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March 4, 2024

Lucille A. Dalton, Town Clerk
Town of Southampton
210 College Highway, Suite 2
Southampton, MA 01073

Re: Southampton Annual Town Meeting of May 9, 2023 -- Case # 11012
Warrant Articles # 32 and 33 (Zoning)
Warrant Articles # 30 and 31 (General) ¹

Dear Ms. Dalton:

Article 33 – Under Article 33 the Town voted to adopt a recodification of the Town's zoning by-laws as shown in a document entitled "Final Draft of the Zoning Bylaw dated March 2023," a copy of which was provided to this Office.

We approve the comprehensive recodification of the zoning by-laws except for certain text as further explained below: (1) Section 275.3.2 requiring a discretionary "zoning permit determination" as a condition of applying for a building permit, special permit, variance or other permits; (2) Section 275-7.6 (H)(6)(e) prohibiting the use of herbicides, pesticides and commercial fertilizers at a solar installation; (3) Section 275-7.15 (D)(3) regarding the measurement of buffer zones from a marijuana establishment to a school; and (4) a portion of Table 1, "Use Regulations," prohibiting child care center uses in four of the Town's six zoning districts. We detail below the basis for these disapprovals. We also offer additional comments on the remaining approved portions of the recodified zoning by-laws for the Town's consideration.

I. Summary of Article 33

Under Article 33 the Town the Town voted to repeal and replace the existing zoning by-laws by a vote to:

¹ In a decision issued November 2, 2023, we approved Articles 30 and 31. In a decision issued January 16, 2024 we approved Article 32 and by agreement with Town Counsel extended our deadline for a decision on Article 33 for 45-days until March 2, 2024.

adopt the renumbering and revision of the Zoning Bylaw of the Town as set forth in the Final Draft of the Zoning Bylaw dated March 2023, said renumbering and revision of the Zoning Bylaw having been done under the direction of the Planning Board, and being a compilation and comprehensive update of the present Zoning Bylaw, including amendments thereto. All Zoning Bylaws, as amended, heretofore in force shall be repealed, except that such repeal shall not affect any suit or proceeding pending as the result of an existing law.

II. Attorney General's Standard of Review of Zoning Bylaws

Our review of Article 33 is governed by G.L. c. 40, § 32. Under G.L. c. 40, § 32, the Attorney General has a “limited power of disapproval,” and “[i]t is fundamental that every presumption is to be made in favor of the validity of municipal by-laws.” Amherst v. Attorney General, 398 Mass. 793, 795-96, 798-99 (1986) (establishing the scope of the Attorney General’s by-law review as determining conflicts with state law). The Attorney General does not review the policy arguments for or against the enactment. Id. at 798-99 (“Neither we nor the Attorney General may comment on the wisdom of the town’s by-law.”) Rather, to disapprove a by-law (or any portion thereof), the Attorney General must cite an inconsistency between the by-law and the state Constitution or laws. Id. at 796. “As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid.” Bloom v. Worcester, 363 Mass. 136, 154 (1973).

Article 33, as an amendment to the Town’s zoning by-laws, must be accorded deference. W.R. Grace & Co. v. Cambridge City Council, 56 Mass. App. Ct. 559, 566 (2002). When reviewing zoning by-laws for consistency with the Constitution or laws of the Commonwealth, the Attorney General’s standard of review is equivalent to that of a court. “[T]he proper focus of review of a zoning enactment is whether it violates State law or constitutional provisions, is arbitrary or unreasonable, or is substantially unrelated to the public health, safety or general welfare.” Durand v. IDC Bellingham, LLC, 440 Mass. 45, 57 (2003). A municipality has no power to adopt a zoning by-law that is “inconsistent with the constitution or laws enacted by the [Legislature].” Home Rule Amendment, Mass. Const. amend. art. 2, § 6.

III. Disapproved Text

A. Section 275-3.2 – Zoning Permit

The amended zoning by-laws include a new Section 275-3.2, “Zoning Permit,” that requires an “endorsed zoning permit determination from the Zoning Enforcement Officer (ZEO) prior to the filing for any building permit, special permit, variance, site plan review/approval or stormwater management permit.” Sections 275-3.2 (A) and (B). The by-law also requires the applicant to submit “pertinent information, including a site plan where applicable” as the ZEO deems necessary. Section 275-3.2 (C). The by-law provides that the ZEO “shall take action on the application, either granting the permit or disapproving the application” within 30 days of its filing.” Section 275-3.2 (D). The by-law authorizes an appeal of the ZEO’s “determination on a zoning permit” to the Zoning Board of Appeals. Section 275-3.2 (E).

