

CITY OF NEWBURYPORT
PLANNING BOARD
60 Pleasant Street
Council Chambers
Newburyport, Massachusetts

IN RE: EVERGREEN COMMONS LLC
OSRD Special Permit
Excerpt of Working Vote through and including Final Vote
10:52 p.m. - 11:16 p.m.

Wednesday, March 1, 2017

KAREN SMITH

Court Reporter

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APPEARANCE:

Planning Board Members:

Jim McCarthy, Chair
Bonnie Sontag, Vice Chair
Andrew Shapiro, Secretary
Don Walters
James Brugger
Leah McGavern
Mary J. Verde
Joe Lamb

LISA MEAD, ESQ.
Mead, Talerman and Costa, LLC
30 Green Street
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(978) 463-7700
Representing the Applicant, Evergreen Commons, LLC

1 **THIS IS AN EXCERPT OF THE EVERGREEN COMMONS LLC**

2 **OSRD SPECIAL PERMIT HEARING**

3 **HELD ON MARCH 1, 2017**

4 (10:52 p.m.)

5 CHAIRMAN MCCARTHY: Just to outline again,
6 here is what we are going to do. We are going to --
7 now we are working toward a vote. The Applicant
8 asked me for an opportunity to withdraw if the vote
9 didn't seem like it was where they wanted it to be.
10 So I want people to talk about everything in the
11 process, anything that bothers them, and then, sort
12 of, give an indication of where they are on it, "yes"
13 or "no." I know that's going to be really hard;
14 we've covered a lot of stuff, a lot of ground, and I
15 know it's a very touchy subject with the water
16 quality and everything.

17 Is there anybody that wants to kick off?

18 DON WALTERS: I don't mind going first; I'm
19 not bashful.

20 As I think I mentioned earlier, after Joe,
21 I will not be voting for the insurance policy during
22 construction. I mentioned before about a performance
23 bond. In the construction business there is a saying
24 that says, "If a contractor can get bonding, that

1 means they don't need bonding." In other words,
2 contractor's rep- -- as a good performer, not many
3 claims, et cetera, that they can get a bond.
4 Conversely, if they have a poor record, if they don't
5 have enough net worth, they can't get a bond.

6 Because this board does not have the
7 ability to pre-qualify the contractors, unless the
8 Applicant is willing to allow some division within
9 the city to pre-qualify the contractors, I,
10 personally, have no alternative but to request a --
11 some form of a construction bond. Again, this is
12 something that is done for the city when they do city
13 projects.

14 In most cases if the contractor is large
15 enough and reputable enough, they can provide it. I
16 would be remiss if I did not tell everyone that there
17 is an incremental cost on the -- costs something, all
18 depending upon the creditworthiness of the con-
19 -- but one to two percent. So I'll be the first
20 person to admit there is an increase in the cost of
21 this project.

22 In my opinion, it's only my opinion, I'm
23 not saying I'm right, but it's my opinion that that
24 incremental cost, to be sure that we have a proven

1 contractor that understands the sensitivity of this
2 area, I think it's worth it.

3 So for that reason, I'll not be voting
4 unless something along those lines is asserted.

5 CHAIRMAN McCARTHY: Okay. Next?

6 BONNIE SONTAG: Okay. I'll go. In 15
7 years on the planning board, this is probably one of
8 the most complex applications -- in fact, it's
9 multiple applications -- that I've experienced.

10 The Open Space Residential Development does
11 cluster 38 homes and it reduces impervious surface
12 and it preserves open space for at least passive
13 recreation. But due to the location and the water
14 resource protection district, we're going to have to
15 review this for a special permit under that ordinance
16 to be sure that stormwater management and drainage
17 are managed or put in -- elements are put into place
18 to manage them effectively to protect the city's
19 drinking water. And I'm not convinced yet that those
20 two issues are resolved.

21 The OSRD subdivision plan will provide us
22 some detailed engineering plans. We kept asking for
23 a lot of data, or a lot of information about how they
24 were going to actually manage the drainage and the

1 stormwater, and they kept saying, well, we can't give
2 that to you until the subdivision discussions. So
3 that's still outstanding, and we can't see those
4 engineering plans until we get to that point, and we
5 can't get there until we get through the decision
6 tonight. So that's another open-ended issue for me.

7 But I've listened to the experts who have
8 been provided by the Applicant, by the city peer
9 review and by all the knowledgeable citizens who have
10 come forward with the research they've done and, even
11 more important to me, the questions they've asked
12 because they've forced us to look at a lot of issues
13 that we might have glossed over or might not even
14 have thought of.

