KAREN R. ELLSWORTH
ATTORNEY AT LAW
180 Matunuck School House Road
Wakefield, Rhode Island 02879
(401) 783-6176 • kellsworth6@verizon.net

TOWN OF RICHMOND
MEMORANDUM

TO: Members of the Planning Board
FROM: Karen Ellsworth, Town Solicitor
DATE: 18 September 2023
RE: Draft amendments to zoning ordinance and subdivision regulations for consistency with 2022 and 2023 amendments to the general laws

This package of documents includes draft versions of all of the zoning ordinance and subdivision regulation provisions that must be amended to comply with the land use legislation enacted by the General Assembly in 2023.

The package also includes the legislation, memos on specific topics, a table showing which bills apply to which amendments, and a comparison of the newly-defined development plan review and minor land development project approval.

The drafts include the changes to the public hearing notice provisions that took effect upon passage in June. I had prepared stand-alone drafts for those, but they were not sent to you before the other drafts were finished, so I combined them.

Last year, Shaun and I began working on amendments to the subdivision regulations, including increases in application fees, but we stopped that work when it became apparent that the 2023 legislation would make additional amendments necessary. The draft subdivision regulation amendments include all of the changes drafted earlier.

I have also included zoning ordinance amendments to implement the 2022 legislation on accessory dwelling units.

One of the bills made very substantial changes to the procedure we now use for development plan review. As a result, it was necessary to review the entire zoning ordinance to find references to development plan review. The amendments to Chapters 18.04, 18.20, 18.26, 18.29, 18.31, 18.34, and 18.47 are necessary only because they refer to development plan review. Two other chapters also refer to development plan review— Ch. 18.21 (APOD) and Ch. 18.55 (Recreational Campgrounds). I have made a provisional amendment to Ch. 18.55, but I think both should be amended when you decide what kind of approval procedure should be used in place of the current development plan review.

Some minor changes will also be necessary to application forms and to the checklists in the subdivision regulations. Those can be done after you have had a chance to review the necessary text amendments.

As you can imagine, these drafts were a substantial undertaking, not only because the

legislation was so poorly drafted, but also because many of the changes in different zoning ordinance chapters and subdivision regulation sections are interrelated. I'm sure there are things that I either got wrong or overlooked. I am counting on all of you to examine the drafts closely and let me know if you find anything that looks like an error or omission.

This is a list of the individual documents in the package:

Land Development and Subdivision Regulations
Art. 1
Art. 2
Art. 3
Art. 4
Art. 5
Art. 6
Art. 7
Art. 8
Art. 9
Art. 10
Art. 11
Art. 12
Art. 13
Art. 14

Zoning Ordinance
Ch. 18.04
Ch. 18.08
Ch. 18.18
Ch. 18.20
Ch. 18.23 (new)
Ch. 18.26
Ch. 18.29
Ch. 18.31
Ch. 18.34
Ch. 18.36
Ch. 18.38
Ch. 18.39
Ch. 18.47
Ch. 18.48
Ch. 18.50 (new)
Ch. 18.52
Ch. 18.54
Ch. 18.58
Ch. 18.59
Ch. 18.60

Memos
Memo - Adaptive reuse

Memo - ADU
Memo - Comp permits
Memo - DPR
Memo - Inclusionary zoning
Memo - Substandard lots
Memo - Variances and special use permits

Tables
DPR v. MLDP
Legislation and corresponding drafts

Bills
H 6058A
H 6059A
H 6061Aaa
H 6081A
H 6083A
H 6086A
H 6090A

Development plan review vs. minor land development project

DEFINITIONS

Development plan review

Design or site plan review of a development of a "permitted" use.

"A municipality may utilize development plan review under limited circumstances to encourage development to comply with design and/or performance standards . . . under specific and objective guidelines, for developments including, but not limited to:"

(I) A change in use at the property where no extensive construction of improvements is sought;

(ii) An adaptive reuse project located in a commercial zone where no extensive exterior construction of improvements is sought;

(iii) An adaptive reuse project located in a residential zone which results in less than nine (9) residential units;

(iv) Development in a designated urban or growth center;

(v) Institutional development design review for educational or hospital facilities; or

(vi) Development in a historic district.

May be waived if:
• use will not affect existing drainage, circulation, relationship of buildings to each other, landscaping, buffering, lighting; and
• existing facilities do not require upgraded or additional site improvements.