We disapprove and delete Section 275-3.2 in its entirety because it conflicts with state law including G.L. c. 40A, the State's Zoning Act, as explained below.²

Section 275-3.2 conditions the right to apply for a building permit, special permit, variance, site plan or stormwater management permit on the applicant first obtaining a discretionary "zoning permit determination" from the ZEO "[t]o ensure that applications required under zoning are being applied for properly." Section 275-3.2 (D) authorizes the ZEO to "either grant[] the permit or disapprov[e] the application" in his/her sole discretion, and without providing any standards or criteria to guide the exercise of that discretion. As such, Section 275-3.2 (D) allows for potentially arbitrary and discriminatory decisions in violation of state law. See Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 363-364 (1973) ("Such vagueness would permit untrammelled [administrative] discretion and arbitrary and capricious decisions..."). Without standards and criteria, the proposed Section 275-3.2 gives unguided discretion to the ZEO to determine whether to grant a "zoning permit determination" and therefore, to determine if an applicant may even apply for a building permit, special permit, variance, site plan or stormwater management permit. For this reason, we disapprove Section 275-3.2.

Section 275-3.2 (D) also violates G.L. c. 40A, §§ 7, 9 and 10, as explained below.

1. *Section 275-3.2 Conflicts with G.L. c. 40A, Section 7*

General Laws Chapter 40A, Section 7 requires the "[i]nspector of buildings, building commissioner or local inspector...or person or board designated by local...by-law" to issue a building permit if the "construction, alternation or moving of any building or structure" or the "use of a building, structure or land" does not violate any zoning by-laws, in relevant part as follows:

The inspector of buildings, building commissioner or local inspector, or if there are none, in a town, the board of selectmen, or person or board designed by local ordinance or by-law, shall be charged with the enforcement of the zoning ordinance or by-law and shall withhold a permit for the construction, alteration or moving of any building or structure if the building or structure as constructed, altered or moved would be in violation of any zoning ordinance or by-law; and no permit or license shall be granted for a new use of a building, structure or land which use would be in violation of any zoning ordinance or by-law.

General Laws Chapter 40A, Section 7, requires the Building Inspector or ZEO to determine whether a permit application complies with the Town's zoning by-laws before he/she issues a building permit. The proposed Section 275-3.2 conflicts with this requirement because it seeks to require a "zoning permit determination" as a pre-requisite to an application for a building permit (or any other required permit).

² The Town may wish to consult with Town Counsel regarding other options (for example, a voluntary pre-application conference), that may achieve the purposes the Town wishes to address with the Section 275-3.2.

2. Section 275-3.2 Conflicts with G.L. c. 40A, Section 9

Section 275-3.2 also conflicts with the procedural protections in G.L. c. 40A, § 9 because it seeks to prohibit the filing of a special permit application until an applicant first applies for and receives a discretionary “zoning permit determination.” See e.g. Wall Street Development Corp. v. Planning Board of Westwood, 72 Mass. App. Ct. 844, 852-853 (2008) (invalidating zoning by-law that required, as a condition for consideration of a subdivision plan, the applicant to also submit a special permit application).

General Laws Chapter 40A, Section 9 provides that: “Each application for a special permit shall be filed by the petitioner with the . . . town clerk and a copy of said application, including the date and time of filing certified by the . . . town clerk, shall be filed forthwith by the petition with the special permit granting authority.” Section 9 contains no prerequisites to the filing of a special permit application. In addition, Section 9 requires the special permit granting authority to hold a hearing within 65 days of the filing of the application. “Failure by the special permit granting authority to take final action within...ninety days...shall be deemed to be a grant of the special permit.” See G.L. c. 40A, § 9. The filing of a special permit application begins the administrative clock under G.L. c. 40A, § 9, 11, and 15. See Mark Bobrowski, Handbook of Massachusetts Land Use and Planning Law, § 10.03 (2003). A by-law cannot condition an applicant’s right to file a special permit application upon first obtaining another discretionary permit. See Wall Street, 72 Mass. App. Ct. at 852-853. For these reasons, we disapprove and delete Section 275-3.2.

3. Section 275-3.2 Conflicts with G.L. c. 40A, Section 10

General Laws Chapter 40A, Section 10, governs variances and provides in relevant part:

The permit granting authority shall have the power after public hearing for which notice has been given by publication and posting as provided in section eleven and by mailing to all parties in interest to grant upon appeal or upon petition with respect to particular land or structures a variance from the terms of the applicable zoning...by-law where such permit granting authority specifically finds that owing to circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the...by-law would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such...by-law.

Section 275-3.2 impermissibly interferes with the authority of the permit granting authority to grant a variance upon the required findings, because Section 275-3.2 seeks to first require a discretionary approval (without any standards or criteria) in the form of a “zoning permit determination” from the ZEO. As explained in more detail above, the absence of any standards or criteria to guide the ZEO’s decision grants unfettered discretion to the ZEO to decide whether, and when, to allow an applicant to apply for a variance, and interferes with the

authority of the permit granting authority. It therefore promotes potentially arbitrary and discriminatory decisions in violation of state law. See Board of Appeals of Hanover, 363 Mass. at 363-364. For these reasons, we disapprove and delete Section 275-3.2.

