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**RE: PETRINI & ASSOCIATES CLIENT ADVISORY (2014:05)
Inclusionary Zoning**

Attached is an article on Inclusionary Housing that Barbara J. Saint André recently presented at the Citizen Planner Training Collaborative Annual Meeting. It includes a sample inclusionary zoning by-law which you may find useful.

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CPTC ANNUAL MEETING 2014

INCLUSIONARY HOUSING

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I. INCLUSIONARY ZONING

For our purposes, inclusionary zoning refers to local by-laws that require or encourage the inclusion of low and moderate income (“affordable”) housing as a component of residential development. Inclusionary zoning takes many forms. Typically, inclusionary zoning by-laws require that certain residential developments of more than a certain number of units make provisions for affordable housing. Affordable housing is generally defined in the zoning to meet the requirements for inclusion on the state’s Subsidized Housing Inventory (SHI), which keeps track of the state’s determination of each municipality’s percentage of low and moderate income housing units for purposes of chapter 40B. The provisions for affordable housing can take the form of providing affordable units on or off the development site, donating land for affordable housing, or making a contribution to an affordable housing trust or other entity to be used for affordable housing.

Attached is a sample inclusionary zoning by-law that includes many of the typical points that are covered by inclusionary zoning. This is an illustrative by-law only; each municipality needs to craft provisions that will address its particular needs.

There are other creative solutions to encouraging affordable housing. An Edgartown by-law entitled “Substandard Lots as Affordable Homesites”, allowing the zoning board of appeals to approve a special permit for a substandard lot to be built upon for affordable housing, was discussed in Mellendick v. Zoning Board of Appeals of Edgartown, 69 Mass. App. Ct. 852 (2007). The by-law allowed “homesites to be buildable for people who have lived in Edgartown for a substantial time, who intend to live year-round in Edgartown, but who, because of high land prices, would otherwise be financially unable to establish their homes in Edgartown.” The owners of three adjacent substandard lots obtained special permits to build single-family residences on three one-acre lots in a district with a three acre minimum lot size. The zoning by-law provided that special permits could allow building on undersized lots with a minimum of 10,000 square feet if a number of requirements, including residence and income, were met. The by-law provided that the “Board shall grant such a Special Permit only if ... the Board finds that

the specific site is an appropriate location for such uses, that such uses will not adversely affect the neighborhood and that adequate and appropriate facilities and protection will be provided such as, without limiting the generality of the foregoing, parking facilities and screening of unsightly uses from public view.” This illustrates another approach to providing incentives to allow affordable housing where it would otherwise not be possible. Creative solutions can address the particularized needs of each community.

II. ZONING ACT (CHAPTER 40A)

Massachusetts statutes do not provide much guidance with respect to crafting inclusionary zoning provisions. Chapter 40A, §9 does contain the following provision:

Zoning ordinances or by-laws may also provide for special permits authorizing increases in the permissible density of population or intensity of a particular use in a proposed development; provided that the petitioner or applicant shall, as a condition for the grant of said permit, provide certain open space, housing for persons of low or moderate income, traffic or pedestrian improvements, installation of solar energy systems, protection for solar access, or other amenities. Such zoning ordinances or by-laws shall state the specific improvements or amenities or locations of proposed uses for which the special permits shall be granted, and the maximum increases in density of population or intensity of use which may be authorized by such special permits.

This provision allows for so-called “bonus density”, where developers who include affordable housing units may be granted, by special permit, an increased number of units over the density allowed by right. Some have questioned the extent to which cities and towns may require that housing developments include an affordable housing component, unless the municipality provides a density bonus as provided in the above-quoted section of chapter 40A, §9.

However, Massachusetts is a Home Rule state, meaning that cities and towns have broad discretion in enacting ordinances and by-laws, including ordinances and zoning by-laws, to govern their affairs. The Second Article of the Amendments to the Massachusetts Constitution, as amended by the Eighty-Ninth Article of Amendment (the Home Rule Amendment) provides in section six that: “Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court.” Thus, cities and towns are not limited in their zoning regulations to subjects set forth in chapter 40A. One of the best known examples of this is site plan review. Although there is no mention of site plan review in chapter 40A, it is now a widely used and accepted planning tool that is included in numerous zoning by-laws and ordinances in various forms. Y.D. Dugout, Inc. v. Board of Appeals of Canton, 357 Mass. 25, 31 (1970).

