



PLANNING BOARD

Report to Town Meeting

**Article 33. Zoning Petition – Bylaw Amendment Affordable Housing
(Petition – O’Connor et al)**

To see if the Town will vote to amend Articles 12 and 15 of the Amherst Zoning Bylaw by inserting the words in **boldface** and deleting the words in ~~strikethroughs~~ as follows:

~ SEE WARRANT ~

Recommendation

The Planning Board voted 5-0-0, with 2 members absent, to make the following recommendation with regard to Article 33:

The Planning Board recommends that Article 33 be divided into two parts, the first part dealing with Article 12, Definitions, of the Zoning Bylaw, and the second part dealing with Article 15, Inclusionary Zoning, of the Zoning Bylaw. The Planning Board recommends approval of the first part, Article 12, Definitions, and referral of the second part, Article 15, Inclusionary Zoning, to the Planning Board. The Planning Board further recommends that if Town Meeting does not vote to refer the second part on Article 15, Inclusionary Zoning, that Article 33 be defeated.

Background

This article would primarily affect Zoning Bylaw Article 15, which is Amherst's Inclusionary Zoning bylaw. Inclusionary zoning is a land use regulation that requires a portion of new residential development to be affordable for households of low or moderate income. It is used in various forms and to varying degrees of success in many communities across the country. Amherst's existing Inclusionary Zoning bylaw was adopted by the 2005 Annual Town Meeting, and since then only a handful of new affordable units have been created as a result of it. Over the last three years several attempts have been made by citizens and the Planning Board to amend Article 15, Inclusionary Zoning, of the Zoning Bylaw so that it would affect a wider range of uses and developments, though none have yet been approved by Town Meeting.

There has been particular controversy over the trigger for imposing an inclusionary requirement on a development project. The Planning Board has interpreted the bylaw to apply to projects that require a Special Permit for the use itself (i.e., to developments that are not "by right"), while others believe it should apply to any project that receives a Special Permit for any reason, including by-right developments that receive a Special Permit to modify a dimensional

regulation or some other secondary aspect of the project. The Planning Board does not endorse the latter approach because it may discourage development that the Zoning Bylaw and Master Plan otherwise seek to promote, and could even prompt a legal challenge.

Inclusionary zoning is expensive for a developer, since it both imposes additional costs and reduces potential profits. The Planning Board's most recent attempt to expand the scope of inclusionary zoning (in Spring 2015 after almost two years of work and consultation with state-level experts) relied on a system of "cost offsets" of the expense of required affordable units based on automatic increases in allowed density, but it was rejected by Town Meeting. A companion measure adopted that year that enables the Town to offer tax incentives for affordable units provides some cost offset, but it is probably not enough to justify the mandate by itself because the tax incentive is not automatic (it must be negotiated by the Town Manager and approved by the Select Board) and the tax incentive for each project phases out over ten years.

A petition article at the Fall 2014 Town Meeting would have required inclusionary zoning for projects receiving a Special Permit for any reason, without offering any cost offset. The current petition article has the same primary purpose, though it also would make a few other changes.

Purposes of the article

The first part of this article would amend the Zoning Bylaw's definition of Affordable Housing to cover only housing affordable to low income households as determined by the U.S. Department of Housing and Urban Development (HUD). It does so by deleting an existing reference to moderate income housing, meant to serve households having an income up to 120% of the area median income (AMI), leaving 80% AMI (or lower) as the remaining population to be served. This creates a clearer, simpler standard, and in fact the lower number likely covers a reasonable portion of what is often called "workforce" housing, as the current 80% income threshold for a family of four is \$65,800.

The amended definition would also require a housing unit to be "eligible and countable" for the state's Subsidized Housing Inventory (SHI) in order to be qualified as affordable. SHI status requires an affirmative fair housing marketing plan and a deed restriction for affordability, both of which are intended to ensure that the housing serves its intended purpose.

In addition to some minor language clarifications, the rest of the article proposes versions of several of the refinements to the applicability of the bylaw that were included in the Planning Board's 2015 article, and most importantly would expand coverage to any Special Permit, regardless of purpose. The language in question is at proposed Section 15.102: "All residential uses and developments. . .requiring a Special Permit **for any aspect of a proposed use or development, including dimensional modifications. . .**"

The existing language reads: "All residential developments requiring a Special Permit. . ." which in practical effect means Townhouse and Apartment developments, which require a Special Permit in order to be built at all in most of the zones in which they are allowed, and Mixed-use Buildings in the Village Center-Residence (R-VC) zone. The new language would have its greatest impact on Mixed-use Buildings, which are allowed by right with a Site Plan Review in

all of the mixed-use (business) zones, but which often require an ancillary Special Permit to modify one or more dimensions for reasons of design, difficult lot configurations, or functionality. A Special Permit that doesn't add any additional residential capacity over what is technically possible under unmodified dimensions is often used to make a building "work better" in the space it proposes to occupy. Sometimes a Special Permit does result in increased capacity, but the proposed amendment makes no distinction between these situations.

