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TOWN OF ACTON
472 Main Street
Acton, Massachusetts 01720
Telephone (978) 264-9636
Fax (978) 264-9630
planning@acton-ma.gov

Planning Department

MEMORANDUM

To: Planning Board ***Date:*** September 14, 2005

From: Roland Bartl, AICP, Town Planner R.B.

Subject: Zoning Changes for Affordable Housing

The "To Live in Acton" report (review at http://doc.acton-ma.gov/dsweb/Get/Document-6986/Acton-REV+REPORT.pdf or visit the Acton Planning Department web page where the document is broken in several part for easier downloading), pages 44-46, contains recommendations for changes in zoning and land-use policies to boost affordable housing production. This memo is intended to begin the discussion about which of these recommendations should be implemented and in which order.

Recommendation:

1) Replace the existing Affordable Housing Incentives and Overlay District bylaw (Section 4.4) with a simplified Inclusionary Housing Bylaw that requires affordable dwelling units in all residential developments of five or more homes and does not obligate the developer to seek a special permit.
   a) Apply the Inclusionary Housing Bylaw to all zoning districts in which residential uses are allowed, and to all types of residential uses, in any development of six or more housing units.
   b) Establish a base inclusionary requirement, e.g., 10% of all dwelling units in any project subject to the bylaw.
   c) Offer developers a menu of choices to comply, subject to approval by the Planning Board:
      (1) Include units in the development.
      (2) Provide equivalent units in another location in Acton.
      (3) Pay a fee in lieu of creating new units, the fee to be equal to the difference between an affordable purchase price as defined by DHCD's Local Initiative Program (LIP) and the median single-family home or condominium sale price for the most recent fiscal year, as determined by the Board of Assessors.
      (4) Donate to the town a parcel of land with equivalent development capacity, restricted for affordable housing use.

d) Provide a density or floor area ratio bonus by special permit to encourage additional affordable units in zoning districts that allow higher-density development.
e) Condition the release of occupancy permits on the town's receipt of affordable unit documentation.

Acton's Affordable Housing Incentives and Overlay District, section 4.4 of the zoning bylaw, has failed in that it produced very little affordable housing since its inception in 1990 (6 units on a quick count). It is clear that its density incentives and affordability percentages have been too poorly tuned to create interest in the program among developers. Instead, a lot of the land originally included in the overlay district has been lost to development without the inclusion of affordable housing. At the last Annual Town Meeting, the Board proposed and the meeting adopted sweeping zoning map changes that eliminated the lost acreage from the overlay. What remains now is a more realistic representation of the overlay district's theoretical potential, but it still lacks the mechanism to realize it.

Section 4.4 as presently written is:

- A voluntary system that relies on density increases as a lure or carrot.
- A two-tiered system with a sub-district A and a sub-district B.
- Sub-A –
  - is scattered around the Town's single-family zoning districts on undeveloped or under-developed lands with larger areas remaining in the central and northern parts;
  - offers modest density increases (up to 25%) in exchange for at least 10% affordable units, or some equivalent in monetary contribution or house donations;
  - requires a minimum parcel size before the density bonuses also create affordable units;
  - is tied to PCRC or OSD developments, which have their own minimum tract requirements;
  - allows some two-family structures in the mix.
- Sub-B –
  - for the most part is grouped around village and business centers;
  - allows up to 5 units per acre with at least 30% affordable units or an equivalent contribution;
  - envisions multi-family buildings;
  - allows development on parcels as small as 2 acres;
- Sub-A and Sub-B both have affordability restrictions that are inconsistent with DHCD's standard forms. Units created under these rules can only add to the 40B count with a variance or a wink. Our bylaw restrictions make more sense but DHCD has the upper hand in this.
- The system relies on density increases. Although very moderate in Sub-A, they can be a red herring.
- On the other hand, high density housing as in Sub-B, or even higher than what is presently allowed, near the village and business centers makes utter sense. So far, we have not lost many of the Sub-B areas and with some searching perhaps more parcels could be added to make up for any losses.

At the time of the adoption of section 4.4, the option of inclusionary zoning did not exist. It was the general belief that such provisions would not be deemed legal under the State's Zoning Act, M.G.L. Chapter 40A. Some Massachusetts cities, including Boston, had inclusionary zoning provisions for some time before, but 40A does not apply to them.

More recently (2-3 years ago), municipalities have begun adopting inclusionary zoning provisions and have received the Attorney General's approval. This came as a surprise, because the legal frameworks have not changed. The AG's approval does not mean that a local bylaw meets legal or constitutional muster if tested in court. Yet, it seems more and more communities take comfort in from AG approvals and are adopting inclusionary zoning. All of the new bylaws and ordinances are too recent to see how effective they are or to find new Massachusetts case law on them that might provide guidance in drafting a provision for Acton.

