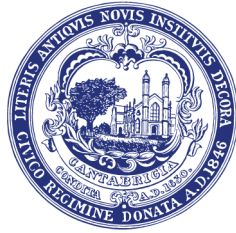


Megan B. Bayer
Acting City Solicitor

Elliott J. Veloso
First Assistant City Solicitor



Assistant City Solicitors
Paul S. Kawai
Sean M. McKendry
Diane O. Pires
Kate M. Kleimola
Sydney M. Wright
Evan C. Bjorklund
Franziskus Lepionka
Andrea Carrillo-Rhoads

Public Records Access Officer
Seah Levy

CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

June 24, 2024

Yi-An Huang
City Manager
Cambridge City Hall
795 Massachusetts Avenue
Cambridge, MA 02139

Re: *Awaiting Report No. 24-17 of March 25, 2024, requesting that the City Manager work with the Law Department and Community Development Department (CDD) to report on whether the City Council could add maximum lot area per dwelling unit, maximum setback requirements, and minimum floor area ratios in some districts or as part of an overlay in the Zoning Ordinance and whether the City Council could require a special permit for a down conversion in developments that would result in a net loss of housing units.*

Dear Mr. Huang:

As set forth above, Awaiting Report 24-17 requests, in part, a legal opinion as to whether the Council could amend the Zoning Ordinance to add maximum lot area per dwelling unit, maximum setback requirements, and minimum floor area ratios, and to require a special permit for down conversion in developments that would result in a net loss of housing units. Additionally, CDD has provided some introductory discussion of planning and policy considerations related to this question.

Planning & Policy Considerations

One of the City's primary goals from the Envision Cambridge (2019) comprehensive planning process included providing "...a variety of housing options for individuals and families of different socioeconomic levels, life stages, and physical needs" so that Cambridge residents could "...transition between homes that are appropriate to their needs as their circumstances and preferences change" (P. 140). If the Council were to amend the Zoning Ordinance to add maximum lot area per dwelling unit, maximum setback requirements, and minimum floor area ratios, and to require a special permit for down conversions, those zoning changes could lead to results that are inconsistent with the goal of providing a variety of housing options.

In the past decade, the trend in multifamily development in Cambridge has skewed towards buildings that contain more dwelling units that are smaller in size, rather than fewer, larger units. In fact, in the last update to the Inclusionary Zoning requirements, the City Council changed the affordable set aside to square feet rather than number of units in order to build flexibility to create more family-size units. The provision also now requires the creation of three-bedroom units in buildings of 30,000 sf or larger. While these provisions cater to creating diversity of housing within the affordable component of new housing construction, it is also important to consider the importance of diversity in the market rate housing stock.

To get an understanding of the magnitude of the issue, we reviewed housing start data during the period 2017-2021. During this time a total of 3,589 units were created citywide and 42 units were lost through down-conversions. The majority of the housing production was in mixed-use districts and higher density residential districts. The down-conversions were primarily in the lower density residential districts, Res A-1, A-2, B, and C. Our conclusions from the data are as follows:

- Down-conversions are a very small percentage of total net housing production during the time period; and
- Most of the “net decrease” happens in more restrictive districts like Res. B; and
- Most of the “net increase” happens in more permissive districts like Res. C-1 and districts with higher density.

Instituting zoning requirements that stipulate a minimum density requirement, for example, could have the unintended consequence of limiting the development of larger homes that can accommodate families with children. Additionally, this could make properties with existing large homes non-conforming and make it difficult to make changes on those sites. The concern about down-conversions may be more effectively addressed by allowing higher density development in more districts of the city that would make it easier and more attractive to build more homes on a site. Such changes to address barriers to multifamily development across the city are currently being discussed at the Housing Committee, including zoning reforms that aim to eliminate exclusionary zoning and increase the density and height afforded to multi-family residential development. It is our belief that removing these barriers to development of multifamily housing throughout the city will facilitate the creation of more homes of all sizes, including smaller units.

Legal Questions & Implications

Amending the Zoning Ordinance to add maximum lot area per dwelling unit, maximum setback requirements, and minimum floor area ratios would promote development that has an increased number of dwelling units on a property and an increased size. This approach is different to what is commonly seen in zoning, which focuses on establishing the maximum density allowed and the maximum building size allowed. This approach also may conflict with the general proposition that zoning sets dimensional and use requirements but does not dictate that property be developed for a certain use or to a certain size.

