




**Town of Arlington
Legal Department**

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To: Arlington Redevelopment Board;
Jennifer Raitt, Planning Director

Cc: Adam Chapdelaine, Town Manager;
John Leone, Town Moderator

From: Douglas W. Heim, Town Counsel 

Date: January 3, 2018

Re: Zoning Recodification Proposal for Special Town Meeting

Members of the Arlington Redevelopment Board, in your capacity as Arlington's Planning Board, I write to provide a brief memorandum to discuss the Zoning Recodification Proposal before you for consideration. In sum, it is my opinion that the proposal before you represents a significant improvement to our current Zoning Bylaw without departing Arlington's past and present zoning philosophy. The proposal makes significant changes to the format, diction, and presentation of our zoning ordinance. However, it does not make meaningful alterations to the substantive parameters of what is permitted, not permitted, or requires special permits, variances, etc., except where a bylaw provision is in clear conflict with State Law *and* rectifying such conflict would not require the development of a new zoning policy. Accordingly,

the Proposal presents a more accessible and adaptable version of the rules that have governed Arlington's residential, commercial, and industrial development and redevelopment for the past 40 years.

History and Scope of Present Recodification

Arlington's first independent zoning bylaw was adopted on May 15, 1924, consisting of one very dense page of regulations and a zoning map aimed at balancing Arlington's historic nature, character, and quality of life with the opportunities presented as an attractive residential and commercial town close to Boston. The original "By-law," (annexed hereto as Attachment "A") contained five (5) zoning districts (compared to 17 in the 1975 Bylaw with two (2) overlay districts) with distinct allowed uses and other regulations. Thereafter, the Zoning Bylaw was modified, and in some instances recodified, at least eighteen (18) times before our present Bylaw was adopted on October 8, 1975. Arlington has added to, subtracted from, and modified the 1975 model through various amendments in sometimes expansive and sometimes piecemeal fashion ever since.

For much of our history, the Zoning Bylaw was relatively simple. Even the October 15, 1954 Zoning Bylaw still consisted of only 14 pages, including the cover and table of contents. (See Attachment "B" annexed hereto for your reference). A more complete history can be found in Attachment "C," excerpts from the 1995 Arlington Business Community Study Final Report, which summarizes Arlington's changing zoning bylaws to meet changing needs. However, overall, as zoning law and practical issues in community planning and development became more complex, the Bylaw naturally expanded. With such expansion also came attempts to restate and change the presentation of zoning ordinances in increasingly technical terms. Moreover,

additional provisions were added to a framework as best as could be managed, but not optimally organized given the challenge of building upon one document over 40 years.

To my understanding, the goal of this most recent recodification has been to render our existing regulations more user friendly to the general public, adaptable to future amendments, and harmonious with current State Law zoning laws without making meaningful policy choices; and further to correct and/or eliminate internal inconsistencies and redundancies. In my opinion, the proposal before the Board achieves those goals.

The detailed summary of changes prepared for your review, the "Guide to Arlington Zoning Recodification," offers a summary of each amendment and its purpose, the overwhelming majority of which are driven by usability. As such, allow me to highlight a few examples of non-controversial changes which would make our Bylaw consistent with black letter law. Provisions of our current bylaw in §5.04 require a special permit for both "Church, place of worship or other religious purpose" (2.05 in the Table of Uses) and "Educational purpose..." (2.07) were removed because they are in unequivocal conflict with G.L. c. 40A §3 (the Dover Amendment), which states "'No zoning ordinance or by-law shall regulate or restrict... the use of land or structures for religious purposes or for educational purpose on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation.'"¹ Simply put, a base special permit requirement for houses of worship and schools is contrary to c. 40A §3. There may be future choices to me made about regulations of appurtenant uses by religious and educational

¹§30A continues by noting that *some* regulation of religious and/or educational uses are permissible, but Courts have well established that "towns may not, through the guise of regulating bulk and dimensional requirements under the use exemption permitted an educational [or religious] institution. *The Bible Speaks v. Bd. of Appeals of Lenox*, 8 Mass. App. Ct. 19, 31(1979)(citing *Sisters of the Holy Cross v. Brookline*, 347 Mass. 486, 494 (1964).

institutions, but there is no meaningful policy choice in removing an unenforceable and illegal provision. Similarly, amendments to our current §9.01 further detail the processes and requirements of nonconformance matters with G.L. c. 40A §6.

In contrast, the intentionally restrained modernization of language and organization leaves some essential changes and important issues to be examined in future work because the only options to render them more harmonious with relevant laws require substantive policy decisions. I will touch briefly upon some of those matters below, but for your present consideration, permit me to stress that the scope of the community's discussions and the proposed changes before you fit firmly within precedent.

Over the Zoning Bylaw's nearly 100 year history, each version of the bylaw reflected the immediate and anticipated needs, concerns, and issues of its respective time. While consistency in zoning is of obvious importance, there is nothing immutable about the presentation of our regulatory controls. So long as changes permissible within the wider scheme of G.L. c. 40A² (which itself has changed in meaningful ways over the last 40 years) the ARB and Town Meeting can and should ensure that the Zoning Bylaw is an accessible, up-to-date set of regulations tailored to our immediate and reasonably anticipated circumstances.

² Along with other germane state and federal laws and regulations.