Inclusionary zoning in its pure form (i.e. without offsets) is a compulsory system that requires an affordable housing contribution from every development project over a certain size. This regulatory approach is grounded in a very different philosophy than incentive zoning and has a more direct impact on land values and market rate home prices. It could guarantee a certain level of affordable housing production as long as there is new housing development activity and as long ads there is buy-in from the development community.

Inclusionary zoning bylaws do not have the solid legal footing in Massachusetts that incentive zoning has. At the least, there is still considerable debate about it. 40A expressly lists incentive zoning as a legitimate zoning tool, but there is no express provision for inclusionary zoning and there is no significant case law history to rely upon. It is not universally accepted that inclusionary zoning could pass a strict rational nexus test. Nevertheless, more and more communities are going for it anyway, encouraged by those who reason that the Zoning Act gives communities broad zoning powers to regulate their affairs and to adopt zoning regulations even if they are not mentioned in 40A. They may be right. But at the least, inclusionary zoning steps out from under the shelter that 40A provides. Moderation (not asking for too much), exemption of small projects, and flexibility in how the affordable housing contribution can be made (on-site, off-site, in-lieu payments) help minimize or deter legal challenges:

Inclusionary zoning, if chosen, would be a new section in the zoning bylaw with at least these basic elements:

1. Purpose Statement: Expression of need; address rational nexus and proportionality tests.

2. Definitions: as needed.

3. Applicability:
    a. All residential development creating, say 6 or more new buildable lots or habitable dwelling units (single- and multi-family), or an equivalent amount of residential floor area, including:
        i. the division of land by ANR
        ii. the division of land by Subdivision Approval
        iii. creation of dwelling units by special permit (e.g. PCRC, OSD, multi-family), and/or
    b. All commercial/industrial development creating, say 10,000 square feet or more, new commercial/industrial floor space (site plan required)

        !!!New inclusionary zoning bylaws in MA so far have focused primarily on residential development. A few (e.g. Wellesley) apply to both. Applicability to only commercial is conceivable, but I have seen no examples in MA. A reasoned argument can be made that both types of developments create the need for and benefit themselves from affordable housing. Both create the need for services, where employees earn incomes below what is needed to buy or rent local market rate housing. Applicability to both seems more equitable, but I suspect local

politics here and in the other communities tends to favor limiting applicability to new housing developments. I believe that applicability to both commercial/industrial and residential development is more equitable, but we must expect serious push-back from the business community, Chamber of Commerce, and probably the EDC.

4. Requirements for Affordable Housing: States the required affordable housing provision by percentage or other formula approach, and list alternatives such as off site affordable units, and monetary contributions (to specific housing trust fund, where expenditures do not require further Town Meeting appropriation).

   !!!The precise contribution formulas need vetting to ensure that the market can absorb the additional burden. This will probably be more of an art than a science. Reviewing other bylaws, the "going rate" is 10% affordable units from total unit count in residential projects, reaching up to 15% in some cases. Fractions are handled by rounding up or by asking for monetary contributions. Wellesley requires one affordable unit for each 5,000 square feet of commercial/industrial, which seems high.

5. Process: Describes the regulatory procedures associated with the affordable housing contribution.

   !!!Special permit seems to be the modus operandi in most cases. However, this adds "insult to injury". Consider instead an administrative procedure and checklist to verify compliance with the affordable housing requirements before the issuance of occupancy permits. In either case, the Building Commissioner will be asked to administer yet another variation to building and occupancy permits. Expect to hear from him.

6. Details: Prevention of project segmentation to avoid applicability; exemption for municipal projects; affordable unit dispersion; affordable unit standards; marketing; buyer/tenant qualifications; affordability restrictions; etc.

As a nearly ironclad safeguard to legal challenges, we might consider a slight density increase for projects that are subject to inclusionary zoning. Most of the communities who have adopted inclusionary zoning do not have this component. I believe they are leaving themselves open to two risks: They might be on the defending side of developing new case law, or developers will avoid the inclusionary zoning trigger wherever they can and otherwise continue to pursue 40B projects. Acton voter sentiment might not be in favor of such an offset. I would expect that some of our more savvy and outspoken voters will look, or have looked, at the actions of other communities and will tell Town Meeting that the offset is not necessary and is just a give-away to developers. We would need to prepare to argue with reason why the other communities may not have made the wisest choices.