Since this proposed approach is different than how zoning is commonly used, there is very little case law addressing this approach. In 1949, in the case of 122 Main Street Corporation

v. City of Brockton, 323 Mass. 646, the Supreme Judicial Court held that a zoning ordinance that required buildings in a business district to be at least 27 feet in height was invalid because it deprived property owners “of a normal use of their property without accomplishing in any reasonable degree one legitimate purpose for which zoning is authorized.” The Court held that “where legislation seeks to force land to remain vacant unless the owner will erect a structure of at least two stories or of a height of at least twenty-seven feet, or will not permit him to remodel an existing structure except upon the same conditions, the general benefit to the community must be something more tangible and less nebulous than any supposed advantages which the city has been able to bring forward in this case.” The general benefits to the community advanced by the City of Brockton in that case were to promote an ideal appearance of the business area and to increase taxable revenue. The Court held that those objectives were not purposes for which zoning was authorized.

The 122 Main Street Corporation v. City of Brockton case stands for the proposition that if zoning requires that a property be developed to a certain minimum size or density, that requirement must be reasonably related to the purposes for which zoning may be enacted. The purposes for zoning come from Chapter 808 of the Acts of 1975, which amended the General Laws to create the current Zoning Act, G.L. c.40A. Section 2A of Chapter 808 of the Acts of 1975 states:

This act is designed to provide standardized procedures for the administration and promulgation of municipal zoning laws. This section is designed to suggest objectives for which zoning might be established which include, but are not limited to, the following:- to lessen congestion in the streets; to conserve health; to secure safety from fire, flood, panic and other dangers; to provide adequate light and air; to prevent overcrowding of land, to avoid undue concentration of population; to encourage housing for persons of all income levels; to facilitate the adequate provision of transportation, water, water supply, drainage, sewerage, schools, parks, open space and other public requirements; to conserve the value of land and buildings, including the conservation of natural resources and the prevention of blight and pollution of the environment; to encourage the most appropriate use of land throughout the city or town

While not an exhaustive list, the statutory language provides guidance as to what the purposes are for which zoning may be enacted. Any zoning requirement must be reasonably related to a proper purpose.

Pursuant to Awaiting Report 24-17, the purpose of minimum development size or density requirements is to disincentivize down conversions and the loss of affordable multifamily housing. One of the zoning purposes referenced in the act and quoted above is “to encourage housing for persons of all income levels.” However, to withstand a challenge there would need to be evidence that requiring minimum development size or density requirements is reasonably related to encouraging housing for persons of all income levels. If the Council ultimately wants to pursue a zoning amendment to require minimum development size or density requirements, the Council should assemble evidence that the proposed zoning is reasonably related to

encouraging housing for persons of all income levels, or another purpose for which zoning may be enacted.

An amendment to the Zoning Ordinance to require a special permit for down conversion in developments that would result in a net loss of housing units would likely be found to be invalid. The section of the Zoning Act that allows for special permits, G.L. c.40A, §9, states: “zoning ordinances or by-laws shall provide for specific types of uses which shall only be permitted in specified districts upon the issuance of a special permit.” Special permits only authorize specific types of uses and not actions such as converting a multi-family structure to a single-family structure. If single-family use is permitted in the zoning district as of right, it cannot be allowed as of right as new construction but require a special permit if it is the result of a down conversion. The Court has held that “a use allowed as of right cannot be made subject to the grant of a special permit inasmuch as the concepts of a use as of right and a use dependent on discretion are mutually exclusive.” Prudential Ins. Co. of Am. v. Bd. of Appeals of Westwood, 23 Mass. App. Ct. 278, 281 (1986); SCIT, Inc. v. Planning Bd. of Braintree, 19 Mass.App.Ct. 101 (1984).

Additionally, requiring a special permit for a down conversion may be found to violate the uniformity provision of the Zoning Act, found in G.L. c.40A, §4. The uniformity provision states that “[a]ny zoning ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted.” The purpose behind this provision is to ensure uniformity of zoning regulations in order to achieve predictability and equal treatment as to uses allowed in a zoning district. SCIT, Inc. v. Planning Board of Braintree, 19 Mass.App.Ct. 101 (1984). Specifically, “all land in similar circumstances should be treated alike, so that ‘if anyone can go ahead with a certain development [in a district], then so can everybody else.’” Id. at 107; quoting 1 Williams, American Land Planning Law § 16.06 (1974). Further, the uniformity provision “does not contemplate, once a district is established and uses within it authorized as of right, conferral on local zoning boards of a roving and virtually unlimited power to discriminate as to uses between landowners similarly situated.” Id. at 108.

As mentioned above, if the Council wants to pursue minimum development size or density requirements, the Council should assemble evidence that the proposed zoning is reasonably related to encouraging housing for persons of all income levels or another purpose for which zoning may be enacted. Additionally, if the Council wants to pursue either the minimum development size or density requirements or special permit for down conversion, the Council should evaluate if these will result in unintended consequences or require additional amendments to the Zoning Ordinance.

Very truly yours,



Megan B. Bayer
Acting City Solicitor