Similarly, zoning provisions for inclusionary zoning are not limited to special permits granting density bonuses under chapter 40A, §9. If a challenge is made to a zoning ordinance or by-law, or amendment to a zoning ordinance or by-law, it will be valid unless it conflicts with Chapter 40A or some other statutory or constitutional provision. See Baldiga v. Board of Appeals of Uxbridge, 395 Mass. 829 (1985). Every presumption is to be made in favor of a zoning ordinance or by-law enacted by a city or town. Sturges v. Chilmark, 380 Mass. 246, 256 (1980). A person challenging a zoning provision has a heavy burden to show that it conflicts with the Constitution or the Zoning Act. Caires v. Building Commissioner of Hingham, 323 Mass. 589 (1949). A by-law will be invalid as inconsistent with state law only if there is a clear intent by the Legislature to preclude local action in a particular area. Bloom v. Worcester, 363 Mass. 136 (1973). The existence of state legislation on a subject does not necessarily bar the enactment of local by-laws. Id.

Any proposed inclusionary zoning by-law or ordinance should be reviewed to ensure that it is consistent with state law. In particular, you should be sure to examine the case of Wall Street Development Corp. v. Planning Board of Westwood, 72 Mass. App. Ct. 844 (2008). In that case, the court struck down a so-called major residential development by-law that was analogous in some respects to the inclusionary zoning provisions found in some by-laws or ordinances.

In Wall Street, the Westwood Zoning By-law required that a landowner seeking a major residential development (essentially a residential subdivision with four or more lots) first obtain a special permit from the planning board as a condition of submitting a subdivision plan. A developer proposing a major residential development could not submit a subdivision or approval not required plan directly to the planning board. The special permit application was required to be accompanied by two plans, one “conventional” and the other an “alternative” plan. The planning board denied plaintiff’s special permit application on the grounds that the conventional plan submitted did not comply with the board’s subdivision regulations, specifically the 500 foot maximum length of a dead end road. The Appeals Court ruled that the zoning by-law provision was invalid because it conflicted with the Subdivision Control Law, chapter 41 §81M, which provides that a subdivision plan shall be approved if it complies with the rules and regulations of the planning board and the recommendations of the board of health. Thus, the Court ruled that the submission and approval of a subdivision plan could not be made contingent on receipt of a special permit under the zoning by-law:

In our view the by-law and the power it gives to the board to reject so called “conventional plans” (i.e., plans in total compliance with applicable laws and regulations) may be more easily seen as presenting a facial conflict with the subdivision control law, specifically with G.L. c. 41, §81M...: “It is the intent of the subdivision control law that any subdivision plan filed with the planning board shall receive the approval of such board if such plan conforms to the recommendation of the board of health and to the reasonable rules and regulations of the planning board pertaining to the subdivisions of land...”

See Pieper v. Planning Board of Southborough, 340 Mass. 157, 163–164 (1959) (legislative history of subdivision control law “gives no indication that planning boards were to have freedom to disapprove plans which comply with applicable standards merely because the board feels general public considerations make such action desirable”); Beale v. Planning Bd. of Rockland, 423 Mass. 690, 695–697 (1996) (discussing generally authority of planning board to reject subdivision only for violations of board's rules and regulations, zoning by-law, subdivision control law, or recommendations of the board of health).
Wall Street Development Corp. v. Planning Board of Westwood, 72 Mass. App. Ct. at 854.

The court in a footnote added that the by-law may also be invalid as inconsistent with G.L. c. 41, §81O and §81P, which give landowners the right to submit subdivision and approval not required plans to the planning board. “We doubt the authority of a town, through its zoning by-law, to condition such submissions on prior authorization by special permit.” Wall Street Development Corp. v. Planning Board of Westwood, 72 Mass. App. Ct. at 855, n. 13. However, since the parties did not raise this issue in their arguments, the Appeals Court did not explicitly rule on it.

Similarly, in Bellingham Residential #2 Realty, LLC v. Laprade, 2009 WL 249756 (Land Court, 2009), the court invalidated a major residential development by-law that required a special permit for subdivisions of ten or more lots. Relying on the Wall Street case, the Land Court ruled that the by-law was inconsistent with the Subdivision Control Law. The Land Court noted that the some of the criteria for the special permit vested the planning board with broad discretion that was inconsistent with the scope of subdivision review.

