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Marc Charney, Chair
Wellesley Planning Board
525 Washington Street
Wellesley, MA 02482

Re: Proposed Development Agreement Amendment to the Residential Incentive ("RIO) Overlay Bylaw

Dear Marc,

The Wellesley Planning Board and its Residential Incentive Overlay Task Force are considering a number of amendments to the Town's Residential Incentive Overlay ("RIO") Zoning Bylaw. One such amendment is to require a developer to execute a contract, referred to as a development agreement, with the Wellesley Select Board. I understand the objectives of this requirement are to provide adequate mitigation of impacts on Town resources and to require a developer to commit to building the project that is proposed at the time Town Meeting votes to include their parcel in the RIO zoning overlay district. We have had a number of discussions on the subject of how best to achieve these objectives, and you have asked me to prepare this memorandum outlining options for the Board to consider along with any legal concerns of note.

I. Background on the RIO Bylaw

Zoning overlay bylaws exist to augment or restrict the provisions of the underlying base zoning district. In some bylaws, they add additional development rights, such as permitting taller structures or denser housing, within the boundaries of the identified overlay. In other bylaws, they impose additional restrictions on development, such as land that is protected due to the presence of flood plains or water resources. Typically, overlay bylaws that provide additional development rights are imposed over an area in which a municipality wishes to encourage or incentivize new or different development.

Wellesley's RIO Bylaw, Section 3.2, is an incentive overlay district that provides developers with an opportunity to construct multifamily housing at a density greater than what is allowed in the base zoning district. What is unique about the RIO Bylaw is that instead of being adopted overtop of a predefined area, developers have begun to request a zoning map amendment for inclusion of their individual parcel in the RIO zoning overlay district. In practice, when a developer requests a zoning map amendment, they present their intended redevelopment plans to the Planning Board, and later to Town Meeting, in the hopes of garnering support for, and ultimately adoption of, the requested zoning map amendment. If Town Meeting approves the zoning map change, the site becomes a part of the RIO zoning overlay district, and the developer is

able to apply to the Planning Board for a special permit to develop their property at a greater density.

Town Meeting has recently expressed concerns with adding more land to the RIO overlay district, in part because while a developer presents its intended project at the time the rezoning is sought, there is nothing which binds the developer to building exactly what was proposed at Town Meeting. Over the last year, the Planning Board, its Residential Incentive Overlay Task Force, and engaged citizens have discussed this concern and suggested that a developer be required to execute a development agreement which would obligate them to build a negotiated project, thus preventing unilateral changes.

II. Requiring a Development Agreement

As described, the goal of the development agreement is to require a developer to commit themselves to certain aspects of a project, such as housing unit density, so that Town Meeting is not induced to approve a zoning change which after the fact results in a project that is substantively different from what was proposed. The Board's current draft bylaw[1] requires a development agreement to be executed with the Select Board before an application for the Section 3.2 special permit can be filed with the Planning Board. This has prompted some discussion about when in the timeline of a proposed project should the development agreement be requested or required, and what the practical and legal implications are in different scenarios.

a. Before Town Meeting

In some recent projects the Select Board has executed a development agreement with a developer where the developer commits to constructing a specific project in exchange for the Select Board's support of a zoning amendment to allow the project. With this background, we have discussed whether the RIO Bylaw can require a development agreement as a precondition of seeking a zoning map amendment.

It is my opinion that the Attorney General would not approve such a bylaw as it conflicts with state law by altering the process for pursuing a zoning bylaw amendment. The procedures for amending a zoning bylaw are expressly defined in G.L. c. 40A, §5, and they serve to ensure that a developer has the legal right to request that the zoning applicable to their property be amended. Imposing the requirement to negotiate and execute a contract before Town Meeting could vote on a proposed amendment would place an additional burden on a developer that exceeds what is required by state law. Additionally, it could prevent them from seeking rezoning altogether if terms could not be reached on a development agreement. In my opinion, this approach is preempted by state law both because it has the potential to interfere with an individual's right to seek rezoning of their property and also because it adds a procedural prerequisite to a zoning amendment that is inconsistent with G.L. c. 40A, §5. See *Town of Amherst v. Att'y Gen.*, 398 Mass.

[1] https://wellesleyma.gov/DocumentCenter/View/49499/Redlined-RIO-Bylaw-Changes-12126

793, 795 (1986) ("The Attorney General may disapprove a by-law only if it violates State substantive or procedural law.")

b. After Town Meeting

As currently proposed, the bylaw would require a development agreement to be executed before a developer can seek required permits from the Town, but not necessarily before Town Meeting approves the map change. There is some precedent for requiring a development agreement,[2] however, the clearest example requires such agreements only where the developer is seeking an optional density bonus or some other voluntary incentive. In such cases, the benefit only becomes available if the developer agrees to provide certain public impact mitigation or amenities.

In considering this proposal, I have consulted with the Municipal Law Unit ("MLU") at the Attorney General's Office. Based on this consultation I have a number of concerns with the legality of a zoning bylaw which would limit a developer's ability to apply for a special permit. However, I was also advised that the MLU does not pre-approve or pre-disapprove any bylaws, and that the text currently proposed would need to be considered carefully by the MLU if adopted at Town Meeting.

