



Ursillo, Teitz & Ritch, Ltd.

Counsellors At Law

2 Williams Street
(at South Main Street)
Providence, Rhode Island 02903-2918

Michael A. Ursillo *
Andrew M. Teitz, AICP * †
Scott A. Ritch * †

Tel (401) 331-2222
Fax (401) 751-5257
amygoins@utrlaw.com

Troy L. Costa †
Amy H. Goins * †
Peter F. Skwirz * †
Gina A. DiCenso * ‡ (Of Counsel)
Admitted in RI*, MA†, NY‡

MEMORANDUM

TO: Chris Martin, Executive Director, East Providence Waterfront Commission

FROM: Amy H. Goins, Esq., Legal Counsel

DATE: February 19, 2021

SUBJECT: Proposed Zoning Ordinance Amendment re: Fees in Lieu of Affordable Housing

As you know, in the spring of 2020, I was retained by your predecessor, Pamela Sherrill, to review the East Providence Commission Waterfront Commission’s proposed regulation on the calculation, payment, and use of fees in lieu of affordable housing (the “Proposed Regulation”). Based upon my advice, Ms. Sherrill redrafted the Proposed Regulation so that it would comply with § 45-24-46.1 of the Rhode Island General Laws (the “Inclusionary Zoning Statute”). I also advised Ms. Sherrill that Sec. 19-485 of the East Providence Zoning Ordinance (the “Inclusionary Zoning Ordinance”) should be revised for consistency with the Inclusionary Zoning Statute. As the proposed amendment to the Inclusionary Zoning Ordinance is now before the Commission for review and approval, this memorandum summarizes my advice to the Commission on this topic.

Overview of Inclusionary Zoning Statute

The Inclusionary Zoning Statute, a copy of which is attached hereto as **Exhibit A**, was originally enacted in 2004 and was last amended in 2014. That amendment, known as P.L. 2014, ch. 372, § 1, and P.L. 2014, ch. 395, § 1, explicitly granted municipalities the authority to allow fees in lieu of development. The 2014 amendment to the Inclusionary Zoning Statute added subsections (b) through (f) of the statute.

For purposes of this memorandum, I will omit my analysis on why the Inclusionary Zoning Statute applies to the Commission (set forth fully in my previous memorandum to Ms. Sherrill) and simply state my conclusion: because the Commission is acting pursuant to the Inclusionary Zoning Ordinance in accepting in-lieu fees, and because it is acting as an agency of the City for that purpose, the Inclusionary Zoning Statute applies to the Commission.

The Inclusionary Zoning Ordinance

Sec. 19-485 of the East Providence Zoning Ordinance (the “Inclusionary Zoning Ordinance”), a copy of which is attached hereto as **Exhibit B**, is the last section of Article IX of the Zoning Ordinance, entitled ‘Waterfront Special Development Districts.’ Article IX was originally enacted in March 2004 and was last amended in May 2019. Subsection (4) of the Inclusionary Zoning Ordinance states in pertinent part as follows:

“The commission shall promulgate rules and regulations regarding calculation of the housing in-lieu fee in accordance with G.L. § 45-24-46.1, said fee to be commensurate with the value that would have been provided through the actual construction of the affordable units. The housing in-lieu fee shall be reviewed by the commission every three years. The commission shall use money received under this subsection only for the construction and promotion of affordable housing.”

The Inclusionary Zoning Ordinance differs from the Inclusionary Zoning Statute in that the Statute provides that the option to submit fees in lieu of development “shall be the choice of the developer or builder.” Sec. 45-24-26.1(c). By contrast, subsection (3) of the Inclusionary Zoning Ordinance provides that the Commission, not the developer, shall determine whether to allow fees in lieu of development. Additionally, although the Statute provides that in-lieu fees are restricted to use for the creation and development of housing units restricted to individuals and families earning no more than 80% of area median income (AMI), the Proposed Regulation would have permitted in-lieu fees to be used for development of housing units restricted to occupants earning as much as 120% of AMI. Finally, the Inclusionary Zoning Statute provides that in-lieu fees shall be determined based on data/calculations by Rhode Island Housing, not established by the municipality (or in this case, the Commission) itself.

Accordingly, in the spring of 2020, I advised Ms. Sherrill that both the Inclusionary Zoning Ordinance and the Proposed Regulation should comply with the Inclusionary Zoning Statute in all respects. Specifically, I advised that both the Ordinance and the Proposed Regulation should be revised to (1) provide that in-lieu fees must be spent on affordable housing serving families earning no more than 80% of AMI; (2) provide that developers, not the Commission, shall determine whether to pay fees in lieu of development; and (3) provide that in-lieu fees shall be determined by Rhode Island Housing. The proposed amendment that is now before the Commission for review and approval is consistent with this advice.

Role of the Commission and Process for Review and Approval

At this point, the proposed amendment to the Ordinance is before the Commission for review and approval. Such approval should be considered advisory, because under state law, the City Council must review and approve all amendments to the Zoning Ordinance, including those provisions relating to the Commission. Further, under state law, the Planning Board must provide an advisory recommendation to the City Council. See § 45-24-50(a) (granting city or town council power to adopt, amend, or repeal zoning ordinance); § 45-24-51 (setting forth procedure for adoption or amendment of zoning ordinance). It should be noted that the Commission has the

sole power to adopt its own plan of development, which is akin to a municipal comprehensive plan, and is empowered to promulgate regulations, but where the Zoning Ordinance is concerned, the City Council retains sole authority to review and approve amendments.

Therefore, the Commission should review and approve the proposed amendment to the Inclusionary Zoning Ordinance, keeping in mind that further review and approval by the Planning Board and City Council (including a public hearing before the City Council) is required. Assuming the City Council adopts the proposed amendment, the Commission can then move forward with promulgating the Proposed Regulation.

I will be happy to answer any questions you and the Commission members have regarding this topic at the meeting on February 25 or in the interim.

C:\Users\Amy\Dropbox (UTR Law)\EPWC\Memo to EPWC re Fees in Lieu\Memo to EPWC 2-19-2021.docx