15 So tonight I'm going to vote to approve the
16 OSRD Special Permit with the special conditions that
17 we have fine tuned for the past, almost, three hours.
18 But I want to explore unanswered questions before
19 deciding how I'm going to vote on the next two
20 applications before this project, if and when it can
21 go through.

22 CHAIRMAN McCARTHY: Next?

23 LEAH McGAVERN: Am I next?

24 CHAIRMAN McCARTHY: It doesn't matter. If

1 somebody's compelled to go, go. If nobody wants to
2 speak, I'll speak.

3 (Hearing none.)

4 CHAIRMAN McCARTHY: Okay. Water quality is
5 everything on this. I don't care if they stack all
6 38 houses on top of each other; water quality is the
7 number-one issue for this piece of property.

8 If you don't think I feel the enormity of
9 the weight of the decision, you're completely wrong.
10 I have studied -- you know, I have a master's degree
11 in engineering, and I don't think I've ever studied
12 as hard as I have for this, on layovers in Rome,
13 reading the stormwater manual. I mean, I have called
14 people at the EPA. Called -- my first question that
15 went through my head is, Do other communities have
16 stuff in their Zone 2 well collection areas? So I
17 found this guy who wrote a report for, I think it was
18 Wayland, who is sort of an expert and wrote
19 mitigation plans for all towns. And I said, It looks
20 like half of Wayland is in their Zone 2, like, half
21 of their housing is in a Zone 2. He goes, Yeah,
22 that's right, and their stadium, their football
23 stadium with all those little rubber pellets. I go,
24 You got to be kidding me. He goes, Yeah, it's not

1 that good of a deal, but I write the mitigation
2 plans.

3 So I said, Have you ever heard of any
4 issues with residential housing being in a Zone 2?
5 He couldn't give me an answer. And I've looked. So
6 I combined that with reading all the stormwater
7 regulations, sitting on this board for 13 years,
8 reading all the chemical stuff from the experts,
9 reading what's allowed by EPA regulations, both our
10 state regulations, our local regulations. I've heard
11 every single word that every person has said from the
12 community. I really have.

13 I do believe it's a very unique spot and
14 that's why, very specifically, I drove this to be an
15 OSRD that's well away from the bottom of the bowl. I
16 believe that's really relevant. I believe the bowl
17 will fill up with water. I believe it's really
18 dangerous if somebody goes over to the wetlands and
19 dumps in something directly into the wetlands,
20 because that water that's very low is connected to
21 the water source. But I think this is the best plan
22 that we are going to get.

23 I also think of other possibilities. I
24 don't even want to consider the possibility of the

1 Conventional Subdivision Plan, because I don't think
2 it works to me. The golf course use is a much worse
3 use than the housing that's being proposed, in my
4 opinion. You're taking much less fertilized land --

5 UNIDENTIFIED: No one agrees with that.

6 CHAIRMAN McCARTHY: -- you're putting it
7 all in the corner. You can do all the modeling you
8 want, Don, but there is no better test than they
9 dumped chemicals on this piece of property for 30
10 years.

11 And now -- so, sometimes when you do
12 modeling, you talk about a different piece of
13 property and you try and compare things. This is
14 very unique. Chemicals have been dumped on it for 30
15 years. We have an initial 97-page report that showed
16 no chemicals. We have 250 chemicals tested by the
17 city, which may have never been done, that showed
18 virtually nothing. We have a testing protocol in
19 place to protect us during constructions and make
20 suggestions after.

21 I have asked the Applicant -- I came up
22 with the strategy when I was traveling for those four
23 points: show us it's clean; show us a good design;
24 provide us some insurance if it isn't during the

1 construction; and talk to us about ongoing testing.
2 They've addressed all four of those, and I'm
3 satisfied that this is the best plan we're going to
4 get. No other -- I don't think any other plan, I'm
5 not convinced, will work at this place. But this
6 plan will work to me, so I'm going to vote for this
7 OSRD.

8 JOE LAMB: I'm with Don on the performance
9 bond. I think that's critical. I think --
10 initially, during this big construction, there's so
11 much ris- -- potential risk. I don't know that it
12 will result in anything. But to me, I think, having
13 that assurance of a healthy performance bond that the
14 city can tap into, if it's needed, then that makes me
15 a lot more comfortable with the product or the
16 project, in general.

17 Part of me feels that if there were any
18 letters or anything from the DPS or the water
19 department or anybody that said this is a bad
20 project, don't do it, I haven't really seen that. I
21 do agree because of where it is, there is some
22 elevated risk, but the Applicant has been very
23 responsive, in my view, of looking at solutions and
24 working with the planning board and the abutters with

1 trying to come up with a plan that does work.

