

Minority Report, RTM Planning and Zoning Committee
Review of Amendment #625, May 31 and June 8, 2011

Introduction. The RTM Planning and Zoning Committee met on May 31 and June 8, 2011 to review Amendment #625 upon petition by 20 or more citizens. It voted on June 8 to sustain the amendment, 4-2. A minority were sufficiently concerned about the uncertainties of what the text would enable to recommend overturning it. This report shares the reasons behind that conclusion.

It should be noted that although #625 encompasses 13 sites, most of which are already developed, Baron's South has been the focus of both the 8-24 and virtually all subsequent discussions. Much thought has leaned towards choosing that parcel of land. A 5/27/10 map in the record entitled "Proposed Senior Housing, Baron's Site, Westport, CT", by Perkins Eastman, depicts two relatively large buildings near the heart of the property. In addition, the committee appointed to develop an RFP is called the "Baron's South Committee."

Discussion. The purview of both the Planning and Zoning Commission and the RTM includes the general welfare of the town. A text amendment takes place within a context, not a vacuum, for every structure it enables has both a purpose and an effect. According to our own rules, our review is guided by land use criteria, which may include, among other considerations, the welfare of the town (Review of Zoning Actions, Standard of Review, Sec. 162-24). This report considers the text both directly and in the context of the general welfare of the town. The problem is not with the concept of senior housing, but rather with the manner in which we would seek to achieve that goal. 625 is vague about what the town can expect once the enabling door of that text amendment swings open. But furthermore, it creates a scenario of uncertainty as to whether or not we can sufficiently serve our own seniors, that is, whether or not what we get will effectively meet their needs.

There are several interrelated areas of concern which this report will discuss. These include:

- the vague methodology in the assessment of the nature and extent of our seniors' needs
- the potential implications of the 60% affordability requirement in the text
- the extent to which the town will be able to grant priority to Westport seniors
- the ineligibility of seniors who will have "too much" to qualify, perhaps as a result of selling their homes
- the shaping of the bidding process by the 60% requirement as well as other factors
- and, last but not least, the question of potential financial implications.

Background considerations. It is reasonable in these financial times to be concerned about the effects of foregoing not merely sales income, but also the potentially more favorable leasing terms and the accompanying tax revenues that could flow from an arrangement with a for-profit organization. As mentioned, the text itself sets a 60% affordability requirement, unprecedented in mixed income plans and a high bar for a for-profit operator to meet. Perhaps the composition of the original "Baron's South planning group", described in the Request Summary accompanying last October's 8-24 request (p.5), sets the process on an inherent bias towards a not-for-profit as the developer. For example, the members included the head of one such organization, the Jewish Home for the Elderly (JHE) in Fairfield. The membership, however, did not include a representative of a for-profit organization. Why not? Nor, incidentally, did it include an active financial practitioner. Broader representation could well have resulted in a different text, perhaps with requirements making it easier for a for-profit to compete. A for-profit developer may also be able to offer greater preference to Westport applicants for units in the facility, similar to the situation in neighboring Wilton with a for-profit facility there.

Vague methodology in the assessment of needs. Why does this matter? The needs study cited in the 8-24 Request Summary is the basis upon which claims of widespread support were based. Of at least equal importance is that this is the data upon which initial demand projections for an RFP should logically rest. Yet, the methodology was vague, consisting of waiting lists, anecdotal evidence, and guided focus group discussions. But where is the hard data, e.g. on sample selection? Where is the uniform set of questions asked? Did the survey inquire as to how many seniors might decide to leave town regardless of this new construction, for reasons such as taxes, climate, or location of their children? Did it inquire how many seniors would prefer to stay in their own homes, with an aide if needed? Were interviewees told that a space might not be available for them when desired? Last but not least, were participants told that they might not be eligible for financial reasons, e.g., after they sold their homes? Don't those seniors deserve the housing opportunity to downsize here as well?

