



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

CENTRAL MASSACHUSETTS DIVISION
10 MECHANIC STREET, SUITE 301
WORCESTER, MA 01608

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

(508) 792-7600
(508) 795-1991 fax
www.mass.gov/ago

July 27, 2023

Wendy Houle, Temporary Town Clerk
Town of Deerfield
8 Conway Street
Deerfield, MA 01373

**Re: Deerfield Annual Town Meeting of April 24, 2023 -- Case # 10896
Warrant Article # 19 (Zoning)**

Dear Ms. Houle:

Article 19 - We approve Article 19 from the April 24, 2023 Deerfield Annual Town Meeting.

Under Article 19 the Town amended several sections of the zoning by-laws related to accessory apartments. One change deletes Section 2244 in its entirety and inserts a new Section 3900, "Accessory Apartments." Another change amends Section 2230, "Use Regulation Schedule" to identify the zoning districts where accessory apartments are allowed or prohibited. Another change amends Section 3100, "Town Wide Parking and Loading Requirements" to establish parking requirements for accessory apartments. We offer comments on the new Section 3900 for the Town's consideration.

I. Summary of Section 3900 – Accessory Apartments

The purposes of the new Section 3900 include providing homeowners with rental income, companionship, security and services through accessory apartments; making rental housing units available; and imposing conditions for the creation of accessory apartments in owner-occupied homes. Section 3910, "Purpose." Accessory apartments within a primary single-family home are allowed by right in the Residential-Agricultural (RA), Center Village Residential (CVRD), Small Business (C-1) and Commercial (C-II) districts and prohibited in all other districts. See Section 3931, "Owner Occupied Dwelling with Accessory Apartments Allowed by Right;" see also Section 2230, "Use Regulation Schedule."

Accessory apartments attached to an existing primary single-family dwelling unit that require "structural modifications larger than the existing footprint of the primary single-family dwelling unit" are allowed by special permit in the RA and CVRD districts and prohibited in all other districts. See Section 3932 (1), "Accessory Apartments Allowed by Special Permit;" see

also Section 2230. Accessory apartments in a detached structure on a permanent foundation on the same lot as a primary single-family dwelling unit are allowed by special permit in the RA and CVRD districts and prohibited in all other districts. See Section 3932 (2) and Section 2230.

The by-law also imposes standards for all accessory apartments, including that the accessory apartment be in an owner-occupied dwelling; only one apartment can be created on a single-family lot; only one unit (either the accessory apartment or the main residence) can be rented; the accessory apartment cannot have more than two bedrooms; and the accessory apartment may not be used for short term rentals for less than thirty days. Section 3934, “Standards for All Accessory Apartments.”

II. Comments on the New Section 3900

1. Section 3932 – Accessory Apartments Allowed by Special Permit

Section 3932 (1) authorizes the Planning Board to allow by special permit “[a]ccessory apartments that are attached to the existing primary single-family dwelling unit, but that require structural modifications larger than the existing footprint of the primary single-family dwelling unit, in all districts.” (emphasis added). However, Section 2300, “Use Regulation Schedule,” states that this use is allowed by special permit only in the RA and CVRD districts and prohibited in all other districts. The Town may wish to clarify this provision at a future Town Meeting to make clear in which districts “[a]ccessory apartments that are attached to the existing primary single-family dwelling unit, but that require structural modifications larger than the existing footprint of the primary single-family dwelling unit” are allowed by special permit. The Town should consult with Town Counsel with any questions on this issue.

2. Section 3934 – Standards for All Accessory Apartments

Section 3934 (7) limits an accessory apartment to “no more than 2 bedrooms.” The Town must apply this provision consistent with the Fair Housing Act (FHA) and G.L. c. 151B, § 4.

Both Federal and State law prohibit discrimination in the provision of housing based on familial status (i.e., the presence of children in the household.). See 44 U.S.C. § 3604 and G.L. c. 151B, § 4, ¶ 6. The Fair Housing Act (“FHA”) expressly prohibits discrimination in the rental or sale of a dwelling based on familial status and provides that it shall be unlawful:

- (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

See 42 U.S.C. § 3604 (a).

“The phrase ‘otherwise make unavailable or deny’ encompasses a wide array of housing practices...and specifically targets the discriminatory use of zoning laws and restrictive

covenants.” Casa Marie, Inc. v. Superior Court of Puerto Rico for Dist. of Arecibo, 988 F.2d 252, 257 n. 6 (1st Cir. 1993).

Similarly, G.L. c. 151B, § 4, the Massachusetts Anti-Discrimination law, forbids discrimination in housing based on familial status. See G.L. c. 151B, § 4, ¶ 6. Both the Act and c. 151B, prohibit towns from using their zoning powers in a discriminatory manner, i.e., using its zoning powers to exclude housing for members of a protected class, i.e., a family with children. Violations occur when a Town uses its zoning power to intentional discriminate against a member of a protected class or when such zoning power has a discriminatory impact on members of a protected class. See Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977). Discriminatory effect can occur when a zoning rule, neutral on its face, is applied in a manner to exclude members of a protected class.

Based on the Attorney General’s limited standard of review, we cannot conclude that the by-law’s bedroom limitations violate the FHA or G.L. c. 151B. However, we suggest that the Town discuss this text with Town Counsel in light of the statutory requirements of the FHA and G.L. c. 151B.

3. Section 3960 – Termination of Accessory Apartment Use

Although G.L. c. 40, § 21 and G.L. c. 40A, § 7 authorize by-law violations to be enforced by a fine, Section 3960 does not impose any fines for a violation of the by-law. Instead, Section 3960 states that a violation of the by-law will be enforced by requiring the accessory apartment use to “terminate immediately.” It is not clear whether the text “terminate immediately” intends to refer to a revocation of a special permit by the Special Permit Granting Authority. See Copeland v. Town of Nantucket, 24 Mass. L. Rptr. 268, *4 (2008) (Planning Board could revoke a special permit for failure to comply with intensity regulations); White Sands Beach Club, Inc. v. Board of Appeal for the Town of Truro, 18 Mass. L. Rptr. 621, *3 (2004) (Board of Appeals had inherent authority to revoke a 1996 special permit); and Hinchliffe v. Koning, 3 Mass. L. Rptr. 229, *3, n.1 (1994) (Board of Appeals and not the Building Commissioner had power to revoke a special permit).

If the Town intends to use the provisions of Section 3960 to authorize the revocation of a previously issued special permit, the Town should consult with Town Counsel regarding the appropriate process for doing so including any required due process considerations such as notice and hearing before revocation. In addition, , the Town should consult with Town Counsel to determine whether Section 3960 should be clarified at a future Town Meeting to address these issues.

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,

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

Nicole B. Caprioli

By: Nicole B. Caprioli
Assistant Attorney General
Municipal Law Unit
10 Mechanic Street, Suite 301
Worcester, MA 01608
(508) 792-7600 ext. 4418

cc: Town Counsel Lisa L. Mead