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December 22, 2023

Richard W. Newton, Town Clerk
Town of Erving
12 East Main Street
Erving, MA 01344

Re: Erving Special Town Meeting of June 28, 2023 -- Case # 11114
Warrant Article # 5 (Zoning)

Dear Mr. Newton:

Article 5 – Under Article 5 the Town voted to adopt a recodification of the Town's zoning by-laws that deletes the Town's existing zoning by-laws and inserts new zoning by-laws as shown in a document entitled "Zoning By-law, dated May 18, 2023" on file with the Town Clerk and the Planning Board Offices. We approve the by-laws as amended by Article 5 except for certain text that we disapprove because the provisions conflict with state law. 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). We also offer comments on certain approved portions of the recodified zoning by-laws as detailed below. [1]

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

Our review of Article 5 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, 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).

[1] By agreement with Town Counsel pursuant to G.L. c. 40, §32 dated September 27, 2023, we extended our deadline for Article 5 for ninety days under December 27, 2023.

Article 5, 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. Disapproved Text

A. Section 3.1.2, "Use Regulation Schedule" Prohibition on Radioactive Waste

Under Section 3.1.2 (G) (5), "Use Regulation Schedule," (Use Schedule) the Town prohibits the "[c]ollection, treatment, storage, burial, incineration, or disposal of radioactive waste, including . . . low level radioactive waste" in all zoning districts. We disapprove this portion of the Use Schedule because it is preempted by the Massachusetts Low-Level Radioactive Waste Management Act, G.L. c. 111H as detailed below.

General Laws Chapter 111H is a comprehensive state statute that expressly preempts local prohibitions of radioactive waste. Among other things, G.L. c. 111H establishes a Low-Level Radioactive Waste Management Board (Board) that is charged with "planning and effecting the management of low-level radioactive waste in the commonwealth." G.L. c. 111H, § 2. Pursuant to this statutory authority, the Board has promulgated regulations at 345 CMR 1.00 ("Low-Level Radioactive Waste Management Plan") detailing comprehensive requirements for the safe and efficient management of low-level radioactive waste. General Laws Chapter 111H also requires that the DEP establish, through its regulations, criteria to be used in the site selection process for low-level radioactive waste facilities. G.L. c. 111H, § 14. Importantly, the statute includes an express statement of intent to preempt local regulation. Section 16 (b) of Chapter 111H states that "no community may prohibit, or require any license, permit, approval or condition for the construction, operation, closure, post-closure observation and maintenance or institutional control of a facility." Therefore, the Town is preempted from prohibiting the collection, treatment, storage, burial, incineration, and disposal of radioactive substances in the Town and we disapprove Section 3.1.2 (G) (5) prohibiting radioactive waste in the Town.

B. Section 230-6.3, "Performance Standards"

Section 230-6.3 imposes land use and environmental requirements that the Town must apply when reviewing site plans, special permits, and variances, including requirements for erosion control, screening, retention of hillside areas, stormwater management, lighting, noise, and

pedestrian and vehicle access. Section 230-6.3.13 exempts certain uses from these requirements, including an exemption for religious uses and structures as follows (with emphasis added):

> 4. Religious Structures and Services. **Religious services conducted by an organization which qualifies under the laws of the commonwealth as a tax-exempt religious group.**

We disapprove the text in bold and underlined above ("Religious services conducted by an organization which qualifies under the laws of the commonwealth as a tax-exempt religious group") because it conflicts with the protections given to religious uses and structures under G.L. c. 40A, § 3. General Laws Chapter 40A, Section 3 protects various uses from a Town's zoning power, including religious uses as follows:

> No zoning . . . 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.