That there is need is not in dispute; however, neither the magnitude of the need nor the nature of the services needed has been scientifically assessed. This amendment would guide and enable us on the basis of vague data. How can we meet the real needs of our senior population without an assessment based on hard data? How can we set an RFP, or evaluate an operator's proposal, without guideposts of our own? #625 allows a range of facilities, including an Independent Living Facility, an Assisted Living Facility, and a Skilled Nursing Facility. Without our own guidelines, based on real research, how do we know what our requirements should be?

The 60% affordability requirement within the text itself is intertwined with much of the unknown potential effect of this amendment. This is an unprecedented high requirement in a mixed income housing plan; to date such a requirement has not exceeded 20%. How does this high affordability requirement, in the text itself, affect our ability to offer priority to our own seniors? How does it affect the eligibility of Westport seniors, such as those who sell their homes at a price which gives them "too much" cash? How does it affect the ability of a for-profit organization to compete with a not-for-profit, and how does this requirement subsequently influence the outcome of the bidding process? The 60% requirement poses questions about the amendment's ability to fulfill the promise to our own seniors.

Serving Westport's Own Seniors: Priority and Eligibility. Will the structure of the amendment make it difficult if not impossible to meet the stated goal of providing the maximum housing opportunity for our own seniors ó of fulfilling both the premise and the promise that launched the process of #625? Will numbers of our own seniors be left out in the cold? At the June 8 meeting the Town Attorney's Office said that although preferences can be given, they would be formulated by the applicant as the project developed and the type of government funding was determined. Note that the new regulation created by #625 refers to preferences granted to **"the extent permissible under applicable State and Federal laws."** (32-15A.6 relates to affordable units. 32-15A.7 relates to all other units). As we prepare to donate a major piece of land, the answer is we simply do not know to what extent we can grant priority to our own seniors. What else but this goal should be the basis for launching this entire enterprise?

A cautionary article has been posted on the P&Z Committee's website, from the *Boston College of Environmental Affairs Law Review, 2008-09*, "Local Preferences in Affordable Housing: Special Treatment for Those Who Live or Work in a Municipality?" (Vol. 36, Issue 1, Article 6, 1-1-2009). It was written by Keaton Norquist, who was then the Executive Editor of that review. He discusses priorities and the need, in a number of cases, for preference "mitigations" due to the Federal Housing Act. He states: **"An FHA claim against a local government's residence preference is likely to succeed when the locality is significantly more homogenous than its surrounding region."** (p.234). This could well apply to us. Of interest is the list of priority

"mitigations" which include extending preferences to local residents in only 50% of the affordable units; extending preferences to local residents only in initial vacancies; and, extending preferences to residents of a more diverse surrounding geographic area.

It may be instructive to consider the experience of Santa Monica, which is cited in that article. In 2002 that municipality contributed \$2.3 million towards an affordable senior housing development. Only 12 out of the 65 affordable units went to previous residents. That's less than one out of five of those units. If the Santa Monica experience is any indication of what we may expect, we should take note and recognize a serious uncertainty about how many units we may be able to "claim" for our own seniors. The high 60% affordability requirement could work as an additional barrier. Furthermore, it is doubtful that we could be perceived as less homogenous than many of our geographic neighbors.

The shaping of the bidding process. There are three factors, one in the text, and two in the record, that seem likely to shape the bidding process to favor a not-for-profit over a for-profit: (1) The high 60% affordability requirement is far more likely to discourage a for-profit applicant than a not-for profit. (2) The anticipation of donating the land, cited in the 10/19/10 staff report, and as well a financial consideration (see below). (3) The necessity of a *Certificate of Need* for beds for a SNF, which could lead us to an existing area provider as opposed to a new entrant or one from outside the area. This is referenced in the 8-24 Request Summary, which cites the JHE as both having beds available to relocate to an 84-bed SNF during a current moratorium, and seeking to move beyond Fairfield (p.12, p.5). (Yet, why we are even considering an 84-bed SNF ó more than ¾ the size of the Westport Health Care Center, formerly Mediplex? The SNF is a model whose use is declining as people age more in less intensive settings, but whose labor costs are likely to increase while medical reimbursements are likely to decrease in the years ahead.)

