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OFFICE OF THE ATTORNEY GENERAL

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March 15, 2022

Jenn Wallace, Assistant Town Clerk/Temporary Town Clerk
Town of Deerfield
8 Conway Street
South Deerfield, MA 01373

**Re: Deerfield Special Town Meeting of October 4, 2021 -- Case # 10331
Warrant Articles # 7, 8, 9, 10, 11, and 12 (Zoning)**

Dear Ms. Wallace:

Article 8 - Under Article 8 the Town voted to amend the minimum frontage requirements for town-owned lots used for municipal facilities in certain Town zoning districts. As explained in more detail below, we approve the by-law amendments adopted under Article 8 because they are not in conflict with state law, including the procedural requirements in G.L. c. 40A, § 5 for adopting zoning by-laws. See Amherst v. Attorney General, 398 Mass. 793, 795-96, 798-99 (1986) (requiring inconsistency with state law or the constitution for the Attorney General to disapprove a by-law).¹

In this decision, we summarize the by-law amendments adopted under Article 8, including the procedural process and the Attorney General's standard of review of zoning by-laws, and then explain why, based on our standard of review, we approve Article 8.

During our review of Article 8 we received various communications urging us to either approve or disapprove the Article.² We emphasize that our approval of the by-law amendments in no way implies any agreement or disagreement with any policy reasons leading to Town Meeting's vote. The Attorney General's limited standard of review requires her to approve or

¹ In a decision dated On January 6, 2022, we approved Articles 7, 9, and 12; elected to proceed under the defect waiver provisions of Chapter 299 of the Acts of 2000 for Article 8, and placed Articles 10 and 11 on a sixty-day extension until March 7, 2022. In a certification received February 4, 2022, the Town Clerk affirmed that the notice for Article 8 was posted and published in accordance with the provisions of Chapter 299, and a claim was filed with the Office of the Town Clerk within 21 days of publication. On February 8, 2022, we placed Article 8 on a thirty-day extension with our decision due on March 15, 2022. On March 3, 2022, we approved Article 10 and elected to proceed under the defect waiver provisions of Chapter 299 for Article 11.

² We appreciate the letters from Attorney John M. McLaughlin on behalf of a Deerfield resident urging our Office to disapprove Article 8 because of the procedural requirements in G.L. c. 40A, §5; and the letters from Attorney Lisa Mead, Town Counsel for Deerfield, urging us to approve Article 8.

disapprove by-laws based solely on their consistency with state law, not on any policy views she may have on the subject matter or the wisdom of the by-law. Amherst, 398 Mass. at 795-96, 798-99.

I. Summary of Article 8

A. Article 8's Substantive Provisions

Under Article 8 the Town voted to amend the zoning by-laws to change the minimum frontage requirements for town-owned lots used for municipal facilities in the Town's Center Village Residential District (CVRD), Small Business (C-1) and Industrial (I) Districts. The Town amended Subsection 2320, "Table of Dimensional Requirements," by adding a new footnote "9" after "Frontage (feet)" in the column entitled "Principal Use," and by adding the text of footnote "9" at the end of the "NOTES" section as follows:

In the CVRD, C-1 and I Districts only, the minimum Frontage requirement shall not apply to Town-owned lots used for Municipal Facilities, which shall be required to have no less than fifty (50) feet of frontage.

The existing frontage requirements in these Districts are 100 feet, 125 feet, and 200 feet respectively. Section 2320, "Table of Dimensional Requirements." The amendments adopted under Article 8 thus reduce the frontage requirements for town-owned lots used for municipal facilities in these Districts to a minimum of 50 feet.

B. Article 8's Procedural History

G.L. c. 40A, § 5 Section 5 requires a properly noticed Planning Board hearing and a two-thirds vote of Town Meeting for a town to adopt zoning by-law amendments such as those proposed in Article 8.

Here the Town conducted two Planning Board hearings on Article 8. The first hearing was held on September 13, 2021 and related to amending the minimum frontage requirements for Town-owned lots used for municipal facilities in two districts - the CVRD and C-1 Districts. The Town fully complied with the procedural requirements in G.L. c. 40A, § 5 for this first hearing by properly posting and publishing the hearing notice in the newspaper and mailing it to the Department of Housing and Community Development (DHCD), the regional planning agency, and to the planning boards of each abutting city and town ("Government Entities"). None of the Government Entities attended the September 13, 2021, hearing or filed any written comments.

During the September 13, 2021, hearing the Planning Board and the Select Board became aware of the need to add the Town's Industrial District to the zoning by-law amendment. According to the Town, the Planning Board announced at the September 13, 2021, hearing that the Planning Board would hold another hearing to discuss adding the Industrial District to the amendment.

The Town then conducted a second Planning Board hearing on September 30, 2021, to add the third district (Industrial District) to the proposed zoning by-law amendment. As required by G.L. c. 40A, § 5, the notice for the second Planning Board hearing was properly posted and published in the newspaper. However, the notice was not sent to the Government Entities as required by G.L. c. 40A, § 5.

In instances where a town does not provide timely notice of the Planning Board hearing to the Government Entities, the statute authorizes the town to obtain waivers of notice from the Government Entities. G.L. c. 40A, § 5. Deerfield obtained those waivers of notice from the Government Entities for the September 30, 2021, Planning Board hearing.