Inclusionary zoning by-laws and ordinances need to avoid the failings of the by-laws in the above cases. The zoning by-law or ordinance cannot require the issuance of an affordable housing special permit in order to submit a subdivision or ANR plan. Density bonuses for subdivisions that provide affordable housing will avoid the pitfalls of Wall Street.

Barbara J. Saint André is a principal with the law firm of Petrini & Associates in Framingham. She has over 30 years of experience representing cities and towns across the state as town and special counsel, with particular emphasis on land use (including zoning, subdivision, Chapter 40R, planning, health, zoning enforcement, and wetlands), comprehensive permits and housing, Community Preservation Act, and general municipal law. Petrini & Associates is a law firm concentrating in the practice of municipal law, public construction, labor, and land use. The firm is town counsel to Framingham, Medway, Sherborn and West Brookfield and special counsel to numerous other communities.

Inclusionary Housing Bylaw

A . Purpose

The Town of sets forth the following requirements in an effort to provide multiple housing choices for people of all economic backgrounds and to address the needs of current and future Town residents by providing permanent affordable housing. The primary purpose of this bylaw (the "Bylaw") is to increase the supply of rental and ownership housing for low and moderate income households in Town, contribute affordable housing units to the Town's Subsidized Housing Inventory (SHI), sustain a viable community making multiple housing options available for future generations in Town and ensure that all units established under this Bylaw count towards the satisfaction of the Town's affordable housing requirements under the Comprehensive Permit law, Massachusetts General Laws chapter 40B §§20-23.

B. Definitions

(1) Affordable Housing Trust Fund (the "Fund"): A trust fund account established in accordance with G.L. c. 44, § 55C and operated for the exclusive purpose of creating and preserving affordable housing in the Town of .

(2) Qualified Affordable Housing Unit: A dwelling unit available at a cost of no more than 30% of gross household income of households at or below 80% of the County median income as reported by the U. S. Department of Housing and Urban Development.

(3) Deed Rider: A deed restriction or other legally binding instrument in a form consistent with the Local Initiative Program (or similar housing program) (collectively referred to herein as the LIP program) requirements and acceptable under LIP that will ensure the affordability of the Affordable Housing Unit(s) for a term of years established by the special permit granting authority, but in no event less than forty years.

(4) Qualified Affordable Housing Unit Purchaser or Tenant: An individual or family with household incomes that do not exceed 80% of the County median income, with adjustments for family size, as reported by the U. S. Department of Housing and Urban Development.

(5) Resale of Affordable Housing Units: The resale procedures and prices of Affordable Housing Units shall be as set forth in the Deed Rider.

(6) Vacant Affordable Rental Housing Units: In the event that an Affordable Rental Housing Unit becomes vacant for a term beyond that designated in the Deed Rider, the Town shall have the Right of First Refusal to purchase said unit and the Town Board of Selectmen, Housing Authority, Affordable Housing Task Force, and the Planning Board shall be notified in writing of vacant affordable housing rental units.

C. Applicability

The provisions of this Bylaw shall apply to any proposed residential development that would create ten or more attached or detached new housing units and which requires a special permit from either the planning board or the zoning board of appeals. Willful evasion of this section of the Zoning Bylaw is prohibited.

Willful evasion is defined as follows: segmenting land or properties with the intention of avoiding Inclusionary Housing requirements by purposefully dividing a large development into phases that would develop less than ten units of housing during each phase. Residential developments subject to this section shall include new housing units created by new construction or new housing units created by remodeling or conversion of an obsolete or unused building or other structure from its original use to an alternate use.

D. Review Procedures

The special permit granting authority shall, as a condition of approval of any development subject to this Bylaw, require that the applicant for special permit approval comply with the obligation to provide affordable housing imposed by this Bylaw. Suitable conditions shall be included in the special permit approval to ensure compliance with this Bylaw.

E. Requirements

The special permit granting authority shall deny any application for development that is subject to this Bylaw if the application does not comply with the following affordable housing requirement: at least ten percent of the new housing units in any residential development shall be designated as and/or fulfill the requirements of Affordable Housing Units of this Bylaw.

