Agricultural Uses Review and Analysis
January 2025

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Project Purpose

To provide the Town of South Hadley with new or revised Zoning Bylaw provisions including but not limited to supplemental regulations regarding agricultural, horticultural, and floricultural uses including but not limited to livestock, horse stables, and related uses (generally referred to as "agricultural uses" below) to address identified local issues.

Summary of Topic Issues

Through discussions with the Planning Director, Building Commissioner, and Public Health Director 9 primary and interrelated issues regarding Agricultural Uses and the Zoning Bylaw were identified:

1. The current Zoning Bylaw does not conform to the exemptions afforded Agricultural uses in MGL Chapter 40A, Section 3.
2. Inconsistencies or conflicts exist between the Use Regulations Schedule and Sections 255-25 and 255-26.
3. Zoning Bylaw is unclear as to whether agricultural uses are considered accessory or principal uses particularly in residential zoning districts.
4. Some key terms/phrases such as "livestock", "objectionable uses" are not defined.
5. Use Regulations Schedule appears to be contradictory and unreasonable in terms of where agricultural uses are allowed or prohibited.
6. Section 255-26 appears to conflict with "animal keeping" restrictions in Section 255-25.
7. Reconciliation of the Zoning Bylaw regulation of agricultural uses with the Board of Health regulations, particularly in regards to keeping of livestock and other animals.
8. Reconciling of the Town's status as a "Right to Farm" community as stated in Chapter 138 of the General Bylaws with the regulation of such uses in the Zoning Bylaw.
9. Overly restrictive of "Sale of Farm Products", particularly in the Residence A-1 and Residence A-2 zoning districts (where Home Occupations are permitted), but also in the Business zoning districts.

Therefore, the project focused on researching these issues and drafting recommendations to resolve them.

Study Process

The assessment phase of this project entailed the following tasks:

- Review of existing South Hadley Zoning Bylaw provisions
- Review of the Board of Health Livestock License Requirements and Regulations
- Review of other Pertinent South Hadley Bylaws and Regulations
- Review of Attorney General Municipal Law Decisions
- Review of Bylaws from other communities

Review of existing South Hadley Zoning Bylaw provisions. In reviewing the South Hadley Zoning Bylaw in its entirety, eight sections/subsections were determined to be related or somewhat related to the focus of this project:

- § 255-10 Terms defined.
- § 255-11 Establishment of districts.
- § 255-19 Use Regulations Schedule. (including § 255-Attachment 1)
- § 255-24 Accessory uses and buildings.
- § 255-25 Agricultural, horticultural, and floricultural uses.
- § 255-26 Stables and riding academies.
- § 255-35 Water Supply Protection District.
- § 255-41 Outdoor recreation facilities.

§ 255-10 is intended to define terms used in the Zoning Bylaw. However, it fails to include any definitions regarding agricultural uses including livestock, etc.

§ 255-11 establishes the zoning districts within the town and defines the purpose for each district. Particularly relevant is that it establishes an "Agricultural" zoning district and defines the district's purpose as follows:

> *"Agricultural. The purpose of this district is to promote agriculture, forestry, recreation, and land conservation, as well as compatible open space and rural uses, by siting development in a manner that preserves large contiguous tracts of open space and agricultural land. The preservation of scenic vistas of open land, forestland, the Mount Holyoke Range, the Mount Tom Range, and the Connecticut River in this district is a key aspect of maintaining South Hadley's desired scenic and rural identity."*

§ 255-19 (including Attachment 1) specifies the uses allowed in each district. The following uses are relevant to this project:

Under "Open Space Uses" category

- Agricultural, horticultural, or floricultural uses on parcels of five acres or more
- Agricultural, horticultural, or floricultural uses on parcels of less than five acres, as provided in Article VII
- Stables or riding academies, as provided in Article VII
- Outdoor recreation facilities/c

Under "Business Uses" category

- Sale of farm products

Significantly, the relevant uses described use the "five-acre" threshold regarding agricultural uses which is an issue of concern.

§ 255-24 provides guidance and clarification regarding accessory uses and buildings including limitations on access to business or industry activities.

§ 255-25 provides regulations and guidance regarding "agricultural, horticultural and floricultural uses". A "five-acre" threshold is used in this section as well which is an issue of concern. There is not a clear division between "accessory" agricultural uses" and "commercial agricultural uses".

§ 255-26 provides regulations and guidance regarding "stables and riding academies". It appears to combine uses which are "accessory" residential and uses which would be considered "commercial agricultural uses".

§ 255-35 provides regulations governing the Water Supply Protection District including permitted uses, prohibited uses, and restricted uses including "agricultural uses". The references to "agricultural uses" do not appear to be limiting; therefore, do not appear to pose a concern.

§ 255-41 establishes regulations and guidance for development of "Outdoor recreation" in the Agricultural zoning district. The provisions only provide for the issuance of a Special Permit to allow the development of miniature golf and batting cage facilities. It requires that a minimum acreage be maintained in active agricultural use.

Review of the Board of Health Livestock License Requirements and Regulations. Among the regulations administered by the Board of Health and the associated application forms, some relate to agricultural uses – in a broad context, such as:

- Minimum Standards for the Keeping of Animals
- Stable and Livestock Permit Application

In regard to agricultural use, the most significant intersect of the Zoning Bylaw and the Board of Health Regulations is in regards to the keeping of livestock and how "livestock" is defined. In this regard, the Board's "Minimum Standards for the Keeping of Animals" is particularly applicable. These standards have various definitions but the following are particularly relevant terms:

> Domesticated animals - Animals of a species of vertebrates that have been domesticated by humans to live and breed in a tame condition and depend on humankind for survival. Domesticated animals shall include, but not be limited to any equine or bovine animal, goat, sheep, swine, dog, cat, poultry or other domesticated beast or bird.

> Household pets - Animals that are primarily kept indoors for non-agricultural purposes, including but not limited to dogs, cats, ferrets, fish, domesticated or exotic birds, guinea pigs, hamsters, and mice.
>
> Livestock - Animals kept for agricultural purposes, including but not limited to cattle, goats, sheep, swine, equines, camelids, poultry (not including roosters and/or cockerels), and other fowl.