While the development agreement bylaw currently proposed appears to be a case of first impression for the MLU, I was directed to a fairly analogous form of bylaws which the MLU has considered on several occasions. A variety of municipalities have adopted, or attempted to adopt, zoning bylaws that require a "pre-application meeting" with town staff or a "discretionary zoning determination" before an applicant may formally apply for a special permit. In each of these cases, the MLU has observed that it "is inconsistent with G.L. c. 40A, § 9 to require an applicant to 'conduct a pre-application conference' as a condition of submitting a Special Permit application."[3] Some of these bylaws are approved with a caution regarding their application, and others are simply disapproved.[4] In another example, the MLU stated that a "by-law cannot condition an applicant's right to file a special permit application upon first obtaining another discretionary permit."[5] The problem, as explained by the MLU is that G.L. c. 40A, establishes the definitive process for applying for a special permit, and once an application is submitted, the permitting board must act on that application within a certain period of time. If the Board fails or refuses to act, the permit may be constructively approved. In comparison, the proposed RIO Bylaw amendment would limit an applicant's ability to apply for the RIO special permit unless and until a development agreement is executed with the Select Board. This similarity suggests that the MLU would be hesitant to approve, and may disapprove the proposed text on the basis that it interferes with the ability of a developer to apply for a special permit.

An additional distinction to consider is that bylaws which do require development agreements, or other contracts, typically employ them as voluntary measures by which an applicant

[2] See Burlington, MA Zoning Bylaw, Section 14.6.0.C.
[3] See MLU-7650 (Saugus, August 31, 2015).
[4] See MLU-11012 (Southampton, March 4, 2024).
[5] *Id*.

can obtain additional zoning relief. In one recent example, the MLU approved a Burlington, MA zoning bylaw which allows an applicant to seek a density bonus, exceeding the unit density otherwise allowed by special permit. Such relief is only available where the applicant agrees to provide one or more specified "public benefit improvements" and this is memorialized in a development agreement. In contrast, the proposed RIO Bylaw amendment requires a development agreement as a precondition of applying for a special permit, but does not provide any incentive for negotiation beyond simply allowing access to the development rights which are stated in the text of the zoning bylaw.

Again, the MLU does not pre-judge zoning bylaws, and the MLU emphasized that if the current proposed bylaw amendment is adopted, it will be considered carefully as its particular language has not been subject to their review before. It is possible that the proposed text is approved with a caution regarding the rights of an applicant to seek a special permit. It is also possible that the bylaw is not approved. There is nothing inherently illegal about requiring a development agreement, but there may be conditions, mitigations, payments, etc., that, if not sufficiently related to a project's actual impacts would not survive judicial scrutiny.

You may consider amending the RIO Bylaw to allow an applicant to receive some benefit in exchange for negotiating the agreement. If project density is a significant concern, a future Town Meeting could consider a more expansive amendment to the RIO Bylaw which would allow for projects of a greater density only where a set of voluntary public benefits or improvements are provided by agreement. Such a proposal would avoid the potential conflict with the special permit application process that has been a red flag for the MLU in similar circumstances. Finally, a development agreement does not need to be the last line of defense. It is possible for the Planning Board to condition the project during a special permit hearing with a lower density if the evidence presented at the hearing does not support the maximum density allowed.

Notwithstanding these concerns, if the Planning Board wishes to proceed with the current amendment, some of the procedural ambiguity can be alleviated by clearly defining the expectations and terms of the required development agreement. I recommend being as precise as possible in the text of the bylaw.

III. A Policy-based Approach

As an alternative to, or potentially in conjunction with the contemplated zoning bylaw amendment, I have suggested considering that the Planning Board and the Select Board adopt policies which direct their approach to RIO Bylaw map changes and development agreements.

At Town Meeting, the Planning Board and the Select Board each make a recommendation stating whether they support favorable action on a proposed zoning map amendment. Each board could adopt a policy, directing a developer to make presentations to each board prior to considering a zoning map change, and potentially requiring that a development agreement be executed as a prerequisite to either board giving a favorable recommendation on a zoning map change. In other words, a developer who wants the support of the Select Board and the Planning

Board would need to be well prepared and have a development agreement in place before recommendations are made to Town Meeting. The benefit of a policy-based approach is that a recalcitrant developer retains the right to seek their zoning map change, and they are not prohibited from getting to a Town Meeting vote on that issue. However, in such a case Town Meeting is then also aware that the developer was unwilling to participate in the expected pre-Town Meeting due diligence. In many cases this would likely have a chilling effect on Town Meeting's action on the amendment. This approach, in lieu of a zoning bylaw amendment expressly requiring a development agreement, may on its own create a process where a project that discloses serious impacts can trigger discussion about the need for a development agreement before Town Meeting authorizes a map change.

Alternatively, this policy approach could be paired with the proposed RIO Bylaw amendment, such that in most cases a would-be developer will be subject to a development agreement prior to Town Meeting, but, if that does not materialize and the map change is approved anyway, the development agreement will still be required prior to permitting. A downside to this approach is that a developer's refusal to engage prior to Town Meeting could sour the relationship with the Town, but if the map change is approved, negotiations must continue anyway. On the other hand, if the effect of the policy is to ensure that the development agreement is in place before Town Meeting, the possibility of conflict after Town Meeting is likely reduced.

IV. Amend the RIO Bylaw to Allow Only What the Developer is Proposing

Another way to address the issue of making sure the developer constructs what they proposed is to create RIO sub districts with associated site specific bylaws that allow only what a developer is proposing. For instance, if a developer were proposing density at 16 units per acre with an even mix of one and two bedroom units, the bylaw could be amended to make that the maximum density and unit mix for the property.

V. Conclusions

In determining how to proceed, I believe the Board should weigh the comparative burdens and benefits of a more formal approach, requiring the development agreement in the text to the RIO Bylaw, to those of a more flexible policy-based approach. If appropriately developed, either approach may be able to produce the intended result.

Sincerely,

Thomas J. Harrington

cc: Interim Planning Director
Executive Director
Select Board