Minor land development project

Land-development project – A project in which one or more lots, tracts, or parcels of land or a portion thereof are developed or redeveloped as a coordinated site for one or more uses, units, or structures.

Minor land development project – A land development project involving any one the following:

(A) 7,500 gross sq. ft. of floor area of new commercial, manufacturing or industrial development; or less, or

(B) An expansion of up to 50% of existing floor area or up to 10,000 sq. ft. for commercial, manufacturing or industrial structures; or

(C) Mixed-use development consisting of up to 6 dwelling units and 2,500 gross sq. ft. of commercial space or less; or

(D) Multi-family residential or residential condominium development of 9 units or less; or

(E) Change in use at the property where no extensive construction of improvements are sought;

(F) An adaptive reuse project of up to.25,000 sq. ft. of gross floor area located in a commercial zone where no extensive exterior construction of improvements is sought;

(G) An adaptive reuse project located in a residential zone which results in less than 9 residential units;

"A community can increase, but not decrease the thresholds for minor land development set forth above if specifically set forth in the local ordinance and/or regulations."

REVIEW and APPROVAL PROCEDURE

Development plan review	Minor land development project
Applicable to any defined type of development, including those that require street creation.	Applicable to any defined type of development, including those that require street creation.
Approved by: Planning board, technical review committee, or administrative officer.	*Approved by:* Without request for street creation or zoning relief – administrative With street creation or zoning relief – planning board
Stages of review Administrative approval – one "Formal" (planning board) approval – Preliminary and Final; Final approval for "formal" is administrative	*Stages of review –* Preliminary and Final Final approval is administrative
Applications that require zoning relief are reviewed under unified development review; public hearing required.	Applications that require zoning relief are reviewed under unified development review; public hearing required.
Time period to certify complete application: No request for street creation or zoning relief – 15 days With street creation or zoning relief – 25 days	*Time period to certify complete application:* No request for street creation or zoning relief – 15 days With street creation or zoning relief – 25 days
Time period to approve or deny Administrative – 25 days from certification Formal – preliminary plan - 65 days from certification	*Time period to approve or deny Preliminary Plan* No request for street creation or zoning relief – 65 days With street creation or zoning relief – 95 days
Time period to approve or deny Final Plan – 45 days from certification of complete final plan submission	Time period to approve or deny Final Plan – 25 days from certification of complete final plan submission
"The administrative officer shall notify the applicant in writing within 14 days of submission of the final plan application if the administrative officer determines that there has been a major change to the approved plans."	"The administrative officer . . . shall approve, deny, approve with conditions, or refer the application to the planning board based upon a finding that there is a major change within 25 days of the certificate of completeness."
Expiration of Final Plan approval – 2 years; extensions upon application	Expiration of approval – 1 year; extensions upon application
Appeal to Superior Court	Appeal to Superior Court

ke 9.11.23

Legislation and corresponding ordinance and regulation sections to be amended

	H 6058A § 45-24-46.1	**H 6059A** § 45-24-31 § 45-24-38	**H 6061Aaa** Title 45, ch. 23 § 45-24-31 § 45-25-49	**H 6081A** § 45-53-3 § 45-53-4	**H 6083A** § 45-53-4 § 45-53-5	**H 6086A** § 45-23-42 § 45-24-41 § 45-23-53 § 45-24-53	**H 6090A** § 45-24-31 § 45-24-37
ZO Ch. 18.08	✔			✔			
ZO Ch. 18.18	✔						
ZO Ch. 18.23							✔
ZO § 18.36.140			✔				
ZO § 18.36.150			✔				
ZO Ch. 18.38			✔				
ZO Ch. 18.39		✔		✔	✔		
ZO Ch. 18.48		✔					
ZO Ch. 18.52		✔				✔	
ZO Ch. 18.54			✔				
ZO Ch. 18.58						✔	
LDSR Art. 1			✔				
LDSR Art. 2			✔				✔
LDSR Art. 3			✔				
LDSR Art. 4			✔				
LDSR Art. 5			✔			✔	
LDSR Art. 10						✔	
LDSR Art. 11			✔				
LDSR Art. 12			✔				
LDSR Art. 13			✔				

LAND USE AMENDMENTS MEMORANDUM

RE: Adaptive reuse

Bill No. 2023 H 6090A and S 1035A
Statutes amended or added: § 45-24-31 and § 45-24-37
Ordinance or regulation: Ch. 18.23 (new)

TO: Members of the Planning Board
FROM: Karen Ellsworth, Town Solicitor
DATE: 2 Sept. 2023

State law defines "adaptive reuse" as "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."