According to Section 2b of the "Minimum Standards for the Keeping of Animals", it does not appear that the Standards are intended to apply to animals kept as part of a commercial agriculture operation:

> *"This regulation is not intended to regulate the use of land for commercial agriculture. Commercial agriculture may be limited by South Hadley zoning bylaw to activities of five (5) acres or more or on parcels of two (2) acres or more if the sale of products produced from the agricultural use on the parcels annually generate at least $1,000 per acre based on gross sales dollars in areas not zoned for agriculture in accordance with Massachusetts General laws Chapter 40A, Section 3."*

The Board's Stable and Livestock Permit Application lists the following as subject animals: Cattle, Rabbits, Sheep, Horses, Goats, Swine, Ducks, Geese, Chickens, Fowl, and Dogs. However, it also provides a "Other" animal for animals not listed; thus, it is all encompassing.

The Board of Health has other permitting requirements that may be applicable to activities carried out on farms. Examples of these include sanitary code, food permitting, etc. All of the permitting requirements include the authorization to conduct inspections by related personnel – such as the Public Health Director and/or their staff and animal control officer.

<u>*Review of other Pertinent South Hadley Bylaws and Regulations.*</u> In addition to the Zoning Bylaw and the Board of Health Regulations, the Town has some other general bylaws which may impact or relate to agricultural activities including the keeping of animals:

- Chapter 138 – Farming
- Chapter 194 – Pets and Domesticated Animals

Chapter 138 – Farming. This bylaw is mostly a statement of policy that the Town of South Hadley is a "Right to Farm" community. It does not override other municipal bylaws and regulations including but not limited to the Zoning Bylaw or Board of Health Regulations.

Chapter 194 – Pets and Domesticated Animals. This bylaw appears to attempt to regulate managing animals when they are in public spaces.

Review of Attorney General Municipal Law Decisions. All towns have to submit adopted bylaws – general and zoning – to the Attorney General's Municipal Law Unit for review and approval. Typically, this is a 90-day process during which the bylaw is reviewed for compliance and consistency with State law, Constitution, and case law on the topic. Following completion of their review, the Municipal Law Unit issues a letter of decision. These letters will indicate whether the bylaw is approved or rejected. They also typically state the basis for the determination and frequently provide some legal analysis of the topic. Decision letters are posted in an online searchable database.

A search was made of decisions regarding agriculture uses to identify communities who have recently amended their bylaws regarding agricultural uses. From this review, some communities' bylaws were identified for review. Additionally, some insight into relevant legal aspects of statute and case law was gathered. Among the points made multiple times in the decision letters were:

Categories of land on which communities cannot require a special permit for, unreasonably regulate, or prohibit commercial agriculture:

(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.

Categories 2 and 3 are most commonly noted. However, the first category is "obvious" but has implications for South Hadley when one looks at the "purpose" of the Agricultural Zoning District and the fact that this category does not have a minimum parcel size associated with the exemption.

Animal breeding as an agriculturally exempt use. Cheshire, Massachusetts adopted an amendment which would require a "kennel or veterinary hospital" to obtain a special permit in a Light Industrial District. In its 2019 decision approving the amendments, the Attorney General Office noted that "Dog kennels that include the breeding and raising of dogs may be considered agricultural uses entitled to the protections provided under G.L. c. 40A, § 3. See Sturbridge v. McDowell, 35 Mass. App. Ct.924, 926 (1993)". A similar comment was made in a 2020 Decision Letter regarding an amendment to the Wrentham Zoning Bylaw requiring a Special Permit for a "Kennel" in a zoning district. Again, a similar comment was in a 2022 Decision Letter regarding an amendment to the North Brookfield Zoning Bylaw requiring a Special Permit for a "dog kennel" in multiple residential zoning districts.

It is important to review the case law cited by the Attorney General's Office. In that decision, the Appeals Court concluded that the breeding, raising, and training of dogs owned by the defendant on the land is an agricultural pursuit under G. L. c, 40A, Section 3". They indicated that they could not see how raising and training of dogs is distinguishable from the raising and training of other domestic animals such as ponies or horses. However, they also noted that they were

mindful that the Supreme Judicial Court has held that maintenance of a dog kennel is not farming or agriculture and a greyhound raising stable is not a farm.

Thus, as always with zoning and land use, the pathway to understanding is not always clear.

Review of Bylaws from other communities.
The bylaws of the following communities were reviewed to assess how they addressed issues which had been identified for South Hadley:

- Amherst
- Belchertown
- Cheshire
- Falmouth
- Granby
- Hadley
- Ludlow
- Monterey
- Mount Washington
- North Brookfield
- Northampton
- Palmer
- Rutland
- Tewksbury
- Wrenthem

Some of these communities were selected due to their proximity to South Hadley. Other communities were selected based on review of the Attorney General Municipal Law Unit Decision Letters. This review identified definitions and approaches to topics that appeared to be particularly relevant.

In addition to the above listed communities, bylaws of other communities were sometimes looked at to see how a particular issue was addressed. These other communities' bylaws typically were looked at when they were being reviewed for another project and the agricultural use was noticed.

Analysis of Issues

The issues identified earlier are reviewed and analyzed below. This analysis includes a summary as to how the other communities appear to address the issue. It is noted that the issues are intertwined. While nine issues were previously identified for analysis, two additional issues were also identified in the course of the analysis.

1. *The current Zoning Bylaw does not conform to the exemptions afforded Agricultural uses in MGL Chapter 40A, Section 3*.

This analysis may not be an exhaustive review of how the South Hadley Zoning Bylaw may not comply with Massachusetts Law regarding the agricultural exemption. It addresses key aspects where the Zoning Bylaw is inconsistent.

The existing Zoning Bylaw only exempts "agricultural uses" which are conducted on parcels 5 acres or larger (Attachment 1 - Use Regulations Schedule, § 255-25, and § 255-26). Similarly, it also does not address the exemption as it could apply to "Stables or riding academies, as provided in Article VII". Under Business Uses, § 255-Atachment 1 Use Regulations Schedule – Business Uses provides for sale of farm products, but this is a vague term and does not indicate that it a permitted use in all districts for exempt agricultural activities. Exempt kennels and breeding of animals as provided in case law is not addressed.