B. Section 275-7.6 (H)(6)(e) –Vegetation Management

Section 275-7.6, “Solar electric generating facilities,” regulates solar electric generating facilities by providing standards for the placement, design, construction, operation, monitoring, modification and removal of solar installations. All solar installations (small-scale [16kW or less]; medium-scale [16kW to 250kW], intermediate-scale [250kW to 500kW] and large-scale [greater than 500kW]) require site plan approval. Section 275-7.6 (E), (G) and (H). The by-law imposes site and design requirements, including dimensional and height requirements; minimum setbacks; and screening. Section 275-7.6 (G) and (H). Section 275-7.6 (H)(6)(e), “Design and performance standards; vegetation management,” imposes a vegetation management requirement on all solar installations other than small-scale as follows, with emphasis added:

Herbicides, pesticides, or chemical fertilizers may not be used to manage vegetation at the solar electric generating facility. Mowing, grazing and using geotextile materials underneath the solar array are possible alternatives. In the Water Supply Protection District, low-growing grasses are optimal. Other grasses must be regularly mowed or grazed so as to minimize the amount and height of ‘fuel’ available in case of fire.

We disapprove the above text in bold and underline regarding herbicide, pesticide, and chemical fertilizer use because it is preempted by G.L. c. 32B, Massachusetts Pesticide Control Act (“Act”) and is preempted by Chapter 262 of the Acts of 2012 (amending G.L. c. 128, § 2), which grants the Department of Agricultural Resources (MDAR) the exclusive authority to regulate the application of plant nutrients, including fertilizers, in the Commonwealth.

1. *The Pesticide Control Act*

General Laws Chapter 132B establishes MDAR’s “exclusive authority in regulating the labeling, distribution, sale, storage, transportation, use and application, and disposal of pesticides in the commonwealth...” G.L. c. 132B, § 1. General Laws Chapter 132B, Section 2 defines “Pesticide” to include herbicides, as follows: “a substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant...” The Act establishes a Pesticide Board within MDAR (Section 3) and authorizes the Pesticide Board to register pesticides for use in the Commonwealth if the Board determines that “a pesticide, when used in accordance with its directions for use, warnings and cautions and for the uses for which it is registered...will not generally cause unreasonable adverse effects on the environment...” (Section 7).

A town by-law that regulates the application of pesticides in a way that interferes with the purpose of the Act is preempted. Town of Wendell v. Att’y Gen., 394 Mass. 518, 528-529 (1985) (by-law that “contemplates the possibility of local imposition of conditions on the use of a pesticide beyond those established on a Statewide basis under the act” is preempted). Because

the by-law text in Section 275-7.6 (H)(6)(e), shown above in bold and underline, prohibiting herbicides and pesticides use at solar installations is preempted by state law, we disapprove it.

2. *General Laws Chapter 128, § 2 (k)*

The use of plant nutrients, including fertilizers, in the Commonwealth is regulated by G.L. c. 128, § 2 (k) (as amended by Chapter 262 of the Acts of 2012, “An Act Relative to the Regulation of Plant Nutrients.”). General Laws Chapter 128, Section 2 grants authority to MDAR to regulate the application of plant nutrients, including fertilizers, in the Commonwealth, by adding to the list of the MDAR’s duties the following Subsection (k):

k. Maintain authority to regulate and enforce the registration and application of plant nutrients put on or in soil to improve the quality or quantity of plant growth, including, but not limited to, fertilizer, manure and micronutrients in the commonwealth.

In addition, G.L. c. 128, § 2 (k) authorizes the MDAR to “promulgate regulations that specify when plant nutrients may be applied and locations in which plant nutrients shall not be applied” and directs the MDAR to work in conjunction with the University of Massachusetts Amherst Extension to “ensure any regulations of the department relative to plant nutrients are consistent with the program’s published information, educational materials and other public outreach programs relative to nutrient management and fertilizer guidelines.” General Laws Chapter 128, Section 2 (k) also authorizes the MDAR to establish penalties for violations of the regulations and establishes an appeal process.

The sole authority to regulate the use and application of plant nutrients is vested in the MDAR. As authorized by G.L. c. 128, § 2 (k), the MDAR has promulgated regulations (330 CMR 31.00) that establish “limitations on the application of plant nutrients to lawns and non-agricultural turf to prevent these non-point source pollutants from entering the surface and groundwater resources of the Commonwealth of Massachusetts.” 330 CMR 31.01, “Purpose.” These regulations are comprehensive “state-wide limitations on plant nutrient applications.” *Id.* Where the Legislature has made a specific determination to vest regulatory authority with the MDAR, rather than cities and towns, the Town may not validly adopt (and we may not approve) a by-law which conflicts with this legislative determination. St. George Greek Orthodox Cathedral of Western Massachusetts, Inc. v. Fire Dep’t of Springfield, 462 Mass. 120, 126 (2012) (local legislative action “is precluded...where...the purpose of State legislation would be frustrated [by a local enactment] so as to warrant an inference that the Legislature intended to preempt the field.”). Because Section 275-7.6 (H)(6)(e)’s prohibition on the use of chemical fertilizers at solar installations is preempted, we disapprove it.