For section 4.4 to gain momentum, either retained independently or as an add-on to an inclusionary zoning provision, the proportionality between incentives and demands would need adjustment. Over the years, the suggestion was made that the required special permit could be a disincentive. I don't believe that is necessarily the case especially in light of the popularity of PCRCs as a development option, which is also with a special permit. Whatever adjustments may be made, there is, of course, still no guarantee, only a likelihood that the program will score better in the future.

A zoning bylaw, section 4.4, upgrade should consider at least the following:

1. Adjust the density incentives v. the required contribution (sections 4.4.3.1 and 4.4.4.1):
    a. Give more density and/or ask for less affordability.
    b. Simplify by deleting ground lease option in 4.4.3.1.
    c. Add off-site option in 4.4.3.1.
    d. Ensure that monetary contributions go towards housing fund without requiring further Town Meeting appropriation.
    e. See if formulas can be simplified.
2. Ease or lifting limitations on two-family structures in minor aff. housing developments (4.4.3.3).
3. Allow "small" multi-family component in minor aff. housing developments.
4. Ease dimensional standards for major aff. housing developments (4.4.4.2).
    a. Reduce min. tract size to 20,000 sf.
    b. Increase max. density to 8 du/a or, even better, define density by FAR and set maximum at, say, 10,000 sf. without a unit maximum. This allows more flexibility in unit sizes and bedroom counts.
    c. Delete common land requirement.
    d. Delete perimeter buffer.
    e. Consider other adjustments.
5. Delete requirement for separate ground floor entrance to each unit in major aff. housing developments. This is a prescription for town houses.
6. Adjust all affordability requirements to be consistent with Massachusetts DHCD LIP program or equivalent and with DHCD standard restrictions and deed riders, but allow for variations in individual cases.
7. Delete sections 4.4.8.2 through 4.4.8.6. They have become obsolete with the adoption of new section 4.4.8.1 at the 2005 Annual Town Meeting.
8. Add more land near village and commercial centers, including smaller parcels, to the affordable housing overlay sub-district B. Consider including all land within ½-mile radius to village centers and Kelley's Corner (generally considered comfortable walking distance).
9. Create "overwhelming" incentives for building density with affordable housing in or near the villages.
10. All other adjustments deemed necessary or helpful.

Recommendation:

2) Consider increasing the minimum lot size for development in the R-2 District but provide a special permit option to build at the current density in exchange for the inclusion of affordable units in a new development, i.e., without the "buy-out" options that would be available under the Inclusionary Housing Bylaw.

This sounds simple enough, at first. But there are problems. The affordability requirement in exchange for returning to R-2 density needs to be calibrated so that we do not simply change R-2 into R-4 or R-8 and thus render many parcels unbuildable or worthless. This proposal primarily targets small parcels, which have limited capacity for infill development, although altogether they represent a sizeable growth potential in the Town. These lands belong to many individual homeowners who have so far held on to an extra acre or two. They may get a very bad deal out of this proposal unless there is an option to make them "whole" again by building more than what R-2 would allow, or by exempting them altogether. Imagine, say, the elderly resident who happens to have enough land for an additional lot and is looking to cash in on it to fund a better retirement.

This change would destroy that option. At nearly $300,000 for a buildable lot and a maximum sale price of an affordable unit of $160,000 or so, the return to R-2 density in exchange for making the unit affordable is still a loss to the homeowner.
So, this option should only apply to the few remaining parcels in R-2 that have significant acreage to absorb such a requirement. In a slight variation from the recommendation (still to be calibrated), the R-2 district would then conceptually -

1. have increased minimum lot area requirements;
2. allow a return to R-2 density with inclusion of affordable units, allow such projects by right, and allow perhaps some other benefits and options such as two-family buildings, reduced set,-backs, average lot size calculations or PCRC-like site planning flexibility, etc.
3. provide a special permit option for alternative affordable housing contributions (off-site or monetary) in R-2 density projects; and
4. exempt small projects and small lots from the increased minimum lot area requirement.

Recommendation:

3) Amend the Zoning Bylaw by updating the existing definitions of "affordable", "low-income", and other terms required to implement affordable housing regulations.

This is a technical change or update. The revised definitions should mirror the criteria and language that is presently used in State regulations.

