BLATMAN, BOBROWSKI, MEAD & TALERMAN, LLC
ATTORNEYS AT LAW

30 GREEN STREET
NEWBURYPORT, MA 01950
PHONE 978.463.7700
FAX 978.463.7747

Concord Office
9 DAMONMILL SQUARE, SUITE 4A4
CONCORD, MA 01742
PHONE 978.371.2226
FAX 978.371.2296

Millis Office
730 MAIN STREET, SUITE 2B
MILLIS, MA 02054
PHONE 508.376.8400
FAX 508.376.8440

LISA L. MEAD
Lisa@bbmatlaw.com

October 19, 2016

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:

Please accept this correspondence as a response to the letter dated October 18, 2016 from Peter Durning, Esq., which was submitted on behalf of the Boyd Drive Residents Group ("BDRG"). This letter also responds to the opinion from Glenn A. Wood of Rubin and Rudman, LLP, dated October 19, 2016, and submitted to Andrew Port.

I. The Planning Board May not Impose Standards Contained in Draft Versions of Provisions of the Master Plan

In reviewing the Special Permit standards, the letter from the BDRG notes that Section XIV-K requires the Board to review consistency with the City of Newburyport Master Plan. The BDRG goes on to review portions of the draft 2014 Master Plan, which has not been adopted by the City. It is axiomatic that the Board may not impose criteria upon the Applicant that remains in draft form, and has not yet been adopted by the City. Aiello v. Town of Braintree Planning Bd., Land Court Misc. Case No. 414098 (July 9, 2015, Scheier, J.) (limiting evidence relating to a Master Plan to "its contents and the fact that it was adopted by the Town and extant in its adopted form."); Britton v. Zoning Bd. of Appeals of Gloucester, 59 Mass. App. Ct. 68, 73 (2004) (holding a special permit decision is legally untenable if based upon "a standard, criterion, or consideration not permitted by the applicable statutes or by-laws."). Therefore, the portions of the draft 2014 Master Plan may not be imposed as special permit criteria upon the Applicant's application.

I refer the Board to my original submission related to the satisfaction of the OSRD special permit criteria by the Applicant.

II. Water Resource Protection District

The letter submitted on behalf of the BDRG addresses the mislabeling of the sections contained in Section XIX of the Ordinance. The Ordinance states that residential uses are allowed as-of-right in Section XIX-E(6), subject to the limitations of Sections XIX-H, I and J (prohibited uses) and Section XIX-K (special permitted uses). Both the Applicant and the BDRG acknowledge that the citations to the other provisions of the Ordinance are mistaken, where they disagree is how these provisions should be interpreted. The letter from the BDRG argues that the Ordinance should be interpreted to state that the list of allowed uses contained in Section XIX-E(6) should be limited by the list of uses prohibited throughout the WRPD as contained in Section XIX-F. The BDRG points to the September 21, 2016 letter from the City Solicitor that notes that a draft version of the Ordinance stated that residential uses are allowed "subject to those restrictions on all uses set forth in the next three sections of the ordinance." This language was, of course, not included within the Ordinance as adopted, and thus should be presumed to have been intentionally omitted. See, Rosnov v. Molloy, 460 Mass. 474, 481 (2011) (stating "[a]s a general rule, when language is removed from a bill before its final passage, we presume its deletion to have been intentional."); Green v. Wyman-Gordon Company, 422 Mass. 551, 556 (1996) (holding "[d]eletions of limiting language from predecessor bills is normally presumed to be intentional."). As will be discussed below, it makes sense that the City eliminated the language in the draft Ordinance making all uses in the WRPD purportedly allowed as-of-right be subject to the provisions of the list of prohibited uses, as allowed uses and prohibited uses are mutually exclusive categories, and an Ordinance containing no uses allowed as-of-right would be invalid. Accordingly, the interpretation offered by the BDRG and the City Solicitor is not correct.

As we have noted in previous submittals, the interpretation of the Ordinance proffered by the City Solicitor and the BDRG, in addition to being inconsistent with the plain language of the Ordinance and with applicable rules of statutory construction, would also violate the uniformity provisions of G. L. c. 40A, § 4. This is a critical point, because the Ordinance must, if possible, be interpreted in a manner that does not result in its invalidity. See, Trustees of Tufts College v. Medford, 415 Mass. 753, 761 (1993) (holding that a zoning bylaw must be interpreted in a manner "which sustains its validity[.]"). In addition to (6) residential development, the list of uses allowed as-of-right in Section XIX-E include (1) conservation, (2) outdoor recreation, (3) foot/bike paths, (4) operation and maintenance of existing water bodies and dams, (5) maintenance of existing structures, (7) farming, gardening, nursery uses, and (8) construction, maintenance and repair of drinking water supply related facilities. Thus, residential development is the only meaningful use, and the interpretation of the Ordinance subjecting this use to the untrammeled discretion in Section XIX-F would thus invalidate the Ordinance. See, Bernstein v. Planning Bd. of Stockbridge, 76 Mass. App. Ct. 759, 770 (2010) (holding invalid a bylaw that prevented a property owner from undertaking "any significant or valuable use of his land without first obtaining a discretionary special