We approve the remaining portions of Section 275-7.6 regulating solar installations, because, on the record before us, we cannot conclude that they amount to an unreasonable regulation of solar facilities in conflict with G.L. c. 40A, Section 3. However, if the by-law is used to deny a solar installation, or otherwise applied in ways that make it impracticable or uneconomical to build solar energy systems and related structures, such application would run a serious risk of violating G.L. c. 40A, § 3. See Tracer Lane II Realty, LLC v. City of Waltham, 489 Mass. 775, 779, 781 (2022) Waltham’s prohibition on solar energy systems in all but one to two percent of its land area violates the solar energy provisions of G.L. c. 40A, § 3.). We

encourage the Town to consult with Town Counsel to ensure that Section 275-7.6 is applied consistent with the protections granted to solar energy systems under G.L. c. 40A, § 3, as discussed further in the case of Tracer Lane II, and this Office’s recent decisions related to solar by-laws.³

C. Section 275-7.15 – Adult Use Marijuana Establishments

Section 275-7.15 regulates adult use marijuana establishments. Section 275-7.15 (D) (3), “Location,” imposes certain location and buffer zone requirements as follows with emphasis added:

(b) No marijuana establishment shall be located on a parcel which is within 300 feet **(to be measured in a straight line from the nearest point of the property line in question to the nearest point of the property line where the marijuana establishment will be located)** of a parcel occupied by a public or private school providing education in kindergarten or any of grades one through 12 in existence at the time a marijuana establishment license is filed with the Cannabis Control Commission.

We disapprove the text above in bold and underline establishing the manner of measuring the buffer zone because it conflicts with the updated Cannabis Control Commission’s (CCC) regulations, 935 CMR 500.110 (3), “Buffer Zone,” (effective October 27, 2023) that require a buffer zone to be measured from the “geometric center” of the entrance, not from “the nearest point of the property line,” as follows:

The buffer zone distance of 500 feet shall be measured in a straight line from the geometric center of the Marijuana Establishment Entrance to the geometric center of the nearest School Entrance, unless there is an Impassable Barrier within those 500 feet; in these cases, the buffer zone distance shall be measured along the center of the shortest publicly-accessible pedestrian travel path from the geometric center of the Marijuana Establishment Entrance to the geometric center of the nearest School Entrance.

Towns are prohibited from imposing restrictions on marijuana establishments that conflict with the CCC regulations. West Street Associates LLC v. Planning Board of Mansfield, 488 Mass. 319 (2021) (holding that towns are preempted from adopting by-law provisions that impose different requirements on marijuana establishments than those requirements imposed by the CCC.). Because Section 275-7.15 (D)(3) requires a measurement that differs from the CCC’s regulations, we disapprove the text above shown in bold and underline.⁴

³ Decisions issued by the Attorney General’s Municipal Law Unit can be found at <https://www.mass.gov/municipal-law-review> by clicking the link for “Decision Look-up” and choosing the topic “Solar” from the search page topic pull down menu.

⁴ The Town should also consult with Town Counsel to ensure that the buffer zone requirement for Registered Marijuana Dispensaries (RMDs) found in Section 275-7.16 (C)(3), “Location,” is applied consistent with the CCC’s regulations, 935 CMR 501.110 (C)(3)(a) that requires a buffer zone between an RMD and a school to be measured from the geometric center of the school

We approve the remaining portions of Section 275-7.15 regulating adult use marijuana establishments. However, we encourage the Town to consult with Town Counsel to ensure that the remaining approved portions of the by-law are applied consistent with the CCC regulations. We note that Section 275-7.15 (B), “Definitions” defines several marijuana related terms used in the by-law, including the term “marijuana retailer,” defined as follows:

An entity licensed to purchase and transport cannabis or marijuana product from marijuana establishments and to sell or otherwise transfer this product to marijuana establishments and to consumers. Retailers are prohibited from delivering cannabis or marijuana products to consumers and from offering cannabis or marijuana products for the purposes of on-site social consumption on the premises of a marijuana establishment.

This definition differs from the CCC’s definition that defines a Marijuana Retailer as follows:

[A]n entity licensed to purchase, Repackage, White Label, and transport Marijuana or Marijuana Product from Marijuana Establishments and to Transfer or otherwise Transfer this product to Marijuana Establishments and to sell to Consumers. Unless licensed, retailers are prohibited from offering Marijuana or Marijuana Products for the purposes of on-site social consumption on the Premises of a Marijuana Establishment.

The by-law’s definition of “marijuana retailer” differs from the CCC’s definition in two ways. First, the by-law definition is not as broad as the CCC definition that authorizes a Marijuana Retailer to “Repackage, [and] White Label” (as those terms are defined in the CCC regulations) marijuana or marijuana products from a marijuana establishment. Second, the by-law’s definition prohibits a retailer from delivering marijuana or marijuana products to consumers. The delivery of marijuana or marijuana products from a marijuana establishment to a consumer is regulated in the CCC regulations. To deliver marijuana or marijuana products to a consumer, the CCC requires a “Delivery License” defined as “either a Marijuana Courier License or a Marijuana Delivery Operator License”⁵ or a “Delivery Endorsement” defined as an “authorization granted to Licensees in categories of Marijuana Establishments identified by the Commission to perform deliveries directly from the establishment to Consumers.” See 935 CMR 500.002. Therefore, for a marijuana retailer to deliver marijuana or marijuana products to consumers, they must hold this additional delivery license from the CCC. The Town should

entrance (not from the nearest property line). The Town should consult with Town Counsel to determine if Section 275.7.16 (C)(3) should be amended.