Potential consequences of the article

Changing the applicability of the Inclusionary Zoning bylaw to projects that are allowed by right but request a Special Permit for another reason seems unlikely to lead to the ostensible goal of increasing the supply of affordable housing. First, unless the prospective developer secures a favorable tax deal from the town, s/he may choose to attempt a project that doesn't rely on a Special Permit and thereby avoid the inclusionary requirement. If circumstances make that too difficult (such as the lot's size, shape, or proximity to another building, any of which could potentially be addressed by a Special Permit) or if the project cannot get financing without the Special Permit, it may not happen at all – in which case, not only would there be no affordable units, but the town would miss out on needed market rate units as well. That would be particularly unfortunate, since in most cases those units would come in a mixed-use center district where the town would prefer that most residential growth happen.

A missed opportunity for new units has follow-on consequences for affordable housing, too. New housing supply reduces pressure on existing housing at levels of affordability reaching beyond the low-income target of Inclusionary Zoning into the moderate income range. Additionally, CPA property tax surcharge revenue from new market rate units supports affordable housing projects.

In a worst-case scenario, the proposed bylaw might be challenged by a developer on the basis of "takings", a legal term for deprivation of property rights without reasonable compensation. Advice the Planning Board has received indicates that when the theoretical development (such as a mixed-use building that includes residential units) is allowed as of right by our Zoning Bylaw, any condition placed on it (such as a requirement for affordable units) must be "roughly proportional" to the burden on the community resulting from the development. It is when the use itself is not necessarily allowed – i.e., it requires a Special Permit just to take place at all – that an inclusionary mandate is more readily defensible.

Well-intentioned but flawed

Some of the proposed changes to Section 15 of the Zoning Bylaw are not harmful (some were originally proposed by the Planning Board itself) but are executed in a way that could be confusing and/or are not really necessary. Those that are worthy but flawed are not crucial and can wait for improved construction in the Planning Board's own forthcoming version of an inclusionary zoning amendment, which it expects to bring forward later this year.

- *"Mixed uses"*. The terms "mixed uses" in Section 15.00 and Section 15.102 and "mixed-use development" in Section 15.1 are inaccurate and confusing. These terms are not defined in the Zoning Bylaw and don't have a clear meaning. The Planning Board's previous

Inclusionary Zoning article proposed use of the phrase "all residential uses and developments" as a way of covering all the bases. A "mixed-use building" is a particular kind of residential use category contained in the bylaw and is therefore encompassed by the phrase "all residential uses and developments."

- *Contiguous parcels.* While the Planning Board had considered including a paragraph similar to Section 15.100 in its previous Inclusionary Zoning article, it eventually decided against doing so because it would limit the flexibility of land owners in mixed-use center districts to develop different projects on their land. For example, an initial development of one mixed-use building with nine units and making use of a Special Permit would cause the later development of a different building elsewhere on the property to effectively have to start at unit number ten and include affordable units even if it had fewer than ten total units itself and didn't require a Special Permit. Some version of this language would make more sense if inclusionary zoning were in effect for by-right development methods like subdivisions, but it is out of place here.
- *Chapter 40B.* Section 15.101, which would exempt Comprehensive Permits from Inclusionary Zoning, is a useful clarification, since these types of projects are by their very nature already providing affordable units at a level exceeding the requirements of Article 15, but it is not really needed. It served a more practical function in the Planning Board's 2015 Inclusionary Zoning article by preventing a feedback loop of affordable units leading to cost offset units leading to affordable units, etc., but it is merely clarification when there are no bonus units in play.
- *Counting units.* The listing in Section 15.102 of three methods for counting the number of units in a project (and thereby determining whether the ten-unit threshold for triggering the inclusionary mandate is reached) – (1) U.S. Census, (2) MGL Ch.40B, and (3) Mass DHCD regulations – is unnecessarily duplicative and potentially conflicting. It appears to be an attempt to exclude certain kinds of residential uses that provide housing without "increasing the denominator" for purposes of determining the percentage of affordable housing in the community. This is a laudable objective, and the Planning Board proposed similar exemptions in its previous Inclusionary Zoning article, but this is a clumsy way of doing it. It would be preferable to list one counting method or explicitly list uses that are exempted.
- *Management plan.* Section 15.103 is unobjectionable but unnecessary because the type of "management plan" referred to in this paragraph is really an "Affirmative Fair Housing and Marketing Plan", which is already a requirement of the Massachusetts Department of Housing and Community Development for qualifying units as affordable and allowing them to be counted on the town's Subsidized Housing Inventory.
- *In perpetuity.* The changes proposed in Section 15.12 are good ones, but another change that the Planning Board proposed in its previous Inclusionary Zoning article was omitted and should be included: The phrase "in perpetuity or to the extent allowable under law" should replace the word "permanently". There are several layers of requirements under state and federal law governing the time span for affordable projects. Permanent affordability is ideal, but may be unenforceable unless the town acquires ownership of the property.

