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December 4, 2017

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

Re: Natick Special Town Meeting of May 9, 2017 - Case # 8548
Warrant Articles # 1 and 3 (Zoning)

Dear Ms. Packer:

Article 3 – We approve Article 3 ("Reasonable Regulation of Uses Exempted from Permitting") from the Natick Special Town Meeting of May 9, 2017 because, on the limited record required for the Attorney General's G.L. c. 40, § 32 by-law review process, we cannot determine that the application of the regulations to a G.L. c. 40A, § 3 protected use is facially unreasonable. Such a determination would require a complete factual record not available to the Attorney General under G.L. c. 40, § 32, and the resolution of disputed issues of fact better left for a court. *See* Martin v. the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 434 Mass. 141, 151 (2001) (the "reasonableness of a local zoning requirement will depend on the particular facts of each case."). However, we urge the Town to consult closely with Town Counsel during the site plan review process to ensure that the Town applies the by-law consistent with the limited use of site plan approval for protected uses under G.L. c. 40A, § 3. [1]

I. Attorney General's Standard of Review and General Zoning Principles.

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

[1] In a decision issued October 2, 2017 we approved Article 1.

considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid." Bloom, 363 Mass. at 154 (emphasis added). "The legislative intent to preclude local action must be clear." Id. at 155. Massachusetts has the "strongest type of home rule and municipal action is presumed to be valid." Connors v. City of Boston, 430 Mass. 31, 35 (1999) (internal quotations and citations omitted).

Article 3, 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). Because the adoption of a zoning by-law by the voters at Town Meeting is both the exercise of the Town's police power and a legislative act, the vote carries a "strong presumption of validity." Id. at 51. "Zoning has always been treated as a local matter and much weight must be accorded to the judgment of the local legislative body, since it is familiar with local conditions." Concord v. Attorney General, 336 Mass. 17, 25 (1957) (*quoting* Burnham v. Board of Appeals of Gloucester, 333 Mass. 114, 117 (1955)). "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.'" Durand, 440 Mass. at 51 (quoting Crall v. City of Leominster, 362 Mass. 95, 101 (1972)). Nevertheless, where a zoning by-law conflicts with state law or the constitution, it is invalid. *See* Zuckerman v. Hadley, 442 Mass. 511, 520 (2004) (rate of development by-law of unlimited duration did not serve a permissible public purpose and was thus unconstitutional).

During the course of our review we have received a communication from counsel for a church in Natick urging us to disapprove Article 3 on the basis of a conflict with G.L. c. 40A, § 3 (the "Dover Amendment."). We have also received a communication from Town Counsel urging us to approve Article 3. Although on balance we determine that we must approve Article 3 based upon our standard of review, counsel for the church raises important issues regarding the application of the intensity regulations to his client, and we urge the Town to consult carefully with Town Counsel during the site plan review process regarding that issue and the highlighted text below.

II. Summary of Article 3.

Article 3 proposes to amend several sections of the Town's zoning by-law to impose regulations for land or structures for uses protected under G.L. c. 40A, § 3. Primarily, the Article amends Section III, Use Regulations, to add a new subsection III-A.7 "Regulation of Land or Structures for Purposes Otherwise Exempted from Permitting." The new subsection III-A.7 imposes a site plan review requirement for uses protected by G.L. c. 40A, § 3 "[s]ubject to the limitations of G.L. c. 40A, § 3 or other State or Federal statute..." The portions of subsection III-A.7 that we wish to highlight for the Town's consideration are listed below:

a) In reviewing the site plan submittal made under this section, the following criteria shall be considered:

i. **relationship of** the bulk, height of structures, and adequacy of open spaces **to the natural landscape,** existing buildings **and other community assets in the area, and compliance with other requirements of this Bylaw, which includes but is not limited to** lot coverage, yard sizes, lot areas and setbacks.

ii. physical layout of the structures, driveways, utilities and other infrastructure **as it relates to the convenience and safety of vehicular and pedestrian movement on the site and in relation to streets and properties in the surrounding area, and for the location of driveway openings in relation to street traffic and to adjacent streets, so as to prevent traffic congestion and dangerous access within the site and onto existing ways, and when necessary, compliance with other requirements for the disabled, minors or the elderly;**

* * *

iv. **physical lighting of the site, including the methods of exterior lighting for convenience, safety and security within the site, and in consideration of impacts on neighborhood properties and excessive light pollution to the standards of Section V-I;** and

3. Intensity Regulations

* * *

(v) Sky Exposure Plane: the roof of the building may not project beyond sky exposure planes determined from the lot lines in a rise:run ratio of 1:1.

III. Site Plan Review for G.L. c. 40A, § 3 Uses.

General Laws Chapter 40A, Section 3, protects various uses from a town's zoning power, including the "educational use[s], religious use[s], or child care center[s]." The statute protects educational and religious uses as follows:

> No zoning ordinance or by-law shall…prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes…; 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.