The amendment to the "permitted uses" section of the zoning enabling legislation says that the adaptive reuse of any commercial building to residential or to mixed residential and commercial use is permitted in all zoning districts if at least half of the gross floor area will be used for residential dwelling units. Cities and towns can enact "specific and objective provisions" in their zoning ordinances to regulate adaptive reuse projects, as long as no more than one off-street parking space is required for each residential unit.

Dimensional regulations

The statute also says that "existing building setbacks shall remain and shall be considered legal nonconforming, but no additional encroachments shall be permitted into any nonconforming setback, unless otherwise allowed by zoning ordinance or relief is granted by the applicable authority." What if the developer proposes a change to the current height or building footprint? The problem with that statutory language is that a zoning ordinance in a rural community is likely not to have any minimum front yard, side yard, and rear yard dimensions for a multi-family residential or mixed use building in the zoning district where the existing building is located. A developer can't get a dimensional variance from a regulation that doesn't exist.

You could establish dimensional regulations for the conversion of existing non-residential buildings, but I think it would be easier to treat the converted building as if it were a legal nonconforming use and allow height and yard dimensions to be established by special use permit, as they would be for any other nonconforming use.

Residential density

The residential density provisions of this statute pose much more of a problem.

The statute says that residential density of at least 15 units per acre must be permitted for projects where:

- the building must maintain the existing footprint, except for additions to accommodate building code and fire code requirements;
- at least 20% of the apartments are low or moderate income, and
- the building has access to public water or adequate well water and DEM will approve the septic systems for the project.

For all other adaptive reuse projects, if the building has access to public water or adequate well water and DEM will approve the septic systems, the permitted residential density is "the

maximum allowed that otherwise meets all standards of minimum housing" and "the density proposed shall be determined to meet all public health and safety standards."

I have no idea what that means. Does it allow density higher than 15 units per acre? If the objective of these amendments is to create more affordable housing, why would the permitted density be higher for a building without low or moderate income units? Where can these public health and safety standards be found? There are no maximum residential density provisions in the building code or the property maintenance code. Those regulations deal with construction and maintenance methods, not with residential density. The housing maintenance and occupancy code establishes a minimum amount of floor space per occupant (150 square feet for the first occupant 130 square feet for each additional occupant), but how could that be translated into maximum residential housing density for zoning purposes?

Because it is impossible to determine from this legislation what the residential density requirements are, my suggestion is that you permit any residential density the developer proposes. It is reasonable to expect that a developer will not propose dwelling units that will be difficult to sell or rent. The only public health and safety limitation that I can think of on the residential density, other than the availability of water and septic systems, would be traffic. You should have the authority to restrict the density if you find, based on a peer-reviewed traffic study, that the streets near the development are not adequate to handle the traffic that will be generated.

Approval procedure

The approval procedure presents another problem. Because of the way the legislation defines development plan review and minor land development, it is impossible to figure out what kind of review and approval is required for some adaptive reuse projects.

Projects that must undergo development plan review "include, but are not limited to," an adaptive reuse project in a residential zone that creates fewer than nine dwelling units, and an adaptive reuse project in a commercial zone that proposes no "extensive" exterior improvements

An adaptive reuse project in a residential zone that creates fewer than nine dwelling units, an adaptive reuse project that proposes no "extensive" exterior improvements, and an adaptive reuse project of up to 25,000 square feet in a commercial zone that proposes no "extensive" exterior improvements, are defined as minor land development projects.

It's very difficult to make sense of these distinctions. Why would an adaptive reuse project in a commercial zone need development plan review while an identical adaptive reuse project in a residential zone need minor land development approval? How can you tell whether an adaptive reuse project that creates fewer than nine apartments should be approved through development plan review or through minor land development project approval?

In my draft ordinance I have recommended some classifications that seem to make sense, but please feel free to suggest others.

LAND USE AMENDMENTS MEMORANDUM

RE: Accessory dwelling units

Bill No. 2022 H 7942 Sub B
Statutes amended or added: § 45-24-31, § 45-24-37, § 45-24-73, § 45-24-74, § 45-24-75
Ordinance or regulation: Ch. 18.08, Sec. 18.36.040

TO: Members of the Planning Board
FROM: Karen Ellsworth, Town Solicitor
DATE: 2 Sept. 2023

The state law on accessory dwelling units was amended in 2022, but you did not recommend amendments to the Town Council to bring the zoning ordinance into compliance with the new law because the legislation was so difficult to make sense of. A decision was made to put off any recommendation until this year in the hope that the legislature would enact revised amendments in 2023. Unfortunately, that did not happen. Because the zoning enforcement officer has been receiving inquiries about accessory dwelling units, I think this issue should be addressed now.