§ 255-25A expressly prohibits keeping and raising of various livestock on parcels under 5 acres in size in all but the Agricultural and Industrial A zoning district. This excludes those parcels of 2 acres or more where such activity could generate at $1,000 per acre in revenue.

§ 255-25E expressly prohibits "agricultural, horticultural and floricultural uses" on all parcels less than 5 acres in size in the Industrial A zoning district. Attachment 1 - Use Regulations Schedule (Open Space Uses) extends this prohibition to the Business A-1 and Industrial B zoning districts.

Stables or riding academies as provided in Section VII are permitted in all but Residence C and Business A districts. The reference to Section VII is apparently a reference to "§ 255-26B. Riding academies" which requires a minimum parcel area of 10 acres. Since stables and riding academies could be considered "agricultural uses" under MGL Chapter 40A, Section 3, this 10-acre minimum exceeds the threshold of the statute. The wording of § 255-26B, could lead to people being denied use of their property for an activity which is exempt under MGL.

Thus, the existing Zoning Bylaw does not address the 2-acre exemption or the broader exemption for land agriculturally zoned. The lack of related definitions contributes to the lack of conformity – or, at least, to the lack of clarity which can lead to lack of conformity as the Zoning Bylaw is interpreted and administered. The wording of § 255-26B, could lead to people being denied use of their property for an activity which is exempt under MGL.

A review of various communities' zoning bylaws generally addresses this issue in several ways. They provide clear definitions of the various terms. Additionally, the bylaws

address all three categories of land which is exempt as described in the AG letters. This compliance is not uniform as the AG Decision Letters raise questions or suggest that there needs to be caution in how the provisions are applied.

Some communities go beyond the statutory exemptions and provide broader agricultural exemptions. Additionally, some Zoning Bylaws, such as Rutland, provide opportunities for farms to be approved for accessory and non-accessory activities.

2. *Inconsistencies or conflicts exist between the Use Regulations Schedule and Sections 255-25 and 255-26*.

There are a number of inconsistencies and conflicts in regard to agricultural uses. These inconsistencies and conflicts can lead to people incorrectly being denied use of their property and/or unnecessary litigation.

Footnote "a" in § 255-Atachment 1 Use Regulations Schedule (Open Space Uses Uses) addresses keeping of horses and/or ponies as an accessory to a residential use. It further states that Site plan review is required. It indicates that it applies only to Residence A-1, Residence A-2, and Residence B. However, § 255-26A does not convey the limitations on keeping of horses as are expressed in in § 255-Atachment 1 Use Regulations Schedule (Open Space Uses Uses).

§ 255-Atachment 1 Use Regulations Schedule provides that "Agricultural, horticultural, or floricultural" uses on parcels of less than five acres, as provided in Article VII is permitted by Site Plan Review in all districts except in Business A-1, Industrial A, and Industrial B where it is Prohibited. However,

- § 255-25A provides that the keeping and raising of certain livestock (an agricultural use) on parcels of less than five acres is prohibited in all districts except Agricultural, and Industrial A. Thus, the Use Regulations Schedule only prohibits it in 3 districts, but § 255-25A prohibits it in all districts except for 2 districts.
- § 255-26A allows stables or keeping of horses and/or ponies as accessory to residential uses without limits on the district while the Use Regulations Schedule prohibit "Stable or riding academies" in Residence C and Industrial A. permits such use in only specified districts.
- § 255-25E prohibits "Agricultural, horticultural and floricultural uses" entirely on parcels of less than five acres in Industrial A Districts. However, the Use Regulations Schedule prohibits the use in both Industrial A and Industrial B zoning districts as well as the Business A-1 and Industrial Garden District.

3. *Zoning Bylaw is unclear as to whether agricultural uses are considered accessory or principal uses particularly in residential zoning districts*.

§ 255-25 is vague on this matter. It seems to suggest that the identified agricultural uses are to be accessory to residential uses. § 255-25B states that keeping of poultry is to be for the use of the resident occupant only. This would suggest that it is accessory to a residential use, yet it is permitted in districts that don't permit residential uses. It is clear as to which zoning districts Again, the lack of definitions is a foundation of the confusion.

§ 255-26A is explicit that "keeping of horses and/or ponies and a private stable, for personal use, are permitted as accessories to residential uses" in all districts subject to some specified standards which include "density" restrictions. § 255-26B appears to apply to keeping of horses for commercial purposes. § 255-Atachment 1 (Open Space Uses) provides that Stables or riding academies, as provided in Article VII is permitted in most districts but in some it is either by right or by Site Plan Review while it is prohibited in the Residence C, Business A-1, and Industrial A zoning districts. This muddies the issue as to whether the agricultural use is accessory or not.

Footnote "a" in Use Regulations Schedule (Open Space Uses) further confuses the issue regarding horses and/or ponies and riding academies. The first sentence limits keeping of horses and/or ponies to being accessory to a residential use. But, the second sentence suggests that a stable or riding academy (which would require horses and/or ponies) is permitted by Site Plan Review. It may be that the intent is to provide that where a stable or riding academy are exempt under MGL Chapter 40A, Section 3, then Site Plan Review is required.

Some communities are explicit as to agricultural uses being accessory to residential uses. Generally, this relationship relates to keeping of livestock or poultry.

Chapter 40A, Section 3 does not require agriculture to be accessory to residential uses as long as it meets one of the three thresholds specified in the statute. Thus, when the agricultural activity (particularly where it involves keeping of livestock or poultry) occurs on property that does not meet one of the three exemption standards in MGL Chapter 40A, Section 3, there does not appear to be any legal barrier to requiring that the use is accessory to an on-site residential use.

4. *Some key terms/phrases such as "livestock", "objectionable uses" are not defined*.

The South Hadley Zoning Bylaw does not define agriculture, farm, livestock, or any related terms. There are implications provided in § 255-25 and § 255-26 which list some livestock. The Board of Health defines some terms as noted previously.

The lack of definitions creates issues in the administration of the Zoning Bylaw in multiple situations:

- Persons seeking to determine what animals they can or cannot keep on their property.
- Working with the Health Department licensing procedures.
- Responding to complaints regarding alleged zoning violations.

