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## MEMORANDUM

**TO:** Hon. Town Council (via Town Clerk)  
Hon. Town Administrator

**FROM:** Andrew M. Teitz, Esq., AICP, Assistant Town Solicitor

**DATE:** July 13, 2022

**SUBJECT:** Robin Rug (a/k/a Bristol Yarn Mill) – Request for Zoning Map and Text Amendments – FREQUENTLY ASKED QUESTIONS

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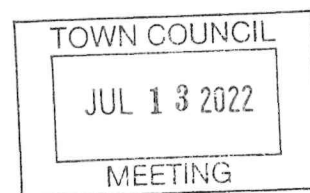
### INTRODUCTION

On July 13, 2022, the Bristol Town Council (“TC”) is scheduled to hold a Public Hearing on and consider requested amendments to both the Zoning Map and the Zoning Ordinance text. Over the last several months, while the Bristol Planning Board (“PB”) has considered both the proposed amendments and the Major Land Development Project (“MLDP”) Master Plan stage application, many questions have arisen from the public, PB members, and elected officials about the legal background and process. This memo is an attempt to address some of the more frequently asked questions. I will be present at the Public Hearing to further respond to the questions from the TC.

This memo has also been supplemented by a memo on Affordable Housing and a Chronology from the Director of Community Development, together with several of the background documents from 2008 through 2010.

### 1. WHAT’S WITH THE BACK AND FORTH BETWEEN THE PLANNING BOARD AND TOWN COUNCIL? WHY CAN’T JUST ONE OF THEM DECIDE?

Rhode Island law provides for a process when approval by both the PB and another local permitting body, in this case the TC, is required. It is as follows:



“§ 45-23-61. Procedure — Precedence of approvals between planning board and other local permitting authorities.

(a) Zoning board.

...

(b) City or town council. Where an applicant requires both planning board approval and council approval for a zoning ordinance or zoning map change, the applicant shall first obtain an advisory recommendation on the zoning change from the planning board, as well as conditional planning board approval for the first approval stage for the proposed project, which may be simultaneous, then obtain a conditional zoning change from the council, and then return to the planning board for subsequent required approval(s).” (Emphasis added.)

In this case, the applicant needs both a MLDP approval from the PB and zoning changes (both map and text) from the TC.<sup>1</sup> Over the past year, the applicant has filed and revised its plans and gone through multiple meetings with the PB and has obtained simultaneously (as authorized explicitly by statute) both the conditional Master Plan approval for its MLDP and the advisory recommendation to the TC on the zoning change.

Master Plan stage of an MLDP does not normally contain a high level of detail. It is an overall “master plan” look at the project. It would not normally include such items as a traffic study, detailed drainage or sewage calculations, or an fiscal impact study. Nor is an applicant required to have any other state or federal permits in hand, such as CRMC, DEM, or DOT approvals. All of those items are not required by Rhode Island law until the Preliminary Stage of MLDP review. As noted in the statute, the applicant will need to return to the Planning Board to satisfy all of those detailed requirements.

## 2. WHAT OPTIONS DOES THE TC HAVE?

The TC must conduct a public hearing on the proposed amendments. Procedurally the TC can then either (1) continue the public hearing, (2) close the public hearing and continue the proposal to a date certain for deliberation and decision, or (3) close the public hearing and deliberate and decide on the same night.

Substantively, as part of the TC deliberation, the TC can follow the PB recommendation or not. However, if the TC does not follow the PB recommendation, it must make its own findings of fact as set forth in Section 28-51(2) of the Zoning Ordinance, as follows:

“The town council shall hold a public hearing within 65 days of receipt of proposal, giving proper notice as prescribed in section 28-52. The town council shall render a decision within 45 days after the date of completion of the public hearing. The town

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<sup>1</sup> If an application contained at least 25% “affordable housing” units, and was filed as a “Comprehensive Permit” under the Low and Moderate Income Housing Act, then it would be decided ONLY by the Planning Board.

council may not make any decisions that are inconsistent with the findings of the planning board, unless the council makes their own findings of facts present in the record, that the findings of the planning board are in clear error or clearly exceed their authority. The provisions of this subsection pertaining to deadlines shall not be construed to apply to any extension consented to by the applicant.” (Emphasis added.)

