



**Town of Arlington
Legal Department**

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To: Arlington Redevelopment Board; Jennifer Raitt, Director of Planning and Community Development

From: Douglas W. Heim, Town Counsel

Date: May 13, 2020

Re: Docket No. 3602

Members of the Arlington Redevelopment Board (“ARB”), I write with respect to the Special Permit Application for 1207-1211 Massachusetts Avenue, Docket No. 3602, on two scores. First, with respect to the application Section 5.3.17 of the Zoning Bylaw, there is a substantial error in the Zoning Bylaw. While the genesis of this error remains unclear, the present Section 5.3.17 was not approved by Town Meeting in 2016 when upper story step backs were adopted into what was then Article 6 of the Zoning Bylaw “Dimensional and Density Regulations.”

Second, with respect to the correspondence from Attorney Winstanley-O’Connor, I confirm that while under no obligation to do so, the Board possesses the discretion to afford both “bonus FAR” consideration under Section 5.3.6 of the Zoning Bylaw, and adjust required setbacks under discretion conferred by Section 5.3.16; however within the limitations and requirements set forth in those sections respectively.

Section 5.3.17 Bylaw Error

Foremost, it has come to the attention of this Office that the version of Section 5.3.17 in the present Zoning Bylaw available on the Town's website is incorrect. In short, the provision regarding upper story step backs should apply beginning at the fourth story, not the third. The provision regarding "upper story step backs" was first enacted under Article 6 of the 2016 Annual Town Meeting. The relevant portion of Article on 6 before Town Meeting (addressing mixed-use in business and industrial districts in a number of ways) was then listed as a new "Section 6.285" (prior to the 2018 Recodification of the Zoning Bylaw and re-numeration as section 5.3.17). It was recommended in the 2016 Report of the ARB and voted upon by Town Meeting as follows:

(Adding) Section 6.285 Upper Story Building Step Backs

For buildings in excess of three (3) stories in height, an additional seven and one half (7.5) foot step back (upper story building setback) **shall be provided beginning at the fourth (4th) story.** The upper story setback shall be provided along all building elevations with street frontage, excluding alleys.

Emphasis added. *See Certified Vote on Article 6 of the 2016 Town Meeting* (attached hereto).

That same vote was submitted to the Attorney General's Municipal Law Unit for review, and approval was given on or about September 1, 2016.¹ However, the version that was eventually included in the Revised 2016 Zoning Bylaw incorrectly read as follows:

Section 6.285 Upper Story Building Step Backs

For buildings more than three stories in height, an additional 7.5-foot step-back (upper story building setback) shall be provided **beginning at the third story level or 30 feet above grade**, whichever is less. The upper story step-back shall be provided along all building elevations with street frontage, excluding alleys.

Emphasis added.

¹ Following the Attorney General's Office initial approval, a separate but significant scrivener's error relative to 2016 Article 6's amendments on minimum lot size within a table was noticed by resident Christopher Loreti resulting in a correction to the Town Clerk's previous submission. Within the correspondence and correction forms submitted by this Office to the Municipal Law Unit, the correct certified vote including the correction version of Section 6.285 was again submitted. The Municipal Law Unit subsequently affirmed its prior decision with the correction on minimum lot size.

Indeed the erroneous provision was and is incongruous with the Building Height and Floor Area Ratio Regulations that references upper story step backs (currently codified in the Zoning Bylaw in section 5-29). This error was carried forward to the Recodified Zoning Bylaw in 2018, where the erroneous provision left unchanged beyond altering its placement in the bylaw and citation number to 5.3.17. In submissions to both Town Meeting and the Attorney General's Office, no alterations of the former Section 6.285 were noted, including the "Guide to Arlington Zoning Bylaw Recodification" where "[n]o change in wording" was noted. *See February 12, 2018 Special Town Meeting Vote on Article 2; and December 14, 2017 Guide to Arlington Zoning Bylaw Recodification* p. 10, (attached hereto).

As noted above, the cause of this error is unclear given that accurate votes were recorded by the Clerk and such votes were transmitted to the Attorney General's Office. Upon information and belief, it seems likely that it represents a prior version contemplated by the Department of Planning and Community Development, the ARB, or both in formulating a final recommendation to the 2016 Annual Town Meeting, which was then inadvertently placed in the revised Zoning Bylaw in lieu of the final version.

Whatever the case may be, c. 40A section 5 requires that a change to the Zoning Bylaw be properly noticed in a town meeting warrant, noticed for a hearing before a planning board, approved by Town Meeting, and approved by the Attorney General's Office before meeting the posting requirements of G.L. c. 40 sec. 32. Because neither Town Meeting nor the Attorney General's Office approved the language presently set forth in section 5.3.17, that version upper story step back requirement is not valid.

The correct language voted upon by the 2016 Annual Town Meeting highlighted above however was noticed, approved by Town Meeting, and approved by the Attorney General's Office. The only question remaining therefore is whether or not it was properly posted in compliance with c. 40 sec. 32.² If not, it is my recommendation that the corrected provision be either posted in public locations in each precinct of the Town, or advertised in the newspaper for two consecutive weeks. Regardless, absent special circumstances not presented here, zoning amendments are retroactive to the date of their approval by Town Meeting. Therefore, the Board

² Given present working conditions, I have not yet been able to confirm the language in the legal advertisement notifying the public of approved bylaw changes within the Clerk's Office archives.

may in good faith apply the correct version of section 5.3.17 to Docket No. 3602 – the version that was approved under Article 6 of the 2016 Town Meeting , but posting requirements must still be met as soon as possible.

ARB Authority Relative to FAR & Setbacks

Briefly, this Office is in receipt of Attorney Winstanley-O'Connor's letter asserting that the ARB has the authority to both afford additional flexibility for minimum floor area ratio and setback requirements under Zoning Bylaw sections 5.3.17 respectively. This Office affirms such authority being vested within the ARB, and further notes that such discretion is consistent with Section 1.2, which, in commenting upon the nature of environmental design review, sets forth as one purpose of the Bylaw as “to achieve optimum environmental quality through review and cooperation by the use of incentives, bonuses and design review.”

However, as the Board knows, in both instances specific findings are required set forth in both such sections. Moreover, FAR exceptions may not exceed percentages in certain districts in per Section 5.3.6(c). Further, the Board must make findings as to specific conditions unique to the proposal should it be inclined to adjust setback requirements under Section 5.3.16. It is entirely within the Board's sound judgment to determine whether such criteria are met and requested or suggested relief appropriate.