2 Other than the performance bond, I'm on
3 board. So that's my sticking point right now, is
4 during construction that insurance -- more than
5 insurance, a performance bond that gives us more
6 assurance that it's going to be done.

7 CHAIRMAN McCARTHY: A performance bond for
8 the environmental component?

9 JOE LAMB: Yes.

10 CHAIRMAN McCARTHY: So are you saying yes
11 or no?

12 JOE LAMB: I'm saying -- I guess I'm with
13 Don. It's a non-starter for me if we can't get to
14 that.

15 CHAIRMAN MCCARTHY. Okay. Next?

16 ANDREW SHAPIRO: I'll just start off by
17 making a quick personal statement. I know other
18 people feel this way. The decision has weighed on me
19 heavily. I've looked at all the paperwork. I've
20 listened to all of the testimony from the public,
21 from the experts that have come forth, from the
22 Applicant themselves. You know, I'm one of the
23 younger applicants (sic) on the board. I have two
24 young kids. You know, I'm going to be here for the

1 foreseeable future; that's what I'd like to think,
2 and I'm going to raise my children here. So I care
3 very deeply about the water supply. I know it's the
4 water supply that I'll be drinking and they'll be
5 drinking for the foreseeable future.

6 So the issue of water quality is of
7 paramount importance to me, just as it is for
8 everyone in this room. You know, that said, looking
9 at all of the information, you know, adding onto what
10 Jim was saying about all of the things that have been
11 done to the property over the years, looking at the
12 water quality and, you know, it proves to be clean
13 right now.

14 I mean, the thing he also didn't mention is
15 there are also existing homes that are very proximate
16 to the well on Boyd Drive and other homes in the
17 area. Even with all the salting and chemical use on
18 lawns that have gone on, you know, most likely
19 throughout the years with those homes, we still find
20 that the water is clean there.

21 So one of the standards that we can utilize
22 to say we don't want to approve this project would be
23 that the city would be unduly subjected to hazards
24 affecting health safety and general welfare. And

1 while there is always a risk for any development that
2 there is going to be some level of disturbance that
3 could be harmful to someone, the word that I'm
4 hinging things on is "unduly," and I don't, at this
5 point, see that exacerbated level of risk at this
6 point.

7 Given the level of thought that's been put
8 into the design of this project, and I agree with Jim
9 that it's, you know, the best designed plan we've
10 seen and I think it accounts for a lot of the risk
11 that is there, and the level of scrutiny that we're
12 giving to this document here to hold the Applicant
13 accountable.

14 To the issue that's being discussed with
15 respect to insurance versus performance bond, you
16 know, unfortunately, I'm just not enough of an expert
17 in that category to say that's enough for me to lean
18 one way or the other. I don't think it's a sticking
19 point for me, not because I don't respect your guys'
20 opinion. I do. I think it's an important issue to
21 consider. I just don't think at this point that I'm
22 in a position to say that that would prevent me from
23 voting in the affirmative in this issue. So that's
24 where I stand.

1 me. Water is everything. You hear about it and our
2 future -- every bit of, you know, environmental
3 information on climate control, water is everything.

4 I feel also that the client -- the
5 Applicant has done everything they can to make this a
6 good plan. I think it's a good plan. I think the
7 residents in the surrounding communities are going to
8 suffer during construction. I don't think they will
9 suffer in the long run, because I think they will
10 have neighbors that are part of a better
11 neighborhood.

12 And in the long run, I say that I trust
13 people; and I trust the people who have lived around
14 the existing well, that they've done due diligence to
15 not harm it in any way. There's many waters that
16 could be harmed and, in general, people don't do it.

17 So from my heart, I think that the
18 homeowner association will abide by what we give them
19 and they will hopefully not damage our water supply.
20 So I'm a yes.

21 (Indiscernible comments from audience.)

22 CHAIRMAN McCARTHY: What -- I didn't hear
23 the final.

24 MJ VERDE: I said, "So I'm a yes." I'm a

1 yes.

2 CHAIRMAN McCARTHY: Against.

3 LEAH McGAVERN: No, "yes."

4 MJ VERDE: I'm a "yes."

5 CHAIRMAN McCARTHY: A "yes." All right.

6 LEAH McGAVERN: I have very much wanted to
7 say no to this project and I've -- but, you know, in
8 all the materials we've gotten from the experts, I
9 have been really hoping to find some advice that says
10 this project should not go through. Unfortunately,
11 we haven't seen that. Fortunately or unfortunately,
12 depending on your perspective, we haven't seen that.
13 So I don't feel like I have anything super tangible,
14 except fear, and I think that's one thing we all have
15 in common, is fear that something will happen here.
16 But the experts don't think that that is likely. And
17 so we here have to depend on the experts, and I think
18 a lot has been done on the plan to minimize risk and
19 I'm comfortable with it. So yes.

