



THE COMMONWEALTH OF MASSACHUSETTS
 OFFICE OF THE ATTORNEY GENERAL
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October 20, 2022

Diane Packer, Town Clerk
 Town of Natick
 13 East Central Street
 Natick, MA 01760

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 TOWN CLERK-NATICK

**Re: Natick Annual Town Meeting of April 26, 2022 --- Case # 10585
 Warrant Articles # 24 and 25 (Zoning)**

Dear Ms. Packer:

Article 25 – Under Article 25 the Town voted to place a fifteen month moratorium on accepting new special permit applications for cluster developments in the Town. Because Article 25 proposes a moratorium that is limited in time (June 1, 2023); limited to a certain type of residential development (cluster developments); limited to certain zoning districts; and reflects a permissible public purpose, it does not present a clear conflict with state law or the constitution, and therefore we approve it. See Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986) (requiring inconsistency with state law or the constitution for the Attorney General to disapprove a by-law).¹

This decision briefly describes the by-law; discusses the Attorney General’s standard of review of zoning by-laws under G.L. c. 40, § 32; and then explains why, governed as we are by that standard, we approve Article 25.

¹ On August 18, 2022 we elected to proceed under the defect waiver provisions of G.L. c. 40, § 32 for Articles 24 and 25. In a certification received on September 28, 2022, the Town Clerk affirmed that the notice for Articles 24 and 25 was posted and published in accordance with the provisions of Section 32, and that one or more claims were filed with the Town Clerk’s Office within 21 days of publication. On October 3, 2022, we placed Articles 24 and 25 on a ninety-day extension with our decision due by January 5, 2023. Because the claims filed pursuant to G.L. c. 40, § 32 relate only to Article 24 and do not relate to Article 25, the Attorney General is authorized by G.L. c. 40, § 32 to waive (and does so waive) the defects as they relate to Article 25. We will issue our decision on Article 24 on or before January 5, 2023.

I. Summary of Article 25

Article 25 amends the Town's zoning by-laws to add a new first paragraph to Section III-F, "Cluster Development Allowed in Certain Districts," that imposes a fifteen month temporary moratorium on the acceptance of special permit applications for cluster developments as follows:

There is a temporary moratorium on accepting new applications under this section intended to allow the Town of Natick adequate time to undergo comprehensive review and planning, and revise this bylaw accordingly at a future Town Meeting. The moratorium period extends from March 2, 2022 (the date of legal notification of the enabling warrant article) for a period of 15 months thereafter, until June 1, 2023.

Under Section III-F, Single Family Residential Cluster (SRC) Developments are a development option designed to help the Town maximize available land for open space and diversify Natick's housing stock with a variety of dwellings. Section 111-F.1 (1). SRC Developments are allowed by special permit in the Town's Residential A, B, and C Zoning Districts and prohibited in the Town's remaining Zoning Districts, including the Residential General and Residential Multiple Zoning Districts, which are the Town's other residential districts. Section 111-F.1 (1). SRC Developments may include single-family dwellings, small single-family cottages, and town houses. Section 111-F.3. SRC Developments must include a certain number of affordable housing units and a certain percentage of open space. See Section 111-F.12, and Sections 111-F.6 and 111-F.14. In sum, the moratorium is limited in time (June 1, 2023) and limited in scope (cluster developments in certain zoning districts) such that it does not affect other residential construction in the Town.

II. Attorney General's Standard of Review

Our review of Article 25 is governed by G.L. c. 40, § 32. Pursuant to 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, 398 Mass. at 795-96. 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, in order 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 25, 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) ("With respect to the exercise of their powers under the Zoning Act, we accord municipalities deference as to their legislative choices and their exercise of discretion regarding zoning orders."). 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). "If the reasonableness of a zoning bylaw is even 'fairly debatable, the

judgment of the local legislative body responsible for the enactment must be sustained.” Id. at 51 (quoting Crall v. City of Leominster, 362 Mass. 95, 101 (1972)). However, 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. Municipal Authority to Adopt A Temporary Moratorium

A temporary moratorium is within a town’s power when there is a stated need for “study, reflection and decision on a subject matter of [some] complexity...” W.R. Grace, 56 Mass. App. Ct. at 569 (City’s temporary moratorium on building permits in two districts was within City’s authority to zone for public purposes). However, the Supreme Judicial Court’s holding in Zuckerman v. Hadley, 442 Mass. 511, 520-521 (2004) is a useful guardrail for towns considering the adoption of moratoria: “Except when used to give communities breathing room for periods reasonably necessary for the purposes of growth planning generally, or resource problem solving specifically, as determined by the specific circumstances of each case, such [moratorium] zoning ordinances do not serve a permissible public purpose, and are therefore unconstitutional.” Id., 442 Mass. at 520-521 (citing Sturges v. Chilmark, 380 Mass. 246, 257 (1980)). Towns must show that a by-law creating a moratorium “has some reasonable prospect of a tangible benefit to the community” and that there was a “reasonable basis” for the by-law. Sturges, 380 Mass. at 257. However, a town is not required to conduct studies before adopting a temporary moratorium or to memorialize all the factors that may lead to a town’s decision on a zoning by-law. W.R. Grace, 56 Mass. at 569.

IV. Analysis of Article 25’s Temporary Moratorium

The moratorium appears to be adopted for a legitimate planning purpose. Article 25 states that purpose of the moratorium is to provide the Town with time to comprehensively review the existing Cluster Development by-law and to revise the by-law as needed at a future Town Meeting. See also Draft Planning Board Meeting Minutes from the March 23, 2022 Meeting dated April 1, 2022. The Planning Board reports that the temporary moratorium will allow the Town time to address both substantive and procedural issues with the existing Cluster Development by-law, including provisions of the by-law addressing formulas and calculations and density bonuses. Id. According to the Town, the existing Cluster Development by-law is confusing and internally inconsistent and for this reason no SCR Development has been fully permitted under the existing Cluster Development by-law. See Email from Attorney North to AAG Gunagan dated October 17, 2022. Moreover, previous attempts to amend the existing by-law made the by-law more complicated to apply. Id. For these reasons, no additional housing units have been created under the existing Cluster Development by-law. Based on the information filed with us by the Town, it appears that the Town is utilizing the moratorium for the proper purpose of “growth planning.” Zuckerman, 442 Mass. at 520-521.

The moratorium is also limited in time (fifteen months) and scope (application for SCR Development special permits in the Town’s RSA, RSB, and RSC Zoning Districts), and does not present the problem of a rate-of-development by-law of unlimited duration which the Zuckerman court determined was unconstitutional. Id.

Because the moratorium appears to be a reasonable mechanism to achieve a legitimate planning purpose, we approve Article 25. However, the Town should consult with Town Counsel to ensure that the planning efforts continue to be carried out in a timely way so that the moratorium time period is used for its intended purpose: “to give communities breathing room for periods reasonably

necessary for the purposes of growth planning generally, or resource problem solving specifically, as determined by the specific circumstances of each case.” Zuckerman, 442 Mass. at 520-521.

V. Conclusion

We approve the temporary moratorium adopted under Article 25 based on the Attorney General’s limited standard of review of Town by-laws under G.L. c. 40, § 32. However, we strongly encourage the Town to consult with Town Counsel to ensure that Article 25 is applied consistent with state law.

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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cc: Town Counsel Karis L. North