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October 25, 2024

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

**Re: South Hadley Annual Town Meeting of May 8, 2024 -- Case # 11422
Warrant Article # 27 (Zoning)
Warrant Articles # 21, 22, 23, 25, and 26 (General)¹**

Dear Ms. Gmeiner:

Article 27 – Under Article 27 the Town voted to amend several sections of the zoning by-laws to allow multifamily residences by right (with site plan and design review) in the Business A-1 Zoning District, subject to a temporary moratorium until June of 2025 while the Town adopts design review guidelines as required by the by-law. We approve Article 27 because it does not conflict with state law, as discussed below. 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).

In this decision we summarize the by-law amendments adopted under Article 27; the Attorney General’s limited standard of review of town by-laws under G.L. c. 40, § 32; and then explain why, under that standard of review, we approve Article 27.

I. Summary of Article 27

Under Article 27, the Town voted to amend several sections of the zoning by-laws to allow multifamily residences in the Business A-1 Zoning District (B A-1). One change amends Section 255-10, “Terms Defined,” to add a new definition for the term “Principal Roadways.” Another change amends the Use Regulation Schedule regarding residential uses in the B A-1 zoning district to change the use of “Multifamily dwellings for more than three families” from

¹ In a decision issued August 26, 2024, we approved Articles 21, 22, 23, 25, and 26; and by agreement with Town Counsel as authorized by G.L. c. 40, § 32, we extended the deadline for our review of Article 27 for 30 days until September 26, 2024. On September 25, 2024, we extended our deadline for an additional 30 days until October 26, 2024.

prohibited (N) to allowed as of right subject to site plan review by the Planning Board (SPR) and to insert a new footnote “h” that provides as follows: “Multifamily development in the Business A-1 zoning district is subject to the provisions of Section 255-52, “Multifamily Residential Development in Business A-1 zoning district.”

Under Article 27 the Town also voted to amend Article VII, “Supplemental District Regulations,” by inserting a new Section 255-52, “Multifamily Residential Development in Business A-1 Zoning District,” to allow multifamily residential developments (multifamily developments), as of right subject to site plan and design review, in the B A-1 district. Section 255-52A. The by-law provides that multifamily developments may only be approved if they conform to both the criteria for site plan review in Section 255-148 and the provisions of Section 255-52 regulating multifamily developments. Section 255-52A.

Section 255-52A requires the multifamily development to be part of a mixed-use development, including that there be an existing commercial building within 200 feet of the principal road on which the property fronts. Section 255-52A (1). The by-law requires a minimum area of not less than 112,120 square feet within the B A-1 district; the property to have at least 125 continuous feet of frontage on a principal roadway; and the total building coverage of the principal and accessory buildings in portions of the development containing first floor residential dwellings not to exceed 20%. Section 255-52A (2). In addition, the new Section 255-52 imposes requirements related to landscaping and screening and design review. Section 255-52A (3) and (4). Sections 255-52A (4) (b) and (c) authorizes the Planning Board to adopt regulations to “further specify design standards” and further provides that:

Except as provided in § 255-52 B, no Site Plan may be granted approval and no building permit may be issued for any dwelling units under this section unless and until the development has been approved under the Planning Board Design Review process.

Section 255-52A (4), relates to design review and architectural design standards and requires the architectural design of a multifamily development to be compatible with the character and scale of similarly used buildings; to have (to the extent possible) interconnected pedestrian and bicycle access routes; to integrate landscaping elements into the project; and to provide for architectural techniques to encourage compatibility and variability. The by-law imposes additional requirements including that a first-floor residential dwelling unit may not be located within 200 feet of a principal roadway; density requirements; regulations related to replacement or alteration of a commercial building; and shared use parking requirements. Section 255-52A (5), (6), and (7). The by-law also restricts a multifamily development on any parcel within a “Smart Growth District enacted pursuant to M.G.L. Chapter 40R and regulated by Section 255-23 of the Zoning Bylaw” and prohibits the issuance of a variance from the required dimensional requirements. Section 255-52A (8) and (9).

Lastly, Section 255-52 (B), imposes a temporary moratorium on the submission of a site plan application for a multifamily development until June 1, 2025, in order to give the Planning Board “reasonable and sufficient time” to develop and adopt a Design Review process, as follows:

B. Moratorium on submittal of Applications until June 1, 2025

(1) To provide the Planning Board with reasonable and sufficient time to develop and adopt a separate Design Review process and associated rules and regulations as provided for in § 255-52(4)(b), no application for Site Plan Review under this § 255-52 is to be submitted or considered prior to June 1, 2025.