20 (Indiscernible comments from audience.)

21 JOE LAMB: Could I ask the attorney to
22 address the reason for insurance versus a performance
23 bond?

24 CHAIRMAN McCARTHY: Yes.

1 MS. MEAD: Thank you. So a performance
2 bond is given when you have to build, do, complete
3 something. So we are going to be required to provide
4 a bond or a covenant to complete all of the public
5 infrastructure. That will be part of the definitive
6 plan required to do that.

7 It took us a long time to find somebody to
8 give us insurance at \$2 million for any act that we
9 would do that would impact the well or harm the well
10 or contaminate the well.

11 A performance bond -- a bond doesn't ensure
12 that that's not going to happen. It's to complete
13 something.

14 And so, performance and payment bonds on
15 public construction projects, there is a project that
16 has to be built. You have to pay your
17 subcontractors. If you go under, the bond kicks in
18 and completes the project and pays the
19 subcontractors, you know, whoever has to do that. So
20 it's not appropriate for insuring against
21 contamination of the well.

22 We actually -- the first numbers that we
23 got back for insurance were at a hundred and five
24 hundred thousand dollars. We really had to push

1 somebody up to the \$2 million limit, so -- and we
2 worked to do that. But I just think the performance
3 bond is the wrong vehicle, that's all. It's just the
4 wrong vehicle in my opinion.

5 CHAIRMAN McCARTHY: So my count was six,
6 and I said I'd give you the opportunity to -- okay,
7 based on that, the two people who had issue with the
8 performance bond discussion, do you want to talk
9 anymore?

10 DON WALTERS: No. I understand what's out
11 there and I understand what Lucien bonds are also
12 associated with contract, with construction. As an
13 EPC contractor previously, I've gotten them for the
14 company I worked for. So they're out there. That's
15 all I've got say.

16 CHAIRMAN McCARTHY: Joe?

17 JOE LAMB: Yeah, I would say from my
18 perspective that, plus the other pieces that I'm not
19 comfortable with that the residents had requested, or
20 at least a couple of abutters had requested about the
21 other road. So I think at this stage I'm still a no,
22 but probably not for the reasons of water quality
23 today, that sort of thing. It's more about making
24 sure that we had a good vehicle that would prevent --

1 that would cover us in the event of some unfortunate
2 incident during construction. I guess that's my
3 biggest thing on the whole deal is that.

4 MS. MEAD: Mr. Chair, I'd request that the
5 board close the public hearing and take a vote.

6 CHAIRMAN McCARTHY: Okay. We've closed the
7 public hearing, and I can't imagine anybody would
8 have anything more to say.

9 Can I get a motion for approval with the
10 conditions as read?

11 ANDREW SHAPIRO: (Raised hand.)

12 CHAIRMAN McCARTHY: Okay. Andrew. Second?

13 JAMES BRUGGER: (Raised hand.)

14 CHAIRMAN McCARTHY: James.

15 Okay. Any final words?

16 (Hearing none.)

17 CHAIRMAN McCARTHY: Okay. All in favor of
18 approving the OSRD with the conditions as read?

19 (Jim Mccarthy, Raised Hand.)

20 (James Brugger, Raised Hand.)

21 (Andrew Shapiro, Raised Hand.)

22 (Bonnie Sontag, Raised Hand.)

23 (Leah McGavern, Raised Hand.)

24 (MJ Verde, Raised Hand.)

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CHAIRMAN McCARTHY: All against?

(Don Walters, Raised Hand.)

(Joe Lamb, Raised Hand.)

CHAIRMAN McCARTHY: Okay. There you go.

MS. MEAD: Thank you very much.

CHAIRMAN McCARTHY: I personally want to
thank the public, they're very motivated.

(OSRD Special Permit Hearing
adjourned at 11:16 p.m.)

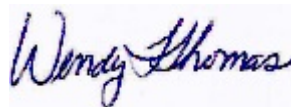
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COMMONWEALTH OF MASSACHUSETTS

I, Wendy L. Thomas, Professional Court Reporter and Notary Public in and for the Commonwealth of Massachusetts, do hereby certify that the foregoing record, Pages 1 to 20 inclusive, is a true and accurate transcript of my system tapes to the best of my knowledge, skill and ability.

I am not connected by blood or marriage with any of the said parties, nor interested directly or indirectly in the matter in controversy.

IN WITNESS WHEREOF, I have hereunto set my hand and Notary Seal this 6th day of April, 2017.



WENDY L. THOMAS, Notary Public
My Commission expires: 2/9/2018

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