

MIYARES AND HARRINGTON LLP MEMORANDUM
ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

To: Planning Board

Cc: Michael A. Lombardo
Patrick Reffett

From: Donna Brewer

Re: Further Questions on Patton

Date: February 17, 2015

Questions continue to be raised concerning the application of the Groundwater Protection Overlay District (“GPOD”) to the application for a special permit for the senior housing development at the Patton Homestead. My opinion is unchanged from one I gave in the context of the Canterbrook project. *See, e.g.*, my memorandum of December 13, 2011, to Marcie Ricker; my memorandum of May 5, 2014, to Kristine Cheetham. **The GPOD does not bar approval of the plan for senior housing in a cluster layout on the Patton property.**

As laid out in my last memorandum to the board, the zoning by-law Section VII defines lot as: “an area of land in one ownership with definite boundaries, used, or available for use, as site for one or more buildings.” The GPOD requires that a lot in the overlay district have a minimum of 80,000 square feet. The C.P. Berry proposal meets the minimum lot size requirement. **Nothing in the GPOD limits the number of buildings on the lot.** Instead, the GPOD focuses on uses with the potential to damage the groundwater (*e.g.*, toxic or hazardous materials).

The question has been raised whether the Planning Board may override or ignore the opinion of the Zoning Enforcement Officer as to the need for a special permit under the GPOD. **By letter dated January 19, 2015, Charlie Brett, the ZEO, opined that he has reviewed the C.P. Berry proposal and it does not require a GPOD special permit. This opinion is binding on the Planning Board.** The Zoning By-law Section V.D.7.a names the Zoning Board of Appeals as the Special Permit Granting Authority for the GPOD. Section VIII.A names the Building Inspector as the enforcement authority for the Zoning By-law. It would be a different question if the ZBA were questioning Mr. Brett’s opinion. In this instance, however, when interpretation and enforcement of the GPOD is expressly designated to a board other than the Planning Board, it is not appropriate for the Planning Board to attempt to step into the shoes of the ZBA and override the ZEO’s opinion.

Some have suggested that the Planning Board can determine whether a GPOD special permit is required and deny a senior housing special permit in the absence of such a permit because Senior Housing Subsection 12.A states: **“General**

Compliance: A proposal must comply with all other applicable town by-laws, and the applicable rules, regulations, and requirements of all departments, boards, and commissions, including the special sensitivities of the Historic District and the Groundwater Protection Overlay District.” This general statement does not confer enforcement authority on the Planning Board for all Town by-laws, or the rules, regulations, and requirements of all other town groups. As I stated in my memorandum dated January 6, 2014, to Michael Lombardo, the Planning Board’s authority is that delegated to it by statute, by-law, or regulation. The Planning Board has no plenary power to act outside of these areas. When a landowner applies for a building permit, the Building Inspector determines whether all necessary permits or approvals from all town boards have been obtained. The building permit will not be issued if in his opinion there is a permit or approval missing. The Planning Board cannot override the opinion of the Conservation Commission, for example, and deny a senior housing special permit because the Planning Board disagrees with the Conservation Commission as to whether the property includes a Resource Area within the Conservation Commission’s jurisdiction. The issue with the GPOD is no different. It is for the Building Inspector and the ZBA to determine whether the C.P. Berry proposal requires some relief under the GPOD. The findings that the Planning Board is required to find under Zoning By-law Section V.E.26 do not include a mandatory finding regarding the GPOD.

A question has arisen whether a future Town Meeting must vote to set aside acreage as the permanent open space required for grant of the senior housing special permit. The necessary Town Meeting approval is already in place. The Annual Town Meeting vote in 2012 authorized the Board of Selectmen to accept the deed of gift of the Patton Homestead on such terms and conditions as are acceptable to the Board. The Annual Town Meeting vote in 2014 authorized the Board of Selectmen to sell a portion of the Patton Homestead for moderately priced housing on such terms and conditions as are acceptable to the Board. The executed P&S expressly acknowledges that C.P. Berry will apply for a senior housing special permit under the zoning by-law. (P&S Section 12, 1st paragraph). It is a condition of the by-law that a senior housing development with an open space component must provide for the open space to be permanently protected. The Board of Selectmen can fulfill this requirement by amending the deed under the authority of the 2012 Town Meeting vote. If the Board wishes, the Purchase and Sale Agreement can be amended by the Board and C.P. Berry to specify that the deed will be amended for this purpose, per the authority granted to the Board by the 2014 Town Meeting vote.