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October 12, 2016
Correction October 18, 2016¹

Jim McCarthy, Chairman
Newburyport Planning Board
City of Newburyport
60 Pleasant Street
Newburyport, MA 01950

RE: Evergreen Commons, LLC – OSRD Application
18 Boyd Drive and 15 Laurel Road, Newburyport, Massachusetts

Dear Mr. McCarthy:

This office represents the applicant Evergreen Commons, LLC (the “Applicant”) regarding the proposed development at 18 Boyd Drive and 15 Laurel Road, Newburyport, Massachusetts (the “Property”). We are in receipt of the letter from City Solicitor Jonathan Eichman, Esq. of KP Law (the “Letter”). We have previously responded in writing to the traffic issues addressed in the Letter. Please accept this correspondence as a response to Water Resource Protection District (“WRPD”) issues contained in the Letter.

The Letter addresses, at the request of the Board, whether Section F of the WRPD, contained in Section XIX of the Ordinance (the “WRPD Ordinance”), may be applicable to the Project. The Applicant respectfully but strongly disagrees with the opinion of the City Solicitor that the Board may apply the provisions of Section XIX-F of the Ordinance to the Project. First, the Solicitor’s an interpretation of the WRPD Ordinance is inaccurate, in that it contradicts the express language thereof. And second, if the WRPD Ordinance is applied as the Letter suggests, G.L. c. 40A, § 4 is violated thereby invalidating the WRPD Ordinance as a whole, not only as it pertains to the Project but as applied to *any* development in the City of Newburyport.

¹ Please note this is submitted as a correction. Please see cross out on page 4 mis-reference to which zoning district the Court determined violated the Uniformity provision.

I. Overview of the WRPD Ordinance

Per Section XIX-D, the WRPD Ordinance establishes within the City certain water protection zones, more specifically identified on an accompanying map as Zones A, B, I and II. The WRPD Ordinance addresses permitted and prohibited uses in several sections, namely Sections XIX-E through XIX-I. Section XIX-E of the Ordinance lists uses allowed as of right in the overlay district. Section XIX-F lists uses prohibited in the entire overlay district; Section XIX-G lists additional uses prohibited in the Zone A, Zone B, Zone I and Zone II areas; and Section XIX-H lists even more uses prohibited in the Zone A and Zone I. (Note that the Property does not reside in either Zone A or Zone I, such that Section XIX-H is inapplicable. The City Solicitor does not state otherwise.) Section XIX-I lists uses allowed in the WRPD pursuant to the grant of a special permit, regardless of Zone.

Be reminded that an overlay district is a zoning district superimposed upon underlying district(s), which may extend additional requirements, e.g. Section XIII of the Ordinance (regulating development in floodplains), *or options*, *see*, e.g., G.L. c. 40R, for development. The WRPD Ordinance does the former, not the latter. The owner or developer of property within the WRPD *must* comply with its strictures, insofar as they apply to the use(s) proposed. Such fact is critical, in part, to the analysis to follow. See Section III, below.

II. Express Language of the WRPD Ordinance

As stated above, Section XIX-E lists uses allowed as-of-right in the WRPD. This section does contain specific references to other sections of the WRPD Ordinance that narrow the scope of such allowed uses. Specifically relevant to the Property (and the Project proposed therefor), Section XIX-E allows “[r]esidential development, subject to sections XIX-H, I, and J (prohibited uses) and section XIX-K (special permitted uses)” (parenthetical references in the Ordinance). The parentheticals are likely in the wrong order of reference: Section XIX-J ought to reference “special permitted uses” (as said Section establishes the special permit process) and Section XIX-K ought to reference “prohibited uses” (as said Section provides for enforcement of violations), not vice versa.

Importantly, excluded entirely from Section XIX-E is any cross-reference (or any reference whatsoever) to Section XIX-F. Again, Section XIX-F contains a list of prohibited uses in the WRPD. It is meant to be a counterpart to the list of as-of-right uses in Section XIX-E. Examples of prohibited uses, per Section XIX-F, are landfills, automobile graveyards and storage of hazardous materials. Among the list of prohibited uses in the WRPD, in Section XIX-F(10) is also a “catch-all” of sorts, namely “[a]ny other activity deemed likely to cause or contribute to the contamination of the public water supply.” But Section XIX-F(10) must be read in context, i.e. as an item in a list of uses prohibited in the WRPD and *not otherwise allowed* by the WRPD Ordinance. *See* 2A Norman J. Singer & J.D. Shambie Singer, Sutherland’s Statutes and Statutory Construction, § 47:17, at 404 (7th ed.) (2008) (hereinafter, “Sutherland”) (it may be inferred that a string of words implicitly establishes a class of objects with later words in

the string interpreted to be of the same kind); see also Chwaliszewski v. Board of Appeals of Lynnfield, 29 Mass. App. Ct. 247, 250 (1990) (“[a] general term in a statute or ordinance takes meaning from the setting in which it is employed”). No provision of Section XIX-F indicates that Section XIX-F(10) is intended to apply to any of the allowed uses listed in the former Section XIX-E. 2A Sutherland § 47:8, at 312-13 (“where there is doubt concerning the extent of the application of [a] proviso on the scope of another provision’s operation, the proviso is strictly construed”); see also In re Opinion of the Justices, 151 N.E. 680, 681 (Mass. 1926) (citing to the same as “a cardinal rule of interpretation”).