Section 3 states that a Town may not prohibit, regulate, or restrict religious uses and structures 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. Section 3 does not limit the zoning protections to "tax-exempt" religious uses. The by-law conflicts with Section 3 because it limits the exemption to religious uses that qualify for tax exempt status. Moreover, Section 230-6.3's performance standards include regulations that are outside of the eight areas towns are allowed to regulate for religious uses. For example, Section 230-6.3 includes requirements for prohibitions on noise, hours of operation, odor, and lighting. See, e.g., Sections 230-6.3.5 and 6.3.10. The Town cannot apply such requirements to protected religious uses. Because Section 230-6.3 impermissibly regulates religious uses that are protected under G.L. c. 40A, § 3, we disapprove the text ("Religious services conducted by an organization which qualifies under the laws of the commonwealth as a tax-exempt religious group") as shown above in bold and underline.

C. Section 230-7.2, "Marijuana Establishments"

Section 230-7.2 allows marijuana establishments by special permit and imposes requirements for locating marijuana establishments in the Town. Section 230-7.2.3 (1) provides that marijuana establishments shall not be located within 350 feet of a school as follows:

> Marijuana Establishments shall not be located within 350 feet of any existing public, parochial, or private school. This setback shall include the grounds on which said public, or parochial, or private school. **The distance between any Marijuana Establishment and any public, parochial, or private school shall be measured in a straight line, without regard to intervening structures, from the closest property line of any existing public, parochial, or private school to the property line of the Marijuana Establishment.**

We disapprove the text above in bold and underline establishing the manner of measuring the buffer zone because it conflicts with the updated Cannabis Control Commission's (CCC) regulations, 935 CMR 500.110 (3), " Buffer Zone," (effective October 27, 2023) that requires a buffer zone to be measured from the "geometric center" of the entrance, not from "the nearest point of the property line," as follows:

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

Towns are prohibited from imposing restrictions on marijuana establishments that conflict with the CCC regulations. West Street Associates LLC v. Planning Board of Mansfield, 488 Mass. 319 (2021) (holding that towns are preempted from adopting by-law provisions that impose different requirements on marijuana establishments than those requirements imposed by the CCC.). Because Section 230-7.2.3 requires a measurement that differs from the CCC's regulations, we disapprove the text above shown in bold and underline from Section 230-7.2.3.

D. Section 230-10.8, "Requests for Reasonable Accommodation"

Section 230-10.8 establishes a procedure for applicants requesting a reasonable accommodation under 42 U.S.C. § 3604, the federal Fair Housing Act (FHA). We approve Section 230-10.8 except for Section 230-10.8.5 that requires the Zoning Board of Appeals (ZBA) to consider such a request "at an open meeting" and imposes criteria for considering a request that differs from the criteria required under the FHA.

While Section 230-10.8 does not require applicants to request a reasonable accommodation under the FHA, it establishes a procedure for such applications. Section 10.8.5 requires the ZBA to consider a reasonable accommodation as follows:

> 10.8.5. ZBA Procedures. The ZBA shall decide a request for reasonable accommodation by majority vote **at an open meeting.** The ZBA may seek information from other Town agencies in assessing the impact of the requested accommodation on the rules, policies, and procedures of the Town. Upon written notice to the ZBA, an applicant for a reasonable accommodation may with draw the request without prejudice. **The ZBA shall consider the following criteria when deciding whether a request for accommodation is reasonable:**
>
> 1. **Whether the requested accommodation is reasonable;**
>
> 2. **Whether the requested accommodation would require a fundamental alteration of a legitimate Town policy; and**

3. **Whether the requested accommodation would impose undue financial or administrative burdens on the Town government.**

We disapprove the text in bold and underlined above because: 1) the "open meeting" requirement imposes a burden on disabled persons that is not imposed on other land-use applicants; and 2) the criteria that the ZBA will consider when reviewing a request for an accommodation conflicts with the criteria established under the FHA for determining whether a request is reasonable.

Under the FHA, it is a discriminatory practice to refuse to make a reasonable accommodation from a town's local laws when the accommodation is necessary to give persons with disabilities equal opportunities to use and enjoy a dwelling. See 41 U.S.C. § 3604 (f) (3) (B); City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 729 (1995) (zoning ordinance defining who may compose a "family" is not a maximum occupancy restriction exempt from the FHA). The FHA's reasonable accommodation requirements apply to local zoning laws, regulations, and practice. Oxford House, Inc., v. Town of Babylon, 819 F.Supp. 1179, 1185 (E.D.N.Y.1993) (denial of reasonable accommodation request to modify the "definition of "family" violated FHA). An accommodation is reasonable under the FHA when (1) it does not cause any undue hardship or fiscal or administrative burden on the municipality and (2) it does not undermine the basic purpose that the zoning ordinance seeks to achieve. Id. at 1186. We disapprove Section 230-10.8.5 because it discriminates against people with disabilities and the criteria for determining whether to grant a reasonable accommodation conflict with the criteria established under the Oxford House.