Yet, when a for-profit could do the job with fewer restrictions to the participation of our seniors and fewer demands on our finances, such a possibility should be maximized rather than discouraged. Why has this not been so, neither in the text nor in the record? One may wonder if it is not possible for a for-profit developer to perceive in this amendment a restraint of trade.

Financial considerations. These are on everyone's mind at this time, especially with the looming burden of OPEB, larger than previously anticipated, and a pending significant tax increase. Financial health is important because without it we are hampered in our ability to provide essential services as well as the amenities upon which we have come to rely. Are we acting in the best interests of all of our constituents if we enable and even encourage the donation of their land to a non-profit developer, when a for-profit could do all that would be required and desired, without that subsidy? What are the financial implications of donating a very valuable piece of land? Whether it is the opportunity loss of a foregone sale, the nature of the terms of the lease, or the foregone stream of tax revenue, if the developer is a non-profit, it will cost the town significantly more. Why have we not done a serious financial assessment of the financial implications of #625 before even embarking on this journey?

Note that in the record, the donation of our land is cited as a distinct possibility. For example, a P&Z Staff Memo dated 10/19/10, states (p.3): "**To help make the project financially viable it is proposed the Town will donate the land and partner with a development team that will include a non-profit service provider.**" (Italics added). This is not about the use of private vs. municipal land, as was discussed at the May 31 meeting. It is about the actual donation of municipal land, most likely a parcel that is irreplaceable and invaluable.

A word on tax revenues: Regarding a for-profit vs. a not-for-profit, there is a difference between regular tax revenues and the Payment in Lieu of Taxes (PILOT) which a municipality may receive because of a not-for-profit. Taxes are set and generally can be counted on to arrive in our treasury at given intervals in a given amount, based on assessment. PILOT is intended to compensate in part for foregone real estate taxes, but is generally for a smaller portion of what the full tax value would have been. At any rate, PILOT payments should not be regarded as equivalent in value to real estate taxes. Regarding personal property taxes, these are generally levied on property such as cars and boats. The amount we are likely receive from such sources pales in significance next to what we could anticipate from real estate taxes, if one is to make a comparison.

Summary and Conclusion. An amendment is an enabling tool, a door that opens onto potential scenarios of land use. On the side of the door facing us today is a promise to our seniors. On the other side of the 625 door lies the uncertainty of our abilities to fulfill that promise. This uncertainty factor includes: -- the initial loose and unscientific methodology in the assessment of the nature and extent of our seniors' needs, and the limited ability of such data to guide both in establishing an RFP and evaluating subsequent proposals -- the potential implications of the 60% affordability requirement, unprecedented in a mixed income plan, within the heart of the text amendment -- the extent to which the town would be able to grant priority to Westport seniors -- the potential ineligibility of seniors who will have "too much" to qualify, perhaps as a result of selling their homes -- the potential shaping of the outcome of the bidding process by the 60% requirement, as well as other factors -- the potential and unexplored range of financial implications which would affect the town as a whole for many years.

Can this amendment lead us down a road where too many seniors will find, to their surprise, they can not follow? Given these factors in the text and the context, there is a great probability that the consequent answer could be "yes." Given the type of guidance afforded by vague research data, in combination with enabling a range possible facilities (ILF, ALF, SNF), we could conceivably end up not even meeting our own needs, but with significant financial consequence. Unthinkable, undesirable, but entirely possible.

In a way, our role at this point is like participating in the RFP, but at a very early stage, when intervention is always most efficient and effective. Amendment #625 enables too many possibilities that could come back to haunt us. After this review, the RTM will never have more power to avoid undesired outcomes, for the RTM's power will be restricted to giving advice. While we have assurances from the present administration to hear our advice, such assurances are limited to this administration and not their successors. And what if an administration disagrees with our advice? Today the weaknesses in 625 are on paper. If there is a tomorrow for 625, those weaknesses will be set in stone.

For the reasons given, we recommend overturn. We also suggest that regardless of the outcome of the RTM review, the P&Z enact a senior residential community affordability requirement either of 20%, or better yet, as will be the case with the pending eligibility requirements, a percentage "to be determined" in conjunction with the successful bidder. This would be a step in the right direction both for our seniors and for us all.

Respectfully Submitted,
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