The 2022 amendments simplified the definitions of accessory dwelling unit and accessory family dwelling unit, but added four new sections to the zoning enabling legislation that impose a number of new restrictions and requirements on accessory dwelling units. The law says cities and towns cannot impose "excessive restrictions" on accessory dwelling units, but it is difficult to tell exactly what qualifies as an "excessive" restriction.

Instead of trying to draft ordinance amendments that are consistent with the enabling legislation, I drafted ordinance amendments that appear to me to be reasonable. Until the law is further clarified, I think that's the best we can do. Sec. 18.36.040 has been amended to make accessory dwelling units a permitted use and remove some of the restrictions on them while keeping, amending, or adding others. Sec. 18.36.045, accessory family dwelling units, is deleted.

The 2022 amendments say:

> "Notwithstanding any other provision of this chapter, an accessory family dwelling unit in an owner-occupied residence that complies with §§ 45-24-31 and 45-24-73 shall be permitted as a reasonable accommodation for family members with disabilities or who are sixty two (62) years of age or older, or to accommodate other family members."

But because the ordinance would now permit accessory dwelling units for family members or for non-family members under the "non-excessive" terms of § 45-24-73, I don't think there is any need to distinguish between different types of accessory dwelling units.

LAND USE AMENDMENTS MEMORANDUM

RE: Comprehensive permits

Bill No. 2023 H 6081A and S 1037A, 2023 H 6083A and S 1050A
Statutes amended or added: Title 45, Chapter 53 (Low and Moderate Income Housing Act)
Ordinance or regulation: Ch. 18.39

TO: Members of the Planning Board
FROM: Karen Ellsworth, Town Solicitor
DATE: 2 Sept. 2023

The Low and Moderate Income Housing Act, enacted in 1991 and extensively amended, most recently in 2022, established the ten percent low or moderate income housing goal that towns must try to meet, created the "comprehensive permit" development as an incentive to production of low or moderate income housing, and created the State Housing Appeals Board to hear appeals when comprehensive permit applications are not approved.

A "comprehensive permit" allows a for-profit or nonprofit developer to build a residential or mixed use development in which at least 25% of the housing units are reserved for low or moderate income households. The statute gives a planning board the authority to modify the regulations that would otherwise apply to the development, including residential density, lot size, and building or utility fees, to make production of the affordable units more financially feasible.

This is a summary of the 2023 amendments to the Low and Moderate Income Housing Act:

The act now defines the modifications of the applicable regulations that a developer can request as "adjustments." It also mandates the density adjustments a city or town must provide:

Mandatory minimum density increases

	25% of units will be affordable	50% of units will be affordable	100% of units will be affordable
Public sewer and water are available	5 units per acre	9 units per acre	12 units per acre
Public sewer. No public water, but developer can show that water is available.	3 units per acre	5 units per acre	8 units per acre
Public water. No public sewer, but developer can get OWTS permits.	3 units per acre	5 units per acre	8 units per acre
No public sewer or water, but developer can get OWTS permits and can show that water is available.	3 units per acre	5 units per acre	8 units per acre

In addition, cities and towns cannot require more than one off-street parking space per unit for one-bedroom or two-bedroom units, cannot restrict the number of bedrooms to one or two, and cannot require the floor area of any unit to exceed what is required by the building code and the housing maintenance and occupancy code.

Comprehensive permit applications will no longer undergo the same review and approval process as other land development projects. The process has been shortened. Master Plan approval has been eliminated, and Final Plan approval is administrative unless the Planning Board has granted adjustments allowing some items required for Preliminary Plan review to be submitted at Final

Plan review. For a pre-application conference submission, a city or town can require only a short written description of the project, including the number of units, type of housing, density analysis, and a preliminary list of adjustments needed; a location map, and a conceptual site plan. The pre-application conference must take place within thirty days of the day the application is filed unless the applicant agrees to an extension.

Changes have been made in the required findings for approval and denial. For approval, the planning board is no longer required to find that "There will be no significant negative environmental impacts from the proposed development as shown on the final plan, with all required conditions for approval."