A review of the Zoning Bylaws for numerous communities found that they generally defined "agriculture", "farm", and "livestock" or variations of such terms. Most commonly, they tend to rely upon or refer to the terms or definitions used in MGL Chapter 40A, Section 3 and Chapter 128, Section 1A. It would be a sound practice to rely upon or reference the relevant provisions in Massachusetts General Laws.

5. *Use Regulations Schedule appears to be contradictory and unreasonable in terms of where agricultural uses are allowed or prohibited*.

Agricultural uses are generally regulated more restrictively in the Residence A-1, Industrial A, and Industrial B zoning districts under § 255-Atachment 1 Use Regulations Schedule (under the Open Space category). For instance,

- "Agricultural, horticultural, or floricultural uses on parcels of less than five acres, as provided in Article VII" is prohibited in the Residence A-1 and all 3 Industrial districts.
- "Stables or riding academies, as provided in Article VII" is prohibited in the Residence C, Business A-1, and Industrial A zoning districts.

Similar issues arise in § 255-25.

- § 255-25A: On parcels of less than five acres, in all districts except Agricultural, and Industrial A, the following restrictions apply: The keeping and raising of pigs, rabbits, livestock, pigeons, whether raised for table or other purposes, or other like objectionable uses are prohibited.
- § 255-25E: Agricultural, horticultural and floricultural uses are prohibited entirely on parcels of less than five acres in Industrial A and Industrial B Districts.

Regulation of "Portable woodworking mills for use on lots of less than five acres" as regulated under § 255-Atachment 1 Use Regulations Schedule (Open space use category) appears to be similarly unreasonable and, potentially, not in conformity with MGL, Chapter 40A, Section 3. The use is only permitted by Site Plan Review in the Agricultural, Industrial B, and Industrial Garden zoning districts. It is prohibited in all other districts regardless of the use of the land.

"Sale of farm products" is also regulated by § 255-Atachment 1 Use Regulations Schedule in a restrictive manner that would not appear reasonable when viewing other permitted uses.

- It is permitted by Special Permit with limitations in the Residence A-1, Business A, Business B, Business C, and Industrial B zoning districts.
- It is prohibited in the Residence A-2, Residence B, Residence C, Business A-1, Industrial A, and Industrial Garden zoning districts.
- Permitted by right with limitations in the Agricultural zoning district.
- However, "Retail Sales" is permitted in all of the Business and Industrial zoning districts while it is prohibited in all of the Residential and Agricultural zoning districts.

The limitations on "Sale of farm products" where it is permitted do not follow the provisions of MGL Chapter 40A, Section 3. Further, "Sale of farm products" is a form of retail sales. It would appear that the intent of allowing "Sale of farm products" in some districts is to allow farms to engage in the operation of farm stands. But, the provisions fail to adequately do so and appear to fail to conform to State Law and Case Law.

A review of the Zoning Bylaws for numerous communities found that contradiction within the Zoning Bylaw is not exclusive to South Hadley. Similarly, there are provisions of other communities' Zoning Bylaw which appear to treat one use unreasonably as compared to treatment of similar uses. The lack of definitions within South Hadley's Zoning Bylaw magnifies these issues contradictions as their absence makes a bylaw less clear.

Communities with definitions regarding agricultural uses generally make their Zoning Bylaws more consistent and clear in terms of how those uses are regulated. For instance, several communities have provisions which provide that raising or keeping of livestock or poultry for use by residents of the premises is considered as an accessory use to residential uses.

In terms of the "Sale of farm products', a number of communities have some provisions for "Farm Stands". There is some diversity as to how the farm stands are permitted. This ranges from "By Right" in some communities to a mix of Site Plan Review and Special Permit in other communities. All of the communities (included in this review) which made provisions for farm stands, allowed them in at least a portion of the residential communities – some made provisions to allow them in all zoning districts.

6. *Section 255-26 appears to conflict with "animal keeping" restrictions in Section 255-25.*

§ 255-26A expressly states that some livestock and private stable" are permitted as accessory to a residential use while § 255-26A expressly prohibits livestock without

exception in all but two zoning districts (including residential districts "on parcels of less than five acres". Similarly, § 255-Atachment 1 Use Regulations Schedule permits "Stables or riding academies, as provided in
Article VII" either by right or Site Plan Review in all of the residential districts except Residence C.

- § 255-26A: Accessory to residential use. The keeping of horses and/or ponies and a private stable, for personal use, are permitted as accessories to residential uses.

- § 255-25A: On parcels of less than five acres, in all districts except Agricultural, and Industrial A, the following restrictions apply: The keeping and raising of pigs, rabbits, livestock, pigeons, whether raised for table or other purposes, or other like objectionable uses are prohibited.

Similarly, § 255-Atachment 1 Use Regulations Schedule permits "Stables or riding academies, as provided in Article VII" either by right or Site Plan Review in all of the residential districts except Residence C. This raises two issues:

- Residence C allows residential uses; thus, the prohibition in § 255-25A would appear to be contradiction or conflict.

- Accessory uses for personal use are not typically subject to Site Plan Review; thus, the accessory use allowance provided in § 255-26A would be unusual and either contradictory or confusing.

The regulation of certain animals in the Residence A-1 zoning district would appear to be contradictory when reviewing § 255-25C and § 255-Atachment 1 Use Regulations Schedule:

- § 255-25C provides that on parcels of less than five acres in Residence A-1 Districts, the keeping and raising of roosters, as well as pigs, rabbits, livestock, pigeons and other like objectionable uses, is prohibited.

- § 255-Atachment 1 Use Regulations Schedule provides "Agricultural, horticultural, or floricultural uses on parcels of less than five acres, as provided in Article VII" is permitted by Site Plan Review in all of the residential zoning districts, Agricultural zoning district, and 3 of the Business Zoning districts including Residence A-1.

This issue may be resolved in part by inclusion of clear definitions. However, a review of the applicable Massachusetts State Laws and the Board of Health Regulations would suggest that the prohibitions on keeping of certain type of animals would not be resolved by defining terms consistent with the State laws or the Board of Health Regulations.

A related issue in these regulations is the lack of conformity with the three categories of land that is exempt for agricultural purposes.

A review of the Zoning Bylaws for numerous communities found communities with definitions regarding agricultural uses generally make their Zoning Bylaws more consistent and clear in terms of how those uses are regulated. This apparent consistency with these other communities would appear to arise by their more thorough approach to regulating livestock and agricultural uses. For instance, several communities have provisions which provide that raising or keeping of livestock or poultry for personal use by the residents of the property is considered as an accessory use to residential uses.

