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MEMORANDUM

To: Andrew Port

From: Glenn A. Wood

Re: Evergreen Commons, LLC – OSRD Application, Arguments Regarding Uniformity

Date: October 19, 2016

Summary

The Applicant's main argument in its recent October 12, 2016 letter is essentially that provision XIX-F(10) of the Water Resource Protection District (WRPD") Ordinance prevents any use in the WRPD as being a true as-of-right use in violation of the Uniformity Clause in G.L. c. 40A, §4. As you are aware, XIX-F provides that "any other activity deemed likely to cause or contribute to the contamination of the public water supply" is prohibited in the WRPD.

First, the Applicant's argument is flawed because it is based on a line of cases (SCIT, etc.) protecting as-of-right uses. Since the Applicant's OSRD requires a special permit under the Ordinance, this project does not even deal with an as-of-right use. Thus, reliance on these cases is inappropriate. Rather, the PB, in its review of whether to issue a special permit for the project, can base its decision on a variety of factors, including those related to the public health and water supply. The PB can thus likely deny or condition the project based on its special permit review for an OSRD alone without even having to rely on provision XIX-F(10) in the WRPD.

Second, assuming the SCIT case and other similar cases are applicable to the Applicant's argument, the Land Court has found that if there is scientific evidence, a board can deny a permit or place conditions on a permit to protect a water supply.

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I. The Uniformity Provision Does Not Apply to the Present Matter because of the OSRD Special Permit Requirement.

The Applicant bases its argument on a line of caselaw that requires at least one use to be allowed as-of-right in every zoning district. *SCIT, Inc. v. Planning Bd. of Braintree*, 19 Mass.App.Ct. 101 (1984). The Applicant essentially states that while the WRPD states in Section XIX-E(6) that residential development is an as-of-right use, it cannot be as-of-right if Section XIX-F(10) prohibits “any other activity deemed likely to cause or contribute to the contamination of the public water supply” and Section F(10) is applied to Section E(6).

The purpose of the uniformity requirement is to ensure that similarly situated land receives identical treatment, so that if someone goes forward with certain development in a district, others can do so. *Id.* at 107. The Supreme Judicial Court (“SJC”) has held that a zoning bylaw that permits at least one use in each zoning district as a matter of right does not violate G.L. c. 40A, §4. *Gage v. Town of Egremont*, 409 Mass. 345, 348 (1991). The concern is to limit a municipality from putting all uses into a category dependent on a board’s discretionary case specific decision. *Lordon v. Town of Pepperell*, 11 LCR 252, 254 (2003). The Land Court has found that the leading “SCIT” opinion does distinguish between local board decisions which are discretionary enough to result in a prohibition of a particular request, and those which only may impose achievable conditions, and have found that special permits of the latter type do not run afoul of the concerns in the SCIT case. *Id.* The Land Court found that it is by requiring special permits (rather than as-of-right uses) across the full range of uses in the district in a city or town that violate the SCIT rule. *Id.* The SCIT decision stated that the uniformity requirement prohibits communities from requiring that all prohibited uses in a specific zoning district be authorized only by a discretionary special permit. *Id.*

At the outset, the Applicant’s reliance on the SCIT decision and its progeny is flawed because while residential is an as-of-right use in the WRPD, the Applicant itself could have never simply constructed its project as-of-right because of the type of development. This project, as the Applicant acknowledges, requires a special permit because Section XIV-C of the Ordinance requires the PB to authorize an OSRD via a grant of a special permit. Thus, because the Applicant is proposing an OSRD development, it was always required to obtain a special permit. Thus, there is no uniformity issue in the present set of facts.

The granting of a special permit is within the discretion of the PB, and certain findings must be made as set forth in Section X-H(7)(A) of the Ordinance. The conditions that are required to be fulfilled, as decided by the PB, include, among other things, (4) the requested use will not overload any public water, drainage or sewer system or any other municipal system to such an extent that the requested use or any developed use in the immediate area or in any other area of the city will be unduly subjected to hazards affecting health, safety, or the general welfare; (6) the requested use will not impair the integrity or character of the district or adjoining districts, nor be detrimental to the health or welfare; and (9) the proposed use shall not be conducted in a manner so as to emit any dangerous, noxious, injurious or otherwise objectionable fire, explosion, radioactive or other hazard, noise or vibration, smoke, dust, odor or other form of environmental pollution.

