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Re: Fox Hill CR Amendment

Dear Bill:

Thanks very much for your August 2 letter to Paul and me, which, among other things, offers some excellent comments about the current proposal to amend the Coastal Residential (CR) District to allow treatment facilities. We understand that this amendment remains a moving target, with further revisions to the proposal coming soon, but we wanted to get back to you as promptly as we could. After the next iteration is presented, we'll supplement this correspondence if it raises new issues.

Put simply, your comments hit the nail on the head as to one fundamental area of concern: the inability to craft a legally valid and binding amendment that would be as limited as we understand the proponents have been representing that they intend.

Your first set of comments encourages Paul to flesh out more specific standards relating to intended use. While the proponents of this particular facility have made a host of representations as to how they intend to operate this facility, as your comments recognize, their actual proposal is a legislative amendment to the CR District. Anyone who in the future uses this piece of property, whether they are these particular proponents (whomever the as yet unidentified investors may be) or any other person or entity to whom they transfer – or lease – the property, would not be legally bound by any of the representations that the proponents are now making. What matters, as you know, is what the ordinance itself provides. Nothing could, for example, prevent these proponents immediately from transferring this property to someone else, taking it out of the tax-base as a non-profit entity, serving court-ordered patients, methadone clinics and so on, unless (1) the ordinance text itself contains these limitations, and (2) such limitations could be legal and binding.

This second point – the legality of such limitations – relates to your second and third set of comments. As your comments again anticipate, such limitations, even set forth in an ordinance, may very well not be binding, either on these proponents or any future property owner. The amendment, moreover, no matter how narrowly written, would have the

unintended consequence of opening the CR District as a whole to treatment centers of all stripes, as explained below.

I. Consequences flowing from federal law: if the CR District is amended to permit this particular treatment facility, other facilities serving other disabilities and populations may have to be allowed throughout the District.

As we've previously noted, this location, and the CR District in general, is not appropriate for a hospital use of this type. Currently, treatment centers – which fall squarely within the definition of a hospital in the Zoning Ordinance – are allowed in the B-2 and B-3 Districts, with 83 separate lots available for this use in those Districts.

What makes this use inappropriate within the CR District and appropriate in commercial / business districts, as reflected in the current Zoning Ordinance, is the commercial nature of the proposed use, with all the traffic and other characteristics accompanying it. Whatever specific population a hospital / treatment facility might serve, and whatever type of facility it may be, such facilities do not fit within this zone. There are no commercial uses in the CR District around Bay View Street and there have been none for over 100 years. Since the adoption of the Zoning Ordinance 21 years ago, there have been no new commercial uses allowed in the CR District.

If, however, an ordinance amendment reflects, as proposed here, the conclusion that the CR District ***is*** an appropriate location for a treatment center, then federal law – the Constitution, the ADA, the Fair Housing Act and / or the Rehabilitation Act – could very well prevent the Town from denying access within the CR District as a whole to any other use of a similar nature, which could include, without limitation, court-ordered patients and treatment centers for other disabilities and / or other populations, *e.g.*, the mentally ill of any type, juvenile offender treatment centers, methadone clinics, and so on. *See* Rathkopf's The Law of Zoning and Planning, § 23:25 (updated June 2013) ("Exclusion of a group home from a zoning district may also be challenged on the equal protection grounds of under inclusiveness where similar uses or other types of group homes are allowed therein"), citing, *inter alia*, *Bannum, Inc. v. City of Louisville, Ky.*, 958 F.2d 1354 (6th Cir. 1992) (ordinance that required a special use permit for community treatment centers for felony offenders, but not for other similar group home uses, violated equal protection). The touchstone decision in this context is *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), finding a constitutional violation for a zoning permit requirement for a home for the mentally retarded when the zone allowed for other group homes such as boarding houses, dormitories, hospitals, and nursing homes.

