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February 13, 2024

Kathlene A. Sanderell, Temporary Town Clerk
Town of Deerfield
8 Conway Street
Deerfield, MA 01373

Re: Deerfield Special Town Meeting of October 23, 2023 -- Case # 11231
Warrant Articles # 7, 8 and 9 (Zoning)
Warrant Articles # 4 and 5 (General) [1]

Dear Ms. Sanderell:

Article 7 – Under Article 7 the Town voted to amend the Zoning Bylaws "to address inconsistencies, update sections, and provide a new Official Zoning Map. The proposed Zoning revisions include changes to many sections of the Zoning Bylaws…" The Warrant states that the complete text of the proposed zoning by-law revisions and the proposed official zoning map were available for review at the Town's Municipal Offices and the Town's website. A copy of this document showing the proposed revisions was provided to this Office.

We approve the revised zoning by-laws, and the related map amendments. However, our approval is limited solely to those changes that were identified in the documents submitted to this Office and does not include any other changes. We will return the approved maps to you by regular mail. We offer comments below for the Town's consideration on certain provisions of the zoning by-law, including existing text not amended under Article 7.

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

Our review of Article 7 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 (1986). 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.") "As a general proposition the cases dealing with

[1] In a decision issued December 18, 2023, we approved Article 5. In a decision issued today (February 13, 2024) under separate cover, we approved Articles 8 and 9 and took no action on Article 4 because it was amending the Town's personnel by-laws.

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 7, 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.

II. Comments on Certain Amendments Under Article 7

A. Section 3140 – Parking Lot Design

Subsection 3145 requires that parking areas "shall include one Electric Vehicle (EV) parking space with EV charging for every fifteen (15) parking spaces." We approve this provision. However, the Town must ensure it is applied consistent with the Massachusetts State Building Code (Building Code). The Building Code defines the term Electric Vehicle Charging Space and requires a certain minimum number of EV Ready Spaces for certain types of buildings. See 780 CMR 13 (202) and 405.10. If the Building Code requires buildings to have a certain number of EV Ready Spaces, the by-law cannot be applied in a manner to conflict with this requirement.[2] The Town should consult with Town Counsel with any questions on this issue.

B. Section 3200 – Signs

Under Article 7 the Town amended Section 3200, "Signs." One change amends Section 3250 (a), "Temporary Signs," to add new text requiring temporary signs to "be removed within 7 days after the event, election, growing season or construction has occurred." Section 3250 (a) (1) – (6) defines temporary signs to include: political signs; construction or remodeling signs; and special event signs. The existing text of Section 3250 (a) imposes size limitations on certain temporary signs including 7 square feet for political signs; 32 square feet for public, charitable or religious organization signs; 9 square feet for construction and remodeling signs; and 32 square feet for signs advertising agricultural products.

[2] See Chapter 3 of the International Building Code (2015 Ed.) and 780 CMR 9th Ed. amendments to Chapter 3 for a complete list of Group designations that includes movie theatres, general business uses such as animal hospitals and professional offices, schools, day care centers, department stores, retail stores, hospitals, and hotels.

We approve the amendments to Section 3200. However, the Town should be aware of the Supreme Court decision in Reed v. Gilbert, Arizona, 135 S. Ct. 2218 (2015), which held that the Town's content-based sign regulation was unconstitutional because it was not narrowly tailored to serve a compelling state interest. The Town may wish to discuss the Reed decision with Town Counsel to ensure the by-law is properly applied.

C. Section 5300 – Special Permits

Under Article 7 the Town amended Section 5300, "Special Permits," to add a new Section 5315, "Impact Statement." The new Section 5315 requires a special permit application to include an impact statement that details the "probable effects of the project, subdivision proposal, or development on the following positive or negative aspects of concerns to the Town" for eighteen identified topics including: (1) attendance at public schools; (2) impact on demand for municipal services such as police, fire, ambulance, road maintenance, garbage collection and disposal, and school transportation; (3) public safety concerns related to crime and acts of terrorism; and (4) harmony with the character of the surrounding neighborhood.