⁵ The CCC regulations’ definition of “Marijuana Courier” and “Marijuana Delivery Operator” provide that a courier or delivery operator is not considered to be a Marijuana Retailer. See 935 CMR 500.002 (A marijuana courier or marijuana delivery operator are “an additional license type under M.G.L. c. 94G, § 4(b)(1) that allows for limited delivery of Marijuana or Marijuana Products to Consumers; and shall not be considered to be a Marijuana Retailer under 935 CMR 500.002 or 500.050 and shall be subject to 935 CMR 500.050(1)(b).”)

consult with Town Counsel to determine if a future by-law amendment is needed to address these issues.

We also note that Section 275-7.15 (E)(d), regarding application requirements, references 105 CMR 725.000 and the Massachusetts Department of Public Health. Under Chapter 55 of the Acts of 2017 (“An Act to Ensure Safe Access to Marijuana”), the administration and oversight of medical marijuana use was transferred from the Department of Public Health to the CCC. As part of the transfer of oversight and administration to the CCC, 105 CMR 725.000 *et seq.* was superseded by the CCC regulations governing marijuana use at 935 CMR 500.000 and 935 CMR 501.000. The Town should consult with Town Counsel regarding whether this text should be amended at a future town meeting.

D. Child Care Center and Related Uses

Table 1, “Use Regulations,” prohibits (--) certain childcare center uses in four zoning districts and allows the use by right with site plan review (SP) in two districts as follows, with yellow highlighting added:

	R-R	R-N	R-V	C-V	C-H	I-P	Notes
Child care center, child nursery, nursery school, kindergarten, child play school, progressive school, child development center, preschool or school-aged child care program	--	--	--	SP	SP	--	As defined in and subject to MGL c 15D, § 1A

We disapprove and delete the prohibition on childcare uses, as shown above in bold and yellow highlight, because this portion of the Table conflicts with G.L. c. 40A, § 3. Section 3 establishes that a town may not prohibit or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a childcare facility, as follows:

No zoning...bylaw in any...town shall prohibit, or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. As used in this paragraph, the term “child care facility” shall mean a child care center or a school aged child care program, as defined in section 1A of chapter 15D.

General Law Chapter 15D, Section 1A, defines a childcare center as follows:

[A] facility operated on a regular basis whether known as a child nursery, nursery school, kindergarten, child play school, progressive school, child development center, or preschool, or known under any other name, which receives children not

of common parentage under 7 years of age, or under 16 years of age if those children have special needs, for nonresidential custody and care during part or all of the day separate from their parents. Child care center shall not include: any part of a public school system; any part of a private, organized education system, unless the services of that system are primarily limited to kindergarten, nursery or related preschool services; a Sunday school conducted by a religious institution; a facility operated by a religious organization in which children are cared for during short periods of time while persons responsible for the children are attending religious services; a family child care home; an informal cooperative arrangement among neighbors or relatives; or the occasional care of children with or without compensation.

Because the Town cannot prohibit these childcare center uses, as defined in G.L. c. 15D, § 1A, we disapprove the portion of the Table shown above in bold and yellow highlight. The Town should consult with Town Counsel with any questions on this issue.

IV. Comments on Certain Approved Text

A. Section 275-7.5 – Accessory Apartments

Section 275-7.5 (A) allows an attached accessory apartment by right with site plan approval and requires a special permit for a detached accessory apartment. The by-law imposes requirements on accessory apartments, including that they be in owner-occupied houses. See Section 275-7.5 (C)(4). We approve these provisions because they are consistent with G.L. c. 40A, § 1A, that defines an accessory dwelling unit (ADU) and authorizes a town to impose additional restrictions on ADUs “including but not limited to...owner-occupancy requirements...” However, the Town should monitor and consult with Town Counsel regarding legislation now pending that could change the ability of a town to impose owner-occupancy requirements on ADUs. See H.4138, “Affordable Homes Act” (pending legislation), Sections 12 and 13 (<https://malegislature.gov/Bills/193/H4138>).

B. Section 275-7.11 – Multifamily Dwellings

Multi-family dwellings are allowed by special permit in the Residential-Village (R-V), Commercial-Village (C-V) and Commercial-Highway (C-H) districts. See Table 1, “Use Regulations.” Section 275-7.11 imposes requires on the construction, enlargement or alteration of multi-family dwellings, including Subsection (I)(1) that provides that the “proposed multifamily development shall not overload any public water system or any other municipal system to such an extent that the requested use or any developed use in the immediate area or in any other area of the Town will be unduly subjected to hazards affecting health, safety, or the general welfare.”⁶

⁶ In addition, Section 275-10.6, “Findings required and review criteria” for special permits requires the SPGA to make a written finding that a special permit application complies with the identified criteria including, “[t]he requested use is not detrimental to the public convenience or welfare;” and “[t]he requested use will not overload...any other municipal systems.”

Section 275-7.11 requires that a proposed multifamily development “shall be compatible with adjacent land uses” and shall not “overload...any other municipal system.” The application of this provision raises concern under federal and state law, including the federal Fair Housing Act (FHA) and Massachusetts Anti-Discrimination Law. The Town should consult with Town Counsel to determine if future amendments are needed to address these issues, as discussed below.