If treatment centers are established as an appropriate use, facially neutral limitations – *e.g.*, a 10-acre minimum or bed number limitation – may also become suspect. *See Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329 (D.N.J. 1991) (six person occupancy limitation violated federal law); *Parish of Jefferson v. Allied Health Care, Inc.*, 1992 WL 142574 (E.D. La. 1992) (invalidating denial of variance to allow six v. four occupant limit). Nor would Camden be able to prevent other owners of properties in the District from asserting these federal rights to build their own centers of whatever type throughout the CR District, south or north, by enacting a quota for such facilities or a dispersal rule, *e.g.*, a provision that no center may be located within X feet of another. *See, e.g.*, B. Blaesser & A. Weinstein, *Federal Land Use Law & Litigation*, § 9:24 (updated August

2012) (noting that state attorneys general have ruled that local ordinances setting quotas or requiring minimum spacing between facilities are invalid under federal law); *Larkin v. State of Mich. Dep't of Social Services*, 89 F.3d 285, 291 (6th Cir. 1996) (holding that spacing requirement in state statute violated federal law, noting that any clustering of facilities is the result of the free choice of the disabled); *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 698 (E.D. Pa. 1992), *judgment aff'd without discussion*, 995 F.2d 217 (3d Cir. 1993) (rejecting argument that 30 family care homes accommodating 150 residents was enough; federal law rejects any notion that antidiscrimination mandate can be avoided by accepting a "fair share" of people with disabilities).

Such quota and dispersal ordinance limitations have been attempted elsewhere because experience teaches that once one facility is deemed appropriate and allowed within a zone, others follow. *See, e.g.*, http://abcnews.go.com/blogs/entertainment/2013/07/malibu-residents-frustrated-by-impact-of-rehab-facilities/ (ABC.com article describing clustering of treatment facilities in Malibu, with City attorney quoted as saying that neighbors are "watching their residential neighborhood turn into, basically, hospital zones."); *Familystyle of St. Paul Inc. v. City of St. Paul, Minn.*, 923 F.2d 91 (8th Cir. 1991) (describing area where the plaintiff set up 21 group homes within a one-and-a-half block area); P. Weinberg, *Alcohol and Drug Rehab Homes – Classic Nimbyism or Everyone's Fair Share?* ("Weinberg"), 31 No. 9 Zoning & Planning Report 1 (Oct. 2008) (describing situation in Newport Beach, California, where clustering has resulted in 26 alcohol and drug treatment recovery facilities for 238 individuals, noting "[t]he morass of federal as well as state legislation that exists to give alcohol and drug rehab operators relative freedom from local zoning and land use regulation is daunting").[1]

In sum, as your second set of comments accurately notes, a new operator of this center (or even these proponents) could very well argue later that a limitation to an alcohol or substance abuse center discriminates against persons with other disabilities. That a center is open to one protected class does not immunize a law that allows only that one class. This is not just logical – a landlord, for example, cannot argue that he need not rent to African-Americans because he allows Jewish people in his building – but the Supreme Court has said that discrimination among the discriminated is not countenanced. *Olmstead v. Zimring*, 527 U.S. 581 n.10 (1999) ("The dissent is driven by the notion that 'this Court has never endorsed an interpretation of the term 'discrimination' that encompassed disparate treatment among members of the *same* protected class' .... The dissent is incorrect as a matter of precedent and logic") (emphasis in original; citations omitted). *See also Amundson v. Wisconsin Department of Health Services*, -- F.3d --, 2013 WL 345505 *3 (7th Cir. 2013) (noting viability of claim that developmentally disabled were treated worse than the visually impaired because under *Olmstead* "discrimination among persons with different disabilities can state a good claim") (citations omitted); *Iwata v. Intel Corporation,* 349 F. Supp. 2d 135 (D. Mass. 2004) (striking down discrimination between physically and mentally disabled); *Children's Alliance v. City of Bellevue*, 950 F. Supp. 1491, 1497, 1499

[1] Even crafted with a 10-acre requirement, and even assuming that such an acreage requirement could withstand judicial scrutiny, there are 11 lots in the CR District exceeding 10 acres, six of which have buildings on them exceeding 5,000 square feet in size. Thus, at least six properties would be immediately available for treatment center use, even with a limitation to lots with existing structures of greater than 5,000 square feet.

