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October 16, 2025

Anita K. Carlson, Town Clerk
Town of Rutland
250 Main Street
Rutland, MA 01543

Re: Rutland Annual Town Meeting of May 10, 2025 – Case # 11881
Warrant Articles # 11 and 12 (Zoning)
Warrant Article # 13 (General) [1]

Dear Ms. Carlson:

Article 11 - Under Article 11, the Town amended Article III, Section 8.F, "Accessory Dwelling Units (ADUs)" to allow ADUs as of right in compliance with G.L. c. 40A, § 3 and the implementing Regulations promulgated by the Executive Office of Housing and Livable Communities ("EOHLC"), 760 CMR 71.00, "Protected Use Accessory Dwelling Units" ("Regulations").[2]

We partially approve Article 11 because the approved text does not conflict with state law. However, we disapprove and delete[3] the following provisions adopted under Article 11 because they conflict with G.L. c. 40A, § 3 and the Regulations. 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):

- multiple references to "single-family" in Section 8.F; and
- Section 8.F (4)(c)'s parking requirements

[1] On August 31, 2025, by agreement with Town Counsel as authorized by G.L. c. 40, § 32, we extended the deadline for our review of Articles 11, 12, and 13 for 45-days until October 16, 2025. By separate cover issued today, we again extended our deadline for a decision on Article 12 for an additional 45-days until November 30, 2025. We will issue our decision regarding Article 13 by separate cover.

[2] The Regulations can be found here: https://www.mass.gov/doc/760-cmr-7100-protected-use-adus-final-version/download

[3] The use of the term "disapprove" collectively means "disapprove and delete" such that any text disapproved by the Attorney General (shown in bold and underline) by virtue of such disapproval is also deleted from the Town's zoning by-law and does not take effect under G.L. c. 40 § 32.

In this decision we summarize the by-law amendments adopted under Article 11; discuss the Attorney General's standard of review of town by-laws and the recent statutory and regulatory changes that allow Protected Use ADUs as of right;[4] and then explain why, based on our standard of review, we partially approve the zoning by-law amendments adopted under Article 11. In addition, we offer comments for the Town's consideration regarding certain approved provisions adopted under Article 11.

I. Summary of Article 11

Under Article 11, the Town amended its zoning by-laws, Article III, Section 8.F, "Accessory Dwelling Units (ADUs)" to allow ADUs by right subject to certain requirements.

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

Our review of Article 11 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, 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.") "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).

Article 11, as an amendment to the Town's zoning by-laws, must be given 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.

[4] 760 CMR 71.02 defines the term "Protected Use ADU" as follows: "An attached or detached ADU that is located, or is proposed to be located, on a Lot in a Single-family Residential Zoning District and is protected by M.G.L. c. 40A, § 3, provided that only one ADU on a lot may qualify as a Protected Use ADU. An ADU that is nonconforming to Zoning shall still qualify as a Protected Use ADU if it otherwise meets this definition."

III. Summary of Recent Legislative Changes Regarding ADUs

On August 6, 2024, Governor Healey signed into law the "Affordable Homes Act," Chapter 150 of the Acts of 2024 (the "Act"). The Act includes amendments to the State's Zoning Act, G.L. c. 40A, to establish ADUs as a protected use subject to limited local regulation including amending G.L. c. 40A, § 1A to add a new definition for the term "Accessory dwelling unit" and amending G.L. c. 40A, § 3 (regarding subjects that enjoy protections from local zoning requirements, referred to as the "Dover Amendment"), to add a new paragraph that restricts a zoning by-law from prohibiting, unreasonably regulating or requiring a special permit or other discretionary zoning approval for the use of land or structures for a single ADU. The amendment to G.L. c. 40A, § 3, to include ADUs means that ADUs are now entitled to statutory protections from local zoning requirements.

On January 31, 2025, the EOHLC promulgated regulations for the implementation of the legislative changes regarding ADUs. See 760 CMR 71.00, "Protected Use Accessory Dwelling Units."[5] The Regulations define key terms and prohibit certain "Use and Occupancy Restrictions" defined in Section 71.02 as follows:

> Use and Occupancy Restrictions. A Zoning restriction, Municipal regulation, covenant, agreement, or a condition in a deed, zoning approval or other requirement imposed by the Municipality that limits the current, or future, use or occupancy of a Protected Use ADU to individuals or households based upon the characteristics of, or relations between, the occupant, such as but not limited to, income, age, familial relationship, enrollment in an educational institution, or that limits the number of occupants beyond what is required by applicable state code.