Currently, the planning board may deny a comprehensive permit application if the town "has an approved affordable housing plan and is meeting housing needs, and the proposal is inconsistent with the affordable housing plan; provided that, the local review board also finds that the municipality has made significant progress in implementing that housing plan." That section of the statute remains, but the definition of "meeting local housing needs" has changed. A town is "meeting local housing needs" if it has an approved affordable housing plan and has not unreasonably denied applications that are consistent with the plan, and if at least twenty percent of all the housing units it has approved "in a calendar year" are for affordable units.

The drafters of the legislation apparently assume that all comprehensive permit developments are major land development projects. The legislation establishes only one procedure for approval, so the changes to the definitions of minor land development project and development plan review apparently do not apply to comprehensive permit applications. This is unfortunate. Richmond has approved at least two comprehensive permit applications as minor land development projects that did not require creation or extension of a street. Under the new law, we will no longer be able to approve small comprehensive permit developments using a simpler and quicker approval process than what would be necessary for a large development.

LAND USE AMENDMENTS MEMORANDUM

RE: Development plan review

Bill No. 2023 H 6061Aaa and S 1034A
Statutes amended or added: § 45-24-31, § 45-24-49, § 45-23-32, § 45-23-50
Ordinance or regulation: Ch. 18.08, Ch. 18.50 (new), Ch. 18.54

TO: Members of the Planning Board
FROM: Karen Ellsworth, Town Solicitor
DATE: 2 Sept. 2023

Under current state law, development plan review (DPR) is approval of a site plan for a permitted use. It's a relatively simple procedure. The state law does not require certification of a complete application, multiple stages of review, a deadline for certification or approval, a public hearing, or an expiration date.

Despite that statutory language, many communities now require development plan review for virtually every type of application. Many communities require DPR for applications that are going to the zoning board or another body, even though the current law clearly identifies that type of review as advisory to the permitting authority.[1] Many communities require DPR for land development project approval, even though land development approval already includes approval of a site plan. Many communities require the same kind of multi-stage approval process for DPR that they require for major land development projects.

The legislation enacted in 2023 apparently is an attempt to eliminate those unauthorized and redundant DPR approvals. However, the bill eliminates the simple DPR procedure we use and instead creates a development plan review process that is is virtually indistinguishable from the newly-defined minor land development project approval. Not only are the two procedures almost identical, but the differences between development plan review and minor land development project approval make no logical sense. (See "DPR vs. MLDP")

The legislation requires unified development review for development plan review applicants who also need a variance or special use permit. By giving a planning board the authority to approve a variance or a special use permit as part of a DPR application, the bill allows DPR to be used for projects that do not involve permitted uses. The legislature amended the definition of development plan review in the zoning enabling legislation, but did not delete the part of the definition that limits it to permitted uses. Instead, the legislature simply added new, inconsistent provisions for development plan review to the subdivision enabling legislation.

The 2023 amendments describe development plan review as one of three types of "projects" approved by the planning board, technical review committee, or administrative officer.

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[1] In a 2013 Superior Court case called *Whalerock Renewable Energy v. Charlestown* (WL 1562604), the judge agreed with the applicant's argument that development plan review is only advisory for a special permit use. Superior Court decisions are only binding on the parties in the case, so this decision has not resulted in any change to the procedure used by any city or town. In fact, the Charlestown zoning ordinance was not amended as a result of the decision, and still says that "all nonresidential activities within the Town shall require Development Plan Review or Major Land Development Project Review approval before a building permit for such is issued."

According to the amended subdivision enabling legislation, development plan review is a procedure used "in limited situations" to "encourage" a development to comply with ordinance or regulation requirements. The amendments makes DPR by the planning board a two-stage review process, and imposes deadlines for application certification and for approval. They also establish an expiration date for DPR approval, and make DPR decisions appealable to the Superior Court.

Under the amended subdivision enabling legislation, development plan review is for developments "including but not limited to" the following:

(i) A change in use at the property where no extensive construction of improvements is sought;

(ii) An adaptive reuse project located in a commercial zone where no extensive exterior construction of improvements is sought;

(iii) An adaptive reuse project located in a residential zone which results in less than nine (9) residential units;

(iv) Development in a designated urban or growth center;

(v) Institutional development design review for educational or hospital facilities; or

(vi) Development in a historic district.