Section 2230, "Use Regulation Schedule," requires a special permit for multi-family dwellings in the Center Village Residential (CVRD), Small Business (C-I) and Expedited Permitting (EPD) Districts. As applied to special permit review of multi-family dwellings the Impact Statement requirement of Section 5315 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.

1. Potential Fiscal Impact on Essential Public Services

As part of a special permit application, Section 5315 requires an impact statement that addresses a project's potential impact on municipal services. In applying Section 5300, including Section 5315, 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.

We recognize that the SPGA retains wide discretion to deny a special permit. However, the denial of a special permit may not be "based upon a legally untenable or arbitrary and capricious ground." Davis v. Zoning Bd. of Chatham, 52 Mass. App. Ct. 349, 355 (2001). 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 special permit for

multifamily housing, and the open question whether the SPGA may consider the impact on other essential public services, we strongly encourage the Town to consult closely with Town Counsel regarding whether the criteria in Section 5315 should be enforced when reviewing special permit applications for multi-family dwelling and whether it should be amended at a future town meeting.

2. FHA and MA Anti-Discrimination Law Requirements

The special permit requirements as applied to multi-family dwellings also raise concerns considering the Town's obligation to comply with the provisions of FHA and G.L. c. 151B when reviewing applications for special permits for multi-family housing in the Town. 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.

D. Article VI – Definitions

Under Article 7 the Town amended Article VI, "Definitions," to amend the definition of family as follows (new text in underline and deleted text in strikethrough):

> Family shall mean a group of persons related by marriage, civil union, blood, adoption, guardianship, or other duly authorized custodial relationship, residing together in one dwelling unit or a group of unrelated individuals, not to exceed 5, residing cooperatively in one dwelling unit. ~~a number of individuals living and cooking together on the premises as a single unit.~~

We approve the amended definition of "Family," but we offer comments for the Town's consideration to ensure that the definition is not applied in a manner that conflicts with the FHA and G.L. c. 151B.

Both the Massachusetts and federal constitution provide protections for a "private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166 (1944); see also Goodridge v. Dep't of Public Health, 440 Mass. 309, 329 (2003) ("whether and how to establish a family…[is] among the most basic of every individual's liberty and due process rights"); A.Z. v. B.Z., 431 Mass. 150, 162 (2000) (acknowledging that the Constitution protects freedom of choice in matters of "family life"). These protections limit the Town's authority to regulate private "family living arrangements." Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977). In particular, the Town may not use its zoning power to place limits on which categories of family members may live together in the same household. Id. (holding that city housing ordinance that restricted occupancy to "only a few categories of related individuals" violated due process clause of the 14th Amendment).

In general, housing by-laws that utilize restrictive definitions of family may violate the due process clause of Article 10 of the Declaration of Rights. See Com. v. Jaffe, 398 Mass. 50, 56-57 (1986) (assuming without deciding that the term "family" must be defined using the concept of a "single housekeeping unit"). The Town should discuss this issue with Town Counsel to ensure the proper application of this definition and to determine if a future amendment is needed.

III. Additional Comments on Existing Text not Amended under Article 7

The amendments under Article 7 made only certain identified changes shown in underline (new text) and strikethrough (deleted text). However, there were many portions of the zoning by-laws that were not amended under Article 7, and we offer comments for the Town's consideration on certain of these existing provisions. We encourage the Town to consult with Town Counsel to determine if future amendments to the zoning by-laws are needed to address these issues.

A. Section 3900 – Accessory Apartments

Section 3900 imposes regulations and requirements on accessory apartments. Section 3910 (3) provides that one purpose of the accessory apartment bylaw is to "[p]rotect stability, property values, and the residential character of a neighborhood by ensuring that Accessory Apartments are installed only in owner-occupied houses and under such additional conditions as may be appropriate to further the purposes of this bylaw."