While a municipality may reasonably regulate a Protected Use ADU in the manner authorized by 760 CMR 71.00, such regulation cannot prohibit, require a special permit or other discretionary zoning approval for, or impose a "Prohibited Regulation"[6] or an "Unreasonable Regulation" on, a Protected Use ADU. See 760 CMR 71.03, "Regulation of Protected Use ADUs in Single-Family Residential Zoning Districts."[7] Moreover, Section 71.03 (3)(a) provides that

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[5] See the following resources for additional guidance on regulating ADUs: (1) EOHLC's ADU FAQ section (https://www.mass.gov/info-details/accessory-dwelling-unit-adu-faqs\) (2) Massachusetts Department of Environmental Protection's Guidance on Title 5 requirements for ADUs (https://www.mass.gov/doc/guidance-on-title-5-310-cmr-15000-compliance-for-accessory-dwelling-units/download); and https://www.mass.gov/doc/frequently-asked-questions-faq-related-to-guidance-on-title-5-310-cmr-15000-compliance-for-accessory-dwelling-units/download; and (3) MassGIS Addressing Guidance regarding address assignments for ADUs (https://www.mass.gov/info-details/massgis-addressing-guidance-for-accessory-dwelling-units-adus).

[6] 760 CMR 71.03 prohibits a municipality from subjecting the use of land or structures on a lot for a Protected Use ADU to any of the following: (1) owner-occupancy requirements; (2) minimum parking requirements as provided in Section 71.03; (3) use and occupancy restrictions; (4) unit caps and density limitations; or (5) a requirement that the Protected Use ADU be attached or detached to the Principal Dwelling.

[7] For example, a design standard that is not applied to a Single-Family Residential Dwelling in the Single-Family Residential Zoning District in which the Protected Use ADU is located or is so "restrictive, excessively, burdensome, or arbitrary that it prohibits, renders infeasible, or unreasonably increases the

while a town may reasonably regulate and restrict Protected Use ADUs, certain restrictions or regulations "shall be unreasonable" in certain circumstances.[8] In addition, while municipalities may impose dimensional requirements related to setbacks, lot coverage, open space, bulk and height and number of stories (but not minimum lot size), such requirements may not be "more restrictive than is required for the Principal Dwelling, or a Single-Family Residential Dwelling or accessory structure in the Zoning District in which the Protected Use ADU is located, whichever results in more permissive regulation…" 760 CMR 71.03 (3)(b)(2). Towns may also impose site plan review of a Protected Use ADU, but the Regulations requires the site plan review to be clear and objective and prohibits the site plan review authority from imposing terms or conditions that "are unreasonable or inconsistent with an as-of-right process as defined in M.G.L. c. 40A, § 1A." 760 CMR 71.03 (3)(b)(5).

We incorporate by reference our more extensive comments regarding these recent statutory and regulatory changes related to ADUs in our decision to the Town of East Bridgewater, issued on April 14, 2025 in Case # 11579.[9] Against the backdrop of these statutory and regulatory parameters regarding Protected Use ADUs, we review the zoning amendments adopted under Article 11.

IV. Text Disapproved from Article 11 Because it Conflicts with G.L. c. 40A, § 3 and the Regulations

A. References to Single-Family

Throughout Section 8.F, the Town refers to an ADU in the context of a "single-family" dwellings as follows (with emphasis added):

> Section 8.F (1)(b)
> Protect...the **single-family** residential character of a neighborhood by ensuring that accessory dwelling units are constructed in a way that maintains the appearance of the **single-family** dwelling.

costs of the use or construction of a Protected Use ADU" would be deemed an unreasonable regulation. See 760 CMR 71.03 (3)(b).

[8] Section 71.03 (3)(a) provides that while a town may reasonably regulate and restrict Protected Use ADUs, a restriction or regulation imposed "shall be unreasonable" if the regulation or restriction, when applicable to a Protected Use ADU: (1) does not serve a legitimate Municipal interest sought to be achieved by local Zoning; (2) serves a legitimate Municipal interest sought to be achieved by local Zoning but its application to a Protected Use ADU does not rationally relate to the legitimate Municipal interest; or (3) serves a legitimate Municipal interest sought to be achieved by local Zoning and its application to a Protected Use ADU rationally relates to the interest, but compliance with the regulation or restriction will: (a) result in complete nullification of the use or development of a Protected Use ADU; (b) impose excessive costs on the use or development of a Protected Use ADU without significantly advancing the Municipality's legitimate interest; or (c) substantially diminish or interfere with the use or development of a Protected Use ADU without appreciably advancing the Municipality's legitimate interest.

