10.5 Construction. In the construction hereof, whether or not so expressed, words used in the singular or in the plural, respectively, shall include both the plural and singular; words denoting males include females; and words denoting persons include individuals, entities and



quasi-entities, trusts and corporations; unless a contrary intention is to be inferred from or is required by the subject matter or context. The marginal and sectional captions and headings are inserted only for convenience of reference and are not to be taken to be any part hereof or to control or affect the meaning, construction, interpretation, or effect hereof.

10.6 Governing Law. All of the trusts, powers, and provisions herein contained shall take effect and be construed according to the laws of the Commonwealth of Massachusetts in general.

10.7 Invalidity. The invalidity of any provision or part of such provision hereof shall not impair or affect in any manner the remainder hereof or the remainder of such provision or such part of such provision.

10.8 Waiver. No restriction, condition, obligation or provision contained herein (including, but not limited to, the Bylaws hereof) shall be deemed to have been waived by reason of any failure to enforce the same, irrespective of the number or frequency of violations or breaches thereof that may occur.



IN WITNESS WHEREOF, **Evergreen Commons LLC, Trustee** has signed this Port Place by Evergreen Commons Homeowners Declaration of Trust as of the day and year first above written.

Evergreen Commons LLC  
By Its Manager

\_\_\_\_\_, Trustee

COMMONWEALTH OF MASSACHUSETTS

Essex, ss.

On this \_\_\_\_ day of \_\_\_\_\_, 2017, before me, the undersigned Notary Public, personally appeared \_\_\_\_\_, Trustee who proved to me through satisfactory evidence of identification, which was \_\_\_\_\_, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily for its stated purpose.

\_\_\_\_\_  
(Official Signature and Seal of Notary)



## **BOARD OF HEALTH LETTER**





## CITY OF NEWBURYPORT HEALTH DEPARTMENT

FRANK P. GIACALONE, R.S.  
DIRECTOR OF PUBLIC HEALTH

NEWBURYPORT CITY HALL  
TEL: 978-465-4410

60 PLEASANT STREET

NEWBURYPORT, MA 01950  
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July 6, 2017

James McCarthy, Chair  
Planning Board  
City of Newburyport  
60 Pleasant Street  
Newburyport, MA 01950

RE: Evergreen Commons 5/22/17 Application for Definitive Subdivision 18 Boyd Drive and 5 Brown Ave.

Dear Chair and members of the Board;

A letter dated June 27, 2017 was sent to the Planning Board regarding the Evergreen Commons after discussions were held at the Board of Health meeting on 6/15/17.

At our meeting Dr. Slocum made a motion to vote that recommendation be made to the Planning Board stating that the Board of Health has no concerns about the project and the Board would rather the funds for the two additional required tests instead be placed in a DPS fund for future use. The motion was seconded by Dr. Merabi. All in favor.

In conclusion the Board of Health, after review of the testing results and application, recommends that the \$10,000.00 be placed in a DPS fund for future use regarding the Evergreen project rather than being used for testing during construction.

Please be advised that the Board of Health's review included the Evergreen Commons definitive plan as well as the Water Resource Protection District Application.

Respectfully Submitted,

For the Board of Health

Frank P. Giacalone, Director of Public Health

## NGI LETTER



July 30, 2017

Planning Board  
60 Pleasant Street  
P.O. Box 550  
Newburyport, MA 01950

Re: Evergreen Commons OSRD  
Newburyport, MA

Dear Board Members:

Northeast Geoscience, Inc. (NGI) is writing to address a request by one of the Planning Board Members at the Planning Board Meeting held on July 5, 2017.

During this meeting, there was a discussion about potential water quality impacts to Newburyport Well No. 2 from chemicals applied to the golf course or future chemical applications to the proposed lawn areas in the OSRD. Mr. Walters of the Planning Board stated that he was aware that there were numerical models that could predict the movement of contaminants in groundwater, and that he would like to see modeling done to predict the risk of contamination to Well No. 2.

Numerical flow and solute transport models are tools available for estimating contaminant migration rates and concentrations in groundwater flow systems. These models are typically used to evaluate future risks posed by existing contaminated sites. These models require a great deal of site specific information on the transmissivity and storativity of the aquifer, groundwater flow directions, pumping scenarios and the quantity, time of release, properties and distribution of the contaminants to be modeled (the source term). Accurate definition of the source term is necessary for reliable model predictions.

Based on the results of testing we have conducted and AECOM has reviewed the golf course is not contaminated. A Phase I Environmental Site Assessment of the site prepared by Ransom Environmental dated March 2, 2016 also reached this conclusion. Further, based on testing conducted by NGI, AECOM and the City, no pesticide or herbicide compounds have been detected in water samples from existing monitoring wells or Well No. 2 at this time. There have been detections of low level concentrations of compounds in the soil at the golf course, but the concentrations detected pose no risk to human health. In addition, there is no indication that these materials are acting as a source of groundwater contamination. With these considerations taken into account, definition of the source term for the golf course is clear as no source of contamination has been identified. Based on this conclusion, it is not reasonable to run model contaminant migration as a solute transport model cannot be run without a source term.

Modeling future contaminant migration from the proposed lawn areas also presents difficulties, specifically in defining the source term. Currently we do not anticipate lawn care activities at the proposed OSRD resulting in groundwater contamination. A model would require information on the specific compound to be modeled, biodegradation rates of this compound, partitioning coefficients of the compound, the quantity, timing and location of future applications, and source area concentrations. None of this information is known. No contaminants are anticipated. Without a source term, a solute transport model has no value or purpose. The model results would essentially demonstrate that if no contaminants are present in the source area, no contaminant migration will occur.

NGI concludes that a solute transport model is not an appropriate tool to evaluate the concerns being raised regarding the golf course and the OSRD.

Please do not hesitate to contact me with any further questions.

Sincerely:

Northeast Geoscience, Inc.

A handwritten signature in black ink, appearing to read 'J. Billings', with a stylized flourish at the end.

Jay Billings  
Hydrogeologist