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Planning Department

INTERDEPARTMENTAL COMMUNICATION

To: Don P. Johnson, Town Manager **Date:** November 22, 2006
From: Roland Bartl, AICP, Town Planner *R.B.*
Subject: **Affordable Housing Zoning Initiative**

The Planning Board has submitted to the Board of Selectmen a draft affordable housing zoning amendment for your review and comment. I have just spoken with Chairman Greg Niemyski. He will be available for the December 18 oversight meeting barring any unforeseen changes in his business travel schedule. Planning Board members will exchange their schedules at the upcoming meeting next week. Hopefully, most other Board members will be available on the 18th. Greg is asking for some extra meeting time on the 18th to allow for presentation and discussion of the Planning Board's Affordable Housing Zoning Initiative.

He would like the Board of Selectmen to feel very comfortable with and supportive of any Planning Board proposal in the subject matter before taking the next steps. He regards it as a proposed landmark change in Acton's zoning approach to affordable housing, one that should be carefully prepared, reviewed, and vetted rather than rushed to meet any deadlines. Therefore, if spring 2007 is not a good time or if it takes more time to formulate a proposal that the Board of Selectmen can be comfortable with, then he has no problem delaying action on it to a later Town Meeting.

He is asking that the Board of Selectmen review the draft proposal in advance of the December 18 meeting. It may be helpful to understand the various other options that the Planning Board had considered before settling on this draft proposal:

Option 1

The "do nothing" option was dismissed quickly because the current affordable housing overlay zoning districts have turned in a miserable performance. In its 15 years on the books, it produced mere 6 or so affordable units. All other units were generate either through 40B or negotiated independently under other permits. Until the Woodlands project approval, the Town was barely maintaining its already low affordable housing percentage.

Option 2

The Planning Board received substantial input from developers and local engineering firms on how the existing affordable housing overlay district provisions could be improved. In the end, the Board dismissed the "fix-it" approach. Taken together, the comments showed that the existing provisions were too deeply flawed in too many of its aspects and that a completely new rewrite would have been in order. Furthermore, a great deal of "available land" as designated in the overlay districts

had been lost to other development since its 1990 inception leaving much fewer opportunities to actually produce affordable housing in the designated areas.

Option 3

The Planning Board reviewed inclusionary zoning as an option for change, but ultimately dismissed it as too premature and untested at this time. Inclusionary zoning in its pure form is a compulsory system that requires an affordable housing contribution from every housing development project, often above a certain threshold size. This regulatory approach is grounded in a very different philosophy than incentive zoning and has a more direct upward impact on land values and market rate home prices. It might generate a certain level of affordable housing production as long as the new housing market is relatively hot and as long as there is buy-in from the developer community.

But things are never that simple and important fundamental questions have not been answered definitively:

How do you meet the rational nexus test between building new market rate housing and an exaction for affordable housing? In other words – how does such an exaction honestly and directly benefit the developer, the development, or the people in the new development? (The case is perhaps a little easier to make for business development.)

In the absence of a clear nexus, what then is a reasonable affordable housing contribution that housing developers are willing to “swallow”. Where do we cross their line of tolerance? Where does it become a blatant taking?

There has been a recurring argument in recent years that other states “simply require developers to provide affordable units, period”. This is partly right, but mostly wrong. Recent research shows that communities in many states and under different State statutes have mandatory inclusion policies, but nearly all of them provide cost offsets as a matter of right: additional density, fee waivers, streamlined permitting, generous incentives to include rental units for very-low-income households, and numerous flexibilities that developers like (for instance “credit” units where a developer who provides more than the minimum required affordable units in one project, he may use this a credit to reduce his requirement in another project). On the bottom line, many of the inclusionary zoning provisions in other states look very much like incentive zoning only that they are not optional, or at least not optional above a certain size threshold.

Encouraged by planning consultants and affordable housing advocates who point at other states where communities “simply do it”, municipalities in Massachusetts began 3-4 years ago adopting inclusionary zoning provisions in different variations. Surprisingly, the Attorney General approved them even though the legal framework for zoning in Massachusetts has 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 several more communities have taken comfort from the AG’s approvals and adopted inclusionary zoning. All of the new bylaws and ordinances are too recent to see how effective they are in actually producing affordable housing, or to find new Massachusetts case law on them that might provide guidance in drafting a better provision for Acton under applicable Massachusetts zoning law.

In summary, it is clear that 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. MGL 40A (the Zoning Act) expressly lists incentive zoning as a legitimate zoning tool, but there is no express provision for inclusionary zoning in 40A. Thus inclusionary zoning steps out from under the “shelter” that 40A provides. There is no case law history to rely upon. It is not universally accepted that inclusionary zoning could pass a strict rational nexus test. With all this considered, the Planning Board decided to take a “wait-and-see” stance on inclusionary zoning for now, rather than to put Acton at the frontline of developing case law in Massachusetts.

Option 4 – Additional measures

The "To Live in Acton" report recommended a slew of auxiliary measures that the Town could implement to boost affordable housing in Acton, such as providing for affordable housing on undersized, unbuildable lots; eliminating the owner-occupancy requirements for multi-family units; or encouraging affordable units in accessory apartments or ECHO units. The Planning Board decided that it was wiser to limit the scope and complexity of a proposed drastic zoning change, and that these other methods could be presented for Town Meeting consideration at a later time.

cc: Planning Board

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