Section 230-10.8.5's open meeting requirement singles out for different treatment those applicants who are protected by the FHA, with no record evidence of a legitimate governmental purpose for this distinction. Section 10.8.5 includes no statement of a legitimate government interest to support the open meeting requirement, and none is discernible in the by-law record. The open meeting requirement thus facially discriminates against disabled persons in violation of the FHA. See Horizon House Developmental Services, Inc. v. Township of Upper Southampton, 804 F. Supp. 683 (1992) (local ordinance imposing buffer requirement on group homes for handicapped individuals violated the Act because it created an explicit classification based on handicap with no rational basis or legitimate government interest).

The public meeting requirement also violates G.L. c. 40A, § 3, ¶ 4 that provides:

> 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. (emphasis added)

The singling out of disabled persons for an open meeting on a reasonable request for accommodation, as Section 10.8.5 does, is facially discriminatory as defined in G.L. c. 40A, § 3, ¶ 4. See Granada House, Inc. v. City of Boston, 1997 WL 106688 (Mass. Super. Ct.) ("[T]he Massachusetts Zoning Act must be read to bar the City's discriminatory treatment of a group

home for recovering drug and alcohol users under the Code.") See also Brockton Fire Dept. v. St. Mary Broad Street LLC, 181 F. Supp. 3d 155 (2016) ("(T)he Massachusetts Zoning Act unequivocally prohibits the facially disparate imposition of the (Massachusetts) Sprinkler Law on a group residence sheltering disabled individuals.").

In addition, Section 10.8.5's criteria for granting a reasonable accommodation conflict with the criteria established in Oxford House. An accommodation is reasonable under the FHA when (1) it does not cause any undue hardship or fiscal or administrative burden on the municipality and (2) it does not undermine the basic purpose that the zoning ordinance seeks to achieve. Oxford House, 819 F.Supp at 1186. Section 230-10.8.5 (3) is similar to the criteria in Oxford House, but the by-law's criteria in Sections 230-10.8.5 (1) and (2) go further and require (1) that the "requested accommodation is reasonable" and (2) that the "requested accommodation would not require a fundamental alteration of a legitimate Town policy." These criteria are not allowed under Oxford House. Because Section 230-10.8.5 discriminates against people with disabilities and the criteria for determining whether to grant a reasonable accommodation conflict with the criteria established under Oxford House, we disapprove Section 230-10.8.5, as shown above in bold and underline.

Finally, Section 230-10.8.6 authorizes the ZBA to take one of three actions regarding the request for a reasonable accommodation: grant, grant with conditions, or deny the request. However, it is only under very limited circumstances that the Town can deny a request for reasonable accommodation (see discussion above) and the failure to grant a reasonable accommodation could result in a violation of the FHA. See Oxford House, 819 F.Supp. at 1186. Before denying a request for a reasonable accommodation, we strongly suggest that the Town discuss the matter with Town Counsel.

E. Section 230-10.7 "Site Plan Review for Dover Amendment Uses"

Section 230-10.7, "Site Plan Review for Dover Amendment Uses," imposes a site plan review requirement for religious, educational, and child-care centers (uses that enjoy certain protections from local zoning pursuant to G.L. c. 40A, § 3.) Section 230-10.7.6 authorizes the Planning Board to "deny an application for site plan approval" as follows:

> The Planning Board may approve, approve with conditions**, or deny** an application for site plan approval. In making its decision, the Board shall be guided exclusively by G.L. c. 40A, s. 3. The Board shall file a written decision with the Town Clerk within ninety (90) days after the close of the Public Hearing. Failure to file a decision within ninety (90) days after the close of the Public Hearing shall constitute approval of the site plan.

