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MEMORANDUM

TO: APA – Rhode Island Chapter
FROM: Amy H. Goins, Esq.
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DATE: August 10, 2023
SUBJECT: Checklist for Amendments to Zoning Ordinance

As you know, a number of laws enacted this year require significant amendments to local ordinances and regulations governing review and approval of development applications. This memo serves as a checklist for the required amendments to local zoning ordinances. A separate memo regarding required amendments to local land development & subdivision regulations will be forthcoming. Please be advised that this memo is not intended as a substitute for the advice of your municipality's solicitor.

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Notice Requirements – Effective 6/24/2023

NB: In our previous memo regarding the newly-enacted legislation, we incorrectly indicated that this law would be effective on January 1, 2024. That was in error, as it specified 'effective upon passage.' This was enacted into law on June 24, 2023, and is currently in effect, whether or not amendments are made to local ordinances. (This goes for all of the laws discussed in this memo:

once effective, state law supersedes local ordinances to the contrary.) Amendments are required as follows:

- ✓ If set forth in the zoning ordinance or elsewhere in the code of ordinances, revise notice requirements for amendments to the comprehensive plan consistent with 45-22.2-8
- ✓ Revise notice requirements for variances consistent with 45-24-41(b):
 - Newspaper for legal notice shall be one of local circulation (rather than general) in the municipality.
 - This term is not defined in the law.
 - Notice shall be posted in the municipal clerk's office and one other municipal building.
 - Notice shall be made accessible on the home page of the municipality's website at least 14 days prior to the hearing.
 - The law is not clear on whether the 14-day timeframe also applies to the posting of the hard copy notice, but best practice would be to post hard copy notice and website notice simultaneously.
 - For mailed notice sent by first-class mail, the sender shall submit a notarized affidavit of mailing.
- ✓ Revise notice requirements for amendments to the zoning ordinance consistent with 45-24-53(a)
 - Same as above changes for notice required for variances.
 - Additionally, mail notice shall be made by first-class mail (rather than certified mail).

Comprehensive Permits/SHAB – Effective 1/1/2024

Because the Low- and Moderate-Income (LMI) Housing Act, which governs review and approval of comprehensive permit applications, was amended to a drastic degree, it requires a full-scale revision of the corresponding section of the zoning ordinance, to include the following:

- ✓ Amend definitions consistent with 45-53-3 as amended.
- ✓ Revise sections pertaining to procedure for review and approval, consistent with 45-53-4
 - Note that the zoning incentives specified in the law as "shall be allowed" establish a floor and not a ceiling. For example, the density bonus specified as mandatory based on the project's characteristics is the minimum density bonus that must be permitted. The law is silent on the degree of discretion that planning boards have to deny projects that propose a density exceeding this minimum.
 - Note also that the necessary amendments are contained within two public laws, one that functions as an overarching rewrite of the LMI Housing Act and one that is narrower in scope, and most importantly specifies that the Superior Court shall hear appeals from decisions on comprehensive permit applications.

Misc Amendments from Amended Zoning Enabling Act – Effective 1/1/2024

- ✓ Amend definition of dimensional variance as follows: “Permission to depart from the dimensional requirements of a [the] zoning ordinance under the applicable standards set forth in § 45-24-41.”
- ✓ Revise dimensional standards for substandard lots to be consistent with § 45-24-38(b): setback, frontage, and/or lot width requirements for structures on substandard lots shall be reduced and the maximum building coverage requirements shall be increased by the same proportion as the lot area of the substandard lot is to the minimum lot area requirement of the zoning district in which the lot is located.
 - Substandard lots shall not be required to seek any zoning relief based solely on the failure to meet minimum lot size requirements.
- ✓ If ordinance contains a merger clause, revise to be consistent with § 45-24-38(c): lot merger shall not be required when the substandard lot of record has an area equal to or greater than the area of fifty percent (50%) of the lots within 200' of the subject lot, as confirmed by the zoning enforcement officer.
 - Practical tip: the use of “confirmed” suggests that the applicant should produce this calculation for review by the ZEO.
- ✓ Revise standards for use & dimensional variances consistent with § 45-24-41(d):
 - Eliminate the ‘least relief necessary’ finding.
 - Eliminate the clause ‘does not result primarily from the desire of the applicant to realize greater financial gain’ from the finding re: no prior action.
 - For dimensional variances only, amend the last required finding as follows: “In granting a dimensional variance, that the hardship suffered by the owner of the subject property if the dimensional variance is not granted amounts to more than a mere inconvenience, meaning that relief sought is minimal to a reasonable enjoyment of the permitted use to which the property is proposed to be devoted.
- ✓ Review table of permitted uses and for all uses permitted by special use permit, ensure that the ordinance contains specific and objective criteria for the issuance of each type of use category of SUP.
 - Criteria cannot include a determination of consistency with the comprehensive plan.
 - If ordinance does not expressly provide for specific and objective criteria for the issuance of a category of special use permit, such category shall be deemed to be [a] permitted use.
- ✓ If ordinance does not currently allow for the granting of a dimensional variance in conjunction with a special use permit, add this provision.
- ✓ If ordinance does not currently provide for a procedure under which a proposed land use that is not specifically listed in the use table can be presented to the ZEO or Zoning Board, revise to include this.