1. *Potential Fiscal Impact on Essential Public Services*

As part of the special permit process, Section 275-7.11 (I) authorizes the SPGA to consider whether a proposed multifamily development will overload any municipal systems. In applying this provision, the Town should be aware of recent Land Court decisions analyzing the question whether a potential impact on essential public services, including education of children, is a lawful consideration in the context of multi-family housing. In two recent decisions the Land Court determined that consideration of potential increased costs for educating school-aged children is not a lawful consideration when reviewing a special permit application for multi-family housing.

In Bevilacqua Co. v. Lundberg, No. 19 MISC 000516 (HPS), 2020 WL 6439581, at *8–9 (Mass. Land Ct. Nov. 2, 2020), judgment entered, No. 19 MISC 000516 (HPS), 2020 WL 6441322 (Mass. Land Ct. Nov. 2, 2020) the court ruled that the Gloucester City Council’s denial of a special permit to construct an eight-unit multi-family building based on the potential fiscal impact of the proposed development on the Gloucester public schools was “legally untenable.” Id. at *9. Because the right to a public education is mandated and guaranteed by the Massachusetts Constitution, (see McDuffy v. Secretary of the Executive Office of Educ., 415 Mass. 545, 621 (1993) and Hancock v. Comm’r of Education, 443 Mass. 428, 430 (2005)) “[a denial of] a special permit to build housing because the occupants of that housing might include children who will attend public schools is [a denial of the children’s] constitutional right under the Massachusetts Constitution to a public education.” Id. at *8 (citing McDuffy and Hancock). “Therefore, notwithstanding the fiscal impact to a municipality from the construction of housing that may result from the obligation to educate children in the public schools, fiscal impact, as a reason for denying permits to construct housing, must give way when it runs afoul of the constitutional obligation of Massachusetts municipalities to provide a public education to all children.” Id. at *9.

The Bevilacqua decision also raises, but does not resolve, the question whether consideration of fiscal impacts from potential increase in demands on other essential public services is similarly unlawful in the context of multi-family housing:

Generally, a municipality may not condition the availability of fundamental public services, such as fire protection, on the ability of any particular member of the public to pay taxes sufficient to support those services. Emerson College v. City of Boston, 391 Mass. 415 (1984) (city may not charge “augmented fire services availability” fee for fire protection for properties requiring additional protection). That prohibition against denying members of the public the right to fundamental public services based on ability to pay is especially applicable when it comes to the right to a public education mandated and guaranteed by the Massachusetts Constitution.

Id. at *8.

Similarly, in 160 Moulton Drive LLC v. Shaffer, No. 18 MISC 000688 (RBF), 2020 WL 7319366, at *13-15 (Mass. Land Ct. Dec. 11, 2020), judgment entered, No. 18 MISC 000688 (RBF), 2020 WL 7324778 (Mass. Land Ct. Dec. 11, 2020) the court rejected the town's argument that the financial impact of educating the number of school-aged children projected to live in the apartments would be greater than the increased tax revenue, thus making the apartment use "substantially more detrimental" (in the language of the applicable by-law) than the existing restaurant use. "The Town cannot deny a permit on the grounds that its own property tax scheme is insufficient to provide for the needs of its inhabitants. Whether the Town has enough funds to provide public education for its school-aged children is simply not a matter for the Board to consider in reviewing special permit applications." Id. at *14 (citing Bevilacqua at *8-9).

The court in 160 Moulton Drive LLC echoed the Bevilacqua court's question whether increased demand for any essential public service is a lawful consideration when reviewing a special permit for multi-family housing:

Denial of a special permit on the grounds that increased tax revenue would not support the education of the children living therein is tantamount to conditioning the availability of public services on the ability of the residents to pay for them, which I find to be unreasonable and arbitrary. See Emerson College v. City of Boston, 391 Mass. 415 (1984).

Id. at *14.

In light of the holdings in Bevilacqua and 160 Moulton Drive LLC that the potential fiscal impact of educating school-age children is a legally untenable ground for denial of a permit for multifamily housing, and the open question whether a reviewing board may consider the impact on other essential public services, we strongly encourage the Town to consult closely with Town Counsel regarding whether the special permit criteria in Section 275-7.11 (I) should be enforced when reviewing a special permit application for a multi-family dwelling and whether it should be amended at a future town meeting.

2. *FHA and MA Anti-Discrimination Law Requirements*

The requirement that the Planning Board consider whether the multifamily dwelling is compatible with adjacent land uses and whether it will overload any municipal systems also raises concerns considering the Town's obligation to comply with the provisions of FHA and G.L. c. 151B. These statutes broadly prohibit discrimination in housing based on certain characteristics including race, color, religion, sex, gender identity, sexual orientation, familial status, national origin, handicap and ancestry. See 42 U.S.C. § 3604 and G.L. c. 151B, § 4, ¶¶ 4A and 6. The FHA and the Massachusetts Anti-Discrimination Law prohibit towns from using their zoning powers in a discriminatory manner, meaning in a manner that has the purpose or effect of limiting or interfering with housing opportunities available to members of a protected class.