(2) Whether or not the Planning Board has adopted a relevant Design Review process and associated rules and regulations pursuant to § 255-52 (4)(b), after June 1, 2025, submission of, processing of, and taking action upon Site Plans submitted under this § 255-52 shall proceed absent Design Review, but compliant with all standards specified in this § 255-52.

(3) After the Planning Board has adopted Design process and associated rules and regulations, all subsequently submitted applications for Site Plan Review under this § 255-52 shall be subject to said process and associated rules and regulations.

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

Our review of Article 27 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.”) 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).

Article 27, 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). 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). 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. The Town's Adoption of a Temporary Moratorium Advances a Legitimate Planning Purpose

Prior to the adoption of Article 27, multifamily dwellings for more than three families were a prohibited use in the B A-1 district. As a result of Article 27, this use is now allowed as of right in the B A-1 District but requires site plan review and design review by the Planning Board. The Town does not currently have a design review process, but intends to create such a process, including regulations to “further specify design standards,” as required by Section 255-52 (A) (4) (b). In order to allow the Planning Board sufficient time to develop and adopt a separate design review process, along with any regulations as provided for in Section 255-42 (A) (4) (b), the by-law imposes a temporary moratorium on the submittal of site plan applications until June 1, 2025.

Given the unique circumstances presented here, we approve this temporary moratorium because it is limited in time and scope and advances a legitimate planning purpose, as explained in more detail below.

A temporary moratorium is within a town's power when there is a stated need for “study, reflection and decision on a subject matter of [some] complexity...” W.R. Grace, 56 Mass. App. Ct. at 569 (City's temporary moratorium on building permits in two districts was within City's authority to zone for public purposes). However, the Supreme Judicial Court's holding in Zuckerman v. Hadley, 442 Mass. 511, 520-21 (2004) is a useful guardrail for towns considering the adoption of moratoria: “Except when used to give communities breathing room for periods reasonably necessary for the purposes of growth planning generally, or resource problem solving specifically, as determined by the specific circumstances of each case, such [moratorium] zoning ordinances do not serve a permissible public purpose, and are therefore unconstitutional.” Id., 442 Mass. at 520-21 (citing Sturges v. Chilmark, 380 Mass. 246, 257 (1980)). Towns must show that a by-law creating a moratorium “has some reasonable prospect of a tangible benefit to the community” and that there was a “reasonable basis” for the by-law. Sturges, 380 Mass. at 257. However, a town is not required to conduct studies before adopting a temporary moratorium or to memorialize all the factors that may lead to a town's decision on a zoning by-law. W.R. Grace, 56 Mass. at 569.

The text of Section 255-52 (B) establishing a temporary moratorium for this new use in the B A-1 District states that its purpose is to “provide the Planning Board with reasonable and sufficient time to develop and adopt a separate Design Review process and associated rules and regulations” related to site plan applications for multifamily dwellings of more than three families in the B A-1 District. See Section 255-52 (B) (1). The Town does not currently have a design review process, but intends to create such a process. The moratorium is temporary in nature and intended only for a limited amount of time to provide the Planning Board time to adopt the design review process. Further, as reflected in Section 255-52 (B) (2) of the by-law, if the Planning Board has not implemented this design review process by June 1, 2025, the submission and processing of a site plan application will proceed, “absent Design Review, but compliant with all standards specified in this § 255-52.”

In its report to Town Meeting, the Planning Board explained that the by-law amendment had a relationship to the Town's 2020 Master Plan to address community-wide housing needs and that the specific B A-1 area, described as a "Gateway District," focuses on "encouraging the development of a mix of uses within the zone including commercial and residential, compatible with the adjacent residential and open spaces areas." See Form 7, Attachment 1 (Planning Board's Report to Town Meeting). Further, the Planning Board's Report to Town Meeting notes that the Town's November 2023 Housing Production Plan seeks to allow housing development as part of a mixed use development and that the Town's housing supply is lower than its demand. Id. Following a robust Planning Board hearing that included comments from several residents (both for and against the proposal) as well as comments from the Planning Board, including the Vice Chair of the Planning Board who noted that the by-law amendments would "expand housing ability around the Town," the Planning Board favorably recommended Article 27 to Town Meeting for adoption.²

For these reasons, the moratorium advances the Town's legitimate planning purposes of allowing for this previously prohibited use in the B A-1 District subject to site plan review and a design review process, while allowing the Town a temporary amount of time to develop and adopt the design review process. Because the moratorium is limited in time (until June 1, 2025) and scope (submission of site plan application for a new use in the B A-1 District), it does not present the problem of a rate-of-development by-law of unlimited duration which the Zuckerman court determined was unconstitutional. Id. Therefore, based on this information, the temporary moratorium, in the unique situation presented here, appears to be adopted for a legitimate planning purpose and the Town intends to utilize the moratorium for the proper purpose of "growth planning." Zuckerman, 442 Mass. at 520-21. However, we suggest that the Town and the Planning Board consult with Town Counsel to ensure that the design review process planning efforts are carried out in a timely way so that the moratorium time period is used for its intended purpose: "to give communities breathing room for periods reasonably necessary for the purposes of growth planning generally, or resource problem solving specifically, as determined by the specific circumstances of each case" and is not of unlimited duration. Id. at 520-21.

