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Amherst Planning Board
Amherst Town Hall
4 Boltwood Avenue
Amherst, MA 01002

Re: Interpretation of Zoning Bylaw Section 15.10 (Inclusionary Zoning)

Dear Members of the Planning Board:

You have requested an opinion regarding the interpretation of Section 15.10 of the Amherst Zoning Bylaw, specifically the language stating, "All residential development requiring a Special Permit and resulting in additional new dwelling units shall provide affordable housing units at the following minimum rates . . . ." I understand that there exists a debate as to whether this section means that the inclusionary zoning requirements apply only when the use itself (the residential use or development method) requires a special permit or whether the inclusionary requirements should also apply to a by-right residential use or development method whenever an applicant seeks an ancillary special permit for relief for dimensional modifications or other secondary purposes.

I have reviewed the correspondence you forwarded. The writers urge that the bylaw language be given its "plain meaning". While plain meaning is in the eye of the beholder, I will acknowledge that the bylaw certainly may be read to apply to any project which requests a special permit of any kind. It is my opinion, however, that "plain meaning" cannot ignore the context in which words appear. For better or worse, zoning bylaws are complex documents. The above language refers to residential developments "requiring" a special permit. Reading "plain English", the significance of that word may be glossed over, but in the zoning context, "requiring" a special permit can have a different meaning. A special permit is "required", in certain instances, for larger scale residential developments, such as apartments, town houses and Planned Unit Residential Developments (PURDs). For other multi-unit projects, the project itself may be permitted by right, but the developer may, for example, seek ancillary special permits for dimensional relief. Such a project does not necessarily "require" a special permit. A project for that use could be built without a special permit, but the developer has opted to design it in a manner that will necessitate, or require if you will, a special permit. In the zoning context, it is my opinion that the bylaw in question can be interpreted to say that such a project does not "require" a special permit.

While Massachusetts courts do not generally look at "statutory history" for the intent behind zoning bylaw amendments, the April 2005 Planning Board Report to Town Meeting makes clear that the above language in section 15.10 was not intended to apply to by-right developments, that is, developments not requiring a special permit for the fundamental use. Whether or not a court would give significant weight to this Report to Town Meeting, it is my opinion that it is a significant document for purposes of guiding staff and boards when applying the bylaw. Presumably Town Meeting members, and Town residents generally, will want staff and board members to apply

bylaws in a manner consistent with the representations made to Town Meeting when the bylaw was being considered for adoption.

Ultimately, the courts would have the final say on how the above language is to be interpreted. In this regard, the courts have said, "although interpretation of the by-law is in the last analysis a judicial function, deference is owed to a local … board's home grown knowledge about the history and purpose of its town's zoning by-law." Duteau v. Zoning Bd. of Appeals of Webster, 47 Mass. App. Ct. 664, 669 (1999). As a result, a court is required to construe a zoning by-law "in accordance with ordinary principles of statutory construction, with some measure of deference given to the local board's interpretation" and application of its own by-law. APT Asset Mgt. v. Board of Appeals of Melrose, 50 Mass. App. Ct. 133, 138 (2000); Building Commr. of Franklin v. Dispatch Communications of New England, Inc., 48 Mass. App. Ct. 709, 713 (2000).

Statutory interpretation requires, in large part, consideration of the "usual and ordinary meaning" of the words and reading the words in the context of the bylaw as a whole to give the language its "common approved meaning." See Department of Environmental Quality Engineering v. Hingham, 15 Mass. App. Ct. 409, 411 (1983). The language of the subject provisions are to be construed "in association with other statutory language and the general statutory plan." Sperounes v. Farese, 449 Mass. 800, 804 (2007) (quoting Polaroid Corp. v. Commissioner of Revenue, 393 Mass. 490, 497 (1984)).

Takings Questions – Article 5, Special Town Meeting

Article 5 on the warrant for the November Special Town Meeting would add language explicitly requiring that a project receiving any kind of special permit would be subject to the Inclusionary Zoning bylaw. You have also asked if this new language, if adopted, would increase the Town's exposure to a takings challenge, since it would extend inclusionary requirements to by-right uses that involve ancillary special permits, without any nexus framework or cost offsets or other flexible provision options.

I can answer this question only in a very general way because any potential liability would depend on the facts. As you have framed the question, the concern is that a sizeable project could be required, under the new bylaw, to contribute, say, seven affordable units because the project received a special permit for a modest variation in a dimensional setback. The constitutional concern would be whether the Town's "exaction" of the affordable units was proportional to the discretionary relief granted. In the absence of a nexus study (i.e., a study demonstrating the link between development generally and affordable housing needs, and also focusing on specific factors), there is a danger that the affordable housing requirement will be out of scale with the relief granted.

When analyzing this takings issue, in this case, the question of whether a town's imposing an affordable housing requirement in exchange for an "ancillary" special permit, courts have employed

the "rough proportionality" test. Under this test, in reviewing whether permit conditions are constitutional, the court determines whether an essential nexus exists between the permit condition and a legitimate governmental interest. Dolan v. City of Tigard, 512 U.S. 374 (1994). Where an "essential nexus" exists, the court then considers whether the permit condition is "roughly proportional" to the need of the development. The danger is that this zoning amendment, without the support of a nexus study, could lead the Town into a position which would be difficult to defend. Such a situation could, in my opinion, expose the Town to a takings challenge.

Very truly yours,

Joel B. Bard

JBB/jmp
cc: Town Manager
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