As provided in more detail above under our discussion of Section 230-6.3, G.L. c. 40A, Section 3 protects educational uses, religious uses, and child care centers. 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. A site plan review requirement for Dover Amendment uses, limited (as here) to the application of reasonable regulations in the categories listed in G.L. c. 40A, § 3, is consistent with the Dover Amendment and G.L. c. 40A, § 3. Jewish Cemetery Assoc. of Mass., Inc. v. Bd. of Appeals of Wayland, 85 Mass. App. Ct. 1105,

*2 (2014) (a site plan review by-law applicable to Dover Amendment protected uses that is limited to imposing reasonable regulations on protected uses does not conflict with state law.) However, a town cannot prohibit an as-of-right use entitled to zoning protections under G.L. c. 40A, § 3 by denying site plan approval. Site plan approval acts as a method for reasonably regulating as-of-right uses rather than for 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). Because the Town cannot deny site plan approval for as-of-right protected Section 3 uses, we disapprove the text in Section 230-10.7.6 in bold and underlined above ("**,or deny**") that authorizes the Planning Board to deny a site plan application for a protected use.

III. Comments on the Approved Portions of the Recodification

We offer the following comments for the Town's consideration regarding certain approved portions of the recodification.

A. Section 230-3.1.2, "Use Regulations Schedule"

1. *Multi-Family Dwellings*

In the Use Schedule multi-family dwellings (dwelling containing three or more units) are allowed by special permit in the Town's Village Residential (VR), Central Village (CV), and French King (FK) Districts and prohibited in the Rural Residential District. See Schedule. Section A, "Residential." The special permit requirements for multi-family housing are found in Section 230-10.5 "Special Permits." Because the current special permit requirements applicable to multi-family dwellings raise concerns under federal and state law, including the federal Fair Housing Act (FHA) and Massachusetts Anti-Discrimination Law, we offer the following comments for the Town's consideration.

a. Potential Fiscal Impact on Essential Public Services

Section 230-10.5 contains several references to the Special Permit Granting Authority's (SPGA) consideration of the project's potential impact on public services. Section 230-10.5 states that the criteria for granting a special permit includes consideration of the "social, economic, or community needs which are served by the proposal," and of the "potential fiscal impacts, including impact on town services, tax base, and employment." Sections 230-10.5.2 (1) and (6).

In applying Section 230-10.5, including Section 10.5.2, 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 land-use applications for multi-family housing projects. 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 multi-family 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 10.5.2 should be enforced when reviewing special permit applications for multi-family dwelling and whether it should be amended at a future town meeting.

b. FHA and MA Anti-Discrimination Law Requirements

The special permit requirements detailed above 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 dwelling the R District to ensure compliance with the FHA and G.L. c. 151B.

2. *Agricultural Uses*

The Use Schedule states that the use of land for agriculture and commercial greenhouses on parcels of more than five acres in area or "two qualified acres" is allowed as of right all districts.

Section 230-3.1.2 (C) (1). Commercial greenhouses less than five acres or two qualified acres are allowed by special permit in all districts. Section 230-3.1.2 (C) (3). For properties less than five acres or less than two qualified acres, the raising and keeping of livestock, including poultry, horses, and cows, are allowed by special permit. Section 230-3.1.2 (C) (4). Sawmills are allowed by special permit in the Town's CV and FK Districts and prohibited in the other districts. Section 230-3.1.2 (G) (6). We approve these portions of the Schedule. However, G.L. c. 40A, § 3 provides exemption from local zoning by-laws for certain agricultural uses and provides in relevant part as follows:

> No zoning . . . by-law . . . shall . . . prohibit unreasonably regulate, or require a special permit for the use of land for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, nor prohibit, unreasonably regulate or require a special permit for the use, expansion, reconstruction or construction of structures thereon for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, including those facilities for the sale of produce, wine and dairy products.....