IV. Additional Comments regarding Article 27

A. Section 255-52 (A) – Site Plan Review

Section 255-52 (A) requires a multifamily residential development in the B A-1 District to conform to the Site Plan Review criteria of Section 255-148, "Review Criteria," as well as the provisions set forth in the by-law. Section 255-148 (A) (9) includes the following as a site plan criterion: "The site design shall minimize and/or mitigate adverse impacts on the Town's services and infrastructure." The application of this provision to a multifamily dwelling raises concern under federal and state law, including the federal Fair Housing Act (FHA) and Massachusetts Anti-Discrimination Law. The Town should consult with Town Counsel to determine if future amendments are needed to address this issue, as discussed below.

² See the Planning Board's minutes from the March 4, 2024 public hearing, found here: https://www.southhadley.org/AgendaCenter/ViewFile/Minutes/_03042024-5361

1. *Potential Fiscal Impact on Essential Public Services*

As part of the site plan review process, Section 255-52 (A) authorizes the Planning Board to consider whether the proposed multifamily development conforms to the Site Plan Review Criteria of Section 255-148, including Subsection (A) (9) that reviews whether the site design will minimize or mitigate adverse impacts on the Town's services and infrastructure. In applying this provision, the Town should be aware of recent Land Court decisions analyzing the question whether a potential impact on essential public services, including education of children, is a lawful consideration in the context of multi-family housing. In two recent decisions the Land Court determined that consideration of potential increased costs for educating school-aged children is not a lawful consideration when reviewing a special permit application for multi-family housing.

In Bevilacqua Co. v. Lundberg, No. 19 MISC 000516 (HPS), 2020 WL 6439581, at *8–9 (Mass. Land Ct. Nov. 2, 2020), judgment entered, No. 19 MISC 000516 (HPS), 2020 WL 6441322 (Mass. Land Ct. Nov. 2, 2020) the court ruled that the Gloucester City Council's denial of a special permit to construct an eight-unit multi-family building based on the potential fiscal impact of the proposed development on the Gloucester public schools was "legally untenable." Id. at *9. Because the right to a public education is mandated and guaranteed by the Massachusetts Constitution (see McDuffy v. Secretary of the Executive Office of Educ., 415 Mass. 545, 621 (1993) and Hancock v. Comm'r of Education, 443 Mass. 428, 430 (2005)), "[a denial of] a special permit to build housing because the occupants of that housing might include children who will attend public schools is [a denial of the children's] constitutional right under the Massachusetts Constitution to a public education." Bevilacqua Co., 2020 WL 6439581, 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 Co., 2020 WL 6439581_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).

160 Moulton Drive, 2020 WL 7319366 at *14.

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 permit for multifamily housing, and the open question whether a reviewing board may consider the impact on other essential public services, we strongly encourage the Town to consult closely with Town Counsel regarding whether the site plan criteria in Sections 255-52 (A) and 255-148 should be enforced when reviewing a site plan application for a multi-family dwelling and whether it should be amended at a future town meeting.

2. *FHA and MA Anti-Discrimination Law Requirements*

The requirement that the Planning Board consider whether the multifamily dwelling site design will minimize and/or mitigate adverse impacts on the Town’s services and infrastructure also raises concerns considering the Town’s obligation to comply with the provisions of FHA and G.L. c. 151B. 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 site plan applications for multi-family dwellings to ensure compliance with the FHA and G.L. c. 151B.

B. Section 255-52 (A)(4)(b) - Rules and regulations

Section 255-52 (A)(4)(b) authorizes the Planning Board to adopt regulations “as may be necessary to further specify design standards.” Any regulations adopted by the Planning Board must be consistent with state law. American Lithuanian Naturalization Club v. Board of Health of Athol, 446 Mass. 310, 321 (2006). The Planning Board should consult with Town Counsel regarding any proposed regulations to ensure they are consistent with state law.

V. **Conclusion**

We approve the amendments adopted under Article 27. The Town should consult with Town Counsel with any questions about the application of the new by-law.

Note: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the Town has first satisfied the posting/publishing requirements of that statute.

Very truly yours,

ANDREA JOY CAMPBELL
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