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TO: Planning Board
FR: Lisa L. Mead, Special Town Counsel
CC: Board of Selectmen
Michael Lombardo, Town Manager
RE: Determination of Application of Zoning Bylaw Provision / Groundwater Protection
Overlay District
DA: January 16, 2015

✓ Reference is made to the above caption matter and the application before the Planning Board concerning the so-called "Patton Estate" development by CP Berry and the Town of Hamilton (collectively, the "Applicants"). In that connection, a question has been raised about the applicability of the Hamilton Zoning Bylaw (the "Zoning Bylaw") provisions related to the Groundwater Protection Overlay District ("GPOD"). Specifically, it is the Applicants' contention that their proposal does not trigger the requirements of the GPOD; accordingly, they have not applied for a Special Permit thereunder.

Specifically, I have previously provided the following opinion:

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D. Does the Ground Water Overlay District restrict the number of housing units being proposed for the Patton Property?

The proposed development is located in the Residence-Agricultural Zoning District. Senior Housing may be constructed in this district by issuance of a Special Permit from the Planning Board. Additionally, the Property is located within the Groundwater Protection Overlay District ("GPOD"). The question comes as to the applicability of the provisions of the GPOD on the proposal and how the requirements of the GPOD interplay with the Special Permit criteria for Senior Housing and the allowed uses in the underlying district. Specifically, a question has arisen as to the requirement in section V(D)(4)(a) which provides "Regardless of the minimum lot size of the underlying zone, there shall be a minimum lot area of 80,000 square feet for a building lot in the Ground Water Protection Overlay District." The term "lot" is defined in the bylaw in section VII as "Lot: Shall mean an area of land in

partially

one ownership with definite boundaries, used, or available for use, as site for one or more buildings."

In the case at hand there are two lots which are part of the proposal, one at 4.5 +/- acres and one at 9 +/- acres. The Senior Housing Permit allows for a base number of one dwelling per acre with density bonuses based upon a number of other factors. In this case as part of a special permit for the RA district under Senior Housing the minimum lot size would be one acre. Nonetheless, given the applicability of the GPOD, the minimum lot size would be 80,000 sq. ft. and the proposal exceeds that requirement. Further, the GPOD does not prohibit greater density on a lot of 80,000 square feet nor does it speak to density at all. As a result, by the very language of the GPOD, "uses or activities permitted in the underlying district are controlled by the underlying district" allowing the property to be used for Senior Housing in accordance with the bylaw, does not conflict with the requirements of the GPOD so long as the lot is greater than 80,000 square feet. To impose any other meaning on the word "lot" in the GPOD would be interpreting the bylaw in a manner inconsistent with the terms thereof. One must give plain meaning to the terms of a bylaw and not try to contort it to mean something not intended by the legislative body. (See Haleblian v. Berv, 457 Mass. 620 (2010): In interpreting a statute, "[w]e begin with the language of the statute." Commonwealth v. Raposo, 453 Mass. 739, 743, 905 N.E.2d 545 (2009). We give effect to each word and phrase in a statute, and seek to avoid an interpretation that treats some words as meaningless.) If the Town wanted to control density and except certain allowed uses in the underlying district from the GPOD, the Town would have done so, they have not. Further, if the Town meant to limit the number of buildings on a lot in the GPOD, they would have specified same in the bylaw itself, they did not. The GPOD limits the size of a lot in the GPOD and further limits what can happen on that lot in section 6 of the GPOD. Nowhere in those limitations are there limits on the number of units on a lot. As such, a meaning different than what is evident from the plain meaning of the bylaw may not now be imposed in the implementation of the bylaw. The proposal to place twelve units in six buildings on a lot in the R-A district, pursuant to a Senior Housing Special Permit is fully consistent with and not violative of the provisions and prohibitions of the GPOD.

The question now comes as to whether or not the Planning Board, on its own initiative, can determine if the Applicants must apply for a GPOD Special Permit. The short answer is “no.” The Planning Board has no authority to make such a determination.