Violations of the FHA and G.L. c. 151B occur when a town uses its zoning power to intentionally discriminate against a member of a protected class or when such zoning power has

a discriminatory impact on members of a protected class. See, e.g., Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc., 135 S.Ct. 2507, 2521-22 (2015) (recognizing disparate impact discrimination under the FHA); Burbank Apartments Tenant Ass'n v. Kargman, 474 Mass. 107 (2016) (recognizing disparate impact discrimination under G.L. c. 151B). Discriminatory impact can occur when a zoning rule, neutral on its face, “disproportionately disadvantages members of a protected class.” Burbank Apartments, 474 Mass. at 121 (discussing disparate impact in housing).

We strongly encourage the Town to consult closely with Town Counsel when reviewing special permit applications for multi-family dwellings to ensure compliance with the FHA and G.L. c. 151B.

C. Section 275-9.1 – Site Plan Review and Section 275.9.2 – Site Plan Approval

Section 275-9.1 (B), “Applicability,” requires site plan review as follows:

Site plan review is required for all projects which involve new construction, alteration or expansion of any residential buildings of two dwelling units or more, any exempt use under MGL c. 40A, § 3, or nonresidential buildings and where such construction will not: (1) require a special permit, variance or finding; (2) exceed a total increase in the footprint of the structure by 2,000 square feet...; or (3) generate the need for more than 10 parking spaces.

Section 275-9.2 (C), “Applicability,” requires site plan approval as follows:

Site plan approval is required for all projects which involve new construction, alteration or expansion of any residential buildings of two dwelling units or more, any exempt use under MGL c. 40A, § 3, or nonresidential buildings, and where such construction will: (1) require a special permit, variance or finding; (2) exceed a total increase in the footprint of the structure by 2,000 square feet...; or (3) generate the need for more than 10 parking spaces.

Section 275-9.1 (D), “Approval” for site plan review and Section 275.9.2 (E), “Approval,” for site plan approval, provides that site plan approval shall be granted upon a determination that the site plan meets certain identified objectives, including: (1) minimizing the volume of cut and fill and the number of removed trees; (2) maximizes pedestrian and vehicular safety; (3) minimizes obstruction of scenic views; (4) minimizes visual intrusion; (5) minimizes glare; (6) minimizes unreasonable departure from the character, materials and scale of buildings in the vicinity; (7) prevents contamination of groundwater; (8) ensures compliance with provisions of the zoning bylaw including parking and landscaping; and (9) ensures adequate access to each structure for fire and service equipment and adequate access for utilities and stormwater drainage.

In addition, both Section 275-9.1 (E), “Denial,” of site plan review and Section 275.92. (F), “Denial” of site plan approval, authorizes the permit granting authority to deny a site plan application, including for a use exempt under G.L. c. 40A, § 3 or a use otherwise allowed as of right, as follows:

Section 275.9.1 (E): In the event the application is not revised as requested by the permitting authority to meet the objectives in § 275-9.1D, the permitting authority may deny the application. The decision shall be in writing and shall clearly state the reasons for the denial with sufficient detail to enable the applicant to revise the site plan to meet the objectives in § 275-9.1D. There shall be no time penalties against the applicant to file a new site plan application, but said application shall require filing of a new fee.

Section 275.9.2 (F): In the event the application is not revised as requested by the permitting authority to meet the objectives in § 275-9.2E, the permitting authority may deny the application. The decision shall be in writing and shall clearly state the reasons for the denial with sufficient detail to enable the applicant to revise the site plan to meet the objectives in § 275-9.2E. There shall be no time penalties against the applicant to file a new site plan application, but said application shall require filing of a new fee.

Under G.L. c. 40A, § 3, a Town by-law may not prohibit, regulate or restrict protected uses, but may impose reasonable regulations in eight areas: the bulk and height of structures, yard sizes, lot area, setbacks, open space, parking and building coverage requirements. See The Bible Speaks v. Bd. of Appeals of Lenox, 8 Mass. App. Ct. 19, 33 (1979) (“The Legislature did not intend to impose special permit requirements, designed under [G.L. c. 40A, § 9], to accommodate uses not permitted as of right in a particular zoning district, on legitimate educational uses which have been expressly authorized to exist as of right in any zone.”) A site plan review requirement for Dover Amendment uses must be limited to the application of reasonable regulations in the categories listed in G.L. c. 40A, § 3. Jewish Cemetery Assoc. of Mass., Inc. v. Bd. of Appeals of Wayland, 85 Mass. App. Ct. 1105, *2 (2014) (a site plan review by-law applicable to Dover Amendment protected uses that is limited to imposing reasonable regulations on protected uses does not conflict with state law.)