Process

The proposal before you is the product of a more than a year-long process. First, the Zoning Recodification Working Group met in the summer of 2016 for among other reasons, to develop an RFP for a recodification consultant.³ Then, the Working Group worked together with the Planning and Community Development Department and our retained consultants (RKG Associates, Inc.⁴) to develop drafts of a revamped Zoning Bylaw. The Working Group, Planning Department, and RKG Associates received and responded to input from additional interested residents and community stakeholders for the past six months. A first reading draft was produced in June of 2017, followed by a second in July. Two public forums were held by the Working Group; one in July and a second in October, while a series of open houses were hosted on October 19, November 2, and November 9, 2017, informed by the October 11, 2017 “Guide to Arlington Zoning Recodification,” which provided section-by-section analysis of proposed changes. Such analysis was revised on December 14, 2017 and December 18, 2017 after corrections to the Second Draft were made.

³ The Working Group consists of ARB Member, Mr. David Watson; Director of Inspectional Services, Mr. Michael Byrne; Town Manager, Mr. Adam Chapdelaine; Conservation Commissioner, Ms. Catherine Garnett; Attorney, Ms. Nancy Flynn-Barvick; Master Plan Implementation Committee Member and Land Development Professional, Mr. Charles Kalauskas; Zoning Board of Appeals Vice Chair, Mr. Christian Klein; Director of Planning, Ms. Jennifer Raitt; Town Meeting Member, Mr. Stephen Revilak; MPIC Member and Land Use Professional, Mr. Ralph Willmer; and Assistant Planning Director, Ms. Laura Wiener.

⁴Of note to this Office’s analysis, RKG Associates includes the services of Robert Ritchie, Esq., one of Massachusetts’ foremost legal authorities on zoning. Attorney Ritchie’s career includes serving for more than a decade as Chief of the Attorney General’s Municipal Law Unit (the same arm of the AGO that reviews and approves bylaw amendments under c. 40A) and 15 years as the Town Counsel of Amherst. Attorney Ritchie, along with RKG’s Robert Mitchell, FAICP, author the *Massachusetts Guidebook for Planning & Zoning*.

It is my understanding that some residents and stakeholders have expressed concerns over the pace of the process and their opportunity to review the proposal in advance of the February 12, 2018 Special Town Meeting. While I am sympathetic to the sense that the volume of change in a core regulatory ordinance is substantial, it is also my understanding that even relatively straightforward substantive changes were tabled in favor of a recodification draft that would restate the present parameters of zoning in Arlington in a clearer, more user-friendly and adaptable manner. Hence, while the number of changes may be high, they are circumscribed in scope and nature.

Moreover, the development process summarized above matches or exceeds similar recodification efforts over the last ten years completed or ongoing in diverse towns including Braintree, Canton, Framingham, Foxborough, Holbrook, Lennox, Lexington, Lynnfield, Medway, Middleborough, Northborough, Northfield, Tewksbury, Wenham, Weston and Winchester. As such, it is my hope that discussion of the proposal before you will focus on whether or not the product of the Working Group accomplishes what it set out to accomplish – a cleaner, more accessible and flexible version of the rules which may be well-used to maintain or change policies that address Arlington’s substantive development issues and concerns over the next forty years.

Limitations and Value of the Proposal for Future Policy Decisions

The fifty-six (56) page Guide to Arlington Zoning Bylaw Recodification addresses every section, amendment, and purpose of amendment in the Proposal. However permit me to note where in my view, because the scope of recodification has been deliberately restricted, there is much debate to be had, and work to be done in the near future.

Foremost, several Zoning Bylaw provisions could not keep pace with significant changes in broader law using only modest corrections or restatement of in different language. The most obvious example is found in our sign regulations, which in the wake of the Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) contain what are likely constitutionally invalid provisions. RKG recommended changes to the sign bylaws, as well as other provisions which presented more subtle legal concerns than outright invalidity (such as the Dover Amendment example highlighted above). Yet in hearing the clear and strenuous desire of the public to keep the scope of this phase of recodification limited to form, the Working Group's judiciously determined that those changes could not be accommodated without making meaningful policy changes. As such, those areas of the Zoning Bylaw which require debate and redress in order to avoid legal complications (all of which pre-date recodification) should be addressed as soon as practicable.

Furthermore, as the Board well knows, there continues to be significant discussion and debate about a host of substantive issues in zoning, planning, and development in Arlington, particularly centered on housing and business growth. For the Board's reference, attached hereto is a now 12-year old article from Commonwealth Magazine: "*Arlington is a Case Study on How Growth has Become a Dirty Word in the Boston Area*" (Attachment "D"). I provide the article, which carries a clear perspective, not to endorse the opinions or conclusions of its author, but to provide context. On one hand, as illustrated in the piece, many of the concerns of the 1970s, 1980s, and 1990s persist, as one might expect in a well-located suburban community. On the other, some issues have changed dramatically, and/or the regulatory framework which evolved to address many of those concerns no longer stymies the volume of development in Arlington as perhaps it once did.

Thus, the Recodification Proposal before you should not be seen as an instrument for or against a specific perspective or vision for land use and development in Arlington. Rather, it should be seen as a valuable opportunity to provide a better vehicle for the ongoing debates central to Arlington's future. These debates are happening now and will continue to present choices for the community. Whether the Town maintains and enforces the status quo, adopts and engages in new development philosophies; does not change, or changes slowly or rapidly; the Recodification Proposal will better serve the Town's residents, officials and Town bodies that implement the Bylaws, and future generations.