permit from the board."). As noted by the Bernstein court, the uses allowed as-of-right "must have some practical significance to the landowner." Id. at 771. Thus it is not only exempt uses pursuant to G. L. c. 40A, § 3 that are insufficient to constitute an allowed use to avoid violation of the uniformity provision of G. L. c. 40A, § 4, there must be an actual valid use of value to a private property owner within the applicable zoning district. The suggestion from the BDRG that the provision of Section XIX-E(8) allowing drinking water supply activity without the limitations of Section XIX-F(10) is clearly inadequate, as this would be, at best, an accessory use that is of no value without an allowed principal use. Thus, the argument put forth by the BDRG that "water supply related activities" would not be subject to the provision of Section XIX-F(10) is not sufficient to prevent the invalidity of the Ordinance if the Board adopts the interpretation that Section XIX-F is applicable to the residential uses allowed as-of-right in Section XIX-E(6). Id. at 768 (stating "including merely incidental or accessory uses . . . will not save a by-law from challenge on SCIT, Inc., grounds."). It is not relevant that a public water supply use does not benefit from an exemption pursuant to G. L. c. 40A, § 3, it is not a beneficial primary use sufficiently robust to allow the WRPD Ordinance to remain valid if Section XIX-(E)6 is found to be subject to the provisions of Section XIX-F(10).

On a similar note, the letter submitted by attorney Glenn A. Wood of Rubin and Rudman, LLP to Andrew Port claims that the interpretation of the Ordinance encouraged by the City Solicitor and the BDRG does not violate the uniformity provisions of G. L. c. 40A, § 4. Attorney Wood cites to a Land Court case, Lorden v. Town of Pepperell, Land Court Misc. Case No. 276791 (June 30, 2003, Piper, J.). The Lorden case involves an interpretation of a bylaw to determine whether it is "discretionary enough to result in prohibition of a particular request, and those which only may impose achievable conditions, of which 'site plan' type permits are an accepted example." The Lorden court went on to note that "[s]pecial permits of this latter type do not run afoul of the concern expressed in SCIT."

Attorney Wood argues that, based upon the Lorden case, the City may apply a special permit standard to the residential uses allowed pursuant to Section XIX-E(6). This argument fails for two reasons. First, the special permit standard suggested by the City Solicitor and the BDRG is not a non-discretionary, site plan approval type of special permit requirement, as discussed in Lorden. Rather, the suggestion by the City Solicitor and the BDRG is that the Board can impose a discretionary special permit standard that would clearly violate the holding of Lorden and SCIT, Inc. Second, and more importantly, the citation to the Lorden case by attorney Wood is misapplied, because the requirements of Section XIX-F(10) would not impose a special permit standard upon the allowed residential use. Rather, the imposition of the requirements of Section XIX-F(10) would allow the Board untrammeled discretion to approve or deny uses otherwise allowed as-of-right, without any special permit requirement. It is indisputable that such an interpretation violates the uniformity provisions of G. L. c. 40A, § 4. See, Boch v. Planning Bd. of Tisbury, Land Court Misc. Case No. 199441 (January 21, 1997, Scheier, J.) (finding a bylaw provision violated G. L. c. 40A, § 4 "because it gives the Board unlimited discretion to allow or forbid any use in the harbor front commercial district[.]"); Gage v. Egremont, 409 Mass. 345, 348 (1991) (stating "[t]he wide discretion

that the by-law gave to the board of appeals to allow or forbid any business use in the zoning district was contrary to the underlying assumption of G. L. c. 40A, Section 4, that a zoning by-law must permit at least one use in each zoning district as a matter of right."). No party is making an argument that the Ordinance imposes a special permit requirement upon residential uses allowed pursuant to Section XIX-E(6), the issue regarding uniformity relates solely to the attempt to impose an unlimited discretion, via the prohibited uses section contained in Section XIX-F(10), to a use allowed as-of-right. It is abundantly clear that such attempt would violate G. L. c. 40A, § 4, and would result in the invalidation of the WRPD Ordinance.

Attorney Wood's letter goes on to discuss the specifics of the Lorden case, noting that the Board may deny or condition a special permit based upon objective and scientific evidence of an adverse affect upon the public drinking water supply. This argument again misunderstands the type of special permit sought by the Applicant. As noted above, there is no proposed special permit process associated with the WRPD Ordinance that is applicable to the Project, the only question is whether the Board has unlimited discretion to approve or deny residential uses pursuant to the prohibited use provisions contained in Section XIX-F(10) of the Ordinance. Accordingly, the Board's special permit discretion is limited to the impacts of granting the requested OSRD special permit, which must thus be weighed against the impacts of a conventional, as-of-right residential development. The Applicant finds it incredibly unlikely that any objective and scientific evidence will show that the OSRD development will have an adverse impact upon the public drinking water supply that is greater than the impact of a conventional development.

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

Very Truly Yours,

Lisa L. Mead
Paul J. Haverty

Cc: Client