Notwithstanding the express language of the Ordinance and the rules of statutory interpretation referenced above, the City Solicitor opines in the Letter that the Board may apply Section XIX-F(10) to the allowed uses identified in Section XIX-E, including residential construction as listed in Section XIX-E(6). But again, the WPRD Ordinance, at Section XIX-E, expressly allows residential development subject only to the limitations contained in Sections XIX-H, I, J and K, and contains no cross-reference to Section XIX-F. The Board cannot ignore the clear and unambiguous language of the Ordinance. See Monell v. Boston Pads, LLC, 471 Mass. 566, 575 (2015) (holding “[c]lear and unambiguous language in a statute is conclusive as to legislative intent.”); Guardione v. Town of Longmeadow, 74 Mass. App. Ct. 118, 122 (2009) (rejecting an interpretation of a bylaw that “changes the plain meaning of the existing language” of the bylaw). The list of allowed uses contained in Section XIX-E of the Ordinance and the list of prohibited uses contained in Section XIX-F are mutually exclusive; any attempt to conflate them, i.e. by applying the provisions of one section to the other, is not consistent with the plain meaning of the Ordinance.

III. Uniformity Violation

Even if the Board is unconvinced that the opinion of the City Solicitor regarding the applicability of Section XIX-F(10) is incorrect, the interpretation proffered by the Letter violates the uniformity clause found in G.L. c. 40A, § 4, i.e. that “[any] ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted” (the “Uniformity Clause”). The Uniformity Clause has been held to require that at least one use be allowed as-of-right in every zoning district. See, SCIT, Inc. v. Planning Bd. of Braintree, 19 Mass. App. Ct. 101, 106-107 (1984). The opinion of the City Solicitor that Section XIX-F(10) may be applied so as to prohibit any use within the WRPD, even those uses specifically designated as as-of-right uses in Section XIX-E, clearly violates the Uniformity Clause.

It makes no difference to this analysis that the zoning provision in question is an overlay district rather than a traditional zoning district. See, KCI Management, Inc. v. Board of Appeal of Boston, 54 Mass. App. Ct. 254, 262-263 (2002); Bernstein v. Planning Bd. of Stockbridge, 76 Mass. App. Ct. 759, 768-771 (2015). It also makes no difference that the zoning provision in question is for a water resource protection district. See Stone-Ridge Associates, LLC v. Stockbridge Planning Bd., Land Court Misc. Case No. 307309 (Amended Judgment, May 7, 2007) (Tromby, J.) (holding a Lake Protection

Overlay District violated the Uniformity Clause); Newport Materials, LLC v. Planning Bd. of Westford, Land Court Misc. Case No. 429867 (Decision, August 15, 2011) (Sands, J.) (determining MCP ~~Water Resource Protection Overlay~~ District violated G. L. c. 40A, § 4 because no use was allowed as-of-right). The City Solicitor's opinion that the Board may use Section XIX-F(10) to convert as-of-right uses into prohibited uses simply upon a finding that a use is "likely to cause or contribute to the contamination of the public water supply" would mean that no use is truly allowed as-of-right within the WRPD. See Duteau v. Zoning Bd. of Appeals of Webster, 47 Mass. App. Ct. 664, 670 (1999) ("By enacting a by-law that allows a use as a matter of right, the inhabitants of a town have previously resolved. . . considerations of comfort, health, safety and traffic. . . To subject all permitted uses to conditions. . . regard[ed] as desirable contravenes the principle that zone regulations apply equally so that all land in similar circumstances [is] treated alike").

While the City Solicitor's letter does not suggest that the Section XIX-F(10) is to be applied only to Section XIX-E(6) i.e. and not to the other as-of-right uses listed in Section XIX-E, such an evenhanded (but erroneous) interpretation will not save the Ordinance from invalidation pursuant to G. L. c. 40A, § 4. To the contrary, even exempting these other as-of-right uses from Section XIX-F(10) would be insufficient. All of the other uses allowed as-of-right in Section XIX-E are either incidental/accessory uses or uses exempt from zoning pursuant to G. L. c. 40A, § 3. The allowance of these uses does not satisfy the Uniformity Clause. See, Bernstein, at 771 (holding that allowing "merely incidental or accessory uses, many of which already are statutorily excepted under G. L. c. 40A, s. 3, of the Zoning Act, will not save a by-law from challenge on . . . [uniformity] grounds."

If the Board adopts the City Solicitor's interpretation of the WRPD, the WRPD Ordinance is invalid in its entirety. It cannot be applied to the Project; nor can it be applied to any other development in the City that is subject thereto.

IV. Conclusion

Respectfully, the opinion from the City Solicitor incorrectly advises the Board that it may ignore the plain language of the Ordinance and apply a category of prohibited uses in one section of the WRPD Ordinance to a use permitted in the WRPD as-of-right pursuant to an entirely different section of that Ordinance. Furthermore, and in any event, the application of the City Solicitor's opinion would invalidate the WRPD Ordinance in its entirety as violative of the Uniformity Clause contained in G.L. c. 40A, § 4. Accordingly, the Applicant urges the Board to adopt the correct interpretation of the WRPD Ordinance and to determine that the provisions of Section XIX-F(10) are not applicable to the as-of-right uses listed in Section XIX-E, including the residential development proposed by the Applicant. Given that the use is by-right, the Planning Board, other than confirming that the design criteria of the Ordinance are met, need make no further determination under the WRPD Ordinance and, in fact, have no authority to do so.

Finally, nothing herein shall be deemed an admission or concession that the Project even qualifies as an “activity deemed likely to cause or contribute to the contamination of the public water supply,” subjecting it to denial under Section XIX-F(10) of the WRPD Ordinance. Quite the opposite, it has been and continues to be the Applicant’s position that the Project can be developed without any measurable impact on the City’s water supply. But in light of the analysis above, the Applicant insists that the quoted standard does not apply to the as-of-right, residential use of the Property.

Please let us know if you have any additional questions regarding this issue.

Very Truly Yours,

Lisa L. Mead

Lisa L. Mead
Adam J. Costa

Cc: Client