F. General Requirements

(1) Consultation: Developers whose projects are subject to this Bylaw are encouraged to consult with the Affordable Housing Committee, or other such entity, on affordable housing early in the development process concerning the Town's affordable housing needs and the optimum manner in which the Town's needs and the developer's affordable housing requirements can be met by the proposed development consistent with any affordable housing planned production plan or strategy then in effect in the Town. The Affordable Housing Committee, or other such entity on affordable housing, may consult with and give advice to the special permit granting authority during the development process and, as a part of the process, may submit written reports to the board reviewing any proposed development subject to the Bylaw.

(2) Comparability: Unless otherwise conditioned by the special permit granting authority to ensure compliance with the Bylaw and due to unique site conditions such as soil, shape, or topography limiting the placement of the buildings on the site, all Affordable Housing Units shall be dispersed throughout the development and shall be indistinguishable from market-rate units except in interior finish, fixtures, and appliances. Interior features of the Affordable Housing Units shall comply with minimum design and construction standards of the LIP program. The number of bedrooms in Affordable Housing Units shall be comparable to the bedroom mix in market-rate units in the development.

(3) Selection Process: The selection of Qualified Affordable Housing Unit Purchasers or Tenants shall be conducted as follows:

a) Marketing Plan: The developer shall prepare and submit to the special permit granting authority for approval an affirmative fair marketing plan acceptable under the LIP for marketing the Affordable Housing Units created under this Bylaw which describes how the Affordable Housing Units will be marketed to potential homebuyers/renters. This plan shall include a description of the lottery or other process to be used for selecting buyers and/ or renters. The marketing plan must describe how the applicant will accommodate local preference requirements of this Bylaw in a manner that complies with the nondiscrimination in tenant or buyer selection guidelines under the LIP. The duration and design of the plan shall reasonably inform all those seeking affordable housing, both within and outside the Town, of the availability of such units.

b) Local Preference: To the extent allowed by law, regulation, and state or federal requirements, local preference shall be included in each development for the maximum number of the Affordable Housing Units created in any development subject to this Bylaw that is permitted. To the extent permitted by DHCD, local preference for all sales, resales and rentals shall be granted to town residents and persons employed in the town (4) Developers may sell affordable for-sale units to the Town, the Housing Authority, or to a private nonprofit entity serving Town for the purpose of providing affordable housing opportunities and to permit such entity to market the Affordable Housing Units and manage the choice of buyers.

(5) LIP Approval. The Affordable Housing Units must be approved under the LIP or by DHCD under other programs that qualify for listing on the SHI. It shall be the responsibility of the developer to work with the Town and facilitate the preparation and submission of an application for approval under the LIP of the Affordable Housing Units, and all costs of such application shall be borne by the developer. The developer shall deposit a document review fee in an amount to be determined by the special permit granting authority, which shall be deposited into a special municipal account pursuant to Massachusetts General Laws chapter 44, section 53G.

G. Fractional Affordable Housing Units and Housing Contribution Payments

All projects consisting of ten or more housing units shall be required to provide ten percent of the units as Affordable Housing Units.

(1) Requirements for Fractional Affordable Housing Units: When the calculation required by this Bylaw results in a Fractional Affordable Housing Unit the developer shall provide an on-site affordable housing unit for that fractional unit.

(2) Amount of Housing Contribution Payments:

For ownership developments the amount of the In-Lieu/ Off-Site Housing Contribution Payment (I/OHCP) shall be equal to:

$$I/OHCP = AMSP \times (\# \text{ of affordable units}) \times .6$$

AMSP = the Average Market Sales Price for the market-rate units in the subject development.

For rental units, the per-unit contribution payment shall be equal to the difference between the average market rental price for the market-rate units in the subject development and the rent affordable to a family of four at or below 80% of the median income, calculated for a term of 10 years without adjustments for interest or inflation.

(3) To make a Housing Contribution Payment (HCP) in-lieu of a qualifying Affordable Housing Unit the developer shall make a binding, written agreement with the Town (with appropriate payment security arrangements) to provide such payment to the Fund established for this purpose. The contribution payment shall be paid in full prior to the issuance of a final occupancy permit for any portion of the project.