In addition, there are only very limited circumstances under which a Town can deny an application for site plan of a by-right use. Site plan acts as a method for reasonably regulating as-of-right uses rather than for prohibiting them. Y.D. Dugout, Inc. v. Bd. of Appeals of Canton, 357 Mass. 25, 31 (1970). Where “the specific area and use criteria stated in the by-law [are] satisfied, the [reviewing] board [does] not have discretionary power to deny...[approval], but instead [is] limited to imposing reasonable terms and conditions on the proposed use.” Prudential Ins. Co. of America v. Westwood, 23 Mass. App. Ct. 278, 281- 82 (1986), quoting SCIT, Inc. v. Planning Bd. of Braintree, 19 Mass. App. Ct. 101, 105 n.12 (1984). A court may uphold a denial of site-plan approval for an as-of-right use or structure only if the problem prompting the denial is “so intractable that it could admit of no reasonable solution,” Prudential Ins., 23 Mass. App. Ct. at 283, or if the applicant “fails to furnish adequate information on the various considerations imposed by the by-law as conditions of the approval of the plan,” Id. See also Mechanic Willow, LLC v. Evans, No. 18 MISC 000183 (MDV), 2020 WL 7706985, at *11 (Mass. Land Ct. Dec. 28, 2020), judgment entered, No. 18 MISC 000183 (MDV), 2020 WL 7752883 (Mass. Land Ct. Dec. 28, 2020) (discussing standards for site plan review of as-of-right uses).

Further, under G.L. c. 40A, § 3, a Town by-law may impose reasonable regulations regarding a use exempt under G.L. c. 40A, § 3 in only eight areas: the bulk and height of

structures, yard sizes, lot area, setbacks, open space, parking and building coverage requirements. Here, the by-law authorizes the permitting authority to deny site plan, including for a use exempt under G.L. c. 40A, § 3, “in the event the application is not revised as requested ...to meet the objectives” in Section § 275-9.1 (D) or Section 275.9.2 (E). These objectives including such things as a review to ensure that the volume of fill and trees removed is minimized, a review of pedestrian and vehicular safety, and a review of whether the project minimizes obstruction of scenic views or other visual intrusion. The Town must ensure that these requirements are not applied in a manner that would exceed the permissible eight areas of review under G.L. c. 40A, § 3 (bulk and height of structures, yard sizes, lot area, setbacks, open space, parking and building coverage requirements). The Town should consult with Town Counsel regarding the proper application of the site plan review and site plan approval requirements for as-of-right uses and consider a future amendment to the by-law to differentiate the site plan review and approval requirements for as of right uses.

D. Table 1 – Use Regulations

Table 1, “Use Regulations,” identifies the uses that are allowed by right (P); by right with site plan approval (SP); by special permit from the Zoning Board of Appeals (ZB); by special permit from the Planning Board (PB); by special permit from the Select Board (BS) or not permitted (--) in the Town. We offer comments for the Town’s consideration on certain uses in the Use Regulations Table (Table).

1. *Church or other Religious Purpose and Public or Non-Profit Educational Institutions*

“Churches or other religious purposes” and “public or nonprofit educational institutions” are allowed in all districts by right with site plan approval and “[i]n accordance with MGL c. 40A, § 3.” As discussed in more detail above, under G.L. c. 40A, § 3, a Town by-law may not prohibit, regulate or restrict protected uses, but may impose reasonable regulations in eight areas: the bulk and height of structures, yard sizes, lot area, setbacks, open space, parking and building coverage requirements See The Bible Speaks, 8 Mass. App. Ct. at 33. A site plan review or approval requirement for Dover Amendment uses must be limited to the application of reasonable regulations in the categories listed in G.L. c. 40A, § 3. Jewish Cemetery Assoc. of Mass., Inc. 85 Mass. App. Ct. 1105. The Town should consult with Town Counsel to ensure the proper application of these portions of the Table.

2. *Hospital or Nursing Home*

Hospitals and nursing homes are allowed by special permit from the planning board in all districts except the I-P district where they are prohibited. The Town must apply these portions of the Table in a manner consistent with the protections provided to disabled persons under G.L. c. 40A, § 3 as follows:

Notwithstanding any general or special law to the contrary, local land use and health and safety laws, regulations, practices, ordinances, by-laws and decisions of a city or town shall not discriminate against a disabled person. Imposition of health and safety laws or land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on

families and groups of similar size other unrelated persons shall constitute discrimination. The provisions of this paragraph shall apply to every city or town, including, but not limited to the city of Boston and the city of Cambridge.

The Town should consult with Town Counsel to ensure that it applies this portion of the Table consistent with the protections given under G.L. c. 40A, § 3.

V. Conclusion

We approve the comprehensive recodification of the Town's zoning by-laws except for the text in: (1) Section 275.3.2 requiring a discretionary "zoning permit determination" as a condition of applying for a building permit, special permit, variance or other permits; (2) Section 275-7.6 (H)(6)(e) prohibiting the use of herbicides, pesticides and commercial fertilizers at a solar installation; (3) Section 275-7.15 (D)(3) regarding the measurement of buffer zones from a marijuana establishment to a school; and (4) a portion of Table 1, "Use Regulations," prohibiting child care center uses in four of the town's six zoning districts, as shown above in bold and underline (or yellow highlight), that we disapprove because it conflicts with state law as detailed herein. We encourage the Town to consult with Town Counsel to ensure the proper application of the remaining approved portions of the zoning by-laws as detailed herein.

Note: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the Town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were approved by the Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,

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