[9] This decision, as well as other recent ADU decisions, can be found on the Municipal Law Unit's website at www.mass.gov/ago/munilaw (decision look up link) and then search by the topic pull down menu for the topic "ADUS."

Section 8.F (2)(b)
One (1) Protected Use Accessory Dwelling Unit (ADU) may be permitted on a Lot in **single-family** dwelling use by Site Plan Approval in any zoning district where single and two (2) family dwelling[10] units are allowed.

Section 8.F (2)(C)
More than one (1) Accessory Dwelling Unit (ADU) may be permitted on a Lot in **single-family** dwelling use by Special Permit in any zoning district where single and two (2) family dwellings are allowed.

Section 8.F (3)(a)
Accessory Dwelling Unit (ADU): a self-contained housing unit...on the same lot as a principal **single-family** dwelling, subject to otherwise applicable dimensional and parking requirements that...

Section 8.F (5)(a)
A Protected Use Accessory Dwelling Unit (ADU) that is attached to the principal **single-family** dwelling shall be designed to maintain the appearance and essential character of a **single-family** dwelling.

We disapprove the text "single-family," as shown above in bold and underline, that defines an ADU as being accessory to a "single-family" dwelling because these provisions conflicts with G.L. c. 40A, § 3 and the Regulations that allow ADUs as of right on the same lot as any type of "Principal Dwelling," as explained below. See West Street Associates, LLC v. Planning Board of Mansfield, 488 Mass. 319, 324 (2021) (citing with approval trial judge's ruling that "By limiting medical marijuana facilities to nonprofit entities, the bylaw[,] while not prohibit[ing] those facilities, does restrict them in a way that the [S]tate explicitly determined they should not be limited" and "[a]ccordingly, the town's bylaw is preempted by State law to the extent it requires all medical marijuana dispensaries to be nonprofit organizations.").

General Laws Chapter 40A, Section 3 and the Regulations allow Protected Use ADUs as of right on the same lot as any type of "Principal Dwelling," not just a one-family dwelling. See 760 CMR § 71.02's definitions of "Accessory Dwelling Unit (ADU)" (defining an ADU as "[a] self-contained housing unit, inclusive of sleeping, cooking, and sanitary facilities on the same Lot as a Principal Dwelling . . .") and "Protected Use ADU" (defining a "Protected Use ADU" as "[a]n attached or detached ADU that is located, or is proposed to be located, on a Lot in a Single-Family Residential Zoning District."). The Regulations define "Principal Dwelling" as a structure that contains at least one dwelling unit as follows (with emphasis added):

[10] Section 8.F (2)(b) allows once ADU on a lot in any zoning district where "single and tow (2) family dwelling units are allowed." We have reviewed the Town's existing zoning by-laws and it appears that two-family dwellings are allowed in all zoning districts that allow a single-family dwelling. We therefore approve this provision; but the Town must ensure that it is not applied in a manner that would prohibit an ADU in any "Single-family Residential Zoning District," defined in the Regulations 760 CMR 71.02 as "Any Zoning District where Single-family Residential Dwellings are a permitted or an allowable use, including an y Zoning District where Single-family Residential Dwellings are allowed as-of-right or by Special Permit." Thus, for any Single-family Residential Zoning District in the Town, even if a two-family dwelling unit is not allowed, a Protected Use ADU must still be allowed. The Town should consult with Town Counsel to ensure the proper application of this provision.

> A structure, regardless of whether it, or the Lot it is situated on, conforms to Zoning, including use requirements and dimensional requirements, such as setbacks, bulk, and height, *that contains at least one Dwelling Unit* and is, or will be, located on the same Lot as a Protected Use ADU.

The Regulations' definition of "Principal Dwelling" contemplates Protected Use ADUs on lots that include more than one dwelling unit. For example, Protected Use ADUs are allowed on lots containing a two-family dwelling or a multi-family dwelling. Therefore, allowing an ADU only in the context of a "single-family" dwelling conflicts with G.L. c. 40A, § 3 and the Regulations. For this reason, we disapprove the text shown above in bold and underline. The Town should consult with Town Counsel with any questions.

B. Section 8.F (4)(c) – Parking Requirements

Section 8.F (4)(c) imposes parking requirements on ADUs as follows with emphasis added:

> **One (1) additional off-street parking space shall be provided for each Protected Use ADU on a Lot.**

We disapprove Section 8.F (4)(c) (shown above in bold and underline), because as written, this text requires *all* ADUs to provide a parking space, including ADUs located within a ½ mile radius of a transit station. Therefore, this provision conflicts with the G.L. c. 40A, § 3 and the Regulations as explained below.

