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September 11, 2023

Sarah B. Gmiener, Town Clerk
Town of South Hadley
116 Main Street, Room M11
South Hadley, MA 01075

Re: South Hadley Annual Town Meeting of May 10, 2023 --- Case # 10942
Warrant Articles # 21 and 22 (Zoning)
Warrant Article # 20 (General)

Dear Ms. Gmiener:

Article 22 - Under Article 22 the Town voted to amend its zoning by-laws to allow for accessory dwelling units (ADUs) in the Town, including adding a new subsection 255-50, "Accessory Dwelling Unit," that provides standards and requirements for ADUs. As explained in more detail below, we approve Article 22 because it does not 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). [1]

During our review of Article 22, we received correspondence urging us to disapprove Article 22 on various grounds, as well as correspondence from Town Counsel urging our approval of Article 22. We appreciate these communications as they have aided our review. As explained below, the arguments advanced in the opposition do not provide us with grounds to disapprove Article 22.

In this decision we describe the by-law amendments; discuss the Attorney General's limited standard of review of town by-laws under G.L. c. 40, § 32; and then explain why, governed as we are by that standard, we approve Article 22. We also provide comments for the Town to consider when it applies the amendments adopted under Article 22.

I. Summary of Article 22

Under Article 22 the Town voted by a simple majority vote, to amend its zoning by-laws to allow ADUs in the Town. The Town voted to amend Section 255-10, "Terms Defined," to add definitions for

[1] In a decision issued on August 4, 2023 we approved Articles 20 and 21 and by agreement with Town Counsel pursuant to G.L. c. 40, § 32 we extended the deadline for our review of Article 22 for an additional thirty days until September 12, 2023.

the terms "Accessory Dwelling Unit (ADU)" and "Detached" Accessory Dwelling Unit. Accessory Dwelling Unit is defined as follows:

> 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 floor area than 1/2 the floor area of the principal dwelling or 900 square feet, whichever is smaller; and (iii) is subject to such additional restrictions as described herein.
>
> The by-law's definition of ADU matches the definition of ADU in G.L. c. 40A, § 1A. [2]

The Town also amended its Use Classification Schedule to allow attached ADUs as of right in the Town's Residence (R), Agricultural, (AGR), Neighborhood Business (BA), and Village Center Mixed Use (BB) Districts and prohibited in all other zoning districts. Detached ADUs are allowed as of right subject to site plan review in the Town's R, AGR, BA, and BB Districts and prohibited in all other districts. Under Article 22 the Town also amended its Dimensional Regulation Schedule to impose dimensional requirements on ADUs, including lot area, frontage, setbacks, building coverage, and height requirements. And the Town added a new subsection 255-50, "Accessory Dwelling Unit," that imposes standards and requirements for ADUs.

The new subsection 255-50 states that ADUs are "essential component[s] of housing choices and supply" in the Town and that ADUs provide benefits to the Town by: (1) increasing the supply of smaller housing stock types to meet the needs of smaller households of all ages; (2) helping older homeowners, single parents, young home buyers, and renters seeking; (3) increasing housing diversity and supply by providing opportunities to reduce the segregation of people by race, ethnicity and income that resulted from decades of exclusionary zoning; (4) providing homeowners with extra income to help meet rising homeownership costs; (5) creating a convenient living arrangement that allows family members or other persons to provide care and support for someone in a semi-independent living situation without the latter leaving his or her community; and (6) providing an opportunity for increased security, home care and companionship for older and other homeowners. Subsections 255-50 (I) (A) (1) and (2). The new subsection 255-50 allows one ADU per a single-family home or lot, requires the owner to be a resident of one of the units, and prohibits ADUs from being used as short-term rentals. See Subsection 255-50 (II) (A). Subsection 255-50 (II) also prohibits ADUs from being occupied by more than three people and limits ADUs to not more than two bedrooms. Subsection 255-50 (II) (A) (5).

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[2] Section 1A defines "Accessory dwelling unit" as "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 floor area than 1/2 the 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, owner-occupancy requirements and restrictions or prohibitions on short-term rental of accessory dwelling units."