H. Off-Site Affordable Housing Creation

In order to ensure compliance with the requirements of this Bylaw, the special permit granting authority may, as a condition of its approval, permit the inclusionary housing requirement to be met through the provision of some or all required Affordable Housing Units on an alternative site or multiple sites suitable for housing use. Affordable off-site housing units may be either new construction, a payment in-lieu for an off-site housing contribution or, in exceptional cases, located in a rehabilitated existing structure. All off-site affordable housing units shall be required to meet the Energy Star requirements for energy efficiency, include a lead paint test where applicable, and a review and inspection by an independent consultant selected by the special permit granting authority. Unless otherwise conditioned by the special permit granting authority to ensure compliance with the requirements of this Bylaw, all affordable off-site units that are newly created or replacing existing legal housing units shall be counted in the total number of housing units created by a proposed development. All Affordable Housing Units provided under this subsection shall comply in all respects, other than on-site location, with the requirements of this Bylaw.

I. Preservation of Affordability

(1) Each Affordable Housing Unit created in accordance with this bylaw as an ownership unit shall have limitations governing its resale. The purpose of these limitations is to preserve the long-term affordability of the unit and ensure its continued availability for Qualified Affordable Housing Unit Purchasers. The resale controls shall be established through a deed restriction on the property recorded at the County Registry of Deeds, and shall be in force for the period established by the special permit granting authority, which shall be a minimum of 40 years.

(2) Sales after the initial sale to a Qualified Affordable Housing Unit Purchaser shall not exceed the maximum sales price as determined by DHCD for affordability within the town of at the time of the resale. All resales shall be to Qualified Affordable Housing Unit Purchasers except as may be provided in the deed restriction.

(3) The purchaser of an Affordable Housing Unit under this Bylaw shall agree to execute and record a deed rider prepared by the Town, granting, among other things, the Town's

right of first refusal to purchase the property in the event that a subsequent Qualified Affordable Housing Unit Purchaser cannot be located.

(4) For rental units, the special permit granting authority shall require, as a condition for granting the special permit, that a deed restriction be recorded as to the Affordable Housing rental units that any subsequent renting or leasing of said units shall not exceed the maximum rental price determined by DHCD for affordability within the town of .

(5) The special permit granting authority shall require, as a condition for the special permit, that the applicant comply with the mandatory set-asides and accompanying restrictions on affordability, including the execution of the deed rider noted above. The Building Commissioner shall not issue an occupancy permit for any Affordable Housing Unit until the deed restriction is recorded.

J . Regulations

The special permit granting authority may promulgate regulations for purposes of carrying out its duties under this Bylaw.

K. Compliance

(1) Building Permit Conditions: All contractual agreements with the Town and other documents necessary to ensure compliance with this Bylaw, including all documents required under LIP, shall be executed and delivered to the special permit granting authority office and as a condition of the issuance of a building permit. The special permit granting authority may require any applicant to post bond or other such surety, in an amount satisfactory to the special permit granting authority, to ensure compliance with all terms and conditions of any approval issued under this Bylaw. The Building Commissioner shall not issue a building permit with respect to any project or development subject to this Bylaw unless and until the special permit granting authority has certified in writing to the Building Commissioner that all conditions of this Bylaw precedent to such issuance, including any such conditions that may be established by the special permit granting authority in any decision or approval, have been met.

(2) Occupancy Conditions:

a) Compliance: No occupancy or other use of any market-rate units in a development subject to this Bylaw shall be permitted until the deed rider, agreements with the Town and/or other documents necessary to ensure compliance by the applicant (and any purchasers of the Affordable Housing Units) with any requirements of this Bylaw and under the LIP program, have been executed and recorded, and a time-stamped copy of all recorded documents has been filed with the Building Commissioner's Office.

b) Housing Contribution Payments: Required Housing Contribution Payments shall be made with respect to each market-rate housing unit or rental unit prior to issuance of an occupancy permit for the unit.

c) Timing of Construction: Unless otherwise directed by the special permit granting authority as a condition of approval, all Affordable Housing Units shall be provided concurrently and proportionately with the development of market-rate units. To ensure compliance with this requirement, the special permit granting authority may establish a schedule for construction of affordable and market rate housing units.

K. Severability

In the event that one or more of the provisions of this Bylaw are found or determined to be illegal or unenforceable, such finding shall not effect the validity of any other provisions of this Bylaw which provisions will remain in full force and effect.