General Laws Chapter 40A, Section 3 prohibits a municipality from requiring a parking space for *any* ADU located within 0.5-miles of a transit station, as follows:

> 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, 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.

In addition, the Regulations, 760 CMR 71.03 (2) prohibit a Town from imposing any prohibited Regulations on a Protected Use ADU, including the following:

> (b) Minimum Parking Requirements. A requirement of, as applicable:
>
> 1. More than one additional on-street or off-street parking space for a Protected Use ADU if all portions of its Lot are located outside a 0.5-mile radius of a Transit Station; or
>
> 2. Any additional on-street or off-street parking space for a Protected Use ADU if any portion of its Lot is located within a 0.5-mile radius of a Transit Station.

The Regulations, 760 CMR 71.02, define "Transit Station" as: "[a] Subway Station, Commuter Rail Station, Ferry Terminal, or Bus Station." The regulations further define each of

these terms, including the term "Bus Station," defined as: "[a] location serving as a point of embarkation for any bus operated by a Transit Authority."

Because Section 8.F (4)(c) requires all Protected Use ADUs to provide a parking space, including Protected Use ADUs located within a 0.5-mile radius of a transit station, this requirement conflicts with G.L. c. 40A, § 3 and 760 CMR 71.03 (2) (b) and we therefore disapprove it (as shown above in bold and underline).

The Town is authorized by statute and the Regulations to require one additional parking space for a Protected Use ADU that is not located within a 0.5-mile radius of a Transit Station. However, the Town cannot, as it has done here, require all Protected Use ADUs to provide one parking space because as written, these requirements conflict with the statute and Regulations. See West Street Associates, LLC, 488 Mass. 319 at 324. The Town should consult with Town Counsel with any questions regarding this issue.

V. The Remaining Approved ADU Requirements Under Article 11 Must be Applied Consistent with G.L. c. 40A, § 3 and 760 CMR 71.00

A. Section 8.F (2)(b) – Site Plan Review

Section 8.F (2)(b) allows ADUs as of right with site plan approval. We approve the site plan requirement, but the Town must ensure that it is applied consistent with state law.

Specifically, for uses allowed as of right, such as a Protected Use ADU, site plan review is limited to the regulation of the use rather than its prohibition. Y.D. Dugout, Inc. v. Bd. of Appeals of Canton, 357 Mass. 25, 31 (1970). The scope of site plan approval for as of right uses is therefore limited to imposing reasonable terms and conditions on the use. Id. citing SCIT, Inc. v. Planning Bd. of Braintree, 19 Mass. App. Ct. 101, 107-110 (1984). "[W]here the proposed use is one permitted by right the planning board may only apply substantive criteria consistent with Prudential Ins. Co. v. Board of Appeals of Westwood, 23 Mass. App. Ct. 278 (1986) (i.e., it may impose reasonable terms and conditions on the proposed use, but it does not have discretionary power to deny the use)." Osberg v. Planning Bd. of Sturbridge, 44 Mass. App. Ct. 56, 59 (1997). "[I]f the specific area and use criteria stated in the by-law [are] satisfied, the board [does] not have discretionary power to deny…[approval], but instead [is] limited to imposing reasonable terms and conditions on the proposed use." Prudential, 23 Mass. App. Ct. at 281-282 (internal quotations and citations omitted). The Town should consult closely with Town Counsel when applying a site plan requirement to a Protected Use ADU to ensure it is not applied in a manner that conflicts with the Dover protections afforded to an ADU.

B. Section 8.F (4) (a) – Compliance with Zoning Requirements

Section 8.F (4)(a) imposes standards on all ADUs including that "a Protected Use ADU or ADUs shall comply with applicable zoning requirements for a single family use in the applicable zoning district."

It is not clear what "applicable zoning requirements" Section 8.F (4)(a) requires the ADU to comply with and whether this refers to dimensional requirements or something else. We encourage the Town to consult with Town Counsel to determine whether Section 8.F (4)(a) should

be amended at a future Town Meeting to state the specific zoning requirements applicable to the ADU. In the interim, we offer comments to ensure that the Town applies Section 8.F (4)(a) consistent with the Regulations.

To the extent Section 8.F (4)(a) intends to impose dimensional requirements on an ADU, the Town must apply this provision consistent with the Regulations, 760 CMR 71.03 (b)(2)(a) that prohibit towns from imposing dimensional requirements, such as setbacks, lot coverage, open space, bulk and height, and number of stories that are more restrictive than required for the Principal Dwelling, Single-Family Dwelling (as defined in 760 CMR 71.02) or other accessory structure in the zoning district where the Protected Use ADU is located, whichever is most permissive. Therefore, the Town cannot apply Section 8.F (4)(a) to impose dimensional requirements on an ADU that are applicable to the "single family use in the applicable zoning district" unless the single family use dimensional requirements are the most permissive between those applicable to the principal dwelling, a single-family dwelling, or an accessory structure in the zoning district where the Protected Use ADU is located. The Town should consult with Town Counsel with any questions on this issue.