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In applying the special permit requirements (above), the PB could determine that the special permit should not be granted based on threats to the water supply pursuant to Section X-H(7)(A). It can likely make this determination without having to even address the challenged Section XIX-F(10) provision in the Ordinance of the WRPD. The Applicant ignores this fact.

The PB is also required in reviewing a OSRD special permit to perform an analysis pursuant to Section XIV-K of its Ordinance.

Additionally, the WRPD Ordinance does prohibit all as-of-right uses, which was a concern in the SCIT line of cases, because the prohibitions of sections XIX-F,G, H, or I do not apply to the following uses in Section XIX-E (uses no. 1, 3, 4, and 8.) and thus as-of-right uses do exist in the WRPD.

In summary, an OSRD development is not as as-of-right development and always requires a special permit in the City, and thus the Applicant basing its entire uniformity argument on a line of caselaw related to as-of-right uses is simply inappropriate.

II. Even if the SCIT Decision and its Progeny were Found to Apply, the Land Court has Found that if There is Scientific Evidence, a Board Can Deny a Permit or Place Conditions on a Permit to Protect a Water Supply.

In the Land Court case *Lordon v. Town of Pepperell*, 11 LCR 252 (2003), the Land Court addressed whether a water resource protection overlay district was valid under the uniformity clause. In that case, the Court analyzed the water resource protection overlay district in light of the SCIT case and its progeny.

The Land Court found that the Zoning Act grants Massachusetts cities and towns the authority to enact zoning bylaws to protect the health, safety, and general welfare of their inhabitants, and that overlay zoning districts are proper instruments for carrying out a municipality's zoning goals. *Id.* at 254. Overlay districts are also appropriately used to protect environmental resources. *Id.*; citing *Lopes v. Peabody*, 417 Mass. 299 (1994) (wetlands conservancy overlay district permissible provided its scope is properly limited); *ACW Realty v. Planning Board of Westfield*, 40 Mass.App. Ct. 242 (1996) (limits on development imposed under an aquifer protection overlay district upheld as applied by the Planning Board).

Like the City of Newburyport, the town of Pepperell had adopted an overlay district with certain subzones to protect its water supply. *Id.* The plaintiffs challenged restrictions placed on various uses in the water protection district as being in violation of the uniformity clause. *Id.* The plaintiffs argued that the water protection district prohibited all uses except minor uses. (note: there was no residential use as-of-right in the water protection district as is the case in Newburyport – uses were limited to minor uses, such as agricultural uses, swimming pools, etc.) *Id.* The Court found that because the as-of-right uses did not provide independent substantive rights of use (because they didn't allow, for example, residential use) – they did not satisfy the SCIT cases. The Court found that the water protection district there did not allow legally sufficient uses as-of-right and required a special permit for all uses in violation of the uniformity

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clause. *Id.* at 256. However, here, Section XIX-E does include a legally sufficient use as-of-right (residential development), and thus could not be invalidated on a similar basis.

Notably, the Land Court further discussed how it would remedy the situation in the Pepperell case. *Id.* The Court stated that an overlay district to protect the public drinking water supply is an important, serious, worthwhile legislative goal which must be respected. *Id.* at 257. It importantly stated that the “intent of the SCIT line of cases surely is not to eviscerate a community’s ability to use the zoning power for protection of its public drinking water resources.” *Id.* The Court stated that it is clear that protecting drinking water resources is a goal of the bylaw. It further stated that there should be a permit approval process that is not broad and discretionary, but limited to the imposition of reasonable conditions targeted to protection of the aquifer. *Id.* The Court required a non-discretionary special permit to be obtained by anyone wanting to take advantage of any of the uses permitted in the district, and stated that this permit would not be one which is broadly discretionary and susceptible of being turned down for reasons unrelated to the aquifer protection purposes of the district, which is the concern of the SCIT line of cases.