These new procedures might be appropriate for urban development, but I don't think they are appropriate for rural towns with many small-scale non-residential buildings. Therefore, I do not think there will be many applications that fall within the "development plan review" definition. I think the number of adaptive reuse projects in Richmond probably will be small. Richmond does not have a designated urban or growth center (a term created in the new legislation establishing the transit-oriented development pilot program) or a historic district. The only time I recall in the past fifteen years that approval of an educational facility has been sought was when Chariho built new buildings on its Switch Road campus.

I have given a great deal of thought to how the town should approach the amendments we have to make. My suggestion is that instead of eliminating development plan review as it exists now, it should be retained and given a new name. I have drafted a new section of the subdivision regulations that is very similar to Ch, 18.54, the current DPR chapter in the zoning ordinance. It is called "Site Design Review." I have drafted amendments to Article 2 of the subdivision regulations to add a definition of site design review, and I have amended the definition of development plan to include only the three types of development listed in the statute (above) that are applicable to Richmond and that are not already included in the statutory definition of minor land development project (two almost identical types of development are described both as minor land development projects and as development plan review projects in H 6061Aaa).

It will still be necessary to amend the zoning ordinance and subdivision regulations to add the newly-designed "development plan review" to be consistent with the 2023 amendments. But because there is so much overlap between the new "development plan review" and the new "minor land development project," it is likely that the new DPR will be used only for the specific types of development listed in the statute.

LAND USE AMENDMENTS MEMORANDUM

RE: Inclusionary zoning

Bill No. 2023 H 6058A and S 1051A
Statutes amended or added § 45-24-46.1
Ordinance or regulation: Ch. 18.18

TO: Members of the Planning Board
FROM: Karen Ellsworth, Town Solicitor
DATE: 24 Aug. 2023

Under the current inclusionary zoning ordinance, a development that creates six or more new housing units or buildable lots (i.e., a major land development project) is required to provide low or moderate units, either on-site or off-site, or the developer must pay a fee in lieu of construction. To determine the number of affordable units required, the number of market-rate units allowed is multiplied by 15% and rounded up. The developer is allowed to increase the density of the development to provide the extra lots.

For instance, if the development will have twelve market-rate houses, the developer would have to provide two affordable units or pay fees in lieu of construction for two units. The current fee in lieu of construction for Richmond (set by Rhode Island Housing) is $87,000. If the developer chooses to build the low-mod units, the developer can create fourteen lots instead of twelve.

Richmond's inclusionary zoning ordinance, like most others in southern Rhode Island, was drafted as part of an affordable housing consulting project funded by the Community Development Consortium. The ordinances were intended to enable towns to maintain their percentage of affordable housing when new large residential developments are built. To offset the cost of producing the low or moderate income homes, developers are allowed to create extra lots in a subdivision. The number of extra lots is determined by multiplying the number of permitted lots by the percentage (usually 10% to 15%) in the ordinance.

State law permits inclusionary provisions in zoning ordinances, but does not make them mandatory. The current state law on inclusionary zoning says that 10% of the dwelling units in the development must be affordable (not that the density can be increased by 10%), and requires a density increase or other municipal subsidies to offset the cost of providing the affordable units.

The 2023 amendment to the inclusionary section of the zoning enabling legislation changes that percentage from 10% to 25%, and also requires towns to allow the developer to add two market-rate units for every affordable unit provided.

In other words, the law is no longer intended to help cities and towns maintain their share of low or moderate income housing when new developments are built. Instead, it is intended to substantially increase the number of affordable dwellings. The amendment applies to all subdivisions and land development projects that will have ten or more dwelling units.

That means that in a development where the yield plan allows ten lots, low or moderate income housing must be constructed on three of those lots. The density of the development would be increased by three lots to accommodate those three houses. In addition, the developer could build two market-rate houses for each low or moderate income house, so six lots could be added— two lots for each low or moderate income house. The total number of lots would be nineteen instead of ten (10 + 3 + 6 = 19).

In a development where the yield plan allows fifteen lots, low or moderate income housing must be constructed on four of the lots. The density of the development would be increased by four lots. The two market-rate houses the developer could build for each of those affordable houses would add eight lots. So in a subdivision where the yield plan allows fifteen lots, the total number of lots would be twenty-seven instead of fifteen (15 + 4 + 8 = 27).

Because most major subdivisions will be designed as a conservation developments, there will be more flexibility in the size and placement of those lots than if a more traditional method of development was required. However, the result still would be a density of almost twice as much as what would ordinarily be permitted in the zoning district.

