

Andrew Port

From: Michele A. Hunton <MHunton@rubinrudman.com>
Sent: Wednesday, October 26, 2016 11:48 AM
To: Andrew Port
Cc: Glenn A. Wood
Subject: RE: Evergreen Commons - Legal Opinions - Attorney Client Privileged

Andy,

We reviewed Attorney Mead's most recent letter dated October 19. Following are our comments.

First, we disagree with Mead's argument that the WRPD ordinance contains no as-of-right uses in violation of the uniformity provision of c. 40A, Section 4. First, she assumes that because there are restrictions (in Section F(10), for example) on the as-of-right residential development use in Section E, that residential development is not an as-of-right use. As explained in our October 19 Memo, we view the prohibitions/limitations in Section F to be merely limitations on the as-of-right residential use, and that residential use is still allowed as-of-right. As stated, all uses in zoning have some limitations on them, such as setbacks, etc. There is no requirement for a special permit in the WRPD for residential use. A SP is being sought here because of the OSRD nature of the project. Further, even if a court were to find that residential development is no longer an as-of-right use because there are restrictions on it, we think that there are sufficient other uses in Section E with no restrictions that are not merely accessory uses and that are sufficient to satisfy as-of-right uses in compliance with the uniformity provision. For example, the use allowing construction of a water supply in Section E is such a use.

Second, it appears that Mead misinterprets our position in our October 19 Memo. We are not suggesting that a special permit is required under the WRPD for the project. Rather, we are stating that a special permit is required due to the OSRD nature of the project pursuant to Section XIV-C of the Ordinance, and that based on the special permit review factors for OSRD alone, the PB can deny the Special Permit without even needing to apply Section F(10). Rather, we relied on the *Lorden v. Pepperell* case to show that courts have found that objective and scientific evidence of an adverse effect on a water supply is a valid basis for limiting an as-of-right use, and it is not in violation of the uniformity clause.

Michele



50 ROWES WHARF | BOSTON, MA 02110 | P:617-330-7000
800 CONNECTICUT AVE. NW | WASHINGTON, DC 20006 | P:202-794-6300
99 WILLOW STREET | YARMOUTHPORT, MA 02675 | P:508-362-6262

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