General Laws Chapter 128, Section 1A defines agricultures and provides in pertinent part as follows:

> "Farming" or "agriculture" shall include farming in all of its branches and the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural, aquacultural, floricultural or horticultural commodities, the growing and harvesting of forest products upon forest land, the raising of livestock including horses, the keeping of horses as a commercial enterprise, the keeping and raising of poultry, swine, cattle and other domesticated animals used for food purposes, bees, fur-bearing animals, and any forestry or lumbering operations, performed by a farmer, who is hereby defined as one engaged in agriculture or farming as herein defined, or on a farm as an incident to or in conjunction with such farming operations, including preparations for market, delivery to storage or to market or to carriers for transportation to market

These statutes together establish that, to the extent the use of land or structures constitutes commercial agriculture, the town cannot require a special permit for, unreasonably regulate, or prohibit such activities (with emphasis added): (1) *on land zoned for agriculture*; (2) on land that is greater than five acres in size; and (3) on land of 2 acres or more if the sale of products from the agricultural use generates $1,000 per acre or more of gross sales.

The Use Schedule allows agricultural uses as of right if they are on land over five acres or on land two acres or more if the agricultural use generates products that have gross sales over $1,000 or more per acre. However, agricultural uses enjoy Section 3 protections if the agricultural activities occur on "land zoned for agriculture" regardless of the acreage size. In addition, commercial kennels that include the breeding and raising of dogs may be considered agricultural uses and subject to the protections provided under G.L. c. 40A, § 3. See Sturbridge v. McDowell, 35 Mass. App. Ct. 924, 926 (1993). General Laws Chapter 128, Section 1A, defines agriculture to include forestry and lumbering operations performed by a farmer. It also includes activities

conducted on a farm as incident to or in conjunction with farming operations, "including preparations for market, delivery to storage or to market or to carriers for transportation to market." In instances where agricultural uses, including commercial greenhouses and sawmills enjoy the protections given to agricultural uses under state law the Town cannot prohibit, require a special permit, or unreasonably regulate such use. The Town must apply these portions of the Use Schedule consistent with the protections given to agriculture under G.L. c. 40A, § 3.

3. *Firearms Sales*

In the Use Schedule, firearms sales are allowed by special permit in all zoning districts. Section 230-3.1.2 (D) (24). In approving this portion of the Schedule regarding firearms sales, we have analyzed the question whether its validity is affected by the United States Supreme Court's decision in New York State Rifle & Pistol Association v. Bruen, 142 S.Ct. 2111 (2022). In Bruen, the Court held that New York's handgun licensing law requiring individuals to show "proper cause" before they could be licensed to carry a concealed weapon in most public places violated the Second and Fourteenth Amendments of the United States Constitution. Bruen, 142 S.Ct. at 2156. Justice Kavanaugh's concurring opinion, joined by Chief Justice Roberts, also reaffirmed the Court's prior holdings in District of Columbia v. Heller, 554 U.S. 570, 626-27 & n.26 (2008), and McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (plurality opinion), that certain gun regulations, including those that: (1) prohibit the possession of firearms by felons and the mentally ill; (2) forbid the carrying of firearms in sensitive places such as schools and government buildings; and (3) impose conditions and qualifications on the commercial sale of arms, are presumptively lawful. Id. at 2162. Because Bruen involved the constitutionality of a handgun licensing law and did not limit a municipality's zoning power to regulate the siting and operation of a firearm business, the Bruen Court's holding does not provide grounds for this Office to disapprove Article 15. The Town should consult with Town Counsel with any questions on the scope of the Court's holding in Bruen. [2]

In applying the Use Schedule's special permit requirement for firearms sales, the Town should also be mindful of the various state laws and regulations governing the safety of firearm businesses and the licensing requirements for gun dealers. Those laws include (but are not limited to) the requirements in G.L. c. 140, § 122 (licenses to sell firearms), § 122B (licenses to sell ammunition), § 123 (imposing conditions on firearm sales licenses issued under G.L. c. 140, § 122), and 940 CMR 16.00 *et seq*. (imposing conditions on the sale of handguns in Massachusetts).[3]

General Laws Chapter 140, Section 122 requires a license to sell firearms and Section 122B

[2] The Town may also wish to consult the advisory issued by the AGO and the Executive Office of Public Safety and Security that includes guidance on how to apply the state's firearms licensing laws in light of the Bruen decision. The advisory may be found here: https://www.mass.gov/doc/ago-eopss-ltc-guidance/download. Town should consult with Town Counsel with any questions on this advisory.