(W.D. Wash. 1997) (striking down ordinance that attempted to impose different conditions on youth and adult homes).

In short, the attempt to alter a general zoning plan to permit a single piece of property to be put to a use that does not fit the general character of a neighborhood can have unintended consequences because, among other reasons, once it is established that the zone is appropriate for a facility of that general type of use, federal law may prohibit an ordinance limitation that tries to restrict the use only to one piece of property within the district, or to one specific type of that general use.

This law on what local regulatory limitations on treatment centers are allowed is not uniform. What is predictable, however, is an onslaught of costly lawsuits challenging any attempt to limit additional or different centers from clustering in Camden if the Town tries to take steps to manage this influx. *See* Weinberg ("Operating sober living centers, particularly in pleasant resort areas, is very big business; Sober Living by the Sea, one of the largest operators in Newport Beach, California is actually owned by Bain Capital, a large hedge fund"; "The overview of the applicable law shows that sophisticated, savvy operators will invoke Fair Housing Law ... to try to overturn a zoning ordinance that interferes with making money") (citation omitted).

Nor could property owners enforce restrictive covenants or association agreements to prevent the establishment of such centers. *See* 24 C.F.R. § 100.80. Indeed, just the attempt to rely on such property rights and to enforce them in court has led to civil rights suits against such property owners trying to enforce these rights. *See* D. Godschalk, *Protected Petitioning or Unlawful Retaliation? The Limits of First Amendment Immunity for Lawsuits under the Fair Housing Act,* 27 Pepp. L. Rev. 477 (2000); *Casa Marie, Inc. v. Superior Court of Puerto Rico*, 988 F.2d 252 n.6 (1st Cir. 1993); *U.S. v. Scott*, 788 F. Supp. 1555 (D. Kan. 1992).

Finally, with no ability to limit either this treatment center to non-court ordered patients, or to limit the number of other centers attracted to the CR District by the establishment of this center, coupled with the high-priced nature of the particular business at Fox Hill, the probability of media attraction, however unintended, is also real. It should be noted that attempts elsewhere to enact regulations in response to the intrusions of such media have been met with First Amendment arguments and other obstacles – again limiting the Town's ability to regulate unintended consequences. *See, e.g.*, C. Locke, *Does Anti-Paparazzi Mean Anti-Press? First Amendment Implications of Privacy Legislation for the News Room,* 20 Seton Hall Sports & Ent. L 227 (2010); G. Wax, *Popping Britney's Personal Safety Bubble: Why Proposed Anti-Paparazzi Ordinances in Los Angeles Cannot Withstand First Amendment Scrutiny,* 30 Loy. L.A. Ent. L. Rev. 133 (2009); J. of R. Roiphe, *Anti-Paparazzi Legislation*, Harv. J. on Legis. 250 (1990).

II. Consequences flowing from state law: the amendment, aside from constituting bad planning, would violate Title 30-A.

Another problem with the attempt to alter a general zoning plan to permit a single piece of property to be put to a use that does not fit the general character of a neighborhood is reflected in your third set of comments. Such an attempt constitutes spot zoning. This is not just bad planning, but within the context presented, illegal under state law.

You describe the decision in *City of Old Town v. Dimoulas*, 2002 ME 133, ¶ 19, as suggesting that inconsistency with a comprehensive plan does not arise unless the comprehensive plan affirmatively and expressly prohibits the specific use allowed by the ordinance at issue. We think this reading of *Dimoulas* is too broad.

There, a grocery store wanted to put tables out for customers to use. The property was located on Stillwater Avenue, described in the comprehensive plan as a street that had "a great deal of commercial activity," *id.*, ¶ 3, with portions of the street expressly zoned for commercial activity. Thus, in finding that the re-zoning of the store lot to allow commercial activity did not violate the comprehensive plan, the Court noted, correctly, that Old Town's comprehensive plan did not prohibit commercial development in the Stillwater area.