It should be noted that some of these more "consistent" communities also fail to align their regulation of agricultural uses with the MGL Chapter 40A, Section 3 exemption of agricultural uses. This likely derives from their lack of updating of this section of their zoning bylaws/ordinances in a number of years.

7. *Reconciliation of the Zoning Bylaw regulation of agricultural uses with the Board of Health regulations, particularly in regards to keeping of livestock and other animals*.

The apparent reasons for the need to reconcile the Zoning Bylaw with the Board of Health are:

- The Zoning Bylaw lacks definitions for livestock, agriculture and related terms.
- The Zoning Bylaw does not require compliance with other regulations for keeping of livestock or animals for personal use

While the Zoning Bylaw suggests what is meant, people often interpret terms differently. The implied meanings in the Zoning Bylaw also appear to differ from what the Board of Health documents expressly mean. It is also noted that the Board of Health's Livestock Permit application appears to specify different animals from those listed in the Board's Regulations – this needs to be reconciled as well.

A review of the Zoning Bylaws for numerous communities found that the relevant terms are typically defined in the Zoning Bylaw. These definitions, where applicable, generally reference the applicable sections of Massachusetts General Law.

8. *Reconciling of the Town's status as a "Right to Farm" community as stated in Chapter 138 of the General Bylaws with the regulation of such uses in the Zoning Bylaw*.

The "Right to Farm" Bylaw is clear on the relationship:

> " . . . when done in compliance with state laws and Town bylaws and regulations. Nothing in this bylaw should be construed to allow a use not already permitted by the Zoning Bylaw" §138-1B

Chapter 138 provides definitions of some agriculture related terms. Something the Zoning Bylaw does not do.

From reviewing the Master Plan and talking with the Town staff, it is apparent that there is interest in supporting and promoting the Town's agricultural businesses. The Town has previously taken limited steps through adoption of § 255-41 "Outdoor Recreation" which was written and adopted to support McCray's Farm effort to develop a miniature golf and/or batting gages on site to bring in more customer to the farm. The Town has also supported efforts to secure Agricultural Preservation Restrictions to maintain farmland.

The issue would appear more on the lines of the Zoning Bylaw being inconsistent with the intent and objectives of the Right to Farm Bylaw. Thus, for this project, the question is: What can be done in the Zoning Bylaw to support and reinforce the policy of a "Farm Friendly community?

A review of the various communities' Zoning Bylaws enumerated previously provides some suggestions:

- Defining agriculture and related terms.
- Creation of a zoning district with agricultural uses being the primary purpose; not focused on siting of development
- Allowing farms stands
- Making provision for a Farm Store
- Permitting farms to have accessory farm and non-farm related business uses

9. *Overly restrictive of "Sale of Farm Products", particularly in the Residence A-1 and Residence A-2 zoning districts (where Home Occupations are permitted), but also in the Business zoning districts*.

In discussions with Town staff, it was suggested that "Sale of Farm Products" via a Farm Stand could be treated as a Home Occupation. Thus, analysis of this issue looks at the Home Occupation regulations and how the Zoning Bylaw regulates "Sale of Farm Products."

As noted under Issue #5,

> "Sale of farm products" is also regulated by § 255-Atachment 1 Use Regulations Schedule in a restrictive manner that would not appear reasonable when viewing other permitted uses.

- It is permitted by Special Permit with limitations in the Residence A-1, Business A, Business B, Business C, and Industrial B zoning districts.
- It is prohibited in the Residence A-2, Residence B, Residence C, Business A-1, Industrial A, and Industrial Garden zoning districts.
- Permitted by right with limitations in the Agricultural zoning district.
- However, "Retail Sales" is permitted in all of the Business and Industrial zoning districts while it is prohibited in all the Residential and Agricultural zoning districts.

The limitations on "Sale of farm products" where it is permitted do not follow the provisions of MGL Chapter 40A, Section 3. Further, "Sale of farm products" is a form of retail sales. It would appear that the intent of allowing "Sale of farm products" in some districts is to allow farms to engage in the operation of farm stands. But, the provisions fail to adequately do so and appear to fail to conform to State Law and Case Law.

Attempting to treat "Sale of Farm Products" as a Home Occupation would be particularly challenging and likely inconsistent with the Home Occupation provisions.

Home Occupations are regulated as either Home Occupation I or Home Occupations II. The first category is allowed by right while the latter requires approval by Site Plan Review. Both categories require the activity to be conducted within the residence – not in an accessory building. Further, Home Occupation I does not provide for any customer activity at the property.

Sale of farm products could possibly meet the General Criteria specified in § 255-22C:

> *"General criteria and standards. All home occupations, regardless of their type or category, shall conform to the following criteria and standards:*
> *(1) The home occupation shall be incidental and secondary to the use of a dwelling unit for residential purposes. It shall be conducted in a manner which does not infringe on the right of neighboring residents to enjoy the peaceful occupancy of their dwelling units and does not alter the character of the neighborhood.*
> *(2) More than one home occupation may be conducted on a lot, provided that the combined impact of all home occupations satisfies the criteria and standards enumerated for the appropriate level of home occupation.*
> *(3) The home occupation is conducted only by residents of the dwelling unit but the business may employ other workers who do not engage in the work of the business at the site of the home occupation."*

However, it is not possible to see how the typical "Sale of farm products" operation could conform with the Home Occupation I criteria in § 255-22D.

Further, it is similarly not possible to see how the typical "Sale of farm products" operation could conform with several criteria associated with Home Occupation II § 255-22E, specifically:

> *(3) The home occupation shall not give the outward appearance of a business. (Signage, conducting of the business in accordance with these standards and criteria, and the incidental appearance of a vehicle allowed under § 255-86F of the Zoning Bylaw to be parked in a residential district with the owner's business name, etc. on said vehicle shall not be construed as giving the outward appearance of a business.)*
>
> *(4) Signs used in conjunction with a home occupation shall not be animated or illuminated and shall not exceed one square foot and must be affixed to the residence and not be freestanding. The Planning Board may approve a small (up to 0.25 square foot) nameplate to be affixed to a freestanding mailbox structure as a condition of the site plan review.*
>
> *(8) There shall be no exterior storage of materials, equipment, vehicles, or other supplies used in conjunction with a home occupation.*

The "typical" such operation is either a farmstand or a farm store. It would appear that MGL 40A, Section 3 would only require allowing such activity on 2 acres or more and then only if the $1,000 per acre test is satisfied.