Thus the TC can either (1) adopt the PB’s recommendation and findings and pass the amendment as presented, or (2) deny the amendments, or (3) further amend and change the zoning amendments, but only if the TC makes its own findings of fact that the findings of the PB are in clear error or clearly exceed the PB’s authority as set forth above.

### **3. WHAT HAPPENS NEXT?**

That depends on what action the TC takes.

If the TC votes to deny the amendments (or no motion to approve obtains a majority vote, which is legally a denial), then the matter is dead. If the applicant wants to modify its plans, it will have to return to the PB for a new Master Plan approval and recommendation.

If the TC votes to approve, either as is or with conditions, there will be a detour to the Zoning Board (“ZB”) because some objectors to the project have filed an appeal of the MLDP Master Plan Decision. That appeal will be heard by the ZB sitting as the “Board of Appeal.” If the ZB votes to sustain (in favor of) the appeal, then the matter will go back to the PB and need to start over for Master Plan review. If the ZB votes to deny (against) the appeal, then the project will proceed to Preliminary Plan stage review before the PB.

If the TC has approved with changes or conditions different from the PB recommendation (with findings as discussed above), the PB will need to review and approve of those changes as part of its Preliminary Plan review. If the PB does not so approve, with appropriate findings it may deny the application at that stage. The PB will also consider all of the elements of the application that were not compete at Master Plan stage, such as traffic study, fiscal impact statement, state and federal permits, etc., in its Preliminary Plan review.

### **4. WHAT ABOUT AFFORDABLE HOUSING? WHY ARE THE DEVELOPERS NOT PROVIDING 20% OF THE UNITS ON SITE AS AFFORDABLE?**

#### **A. 2008 Zoning**

When the prior zoning amendments were adopted on July 31, 2008, the Zoning Ordinance did not have what is called “inclusionary zoning” which is a mandatory requirement that a certain defined portion of all new developments be affordable onsite, or provide offsite affordable units, or provide a fee in lieu of providing the affordable units which fee would go to a municipal or private agency to create more affordable units (known often as simply “fee in

lieu”). There were, however, already elements in the Comprehensive Plan with the goal of increasing affordable housing.

The PB’s 2008 recommendation to the TC was included by the TC in its vote, and even recorded with the TC vote in the Land Evidence Records. Development Condition #2 of that document (at Book 1457, Page 179) states:

“Affordable Housing: The developer is to provide a minimum of 10% and no more than 20% affordable units, either onsite, offsite, or by fee in lieu to Affordable Housing Trust Fund as agreed to by the Planning Board during the Major Land Development Process.” (Emphasis added.)

Therefore, as of July 31, 2008, the requirement for this project was somewhere between 10% and 20% with any combination of onsite, offsite, or fee in lieu available for negotiation.

#### **B. 2010 MLDP Master Plan Approval**

The “Major Land Development Process” referred to above was then conducted over the next two years, and on June 22, 2010, the PB granted approval which required 10 units (10% of the 98 units then allowed), and the “location of the 10 affordable housing units (on site or off site) to be made prior to Preliminary. [Plan stage]”

Therefore 10% affordable units were required, although they could be offsite. However, this 2010 MLDP approval has since expired, so the 10%-20% requirement of the 2008 zoning map change still applies.

#### **C. Inclusionary Zoning as part of Zoning Ordinance**

It is confusing, but necessary to note, that on March 31, 2010, a few months before the 2010 Master Plan decision, the TC adopted a wide variety of amendments to the Zoning Ordinance, as part of a periodic review of the Zoning Ordinance. (The name was “Phase IV Zoning Revision” as this was the fourth such comprehensive review for Bristol since the adoption of the Zoning Enabling Act of 1991.) Included in those amendments was adoption of inclusionary zoning, which allowed onsite or offsite options and fee in lieu.

However, this section of the Zoning Ordinance did NOT apply to the Robin Rug Master Plan stage application because such application had been certified complete back on October 17, 2008, long before the Phase IV revisions were considered and adopted. Thus, Robin Rug was “grandfathered” as to affordable housing, going back to the 10%-20% requirement of the 2008 zoning map amendment, which amendment was never repealed or itself amended (until now).