The protections for child care uses are detailed in slightly different language:

> No zoning ordinance or bylaw in any city or 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.

Together these provisions establish that a Town by-law may not prohibit, or require a special permit for, educational, religious, or child care 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.") The Supreme Judicial Court has indicated that local zoning requirements serving "legitimate municipal purposes" may be applied to Dover Amendment uses. Trustees of Tufts Coll. v. City of Medford, 415 Mass. 753, 757-758 (1993) (*citing* MacNeil v. Town of Avon, 386 Mass. 339, 341 (1982). In addition, the Appeals Court recently upheld a site plan review requirement for Dover Amendment uses, limited to the application of reasonable regulations as set forth in G.L. c. 40A, § 3, as "consistent with a reasonable reading of the Dover Amendment, G.L. c. 40A, § 3, and The Bible Speaks v. Board of Appeals of Lenox, 8 Mass. App. Ct. 19, 31 91978)." Jewish Cemetery Assoc. of Mass., Inc. v. Bd. of Appeals of Wayland, 85 Mass. App. Ct. 1105, *2 (2014).

As in Jewish Cemetery Assoc., it appears reasonable for the Town to use a limited site plan review as the process by which it regulates the bulk and height of structures, yard sizes, lot area, setbacks, open space, parking and building coverage requirements for such statutorily protected uses. However, the text in highlight and bold (see p. 3, above) in Section III-A.7 appears to go far beyond the allowable reasonable regulation of the eight limited categories allowed under G.L. c. 40A, § 3 (the bulk and height of structures, yard sizes, lot area, setbacks, open space, parking and building coverage requirements), and instead mirrors the type of special permit criteria that is expressly prohibited under The Bible Speaks v. Bd. of Appeals of Lenox, 8 Mass. App. Ct. 19, 33 (1979). It should be noted that site plan approval acts as a method for regulating as-of-right uses rather than 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 from* SCIT, Inc. v. Planning Bd. of Braintree, 19 Mass. App. Ct. 101, 105 n.12 (1984). We urge the Town to consult closely with Town Counsel during the site plan review so that this text in the by-law is not utilized as the basis for a discretionary special permit type of review, rather than a limited site plan review of the eight allowable uses in G.L. c. 40A, § 3 (the bulk and height of

structures, yard sizes, lot area, setbacks, open space, parking and building coverage requirements).

In addition, when considering whether/how to apply the "sky exposure plane" requirement of Section III –A.7 (3) (b) (v) to religious uses, the Town should consult closely with Town Counsel regarding the court's decision in Martin v. the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 434 Mass. 141, 154 (2001) (in the circumstances and based on the factual record, the height restriction of the Belmont bylaws could not reasonably be imposed on a church because of the protections in G.L. c. 40A, § 3).

The Town should also be aware of the protections afforded to disabled persons under G.L. c. 40A, § 3, ¶4:

> 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 or other unrelated persons shall constitute discrimination.

Uses that qualify as educational, religious or child care pursuant to G.L. c. 40A, § 3 may also qualify for the protections accorded to disabled persons under G.L. c. 40A, § 3, ¶4. For example, persons recovering from or receiving treatment for addiction to alcohol or drugs are disabled individuals for the purposes of the Americans with Disabilities Act, 42 U.S. C. §§ 12102 (2) (B) (C), and a substance abuse treatment center is likely to be protected under G.L. c. 40A, § 3, ¶4. *See e.g.*, Granada House, Inc. v. City of Boston, 1997 WL 106688 (Mass. Super. Ct.) (the Zoning Act bars the City's discriminatory treatment of a group home for recovering drug and alcohol users.).

Finally, certain religious or educational uses protected under G.L. c. 40A, § 3 may also be protected by the Fair Housing Act (FHA), the Americans with Disabilities Act (ADA), and/or the Rehabilitation Act (RA). *See, e.g.*, South Middlesex Opportunity Council, Inc. v. Town of Framingham, 752 F.Supp.2d 85, 95 (D. Mass. 2010) (Residential substance treatment centers are covered by the FHA because federal regulations define "handicap" to include drug addiction or alcoholism); Safe Haven Sober Houses, LLC v. Good, 82 Mass. App. Ct. 1112, *3. (2012); Innovative Health Systems v. City of White Plains, 931 F.Supp. 222 (S.D.N.Y. 1996) (the ADA and Section 504 of the Rehabilitation Act apply to zoning enforcement activities; and zoning board decision reversing issuance of building permit to outpatient alcohol and drug dependence program violated those statutes.).

In conclusion, we approve the by-law adopted under Article 3 on the Attorney General's limited standard of review of town by-laws under G.L. c. 40, § 21. However, we strongly encourage the Town to consult with Town Counsel during any site review process because of the protections afforded to educational, religious, and child care uses in G.L. c. 40A, § 3.

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 John Flynn