

Andrew Port

From: Jonathan D. Eichman <JEichman@k-plaw.com>
Sent: Wednesday, October 19, 2016 2:24 PM
To: Andrew Port
Cc: Donna Holaday; Mark R. Reich
Subject: Evergreen Commons - Uniformity requirement
Attachments: Ltr to PB Water Resource Prot 10 18 correction.pdf

Andy:

In my opinion, reading Section XIX-E of the Zoning Ordinance to state that certain uses listed as permitted therein are subject to further sections of the ordinance identifying prohibited and special permit uses (Section XIX-E.1, 5, 6 and 7) does not, contrary to the argument of the applicant's counsel in the attached letter, result in a violation of the so-called uniformity requirement. As counsel for the abutters has already pointed out, other subsections of Section XIX-E, including 1, 3, 4 and 8, are not expressly made subject to the three following sections on prohibited uses (Sections XIX-F, G and H) and the section establishing special permit uses (Section XIX-I), and thus are allowed "as-of-right" without qualification. I further disagree that these uses allowed as of right without qualification are merely "incidental/accessory uses" or uses exempt from zoning pursuant to G.L. c.40A, s.3. "Construction, maintenance, repair, and enlargement of drinking water supply related facilities," for example, which could include structures such as pumps, water towers, and treatment facilities, is not limited to incidental/accessory uses, or necessarily exempt under G.L. c.40A, s.3.

More importantly, however, the prohibitions on uses in Sections XIX-F, G and H, and the special permit requirements in Section XIX-I, do not, contrary to counsel's argument, render the allowed uses in Section XIX-E something other than as-of-right uses. Those sections simply act to define and limit the scope of the permitted uses. For instance, the prohibitions in Section XIX-F as applied to the residential use allowed under Section XIX-E simply mean that the residential use may not use other than "clean" fill, divert water out of the overlay district, store certain hazardous chemicals without proper containment, or take any action that may cause or contribute to the contamination of a public water supply. They do not act to prohibit or require a special permit for residential use and thereby make it something other than a permitted use. Such limitations on permitted uses are a common feature of zoning bylaws and ordinances, and are particularly common to water supply protection districts. "As-of-right" does not mean "free of all further zoning regulation."

Please contact me if you have further questions concerning the above.

Sincerely,

Jonathan Eichman

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