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

Our review of Article 22 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.") "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 22, 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). 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. Housing Choice and Majority Vote

The simple majority vote for Article 22 is authorized by amendments to Section 5 of the Zoning Act, G.L. c. 40A, in the "housing choice" provisions of Chapter 358 of the Acts of 2020. The "housing choice" legislation is intended to promote housing production by making it easier for cities and towns to approve housing-supportive zoning amendments. To that end, the legislation authorizes cities and towns to adopt certain zoning by-law amendments through a simple majority vote, as opposed to the two-thirds majority vote traditionally required.

As amended by Chapter 358 of the Acts of 2020, G.L. c. 40A, § 5 now provides in relevant part:

> Except as provided herein, no zoning . . . by-law or amendment thereto shall be adopted or changed except by . . . a two-thirds vote of a town meeting; provided, however, that the following shall be adopted by a vote of a simple majority . . . of town meeting:
>
> (1) an amendment to a zoning ordinance or by-law to allow any of the following as of right: . . . (b) accessory dwelling units, whether within the principal dwelling or a detached structure on the same lot; . . .
> (2) an amendment to a zoning ordinance or by-law to allow by special permit: . . . (c) accessory dwelling units in a detached structure on the same lot; . . .

See also G.L. c, 40A, § 1A (simultaneously amended to include definitions of "accessory dwelling unit,").

One of the categories that qualifies for a simple majority vote is a zoning by-law amendment that allows for attached and detached ADUs by right or by special permit. G.L. c. 40A, § 5. Because Article 22 allows for attached and detached ADUs by right or by right subject to site plan review in certain zoning districts, Article 22 passed by the correct quantum of vote, and presents no conflict with state law, we approve it.

We remind the Town that the Executive Office of Housing and Livable Communities issued guidance on the housing choice legislation that can be accessed here:

https://www.mass.gov/info-details/housing-choice-and-mbta-communities-legislation

IV. The Arguments Raised in the Opposition do not Furnish the Attorney General with Grounds to Disapprove Article 22

During our review of Article 22, we received an opposition contending that Article 22 should be disapproved. See May 26, 2023 letter from Attorney Presley to AAG Caprioli. The opposition suggests that: the material presented to Town Meeting was "flawed and rushed;" (2) Article 22 does not increase affordable housing; (3) the by-law contain vague terms; (4) many Town Meeting Members voting on the by-law are not directly affected by its provisions; and (5) other surrounding towns have not adopted similar ADU by-laws. Id. We have considered these assertions and determine that they does not provide grounds to disapprove Article 22. [3]

In determining whether a by-law is inconsistent with the Constitution and laws of the Commonwealth, the Attorney General has available to her the materials which the Town Clerk is required to submit pursuant to G.L. c. 40, § 32:

> . . . . a certified copy of such by-law with a request for its approval, a statement clearly explaining the proposed by-law, including maps and plans if necessary, and adequate proof that all of the procedural requirements for the adoption of such by-law have been complied with.

The Attorney General's review under G.L. c. 40, § 32 is limited to the text "of the proposed by-law . . . and adequate proof that all of the procedural requirements for the adoption of such by-law have been complied with." We generally interpret the phrase "procedural requirements" in G.L. c. 40, § 32 to refer primarily if not exclusively to those established by statute as basic conditions essential to the validity of Town Meeting action, rather than all possible procedural requirements (such as rules of order) that might govern the conduct of Town Meeting itself.

[3] The opposition suggests that this Office must apply a strict scrutiny standard of review to our review of Article 22. However, the strict scrutiny standard of review is used where a law implicates a fundamental right or uses a suspect classification. Commonwealth v. Weston W., 455 Mass. 24, 30 (2009) (City of Lowell's juvenile curfew ordinance is subject to strict scrutiny, is not sufficiently "narrowly tailored," and therefore unconstitutionally infringes on a minor's right to freedom of movement). The opposition has not provided us with any argument or evidence that Article 22 implicates a fundamental right or uses a suspect classification, nor do we see one. Therefore, our review of Article 22 is not subject to the strict scrutiny standard.