The Court found that a petitioner who has satisfied the underlying zoning requirements will be entitled to a special permit unless, in an unusual case justified by a well-founded and documented decision, the board determines, applying objective and scientifically accepted principles, that the petitioner’s project, no matter what conditions may be applied to it, will materially and adversely affect the public drinking water supply. *Id.* The Court found that except in such an unusual case, the board may not deny the petitioner’s application outright, but rather may impose reasonable terms and conditions on the petitioner’s proposal (again based on objective and scientifically accepted principles) which are specifically and reasonably directed to reducing the adverse impact the proposed development will have on the safety and quality of the protected water resource. *Id.*

While this case is not directly on point, it is important because the Land Court clearly recognizes that denying a permit or conditioning a permit based on objective and scientific evidence that the public drinking supply will be adversely affected is appropriate and that it would not violate the uniformity clause. The concern that the SCIT line of cases had with a potential violation of the uniformity clause was that the board’s discretion in reviewing projects would be too broad if uses were not allowed as of right. Here, the court is acknowledging a nondiscretionary review project where a proposed project would be required to be approved by a board unless there was scientific evidence that the public drinking water supply would be adversely affected.

Here, Section XIX-E of the Ordinance allows residential as-of-right uses but places a limit on it if it would cause or contribute to the contamination of the public water supply. Such a limit, assuming there is scientific evidence as we have here, would not give the PB unlimited discretion but rather would simply allow limits on a permit to protect the water supply, which is the purpose of the WRPD and allowed in the *Lordon* case. This would not appear to violate the uniformity clause.

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Of note is that many uses in zoning are subject to setbacks, lot coverage requirements, etc., which are limits on as-of-right uses. A requirement that a project would not adversely affect the water supply can be viewed as a similar limit on an as-of-right use. While a use can be allowed, the intensity of it can be limited.

Here, XIX-F(1) is not an outright prohibition which unravels the as-of-right residential use, but rather a type of performance standard that a proposed project must comply with. While as-of-right uses are allowed in the WRPD, each project still needs to demonstrate the ability to satisfy the requirement based upon reliable expert testimony relative to the details of the individual development proposed as well as site conditions (i.e. depth to groundwater, soil permeability, travel time from infiltration to the groundwater, transport to the well, etc.)

Under the above line of reasoning, even if an applicant were to come forward with a proposal for one residential house (which would not require an OSRD special permit), the PB could still make the as-of-right residential house development subject to Section XIX-F(10).

III. Language of WRPD Ordinance

There is discussion in the Applicant's letter as to whether there are typographical errors in the language of the WRPD ordinance and how this should be interpreted. We reviewed KP Law's September 21, 2016 letter and agree with Attorney Eichmann's analysis. Section XIX-6, which states that residential development is an as-of-right use, states that it is subject "to sections XIX-H, I, and J (prohibited uses) and section XIX-K (special permitted uses)." Sections I and J are actually special permitted uses, and therefore these sections should have been included with section K. In addition to section H being a prohibited use section, sections F and G are also prohibited use sections, and thus should also have been included in XIX-6. Thus, Section XIX-6 was likely intended to refer to the uses in section XIX-F as prohibited uses.

Section XIX-F(10) prohibiting "any other activity deemed likely to cause or contribute to the contamination of the public water supply" would limit the as-of-right residential use. The Court in the *Lordon* case found that such a limitation would be appropriate assuming there is scientific evidence to support it. The ability for the PB to apply XIX-F(10) also is logical because it provides a mechanism to satisfy the purposes of the WRPD to "preserve and protect existing and potential watersheds and aquifers for drinking water supplies" and "to prevent temporary and permanent contamination in the water resource protection district."

Again, even though we have evidence to support it, such analysis may be unnecessary if the project fails the requirements of a special permit.