A review of the Zoning Bylaws for numerous communities found that many of the reviewed communities provide some form of "farm stand" allowance. As noted in #5 above, there is some diversity as to how the farm stands are permitted. This ranges from "By Right" in some communities to a mix of Site Plan Review and Special Permit in other communities. All of the communities (included in this review) which made provisions for farm stands, allowed them in at least a portion of the residential communities – some made provisions to allow them in all zoning districts. Several communities also make provision for either a "Farm Store" or "Farm Stand Restaurant". A few communities created a category of Exempt Farm Stand and Non-exempt Farm Stand – differentiating between parcels covered by the MGL Chapter 40A, Section 3 exemption as well as those parcels not so covered. Typically, the differentiation also extended to the size of farm stand permitted.

10. *Bonus Issue - Compliance with related permitting and license requirements – particularly Board of Health requirements*.

In the course of conducting this review and analysis, a tenth issue emerged. This issue is not "agriculture-specific" but becomes more relevant as efforts are made to make changes to zoning to support agricultural activities through allowance for "related business" events.

The Board of Health has a variety of permitting requirements – they do not just permit animal keeping. Among the topics which the Board regulates are food vendors and waste disposal for special events. Thus, if a property owner is operating special venue where food trucks are present or port-a-potties are being used, permits are required by the Board of Health.

If efforts are to be made to allow farms to hold special events, it would be beneficial to require that they obtain permits from other entities, especially the Board of Health, in a timely manner. This has been an issue for some events in the past. It is noted that the Board of Health Livestock Regulations specify that applicants must comply with the applicable Zoning Bylaw provisions.

While related permitting or subsequent permitting requirements are not limited to those of the Board of Health, the requirements for Board of Health permitting have been the more significant to manage.

A review of the Zoning Bylaws for numerous communities found that some communities expressly incorporate references to other permitting requirements related to those of the Board of Health. Other communities make no mention of the requirements (similar to the existing South Hadley Zoning Bylaw) while others make a broader, generalized reference to coordination with other agencies. Where the communities' require Site Plan Review and/or a Special Permit, the coordination is built into the process.

11. *Second Bonus Issue - Stated purpose of Agricultural Zoning district mixes agricultural use with development*.

The stated purpose of the "Agricultural" zoning district suggests the district is to promote agriculture and accommodate development:

> *Agricultural. The purpose of this district is to promote agriculture, forestry, recreation, and land conservation, as well as compatible open space and rural uses, by siting development in a manner that preserves large contiguous tracts of open space and agricultural land. The preservation of scenic vistas of open land, forestland, the Mount Holyoke Range, the Mount Tom Range, and the Connecticut*

River in this district is a key aspect of maintaining South Hadley's desired scenic and rural identity.

Given that the statutory exemption exempts all area zoned for "agriculture", this would suggest that ALL parcels in the Agricultural zoning district could be used for agricultural purposes regardless of their size. § 255-Atachment 1 Use Regulations Schedule provides for such uses via Site Plan Review and subject to restrictions specified in Article VII.

The dimensional requirements for the Agricultural zoning district only specify a lot area of 30,000 square feet except in the Water Supply Protection District where the minimum lot area is increased to 40,000 square feet. Neither of these requirements reach even an acre of land. The district's stated purpose and the dimensional requirements give some rise to confusion as to the intent of the district.

A review of the Zoning Bylaws for numerous communities found that some communities provide one or more agricultural zoning districts. Belchertown, for example, has an "Agricultural A" and "Agricultural B" zoning districts which appear to differentiate "agricultural" for farming and "agricultural" for lower density neighborhoods:

- Agricultural-A (AG-A). These areas containing prime farm soils and/or active farm and forest operations are best suited to the land uses and activities common in the less developed areas of a rural town, particularly farm and farm-related uses.
- Agricultural-B (AG-B). These are neighborhoods which are characterized by their relatively quiet atmosphere and the exclusion of nonresidential use.

The "Agricultural-A (AG-A)" is in the "Open" category of uses while "Agricultural-B (AG-B)" is included in the "Residential" category of uses.

Summary of Findings

As suggested in the previous section, there are a number of key findings relevant to Zoning Bylaw amendments:

- The "Right to Farm" Bylaw does not conflict with the Zoning Bylaw as it gives deference to the Zoning Bylaw; rather, the Zoning Bylaw does not support the "Right to Farm" Bylaw.
- Need for definitions related to agricultural uses including livestock, animals, farms, etc.
- Change the tone and character of the Zoning Bylaw to be supportive of the Right to Farm policy and goals of the Town
- Need to incorporate the 3 categories of exemption under MGL Chapter 40A, Section 3.
- Establish a framework for commercial agriculture and related uses
- Clarify what agricultural uses are accessory to residential uses and what that means

- The definitions used by the Board of Health and the terms used in the Board of Health permitting could be made more consistent with the Zoning Bylaw – if the proposed changes to the Zoning Bylaw are adopted.
- Make coordination with and timely permitting of activities with other agencies such as the Board of Health an explicit requirement – even for "By Right" accessory agricultural uses.
- The stated purpose of the "Agricultural" zoning district appears to qualify all parcels for the "agricultural exemption" of MGL 40A, Section 3 while the dimensional requirements make it attractive for subdivision development.

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November 14, 2019

Christine B. Emerson, Town Clerk
Town of Cheshire
80 Church Street
P.O. Box S
Cheshire, MA 01225

Re: Cheshire Annual Town Meeting of June 10, 2019 -- Case # 9588
Warrant Articles # 7 and 8 (Zoning)
Warrant Article # 9 (General)

Dear Ms. Emerson:

Articles 7, 8 and 9 - We approve Articles 7, 8 and 9, and the map amendments related to Article 8, from the June 10, 2019 Cheshire Annual Town Meeting.[1] We will return the approved map to you by regular mail. Our comments regarding Articles 7, 8 and 9 are provided below.