[3] There is also pending legislation regarding firearms and firearm businesses that the Town should discuss with Town Counsel. See, e.g., HB 4135 https://malegislature.gov/Bills/193/H4135/Amendments/House

requires a license to sell ammunition. A license issued under Section 122 and 122B must "specify the street and number of the building where the business is to be carried on." It is not clear whether the denial of a special permit or the revocation of a special permit previously granted might have the unintended effect of invalidating a dealer's license if the dealer no longer has the right to operate at the address included on their license. The Town should discuss this issue in more detail with Town Counsel and should consult closely with Town Counsel when it applies this portion of the Schedule.

4. *Quarrying, gravel mining, and earth removal*

Quarrying, gravel mining, and earth removal are prohibited in the Town. The prohibition on these uses in the Town must be applied consistent with: (1) the protections given to agriculture under state law and the Department of Environmental Protection's authority over the transportation, treatment, re-use and disposal of soils and other materials to solid waste facilities as provided in more detail below.

a. Agricultural Protections

Earth removal operations may enjoy agricultural protections under state law. As provided in more detail above under Section 230-3.1.2 discussions Use Schedule's regulation of agricultural uses, G.L. c. 40A, § 3, provides that Towns cannot require a special permit for, unreasonably regulate, or prohibit agricultural activities: (1) on land zoned for agriculture*;* (2) on land that is greater than five acres in size; and (3) on land of 2 acres or more if the sale of products from the agricultural use generates $1,000 per acre or more of gross sales. Depending on the circumstances, earth removal activities may qualify as the normal and customary maintenance and improvement of agricultural land. Earth removal may be necessary for several agricultural purposes, e.g., leveling of land for growing areas and preparing land for farm structures. We strongly suggest the Town consult with Town Counsel to ensure that it applies Section 230-3.1.2 consistent with state law.

b. DEP's Regulatory Authority

The DEP has broad authority to regulate the transportation, treatment, re-use and disposal of soils and other materials to solid waste facilities. The Town may not apply the by-law in a way that would interfere with the DEP's authority over solid waste facilities under G.L. c. 40A, § 9, and G.L. c. 111, § 150A, and 310 CMR § 19.000 *et seq*. See, e.g., Buckley v. Wilmington, 68 Mass. App. Ct. 1113 (2007) (invalidating a landfill height limitation by-law that interfered with and frustrated DEP's authority under G.L. c. 111, § 150A to close and cap a landfill.)

The DEP has also issued an "Interim Policy on the Re-Use of Soil for Large Reclamation Projects" (Policy COMM-15-01) https://www.mass.gov/doc/interim-policy-on-the-re-use-of-soil-for-large-reclamation-projects-policy-comm-15-01/download (lasted visited December 22, 2023) This policy is issued pursuant to Section 277 of Chapter 165 of the Acts of 2014, G.L. c. 21E, Section 6, and G.L. c. 111, Section 150A. In it, DEP expresses an intent to issue site-specific approvals, in the form of Administrative Consent Orders (ACO), to ensure that the reuse of large volumes of soil for the reclamation of sand pits, gravel pits and quarries pose no significant risk of harm to health, safety, public welfare or the environment, and would not create new releases or

threats of releases of oil or hazardous material. However, Policy COMM-15-01 provides that nothing in the Policy "eliminates, supersedes or otherwise modifies any local, state or federal requirements that apply to the management of soil, including any local, state or federal permits or approvals necessary before placing the soil at the receiving location." Interim Policy on the Re-Use of Soil for Large Reclamation Projects Policy # COMM-15-01, August 28, 2015, p. 3. The Town should consult with Town Counsel and DEP regarding the proper application of the by-law to any project that has received a DEP site-specific approval in the form of an ACO.