Since 2008, when Ch. 18.18 was enacted, I believe Richmond has approved only one major residential subdivision. Developers apparently have been proposing smaller developments to avoid having to comply with the inclusionary requirement. However, because the new law will make it easier financially for developers to provide the required number of low or moderate income dwellings, we might see more large developments.

I believe the 2023 amendments to the law turn standard major subdivisions and land development projects into the equivalent of comprehensive permit developments. I have drafted the required amendments to Ch. 18.18 to illustrate how the new inclusionary zoning provisions would work. However, the only way to avoid this substantial increase in density would be to repeal Ch. 18.18, and that is what I recommend.

LAND USE AMENDMENTS MEMORANDUM

RE: Nonconforming lots

Bill No. 2023 H 6059A and S 1032A
Statutes amended or added: § 45-24-31, § 45-24-38
Ordinance or regulation: Ch. 18.48

TO: Members of the Planning Board
FROM: Karen Ellsworth, Town Solicitor
DATE: 2 Sept. 2023

A nonconforming lot is a lot that does not meet the current requirements for area or frontage.

The enabling legislation has been amended to say:

> " [A] substandard lot of record shall not be required to seek any zoning relief based solely on the failure to meet minimum lot size requirements of the district in which such lot is located. The setback, frontage, and/or lot width requirements for a structure under this section 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. All proposals exceeding such reduced requirement shall proceed with a modification request under § 45-24-46 or a dimensional variance request under § 45-24-41, whichever is applicable."

This requirement for establishing reduced dimensional requirements for nonconforming lots is impractical at best. Lots that are nonconforming in area do not come in standard shapes and sizes. It would make no sense to enact an a zoning ordinance provision that would decrease the frontage and yard dimensions for nonconforming lots proportionately and expect it to work in most situations.

Another problem with this statutory language is that it seems to assume that minimum lot sizes determine the size of residential building lots. In Richmond and many other communities, that is no longer true. Minimum lot size controls residential density, not the size of house lots.

Many undersized lots in Richmond are in cluster developments with open space. Even though cluster developments are no longer permitted, the dimensional regulations for those lots should remain the same as they were when the lots were platted and houses were built on them. That is why the zoning ordinance was amended several years ago to include the dimensional regulations that were in effect when those cluster development lots were created.

Since 2002, Richmond has required most residential lots to be platted as conservation developments. In a conservation development, the minimum lot size is only 10,00 square feet (about a quarter of an acre). The required minimum yard dimensions are similarly reduced—minimum frontage is 80 feet, front yard is 25 feet, rear yard is 30 feet, and side yards are 10 feet. It would not make sense to treat those lots as legal nonconforming lots for the purpose of determining the need for dimensional variances, because the applicable dimensional regulations are already minimal.

Richmond already treats legally-created lots that are nonconforming in size as buildable lots. The owners of those lots do not need special permission from the zoning board to build on those lots; they only need zoning board relief if they cannot meet the reduced dimensional requirements for

substandard lots.

In addition to the dimensional tables specifically for lots in cluster subdivisions (Sec. 18.20.040), the Richmond zoning ordinance also has separate reduced dimensional regulations for other nonconforming lots based on the lot frontage rather than the lot size (Sec. 18.48.010). Relief from those regulations is already available as a modification or dimensional variance.

My recommendation is that we keep on treating nonconforming lots the same way we treat them now, instead of trying to amend the ordinance to conform to the new language in the zoning enabling legislation.

This legislation also restricts lot merger— the circumstances under which adjacent substandard lots in the same ownership must be treated as one lot. Richmond's zoning ordinance, unlike many others, does not force developed lots to merge with adjacent undeveloped lots; it only applies to adjacent vacant lots in the same ownership. This legislation prohibits merger if a substandard lot has an area at least as large as half of the lots within 200 feet of the it. That provision has been added to Sec. 18.48.020.

LAND USE AMENDMENTS MEMORANDUM

RE: Variances and special use permits

Bill No. 2023 H 6059A and S 1032A
Statutes amended or added: § 45-24-31, § 45-24-41, § 45-24-42
Ordinance or regulation: Ch. 18.08, Ch. 18.52

TO: Members of the Planning Board
FROM: Karen Ellsworth, Town Solicitor
DATE: 7 Sept. 2023

Zoning ordinances divide land uses into different categories, but they treat all uses in that category the same way. However, every piece of land is unique. That's why there are zoning boards of review. They can change the rules that apply to a particular piece of property if the property owner can prove that he is entitled to the relief.