Article 7 - Article 7 amends the Town's zoning by-laws to make several amendments pertaining to accessory agricultural uses. One change amends Section 3.2, "Table of Use Regulations," Sub-section (b), "Accessory Uses," to add lines 17, 18 and 19, as follows:

(b) Accessory Uses — Zoning District

	R-1	A-R	B	LI
17. Accessory Farm Stores	No	Yes*	No	No
18. Agricultural Tourism, or Agritourism	No	Yes*	No	No
19. Value Added Agricultural Uses	No	Yes*	No	No

*Subject to Performance Standards

Another change amends Section 12, "Definitions," to add new definitions for these accessory uses, as follows:

> Accessory Farm Store: An onsite retail outlet in a permanent structure for farm products that is subordinate to the growing or harvesting or crops (except cannabis) or the raising of livestock designed to bring the public to the farm for the purpose of agricultural products, agriculturally-related products, and/or value-added agricultural products.

[1] On October 2, 2019, we placed Articles 7, 8 and 9 on "hold" pending receipt of a completed by-law submission. On October 18, 2019, the Town submitted all required documents to complete its by-law submission.

> Agricultural Tourism, or Agritourism: Agriculturally-related accessory uses that are subordinate to the growing or harvesting of crops (except cannabis) or the raising of livestock designed to bring the public to a farm on a temporary or continuous basis, including but not limited to, retail sales of agricultural products, short-term stays, weddings, similar events, small concerts, and other farm-located events, classes and workshops.
>
> Value Added Agriculture: The enhancement or improvement of an agricultural commodity (except cannabis) or of an animal or plant product produced on a farm to a higher value. The enhancement or improvement includes but is not limited to marketing; processing, transforming, and/or packaging of agricultural commodities grown, raised, or otherwise created on the premises controlled by the owner of the agricultural operation into a product of higher value.

The accessory agricultural uses of: (1) accessory farm stores; (2) agricultural tourism or agritourism; and (3) value added agriculture uses, as defined in Section 12 of the by-laws, are allowed in the Agricultural-Residential (A-R) district (subject to the performance standards of Sections 3.11, 3.12 and 3.13) and are prohibited in the Residential District (R-1), Business District (B) and Light Industrial (LI) District.

We approve the amendments pertaining to accessory agricultural uses under Article 7. However, the Town should be mindful that 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: (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 Town must apply the by-law amendments adopted under Article 7 consistent with the protections given to agriculture under G.L. c. 40A, § 3. The Town should consult with Town Counsel with any questions on this issue.

Article 8 - Article 8 amends the zoning by-laws to add a new Light Industrial (LI) district. In addition, Article 8 makes related amendments to other sections of the zoning by-laws, including Section 3.2, "Table of Use Regulations" and the Town's zoning map. We offer the following comments on the new Light Industrial district.

I. Section 3.2 - Table of Use Regulations

Section 3.2, "Table of Use Regulations," (Table) is amended to add a new column for the Light Industrial district to identify uses permitted by right (YES); uses that require a special permit from the Zoning Board of Appeals (SPA); uses that require a special permit from the Planning Board (SPP); and prohibited uses (NO). We offer comments on the new portion of the Table pertaining to the Light Industrial district (LI).

a. Hospital, Sanitarium, Nursing Home, Children's Day Care Center or other similar use

i. Hospital Sanitarium and Nursing Home

Section 3.2 (a)(10) allows "hospital, sanitarium, nursing home...or other similar use established and operated under the State Department of Health regulations" uses in the LI district only by a special permit from the Planning Board. The Town must apply the portion of the Table pertaining to hospitals, sanitariums and nursing homes in a manner consistent with the protections provided to disabled persons under G.L. c. 40A, § 3, as follows:

> 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. The provisions of this paragraph shall apply to every city or town, including, but not limited to the city of Boston and the city of Cambridge.

The Town should consult with Town Counsel to ensure that it applies this portion of the Table consistent with the protections given to disabled persons under G.L. c. 40A, § 3.

ii. Children's Day Care Center

Section 3.2 (a)(10) allows "...children's day care center or other similar use established and operated under the State Department of Health regulations" uses in the LI district only by a special permit from the Planning Board. The Town's by-laws do not define the term "children's day care center." Thus, it is unclear what would constitute a "children's day care center" for purposes of Section 3.2. (a)(10)'s special permit requirement. The Town should consult with

Town Counsel to determine if an amendment to the zoning by-laws is needed to define "children's day care center."

In addition, to the extent that a "children's day care center" is encompassed in the definition of "child care center" set forth in G.L. c. 15D, § 1A, the Town must apply Section 3.2 (a)(10) consistent with the zoning protections given to child care facilities under G.L. c. 40A, § 3. Specifically, G.L. c. 40A, § 3, establishes that a town may not prohibit or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility, as follows:

> *No zoning . . . bylaw in any . . . town shall* prohibit, or *require a special permit* for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; 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. *As used in this paragraph, the term "child care facility" shall mean a child care center or a school-aged child care program, as defined in section 1A of chapter 15D.* (emphasis added).

General Law Chapter 15D, Section 1A, defines a child care center as follows:

> [A] facility operated on a regular basis whether known as a child nursery, nursery school, kindergarten, child play school, progressive school, child development center, or preschool, or known under any other name, which receives children not of common parentage under 7 years of age, or under 16 years of age if those children have special needs, for nonresidential custody and care during part or all of the day separate from their parents. Child care center shall not include: any part of a public school system; any part of a private, organized education system, unless the services of that system are primarily limited to kindergarten, nursery or related preschool services; a Sunday school conducted by a religious institution; a facility operated by a religious organization in which children are cared for during short periods of time while persons responsible for the children are attending religious services; a family child care home; an informal cooperative arrangement among neighbors or relatives; or the occasional care of children with or without compensation.