Recommendation:

4) In conjunction with the Inclusionary Bylaw, establish a permanent Affordable Housing Trust fund by special act of the legislature for all revenue generated by the bylaw and any other funding sources as determined by the town, e.g., community housing funds appropriated under the Community Preservation Act.
   a) Assign administrative responsibility for the trust fund to the Board of Selectmen, whose duties should include preparing an annual allocation plan for the expenditure of trust fund revenue, in consultation with the Planning Board.
   b) Place authority for approving the annual allocation plan with Town Meeting.
   c) Incorporate in the home rule petition an exemption from G.L. c.30B requirements so the Town can expend trust fund revenue on contracts with the Acton Housing Authority, the Acton Community Housing Corporation, the Acton Economic Development and Industrial Corporation, or another non-profit organization without conducting a formal procurement process for goods and services.
   d) Limit the use of trust fund revenue to the production of dwelling units that qualify for listing on the Chapter 40B Subsidized Housing Inventory as Local Initiative Program Units. "Production" should be defined to include new unit creation, preservation of existing affordable units, reuse, and conversion of existing structures, and affordable housing restrictions placed on existing dwelling units.

This recommendation is intended to accompany the recommended zoning changes, which include options for payments in lieu of producing affordable housing on- or off-site. Home Rule petition is a longer process and is likely to require two Town Meeting votes – one to vote to file the petition and then to adopt what the General Court has authorized. This needs exploration with the Town Manager and Town Counsel. I do not think it needs to be in place before or concurrently with the zoning changes, but can follow in a year or two.

Recommendation:

5) Amend the Zoning Bylaw for single-family to multi-family conversions as follows:
   a) Allow conversions by right in any zoning district in which multi-family dwellings are also allowed by right, provided that a conversion project includes at least one affordable dwelling unit.
   b) Retain the existing special permit requirement for conversion projects that do not include affordable units.
   c) Consider modifying the conversion-by-special permit provision for existing dwellings in a Business District so that conversions must include at least one affordable housing unit.

a) points to an inconsistency in the zoning bylaw. Refer to section 3.3.4 and the corresponding line in the Table of Principal Uses. Dwelling conversions are limited to 4 units, so it makes sense to allow them by right in the R-AA, EAV, EAV-2, SAV, and WAV districts. I would also consider it appropriate to remove the special permit in the R-A, VR, KC, and LB districts, and allowing it in the PM district. The trade-off for the removal of the special permit is the requirements for inclusion of one affordable unit. The administrative and oversight procedures for the affordable unit will need to be defined, and some standards may need to be set in place of the special permit. Also, consider moving the eligibility date up to a more recent year – anything before 2005 would work; removing the requirement for 10,000 square feet per unit, and defining whether building additions can be part of the dwelling conversion.

I am not sure that we even need to bother with b).

c) recommends allowing dwelling conversions in the business districts. Dwelling conversions, by definition in 3.3.4, exclude conversions from commercial to residential. I have already suggested above including KC, LB, and PM in the proposed change. A related use in business and village districts is Combined Business and Dwelling – section 3.5.6. An affordable housing component seems appropriate here, too, but an incentive mechanism may be needed to encourage mixed uses in the village districts and Kelley's Corner.

As a general comment, please note that dwelling conversions are rare. Therefore, this mechanism will probably not create a significant number of affordable units.

Recommendation:

6) Amend the Zoning Bylaw by adding a new use definition for "ECHO dwelling" and establishing ECHO units as a permitted accessory use in any

zoning district in which two-family dwellings are currently allowed, as a special permitted use in all other zoning districts.

a) Establish an administrative site plan review process for ECHO units.
b) Establish minimum design standards and additional land area requirements (if any) for ECHO units.

ECHO (Elderly Cottage Housing Opportunities) units are a form of accessory apartment, but they are usually stand-alone dwellings and specifically geared to address housing needs of the elderly. I do not see that an additional land area requirement is necessary. The administrative review procedure needs to be invented.

Other:

Accompanying elements that might help in small ways preserve or increase the supply of restricted affordable or less expensive market rate rental or ownership units:

- Allow the construction of affordable single- or two-family homes on existing parcels that are unbuildabe under normal application of the zoning bylaw and do not meet the single lot exemption criteria under 40A. (there are some of those in Acton).
- Move the date for accessory apartment eligibility (section 3.3.2) from 1990 to a more recent year, or allow accessory apartments in new construction while retaining the limit on their size.
- Remove owner-occupancy requirement in multi-family buildings.
- Instead of allowing the "mansionization" of existing older and smaller homes, one could require that they be preserved as a second unit on the lot, which must then be an affordable rental or could be divided out as an affordable ownership unit. In the alternative, removal of such older homes could be allowed if the replacement includes an affordable accessory apartment, affordable full-sized 2nd unit, or an ECHO unit.
- Allow two-family by right in the NAV district.

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