The contrast between this context and Camden's, with no surrounding commercial uses (as noted above), and the language in Camden's comprehensive plan as to the uses contemplated within in the CR District, as noted in my previous letter to the Planning Board of July 31, 2013, is clear. We do not read *Dimoulas* as setting a blanket rule that no ordinance is inconsistent with a comprehensive plan unless the plan affirmatively and expressly prohibits the use within a district. Rather, as post-*Dimoulas* decisions provide, the test remains whether the zoning classification "is in basic harmony" with the plan. *E.g., Bog Law v. Town of Northfield*, 2008 ME 37, ¶ 18.

Furthermore, the type of amendment now being contemplated here, with provisions designed to allow only this very specific project as described and owned and operated by these proponents, constitutes contract zoning. See 30-A M.R.S. § 4301(5) (""Contract zoning" means the process by which the property owner, in consideration of the rezoning of that person's property, agrees to the imposition of certain conditions or restrictions not imposed on other similarly zoned properties."). Contract zoning is permitted by state statute under certain conditions. The first condition, however, is that the municipality have an ordinance that provides for it. *See* 30-A M.R.S. § 4352(8) ("A zoning ordinance may include provisions for conditional or contract zoning.")

Camden has no such ordinance. There is no mechanism in Camden for allowing a contract zone as contemplated here. Hence, any proposed ordinance amendment would need to be accompanied by an amendment to Camden's Zoning Ordinance approving contract zoning as a general matter, with whatever limitations Camden may deem appropriate for the use of this zoning tool. The Town may or may not decide that having a contract zoning mechanism is now a good idea; but if it were going to contemplate taking such a step, it would need to explore the general ramifications of such a significant change to its approach to zoning, as well as conditions specific to Camden which the Town may deem necessary and appropriate to include in such a mechanism made generally available in Camden through such an ordinance change.

State statute, moreover, prohibits contract zoning from including some of the conditions we understand are being contemplated here, *e.g.*, assuring retention in the Town's tax base. *See* 30-A M.R.S. § 4352(8)(C) (rezoning under a contract zoning ordinance can "[o]nly include conditions and restrictions that relate to the physical development or operation of the property.") State statute also requires contract zoning to be consistent with the

comprehensive plan. *Id.*, § 4352(8)(B). As noted, we believe that the proposed facility is not consistent with Camden's comprehensive plan.

III. Conclusion

We believe that the proposed ordinance amendment should be rejected by the Planning Board. The specific use now articulated as contemplated by the amendment proponents is inappropriate for the CR District. It is a commercial use already allowed, appropriately, in the B-2 and B-3 districts. It is not appropriate to allow commercialization by an investor group in the historic and zoned coastal neighborhood CR district. Additionally, we believe that the proposed ordinance amendment should be rejected because (a) contract zoning is not allowed in Camden; (b) spot zoning is bad planning; and (c) Camden would not be able to limit the zone change to allow just this one treatment center, to serve only the particular population that these particular proponents are currently indicating they intend to serve, subject to whatever other limitations they suggest and are included in any final iteration of the proposed amendment. Once a center is deemed appropriate in the district, such limitations, as noted, become suspect.

Zoning is a holistic exercise, requiring an examination of impacts and goals on a town-wide basis. It is legislation, applicable to everyone, not an adjudication impacting only one piece of property or one owner. The unintended consequences of making piecemeal changes to a carefully planned growth management plan as reflected in Camden's comprehensive plan and existing Zoning Ordinance cannot be underestimated.

We hope that this responds to your comments in the manner you sought. Please let us know if you have any further comments or questions.

Sincerely,

Matthew D. Manahan

cc: Steve Wilson
John J. Sanford, Esq.
Paul L. Gibbons, Esq.