Following Town Meeting, on October 18, 2021, the Town Clerk submitted the information required by G.L. 40, § 32 for the Attorney General's review of town by-laws. On January 6, 2022 we elected to proceed under the provisions of Chapter 299 of the Acts of 2000 (Chapter 299) (which amends G.L. c. 40, § 32). Chapter 299 allows the Attorney General to direct the Town Clerk to post and publish a notice of the defect and allows for objections or claims to be filed regarding the procedural defect.³ On February 4, 2022, the Town Clerk certified that the notice of defect was posted and published in accordance with the provisions of Chapter 299 and that a letter from Attorney McLaughlin was filed in response to the Chapter 299 posting and publishing process. As required by Chapter 299, the Town Clerk submitted a copy of the letter to this Office.

Attorney McLaughlin's letter includes statements contending that the notice defect regarding Article 8 was misleading or otherwise prejudicial.⁴ In this letter, Attorney McLaughlin contends on behalf of his client that the client attended and participated in both Planning Board hearings but was prejudiced by the Town's failure to provide notice of the second hearing to the

³ General Laws Chapter 40, Section 32, ¶ 2 provides in relevant part as follows:

Notwithstanding the provisions of the preceding paragraph, if the attorney general finds there to be any defect in the procedure of adoption or amendment of any zoning by-law relating to form or content of the notice of the planning board hearing prescribed in section 5 of chapter 40A, or to the manner or dates on which said notice is mailed, posted or published as required by said section 5, then instead of disapproving the by-law or amendment because of any such defect, the attorney general may proceed under the provisions of this paragraph. If the attorney general so elects, written notice shall be sent to the town clerk within a reasonable time setting forth with specificity the procedural defect or defects found, including a form of notice thereof . . . The town clerk shall forthwith post the notice in a conspicuous place in the town hall for a period of not less than 14 days, and shall publish it once in a newspaper of general circulation in the town. The notice shall state that any resident, the owner of any real property in the town, or any other party entitled to notice of the planning board hearing, who claims that any such defect was misleading or was otherwise prejudicial may, within 21 days of the publication, file with the town clerk a written notice so stating and setting forth the reasons supporting that claim. Forthwith after the expiration of said 21 days, the town clerk shall submit to the attorney general either (a) a certificate stating that no claim was filed within the 21 day period, or (b) a certificate stating that one or more claims were filed together with copies thereof. . . If no claim was made, the attorney general may waive any such defect; but, if any claim is made then the attorney general may not waive any such defect. . . .

⁴ Attorney John M. McLaughlin filed the written notice on behalf of this Town resident. Letter dated January 22, 2022 from Attorney McLaughlin to Barbara Hancock, Deerfield Town Clerk.

Government Entities. As further explained below, we have determined that this letter does not qualify as a valid Chapter 299 objection or claim regarding Article 8.

II. Attorney General's Standard of Review of Zoning By-laws

Our review of Article 8 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. Amherst 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). 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). “The legislative intent to preclude local action must be clear.” Bloom, at 155.

Article 8, 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. “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)). 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. Analysis of Article 8’s Consistency with State Law

The substance of the by-law amendments proposed by Article 8 pose no conflict with state law. As to the procedural requirements in G.L. c. 40A, § 5 and Chapter 299 of the Acts of 2000, we cannot conclude that Attorney McLaughlin’s letter is a “valid claim” under Chapter 299 that requires this Office to disapprove Article 8. We explain our decision in more detail below.

In his letter Attorney McLaughlin claims that his client was prejudiced and misled by the Town's failure to send the September 30, 2021, Planning Board hearing notice to the Government Entities. But any claim that the failure to send notice to the Governmental Entities was misleading or prejudicial belongs to the Governmental Entities, not to Attorney McLaughlin's client. And the Government Entities here have all filed waivers of late notice and are not asserting any such claims.

Moreover, the Government Entities received notice of the first Planning Board hearing (September 13, 2021) and none of the Government Entities responded to or appeared at the first hearing. Attorney McLaughlin's claim that participation by the Government Entities in the second hearing would have somehow changed his client's input or the Planning's Board's recommendation to Town Meeting is purely speculative, especially because the Government Entities did not participate in the first hearing after timely notice and waived their timely notice to the second hearing. Importantly, Attorney McLaughlin's client attended both the September 13, 2021, and September 30, 2021, Planning Board hearings and participated in the hearings by providing comments against the amendments. In these circumstances we cannot determine that the Town's failure to provide notice of the second hearing to the Government Entities was "misleading or otherwise prejudicial" as required by Chapter 299. See e.g., Hallenborg v. Town Clerk of Billerica, 360 Mass. 513, 529-530 (1971) ("amendments of zoning by-laws or ordinances ought not to set aside lightly as invalid because of trivial procedural defects in their adoption...at the behest of persons who have not shown themselves to be prejudiced significantly by the procedural deficiencies"). For these reasons, we cannot conclude that the letter filed by Attorney McLaughlin on behalf of his client qualifies as a valid claim under Chapter 299.

IV. Conclusion

Because we have determined that the letter filed by Attorney McLaughlin on behalf of his client does not constitute a valid claim as required by Chapter 299, the Attorney General is authorized by Chapter 299 to waive (and does so waive) the defect pertaining to Article 8. We approve Article 8 because we conclude that Article 8 is not in conflict 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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