General Laws Chapter 40, Section 32 does not confer upon the Attorney General the plenary power to determine all issues relevant to whether the legislative process by which the Amendment was adopted violated the laws and Constitution of the Commonwealth. The Attorney General has no power to disapprove a by-law because a town has chosen a different or novel approach to addressing a local issue or concern in comparison to approaches taken by other cities and towns in the state. The alleged deficiencies in Article 22 are issues beyond the scope of the Attorney General's review of town by-laws under G.L. c. 40, § 32. Amherst, 398 Mass. at 795-96, 798-99. Finally, as to the argument that the Town Meeting voters were provided misleading information, we were not provided – and it is not required that the Town provide – a complete transcription of all that transpired at Town Meeting. The Attorney General's review of a by-law is based primarily if not exclusively on the materials that G.L. c. 40, § 32, requires a town to submit: "a certified copy of such by-law with a request for its approval, a statement clearly explaining the proposed by-law, including maps and plans if necessary, and adequate proof that all of the procedural requirements for the adoption of such by-law have been complied with." Any inquiry into whether voters were materially misled by any materials provided to, or statements made at, Town Meeting would involve consideration of evidence and determination of factual issues going well outside the bounds envisioned by G.L. c. 40, § 32. See Durand v. IDC Bellingham, LLC, 440 Mass. 45, 51 (2003) (analysis of by-law's validity "is not affected by consideration of the various possible motives that may have inspired legislative action.")

In reviewing Article 22, we are mindful that "[z]oning has always been treated as a local matter and much weight must be accorded to the judgment of the local legislative body, since it is familiar with local conditions." Concord v. Attorney General, 336 Mass. 17, 25 (1957) quoting Burnham v. Board of Appeals of Gloucester, 333, Mass. 114, 117 (1955). In general, a municipality "is given broad authority to establish zoning districts regulating the use and improvement of the land within its borders." Andrews v. Amherst, 68 Mass. App. Ct. 365, 367-368 (2007). A zoning by-law must be approved unless "the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals or general welfare." Johnson v. Town of Edgartown, 425 Mass. 117, 121 (1997).

Based upon the documents submitted to us by the Town pursuant to G.L. c. 40, 32, and our standard of review, we cannot conclude that the Town's vote under Article 22 lacks a legitimate planning purpose, or is "arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals, or general welfare." Id. On the contrary, the documents submitted by the Town reflect that Article 22 was thoughtfully considered by the Planning Board and subsequently positively recommended to Town. Because Article 22 is consistent with state law, we approve it. Amherst, 398 Mass. at 795-96 (requiring inconsistency with state law or the constitution for the Attorney General to disapprove a by-law).

V. Subsection 255-50 (II) (A) (5)'s Occupancy and Bedroom Limitations Must Be Applied Consistent with the Fair Housing Act and G.L. c. 151B

Subsection 255-50 (II) (A) (5) limits the occupancy of an ADU to not more than three people and limits an ADU to no more than two bedrooms. We offer the following comments for the Town's consideration in light of the requirements of Federal and State law that prohibit discrimination in providing housing based on a protected class, including family status (i.e., the presence of children in the household.) See 44 U.S.C. § 3604 (the Fair Housing Act [FHA]) and G.L. c. 151B, § 4, ¶ 6.

Both federal and state law prohibit discrimination in the provision of housing based on familial status (i.e., the presence of children in the household.). See 44 U.S.C. § 3604 and G.L. c. 151B, § 4, ¶ 6.

The FHA expressly prohibits discrimination in the rental or sale of a dwelling based on familial status and provides that it shall be unlawful:

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

See 42 U.S.C. § 3604 (a).

"The phrase 'otherwise make unavailable or deny' encompasses a wide array of housing practices…and specifically targets the discriminatory use of zoning laws and restrictive covenants." Casa Marie, Inc. v. Superior Court of Puerto Rico for Dist. of Arecibo, 988 F.2d 252, 257 n. 6 (1st Cir. 1993).

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

In light of the statutory requirements of the FHA and G.L. c. 151B, the Town should consult with Town Counsel about the proper application of Subsection 255-50 (II) (A) (5)'s occupancy restriction of no more than three people and two-bedroom limitation.

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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cc: Town Counsel Lisa L. Mead