#### **D. Fee in lieu – Come and Gone, but still an option for Robin Rug**

As per #C above, fee in lieu became a formal option in the Zoning Ordinance in 2010. However, at that time state law allowed the Planning Board to decide whether they wanted onsite, offsite or fee in lieu, or a mix of them. Also, the fee in lieu amount was large enough to create an affordable unit if the land value could be eliminated from the calculations.

The state law subsequently changed so that onsite vs. offsite vs. fee in lieu became the option of the developer, not of the PB. Also Rhode Island Housing was given authority to set the amount of the fee in lieu by community, and its revamped formula left municipalities such as Bristol with a fee that is nowhere near what is required for a unit (currently about \$40,000 per unit). Thus, in 2020, the PB recommended (as part of another round of comprehensive revisions to the Zoning Ordinance) and the TC approved, the removal of the option for fee in lieu. However, as noted above, Robin Rug was “grandfathered” as to affordable housing, going back to the 10%-20% requirement of the 2008 zoning map amendment, which amendment was never repealed or itself amended.

**E. What can the TC require now as to affordable housing.**

The PB compromised at 15%, or 20 (as rounded up) affordable units, to be composed of 3 onsite (in the existing residential buildings on the east side of Thames Street) and 17 by fee in lieu with such fee at \$40,000 per unit. If the TC decides to accept this recommendation, then it will amend the 2008 zoning map change to replace the old 10%-20% language with this requirement.

If the TC, makes its own required findings (as noted in #2 above), the TC may itself require anywhere from 10% to 20% affordable housing, and may set the mixture of onsite and offsite and fee in lieu units.

**5. HOW MANY UNITS AND WHAT ABOUT THE “GROSS FLOOR AREA PER DWELLING UNIT” REQUIREMENT IN THE ZONING ORDINANCE TEXT?**

The usual zoning “control” on density as-of-right is “lot” area per dwelling unit. However, with a large multi-story structure such as this located on a relatively small lot, that method does not work. The situation is further exaggerated by the historic nature of the structure, which prevents demolition of all or even significant parts of the structure.<sup>2</sup> So an alternative method of gross floor area (of the buildings) per dwelling unit (“GA/DU”) was tried. This too had problems in application, including how to calculate the floor area for existing vs. proposed layout.

In hindsight, this “control” wasn’t even necessary, because no dwelling units could be built on the site completely as-of-right. Any residential development would be a MLDP, subject to multistage review and approval by the Planning Board. The real “correct” number of units would be as a result of that review based on such factors as available infrastructure including sewer and water capacity, traffic, parking, lighting, historic preservation requirements, and impact on the neighborhood. Even in 2008, when the TC set the maximum number of units at 98 in the zoning map change, the GA/DU in the zoning text was inconsistent because the GA/DU of 2,250 might have allowed up to 126 units based on the estimated gross floor area.

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<sup>2</sup> Back in 2008-2010, the RI Historic Preservation and Heritage Commission denied permission to selectively demolish parts of the buildings, which would have created view corridors.

Now that the PB has reconsidered the number of dwelling units, the TC has the opportunity to amend that 2008 zoning map change and approve the new number of 127 or, with appropriate findings, some other number of units. In order not to maintain the past inconsistency between the map amendment and the text, the proposed new text change eliminates the GA/DU formula, and delegates that as part of the approval process based on review of infrastructure and other relevant factors.

It is not illegal to remove an arbitrary formula from the zoning ordinance and replace it with the discretion of the permitting authority, especially when it is not an as-of-right approval, but part of an application and review process. The Comprehensive Plan already strongly supports residential use as part of mixed use at Robin Rug, and does not need to be amended for this technical change.

In conclusion, as discussed above but specifically as to the number of units, the TC can deny the 127 units, approve the 127 units, or approve some other number with the TC's own appropriate findings of fact. Also as noted above, if it is a number higher than 127, then it will still need further review and approval of the PB as part of the Preliminary stage.