- ZEO or Zoning Board shall evaluate and determine whether the proposed use is of a similar type, character, and intensity as a listed use requiring a SUP; upon such determination, the proposed use may be considered to be a use requiring a SUP.
- ✓ If ordinance does not currently allow for unified development review, revise to include this.
 - Governed by 45-24-46.4 of the Zoning Enabling Act, which was not amended as part of this legislation, and by 45-23-50.1 of the Development Review Act
- ✓ Revise ordinance to allow for modifications consistent with 45-24-46, as amended.
 - If ordinance does not currently allow for modifications, revise to allow them.
 - If ordinance currently allows for modifications, revisions are needed to reflect new rules:
 - Modifications from dimensional requirements of up to 15 percent must be permitted.
 - Modifications between 15 percent and 25 percent may be permitted.
 - Standards for granting and notice requirements have been amended:
 - No notice required for modifications of 5 percent or less.
 - Notice required via first class mail to abutters and newspaper ad for modifications of more than 5 percent.

Inclusionary Zoning – Effective 1/1/2024

If municipality does not have an existing inclusionary zoning ordinance:

No changes are needed. Inclusionary zoning remains optional rather than mandatory.

If municipality has an existing inclusionary zoning ordinance:

Amendments required as follows:

- ✓ Minimum percentage of affordable housing must be no less than 25% of the total units in the development.
- ✓ Minimum number of dwelling units that triggers the inclusionary requirement shall not be higher than ten (10) dwelling units [this means that a lower threshold such as four or five units is ok, but a higher threshold such as 12 units is not].
- ✓ The density bonus shall be at least two (2) market rate units for each affordable unit, and minimum required lot area shall be reduced by the necessary amount.
 - Setback, lot width, and frontage requirements still apply, and relief can be requested.
 - Greater density bonus may be provided for an increased percentage of affordable housing.
- ✓ List available zoning incentives and municipal government subsidies in the ordinance.
- ✓ Fee in lieu: applications using this option shall not be eligible for the density bonus, and further, shall not be eligible for administrative review, i.e., must be reviewed and approved by the planning board.
- ✓ Municipality shall allocate fees received within three (3) years of collection and the process for allocating these funds must be contained in the ordinance.

- Funds not allocated within three (3) years of collection shall be transferred to RI Housing.
- Municipality must prepare an annual report (first due 12/31/24) on fees collected, identifying the amount collected, the projects that received funding, the dollar amounts allocated to the projects, and the number of units created.

Adaptive Reuse – Effective 1/1/2024

- ✓ Insert definition of “adaptive reuse” as follows: “‘Adaptive reuse’ means the conversion of an existing structure from the use for which it was constructed to a new use by maintaining elements of the structure and adapting such elements to a new use.”
 - NB: The law amends the Zoning Enabling Act by referencing this definition from § 42-64.22-2.
- ✓ Add a section/chapter governing adaptive reuse, consistent with § 45-24-37(h)(1) of the ZEA, containing specific and objective provisions.
 - Adaptive reuse for the conversion of any commercial building, including offices, schools, religious facilities, medical buildings, and malls into residential units or mixed-use developments which include the development of at least 50 percent (50%) of the existing gross floor area into residential units – shall be a permitted use.
 - Must be exempt from off-street parking requirements of over one space per dwelling unit.
 - Density can be limited but not below the minimum density set forth in the law.
 - Existing setbacks shall remain and shall be considered legal nonconforming, but no additional encroachments shall be permitted into any nonconforming setback, unless otherwise allowed or zoning relief granted.
 - Height of existing structure may remain and shall be considered legal nonconforming (if not conforming), and any rooftop construction shall be included within the height exemption.

Laws for Which Amendments Not Required or Not Yet Required

Several additional laws that were enacted and discussed in our previous memo either do not require amendments at all or do not require amendments at this time.

- ✓ Transit-oriented development: Waiting on state-level regulations, after which amendments to the ordinance may be required.
- ✓ Land use calendar: This law governs how the Superior Court will handle appeals related to land use applications, and amendments to local ordinances are not required.
- ✓ Comprehensive plans: This law does not require changes to either zoning ordinances or local regulations, as it relates to the comprehensive planning process. The required changes to that process are as follows:
 - The Housing element of the plan must include specific goals, implementation actions, and time frames for development of low- and moderate-income housing.

- After adoption/amendment of the plan, the municipality shall bring its zoning map into compliance with the future land use map within eighteen (18) months. The future land use map in a valid comprehensive plan shall govern all local municipal land use decisions.
- Implementation element of the plan shall contain a concise strategic plan as set forth in § 45-22.2-6(12)(v).
- If a municipality fails to fully update and re-adopt its plan within twelve (12) years from the date of the previous plan's adoption, the municipality shall not use that plan as a basis for denial of a land use decision.