“[T]he administrative process begins with the ‘zoning enforcement officer.’ The Zoning Act and local provisions alike confer upon the zoning enforcement officer, who most typically is the building inspector, the role of applying zoning requirements. . . . [T]he zoning enforcement officer plays the initial role in interpreting the zoning ordinance or bylaw. . . and in determining if a particular use or structure complies with the requirements of the zoning regulations. . .” Healy, Massachusetts Zoning Manual, § 13.01 (MCLE) (1997). By providing a procedure for appeal of a zoning enforcement officer’s determination to a municipality’s zoning board of appeals, “the Zoning Act establishes a local

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administrative forum"; by further providing a right to appeal to the courts, "the Zoning Act. . . allow[s] for a conclusive determination of a property owner's rights which is thereafter binding. . ." Id.

The Town of Hamilton Zoning Bylaw places the authority for its enforcement in the hands of the Building Inspector. See Zoning Bylaw, § VIII-A ("[t]he provisions of this By-law shall be administered and enforced by the Building Inspector. . ."). That is consistent with G.L. c. 40A, § 7:

The inspector of buildings, building commissioner or local inspector. . . shall be charged with the enforcement of the zoning ordinance or bylaw and shall withhold a permit for the construction, alteration or moving of any building or structure if the building or structure as constructed, altered or moved would be in violation of any zoning ordinance or bylaw. . . and no permit or license shall be granted for a new use of a building, structure or land which. . . would be in violation of any zoning ordinance or bylaw.

See also Morganelli v. Building Inspector of Canton, 7 Mass. App. Ct. 475, 481 (1979) ("[t]he responsibility for enforcing zoning ordinances or by-laws lies with the municipality and is assigned by statute to the building inspector. . ."). It is the Building Inspector who is authorized in the first instance to enforce the provisions of the GPOD. In the event that the Applicants, upon application for a building permit, have not yet received all necessary underlying permits, the Building Inspector will require them to seek outstanding permits determined by him to be required for the project to proceed. These could include a GPOD Special Permit, but only if determined by the Building Inspector to be a mandated by the Zoning Bylaw and, as such, a prerequisite to the issuance of a building permit.

The legislative history to the above-quoted G.L. c. 40A, § 7 explains the rationale of the statutory scheme: "[T]he existence of a 'permit' requirement is essential to the sound and orderly administration of a zoning bylaw. Building permit requirements provide a threshold technique for enforcement of. . . land use restrictions as well as a basis upon which administrative and judicial review procedures can be initiated. . ." Mass. H.R. Rep. No. 5009 (1972), a.k.a. the "Report of the Department of Community Affairs Relative to Proposed Changes in the Zoning Enabling Act." The Planning Board cannot determine that a GPOD Special Permit is needed for the Patton Estate development and require, in the proceedings now before it, that the Applicants apply for or receive it. See Pelletier v. Board of Appeals of Leominster, 4 Mass. App. Ct. 58, 62 (1976) ("[a] board's decision must be confined to the matter pending before the board and cannot validly determine matters not pending before the board"); The Board lacks zoning enforcement authority, as explained above. No route of appeal would be available to the Applicants from such a determination by the Board. It is the Building Inspector, i.e. the zoning enforcement officer for the Town of Hamilton, who can properly reach that conclusion (if warranted); and, as intended by the State Legislature, his decision is subject to appeal. See G.L. c. 40A, § 8 ("[a]n appeal to the permit-granting authority as the zoning ordinance or bylaw may provide may be taken by any person aggrieved by reason of his inability to obtain a permit. . . from any administrative officer under the provisions of this chapter. . ."); see also Zoning Bylaw, § VII-F(1) (providing for a right of appeal by any person aggrieved by a decision of the Building Inspector, but no other). Judicial review is subsequently available, pursuant to G.L. c. 40A, § 17.

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PB → ZBA?
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✓ That the Planning Board is not authorized to require what-it-determines-to-be zoning compliance is further evidenced by the references in G.L. c. 40A, § 8 to "any person including an officer or board of the city or town" (emphasis added) as among those who may appeal the action(s) of the zoning enforcement officer. Like any other, the Board has a right to appeal a zoning determination made by the Building Inspector. It does not have the right to render such a determination itself, in these circumstances.

I look forward to discussing this matter with you further.