There are two basic types of relief that a zoning board can grant, a variance and a special use permit.

Variances

A variance is permission to do something the zoning ordinance does not allow.

> A ***dimensional variance*** is permission to waive or modify a regulation that applies to a permitted use. The applicant must show that complying with the ordinance is "more than a mere inconvenience."
>
> A ***use variance*** is permission to use property for a use that is not permitted by the zoning ordinance. The applicant must show that he will lose all beneficial use of the property if he is required to use it for a use permitted by the zoning ordinance.

All variance applicants must prove that:

1. They can't comply with the ordinance because of the unique characteristics of the land or building.
2. The hardship (inability to comply with the ordinance) is not caused by a personal economic or physical disability (except for disabilities covered by the ADA).
3. The hardship is not the result of anything the property owner himself did in the past.
4. The relief is not requested primarily to increase the property owner's income.
5. Granting the relief requested will not affect the character of the surrounding area.
6. The relief requested is the least relief necessary to remove the hardship.

The 2023 legislation deletes conditions #4 and #6. It also adds a new definition of "more than a mere inconvenience:"

> ". . . 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."

Before zoning ordinances were standardized statewide by the 1991 zoning enabling act, relief from the dimensional requirements for a permitted use were available by a "deviation," which

required a showing that compliance with the ordinance would be "more than a mere inconvenience."

The 1991 Zoning Enabling Act replaced the deviation with a dimensional variance, which required a showing 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, which means that there is no other reasonable alternative to enjoy a legally permitted beneficial use of one's property."

In two cases decided in April of 2001, the Supreme Court said that the 1991 enabling legislation "effectively sounded the death knell for the old . . . doctrine that had allowed a property owner to obtain a dimensional variance simply by demonstrating an adverse impact amounting to more than a mere inconvenience." The Court found that the new standard was more stringent. In response, during the next legislative session, the General Assembly amended the zoning enabling law to strike out the "no other reasonable alternative to enjoy a legally permitted beneficial use" part of the definition, thus restoring the old "more than a mere inconvenience" requirement.

H 6059A and its Senate companion bill amend R.I. Gen. Laws § 45 24 41 to require an applicant for a dimensional variance to show that complying with the ordinance would be "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."*

Is that a more stringent standard than more than a mere inconvenience? It sure sounds a lot like "no other reasonable alternative to enjoy a legally permitted beneficial use," the 1991 standard that was repealed in 2002 because it was thought by some to be too difficult to meet.

If the goal of this 2023 legislative package was to make it easier to get zoning relief, why did the legislature amend the zoning enabling legislation to make it harder to get a dimensional variance, especially when, in the same bill, two of the other requirements for variances in effect since 1991 were repealed?

I can't tell you what the new standard means because I don't know. The only thing we can do is put it in Ch. 18.52 of the zoning ordinance and wait for the Supreme Court to tell us what it means.

Special use permits

A special use permit is permission to establish a use that is allowed in the zoning district if the criteria in the ordinance are satisfied. Those criteria usually have to do with the effect of the use on the specific location where the use will be established. A special permit use is a conditionally permitted use rather than a permitted use.

Zoning ordinances in many cities and towns require the zoning board of review to find that the proposed use will be consistent with the comprehensive plan. The 2023 legislation specifically prohibits that finding as a condition of granting a special use permit.

The legislation also says that each zoning ordinance must now:

> "establish specific and objective criteria for the issuance of each type of use category of special use permit, "which criteria shall be in conformance with the purposes and intent of the comprehensive plan and the zoning ordinance of the city or town."

I don't know what that means. Special use permits don't come in categories. The criteria are general so they can be used in different situations. Does this mean we have to put all our special permit uses into categories and set different criteria for each category? That would take a long time, and I'm not even sure how it could be done. I have tried to address this by adding specific language whenever new ordinance text applies to a specific kind of special use permit (for example, for an accessory dwelling unit in a dimensionally nonconforming building).

Currently, Richmond does not allow an applicant for a special use permit to ask for a dimensional variance for that use. That is because a dimensional variance is, by definition, relief granted for a *permitted* use, and special permit uses are not permitted uses.

However, the new legislation requires every city and town to allow an applicant for a special use permits to ask for a dimensional variance for the use. In other words, a dimensional variance is no longer just relief for a permitted use, even though the statute still refers to a dimensional variance as relief that is "minimal to a reasonable enjoyment of the permitted use."