This provision is 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). [3]

[3] The relevant text of the pending legislation currently provides as follows, with emphasis added:

> SECTION 12. Section 1A of chapter 40A of the General Laws, as appearing in the 2022 Official Edition, is hereby amended by striking out the definition of "Accessory Dwelling Unit" and inserting in place thereof the following

B. Section 4660 – Marijuana Establishments

Although much of the existing Section 4660, "Marijuana Establishments," was not amended under Article 7 and is therefore not before the Attorney General for review and approval, we offer comments for the Town's consideration regarding certain subsections of the by-law and encourage the Town to consult with Town Counsel to determine if a future amendment to the by-law is needed.

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definition:-

"Accessory dwelling unit", a self-contained housing unit, inclusive of sleeping, cooking and sanitary facilities on the same lot as a principal dwelling, subject to otherwise applicable dimensional and parking requirements, that: (i) maintains a separate entrance, either directly from the outside or through an entry hall or corridor shared with the principal dwelling sufficient to meet the requirements of the state building code for safe egress; (ii) is not larger in gross floor area than 1/2 the gross floor area of the principal dwelling or 900 square feet, whichever is smaller; and (iii) is subject to such additional restrictions as may be imposed by a municipality, including but not limited to additional size restrictions, and restrictions or prohibitions on short term rental, as defined in section 1 of chapter 64G; provided, however, that no municipality shall unreasonably restrict the creation or rental of an accessory dwelling unit that is not a short-term rental.

SECTION 13. Section 3 of said chapter 40A of the General Laws, as so appearing, is hereby amended by adding the following paragraph:-

No zoning ordinance or by-law shall prohibit, unreasonably restrict, or require a special permit or other discretionary zoning approval for the use of land or structures for an accessory dwelling unit, or the rental thereof, in a single-family residential zoning district; provided, that the use of land or structures for an accessory dwelling unit under this paragraph may be subject to reasonable regulations, including but not limited to 310 CMR 15.000 et seq., if applicable, site plan review, regulations concerning dimensional setbacks and the bulk and height of structures and may be subject to restrictions and prohibitions on short term rental as defined in section 1 of chapter 64G. The use of land or structures for an accessory dwelling unit under this paragraph shall not require owner occupancy of either the accessory dwelling unit or the principal dwelling; provided further, that not more than 1 additional parking space shall be required for an accessory dwelling unit; and provided further, that no additional parking space shall be required for an accessory dwelling located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station. The executive office of housing and livable communities may issue guidelines or promulgate regulations to carry out the purposes of this paragraph.

1. Section 4662 – Definitions

The Cannabis Control Commission (CCC) recently amended its regulations, 935 CMR 500.000 (Adult Use of Marijuana) and 935 CMR 501.000 (Medical Use of Marijuana), effective October 27, 2023. As detailed below, some of the Town's existing marijuana-related definitions now differ from the current CCC regulations including marijuana microbusiness; marijuana research facility; marijuana retailer and marijuana social consumption operation. The Town must ensure that its marijuana related definitions are applied consistent with the applicable statutes and regulations, including the CCC's definitions found in 935 CMR § 500.002. This is especially important given the court's holding in West Street Associates LLC v. Planning Board of Mansfield, 488 Mass. 319 (2021) that towns are preempted from adopting by-law requirements that conflict with the CCC regulations. We offer comments on certain existing definitions in Section 4662.

Section 4662 defines "Medical Marijuana Treatment Center" (MTC) as "[a] not-for-profit entity registered under 105 CMR 725.100" (emphasis added).[4] The CCC regulations no longer define or require a MTC to be a not-for-profit entity. If this by-law definition was before the Attorney General for review and approval now, we would disapprove the requirement that a MTC be a "not-for-profit" because it conflicts with the current version of the CCC regulations that no longer require a MTC to be a not-for-profit entity. See West Street Associates LLC, 488 Mass. at 323 (invalidating local a bylaw requiring all medical marijuana dispensaries to be nonprofit organizations because CCC regulations no longer include the non-profit requirement).