Moreover, in applying Section 8.F (4)(a) imposing any other "applicable zoning requirements for a single family use in the applicable zoning district," the Town must ensure that, because a Protected Use ADU is a Dover Amendment protected use, any requirement imposed on a Protected use ADU is a "reasonable regulation." Therefore, if an imposed requirement is used in a manner to prohibit or unreasonably restrict a Protected Use ADU, such application would run afoul to the Dover amendment protections given to a Protected Use ADU under G.L. c. 40A § 3 and the Regulations. Moreover, the Town must ensure that Section 8.F (4)(a) is analyzed on a case by case basis as it relates to a particular property because in some circumstances this provision could be unreasonable as applied to a particular property. In addition, the Town must ensure that the application of Section 8.F (4)(a)'s requirement serves, and is rationally related to, a legitimate municipal interest and will not, as applied, result in a nullification, impose an excessive cost or substantially diminish or interfere with the use or development of a Protected Use ADU. See 760 CMR 71.03 (3)(a). If the Town cannot satisfy this standard, the regulation may be deemed to be unreasonable. The Town should consult with Town Counsel to ensure the proper application of any additional requirements "for a single family use" that are also imposed on the Protected Use ADU to ensure the proper application of this provision to a Protected Use ADU.

C. Section 8.F (4)(g) – Finding

Section 8.F (4)(g) requires a finding, but not a special permit, for nonconforming principal dwellings with an ADU as follows:

> Where the Lot or Principal Dwelling is nonconforming, prior to the issuance of a building permit, G.L. c. 40A, § 6 and Section 13 of this Bylaw shall apply and a finding by the Zoning Board of Appeals, acting on a majority vote, that the Protected Use ADU will not be substantially more detrimental than the existing nonconformity to the neighborhood shall be required but shall not be subject to a special permit.

Section 8.F (4)(g) regarding non-conforming principal dwellings, requires a finding (but not a special permit) under G.L. c. 40A, § 6. It appears that this text (and reference to Section 13) may intend to reflect the requirements of G.L. c. 40A, § 6 regarding pre-existing nonconforming

structures that provides: "Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority...or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood."

Because Section 8.F (4)(g) requires a "finding" and does not require a special permit, we approve this provision. However, because ADUs are a Dover Amendment protected use, only in limited circumstances, may it be appropriate for the Town to require even a Section 6 *finding* for an ADU associated with a nonconforming structure or lot. See Petrucci v. Bd. of Appeals of Westwood, 45 Mass. App. Ct. 818 (1998) (no Section 6 "finding" required where applicant successfully demonstrated the unreasonableness of the application of the dimensional requirements to the structure…"). In circumstances where the regulations creating the increased nonconformity can lawfully be applied to the ADU, the Town may require that the applicant demonstrate that the altered structure use will not be substantially more detrimental to the neighborhood than the existing structure so long as the town applies objective, nondiscretionary criteria and no special permit is required. However, changing the use of a nonconforming structure to an ADU use, a statutorily protected use, cannot trigger scrutiny of the impact on a neighborhood because the ADU is a Dover Amendment protected use and cannot be denied.

Moreover, a Protected Use ADU is not "nonconforming" to any zoning rule that cannot lawfully be applied to it under the ADU statute and regulations. See Watros v. Greater Lynn Mental Health and Retardation Ass'n, Inc., 421 Mass. 106, 115 (1995); see also Ellsworth vs. Mansfield, Case No. 08 MISC 382311, 2011 WL 3198174, at *4 (Mass. Land Ct. July 25, 2011) (no Section 6 finding required for Dover protected educational use because "effectively, G.L. c. 40A, § 3 removes the non-conformity (the lack of frontage) because it would not be a 'reasonable regulation' of the proposed school in these circumstances"). As a result, construction or alteration of a structure for an ADU will not increase a nonconformity unless the nonconformity is created by regulations that can reasonably be applied to the ADU. We strongly suggest that the Town discuss the application of G.L. c. 40A, § 6 and Sections 8.F (4)(g) and 13 with Town Counsel.

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.

Very truly yours,

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cc: Town Counsels Lauren F. Goldberg and Roger L. Smerage