B. Article §230-7.0 "Special Regulations"

1. *Section 230-7.1 "Energy Storage Regulations" and Section 230-7.4 "Solar Energy Systems"*

Section 230-7.1 allows accessory energy storage systems as of right in all districts. [4] All other energy storage systems (ESS) are allowed by special permit in the RR and FK Districts and prohibited in the other two zoning districts. [5] Section 230-7.1.2 requires ESS to comply with the National Fire Protection Association's 855 Standards for the Installation of Stationary Energy Storage Systems, the State Fire Safety Code, State Electrical Code, and the State Building Code. Section 230-7.1.3 requires an ESS applicant to submit an operation and maintenance plan that includes provisions for access, stormwater management and vegetation controls, and other general procedures for the ESS' operation and maintenance.

Section 230-7.4 regulates large-scale ground-mounted solar photovoltaic installations (large-scale solar installations). [6] Section 230-7.4.4 allows large-scale solar installations in all districts by special permit on parcels of land between 20 and 40 acres and allows them a as of right subject to site plan review on parcels greater than 40 acres. [7] Section 230-7.4.6. Sections 230-7.9, 230-7.10, and 230-7.11 impose design standards, safety and environmental standards, and

[4] Accessory ESS is defined is Section 230-11.0, "Definitions," as "[a] system to store energy as defined in M.G.L. c. 164 s. 1 that is accessory to a Small-Scale, Medium Scale, Large-Scale, or Very Large-Scale Ground Mounted Solar Electric Generating Installations and located on the same lot."

[5] ESS is defined in Section 230-11.0 as "[a] system to store energy as defined in M.G.L. c. 164, s. 1."

[6] Large-scale ground mounted solar installation is defined in Section 230-11.0 as "[a] solar photovoltaic system that is structurally mounted on the ground and is not roof-mounted and has a minimum nameplate capacity of 250kWDC."

[7] Section 230-7.4 regulates large-scale installations, but there are no zoning provisions regulating other types of solar installations. However, Section 230-7.1 appears to recognize small and medium scale solar installations because ESS are allowed as of right when they are accessory to small-scale and "medium-scale" solar installations. See Section 3.1.2 (H) (10) of the Use Schedule and Section 7.1.1. The Town should discuss with Town Counsel whether a future amendment to the by-law is needed to clarify regulations regarding small and medium-scale solar.

monitoring and maintenance requirements on large-scale solar installations.

We approve Sections 230-7.1 and 230-7.4 because on the record before us, we cannot conclude that the by-law amendments amount to an unreasonable regulation of solar facilities or ESS in conflict with Section 3. See Tracer Lane II Realty, LLC v. City of Waltham, 489 Mass. 775, 779, 781 (2022) (to evaluate the validity of a solar by-law under Section 3, a court will "balance the interest that the ordinance or bylaw advances and the impact on the protected use" while keeping in mind that Section 3's solar energy provision "was enacted to help promote solar energy generation throughout the Commonwealth.") However, if these provisions are used to deny a solar installation ESS or otherwise applied in ways that make it impracticable or uneconomical to build solar energy systems and related structures, such application would run a serious risk of violating G.L. c. 40A, § 3. As the court stated in PLH LLC v. Town of Ware, No. 18 MISC 000648 (GHP), 2019 WL 7201712, at *3 (Mass. Land Ct. Dec. 24, 2019), aff'd, 102 Mass. App. Ct. 1103 (2022), "the review of the municipality conducted under the bylaw's special permit provisions must be limited and narrowly applied in a way that is not unreasonable, is not designed or employed to prohibit the use or the operation of the protected use, and exists where necessary to protect the health, safety or welfare." The Town should consult further with Town Counsel on this issue. [8]

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 that 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 voted by Town Meeting, unless a later effective date is prescribed. in the by-law.

Very truly yours,
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[8] For a detailed discussion of the Section 3 protections granted to solar facilities and ESS see our decision issued on December 19, 2023 to the Town of Hubbardston in Case # 10663.