In addition, we note that the Town's definition references 105 CMR 725.100. 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.

Section 4662 defines the term "Community Host Agreement" as:

> An agreement, pursuant to General Laws, Chapter 94G, Section 3 (d), between a Cannabis Establishment and a municipality setting forth additional conditions for the operation of a Cannabis Establishment, including stipulations of responsibility between the parties and a up to 3% host agreement revenue sharing. Note this term is not defined in 935 CMR 500.

As a result of the recent amendment to the CCC regulations, the term "Host Community Agreement" is now defined, as follows: "Host Community Agreement (HCA) means an agreement entered into and executed between a Host Community and a License Applicant or between a Host Community and a Marijuana Establishment or MTC pursuant to M.G.L. c. 94G,

[4] In addition, the exiting text in Article VI, "Definitions," also defines a "Medical Marijuana Treatment Center" as "a not-for-profit entity registered under 105 CMR 725.100." The Town should consult with Town Counsel to determine if this existing text should also be amended at a future Town Meeting.

§ 3(d).” In addition, the CCC’s updated regulations impose requirements for Host Community Agreements, including requirements related to community impact fees. See 935 CMR §§ 500.180 and 500.181. The Town should consult with Town Counsel to ensure that the by-law is applied consistent with the updated CCC regulations.

Further, the by-law’s definition of “marijuana establishment” includes a “Medical Marijuana Treatment Center” but a MTC is excluded under the CCC regulations’ definition that defines a “Marijuana Establishment” as follows (with emphasis added):

> a Marijuana Cultivator (Indoor or Outdoor), Craft Marijuana Cooperative, Marijuana Product Manufacturer, Marijuana Microbusiness, Independent Testing Laboratory, Marijuana Retailer, Marijuana Transporter, Delivery Licensee, Marijuana Research Facility Licensee (as defined in 935 CMR 500.002: Marijuana Research Facility Licensee) Social Consumption Establishment (as defined in 935 CMR 500.002: Social Consumption Establishment) or any other type of licensed Marijuana-related business, except a Medical Marijuana Treatment Center (MTC).

In light of the above, the Town should consult with Town Counsel to determine if a future amendment to Section 4662, “Definitions,” is needed to address these issues.

2. Section 4666 (a) – Location

The existing text in Section 4666, “Additional Requirements/Conditions,” Subsection (a), “Location,” paragraph 2 imposes a buffer zone requirement as follows:

> No marijuana establishment shall be located on a parcel which is within five hundred (500) 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 is or will be located) of a parcel occupied by a preexisting public or private school or licensed daycare center(existing at the time the applicant’s license application was received by the Cannabis Control Commission.

The updated CCC regulations, 935 CMR 500.110 (3), “ Buffer Zone,” provides that the entrance of a MTC may not be closer than 500 feet from the nearest school entrance and requires the buffer zone to be measured in a straight line from the *geometric center* of the MTC to the *geometric center* of the school entrance, as follows:

> The buffer zone distance of 500 feet shall be measured in a straight line from the geometric center of the MTC 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 MTC Entrance to the geometric center of the nearest School Entrance.

The Town must ensure that Section 4666 (a)(ii) is applied consistent with 935 CMR 500.110 (3). In addition, the Town should consult with Town Counsel to determine if a future amendment to Section 4666 (a)(ii) is needed to address this issue.

IV. Conclusion

We approve the amendments to the Town's zoning by-laws adopted under Article 7. However we encourage the Town to consult with Town Counsel regarding the issues raised herein to ensure proper application of the Town's zoning by-law and to determine if any future amendments are needed to the zoning by-laws as discussed 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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