Benefits

As noted, the portion of Article 33 proposing changes to the definition of affordable housing (Article 12, Definitions) would establish an easier-to-understand and easier-to-administer definition of Affordable Housing. There is still a need for affordable units at the moderate income level, but the need is more obvious at the low income level and harder to fill. Amending this definition focuses the Inclusionary Zoning bylaw on low income affordability. Other zoning amendments the Planning Board has proposed in recent years are helping to address the supply of moderate income housing. The Town has also made some advances in providing housing for those at a very low income level, and should continue making that effort.

In the portion of Article 33 proposing changes to Article 15, Inclusionary Zoning, of the Zoning Bylaw, the use of the phrase "net increase in units" in two places in Section 15.102 (existing Section 15.10), replacing "additional new units" and "total development unit count" would be a welcome clarification of currently unwieldy language.

Risks

Adopting the second part of this article (dealing with Article 15, Inclusionary Zoning, of the Zoning Bylaw) so that virtually all multi-unit residential development is potentially subject to an affordability mandate could stifle development in mixed-use centers, particularly downtown, where creativity and flexibility are often needed in order to make a project successful. While the new buildings we have seen recently may seem like an indicator of boundless profit potential, it was only when Town Meeting loosened some zoning regulations that they became possible after many years of slow growth or regression. Imposing new regulations without carefully balancing costs and benefits could put a stop to that.

There may appear to be a small incongruity in adopting the first part of this article and not the second in that language in existing Section 15.11 calls for "a minimum of forty-nine percent" of the affordable units provided under Inclusionary Zoning be for low income households (at or below 80% of AMI), while the amended definition includes only that level. These aren't technically in conflict, but together they do send a slightly confusing message. The Planning Board expects to correct that problem in the next Inclusionary Zoning amendment it brings.

Process and Public Hearing

When he first presented this article to the Zoning Subcommittee, the petitioner stated that he believes the Inclusionary Zoning bylaw should apply to any project in which a Special Permit is involved and that Town Meeting should decide, by a vote on this article, whether to support that position. He requested that the Planning Board not attempt to "fix" the article by either proposing its own version or making amendments from the floor, so as not to introduce confusion into Town Meeting's deliberation, and the Planning Board has complied.

However, the Board feels strongly that there are many flaws in the petition language and too much downside if it were to pass. Prompted by its duty to evaluate the article in advance of the public hearing, the Zoning Subcommittee has begun work on a new version that would expand Inclusionary Zoning applicability to all and any Special Permit projects, but in a way that is

proportional to the impact of the Special Permit being requested, so that it wouldn't have a dampening effect on development. The Zoning Subcommittee believes it will be able to accomplish this before the next Town Meeting.

A public hearing on Article 33 was held on April 13, 2016. The petitioner characterized the way the Planning Board has applied the Inclusionary Zoning Bylaw as a misinterpretation of the text, and stated that the petition article is an attempt to correct that. Some members of the public attending the hearing expressed support for an expansive interpretation of the Special Permit trigger, while others stated that downtown lots in particular are expensive and difficult to work with and need the flexibility of ancillary Special Permits to enable buildings to be built.

There was some debate about limiting the range of affordability to be required by Inclusionary Zoning, with some commenters pointing out that the town needs additional housing for households that don't qualify as low-income but have been unable to afford current market rates. However, there is not an official measurement of 120% AMI and no mechanism for administering it like there is for 80% AMI housing. The Planning Board had proposed a moderate-income level of 95% AMI in its Spring 2015 Inclusionary Zoning article, a number that is calculated and used for some programs by HUD, and could support including that in the definition of affordable housing, but agrees with the petitioner that the higher level may not be needed and that the 80% level should be the priority here.

The Planning Board voted 5-0-0 with two members absent to make a motion at Town Meeting to divide the article into two parts, the first having to do with Article 12, Definitions, and the second having to do with Article 15, Inclusionary Zoning; and that the Planning Board's recommendation be to support the first part and refer the second part to the Planning Board; and further that if the motion to divide is not approved or if the motion to refer is not approved, that the Planning Board recommendation be to defeat the article.