In accordance with the protections given under G.L. c. 40A, § 3, a Town may not require a special permit for a child care facility, as defined in G.L. c. 15D, § 1A. The Town should consult with Town Counsel to ensure that the portion of the Table pertaining to a "children's day care center" is applied in a manner consistent with G.L. c. 40A, § 3. In addition, the Town should consult with Town Counsel to determine if an amendment to the zoning by-laws is needed to define "children's day care center."

b. Kennel or veterinary hospital

Section 3.2 (a)(27) allows "kennel or veterinary hospital" uses in the LI district only by a special permit from the Planning Board. As provided in more detail above, G.L. c. 40A, § 3, provides exemption from local zoning by-laws for certain agricultural uses. Dog kennels that include the breeding and raising of dogs may be considered agricultural uses entitled to the protections provided under G.L. c. 40A, § 3. *See* Sturbridge v. McDowell, 35 Mass. App. Ct.

924, 926 (1993). To the extent a kennel constitutes an agricultural use, the Town must apply this portion of the Table consistent with the protections afforded to commercial agricultural uses in G.L. c. 40A, § 3. Specifically, the Town cannot require a special permit for, unreasonably regulate, or prohibit such activities, on (1) land zoned for agriculture; (2) on land that is greater than five acres in size; or (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 Town should consult with Town Counsel with any questions about the proper application of Section 3.2 (a)(27).

c. Cemetery

Section 3.2 (a)(28) prohibits cemeteries in the LI district. The Town should consult closely with Town Counsel when applying the Table's cemetery prohibition to any religious cemetery protected by the Dover Amendment, G. L. c. 40A, § 3, ¶ 2 and/or the federal Religious Land Use & Institutionalized Persons Act, 42 U.S.C. §§ 2000cc et seq. ("RLUIPA").

The protections of the Dover Amendment would govern the application of this section of the Table to a protected religious use. The Dover Amendment was first adopted in 1950 in response to a Dover by-law that prohibited educational uses in a residential district. *See* The Bible Speaks, 8 Mass. App. Ct. 19 at 27, n. 10. Under the current version of the Dover Amendment, G.L. c. 40A, § 3, ¶ 2, a town may not "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." G.L. c. 40A, § 3, ¶ 2. The statute thus prevents towns from adopting or implementing zoning by-laws prohibiting religious uses. However, a town may adopt reasonable regulations in the eight allowable areas (bulk and height of structures and determining yard sizes lot area, setbacks, open space, parking and building coverage requirements). "The whole of the Dover Amendment, as it presently stands, seeks to strike a balance between preventing local discrimination against (religious and educational uses) and honoring legitimate municipal concerns that typically find expression in local zoning laws." Trustees of Tufts College, 415 Mass. at 757.

The reasonableness of a local zoning by-law, as applied to a proposed religious use, will depend on the facts of each case. But it is clear that, in light of the Dover Amendment, a town may not prohibit a religious use through its zoning by-law and may not apply regulations against a religious use in a way that would nullify the protections of G.L. c. 40A, § 3. *See* The Bible Speaks, 8 Mass. App. Ct. at 33 (invalidating a by-law on the basis that it "would enable the board to exercise its preferences as to what kind of educational or religious denominations it will welcome, the very kind of restrictive attitude which the Dover Amendment was intended to foreclose.")

This prohibition in Section 3.2(a)(28) of the Table would exceed the allowable regulation of religious uses under G. L. c. 40A, §3, ¶ 2, if applied to a religious use protected by the statute. For example, the Town has no power to prohibit religious uses from certain zones in Town. *See* The Bible Speaks, 8 Mass. App. Ct. at 33 ("The Legislature did not intend to impose special permit requirements…on legitimate educational uses which have been expressly authorized to exist as of right in any zone.") Therefore, the Town may not apply the prohibition such that religious cemeteries are prohibited in the LI district.

Applying the by-law to a religious cemetery may well also violate the federal Religious Land Use & Institutionalized Persons Act, 42 U.S.C. §§ 2000cc et seq. ("RLUIPA"), in that requiring special permit approval for such a use may "impose[] a substantial burden on the religious exercise" of a religious group without advancing a compelling governmental interest. *See, e.g.*, Garu Nanak Sikh Society of Yuba City v. County of Sutter, 456 F.3d 978 (9th Cir. 2006) (county board of supervisors violated RLUIPA in denying religious organization's application for conditional use permit to build Sikh temple on land that was zoned agricultural). The Town should also consult with Town Counsel on these issues.

Article 9 - Article 9 amends the Town's general by-laws to add a new by-law, "Stretch Energy Code" for the purpose of "regulating the design and construction of buildings for the effective use of energy...with an effective date of July 1, 2019." (emphasis added). Pursuant to G.L. c. 40, § 32, a by-law approved by the Attorney General must be posted or published before it goes into effect:

> Before a by-law or an amendment thereto takes effect it shall also be published in a town bulletin or pamphlet, copies of which shall be posted in at least five public places in the town; and if the town is divided into precincts, copies shall be posted in one or more public places in each precinct of the town; or instead of such publishing in a town bulletin or pamphlet and such posting, copies thereof may be published at least twice at least one week apart in a newspaper of general circulation in the town.

Therefore, the new "Stretch Energy Code" by-law does not become effective until the Town satisfies the posting/ publishing requirements of G.L. c. 40, § 32. The Town should consult with Town Counsel with any questions on this issue.

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 Edmund St. John III

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May 19, 2022

Tara Hayes, Town Clerk
Town of North Brookfield
215 North Main Street
North Brookfield, MA 01535

Re: North Brookfield Special Town Meeting of November 6, 2020 -- Case # 10305
Warrant Articles # 13, 14, 15, 17, 18 and 19 (Zoning)

Dear Ms. Hayes:

Articles 13, 14, 15, 17, 18 and 19 – We approve Articles 13, 14, 15, 17, 18 and 19, and the map amendment related to Article 18, from the November 6, 2020, North Brookfield Special Town Meeting.[1] We will return the approved map to you by regular mail. Our comments regarding Article 19 are provided below.

Article 19 - Under Article 19 the Town amended the Zoning By-laws, Section IV, "Use Regulations," to add a new Table 2, "Reference Table of Uses by District" (Reference Table) that restates the Town's existing use regulations in Table form but does not make any substantive changes to the use regulations.[2]

We approve the Reference Table added under Article 19, but we offer comments for the Town's consideration regarding the new Reference Table and the Town's existing use regulations. In addition, we encourage the Town to consult with Town Counsel to apply the existing solar by-law provisions in a manner that hews to developing law on this topic, as detailed below, and note that because those preexisting provisions are not currently before us for

[1] On November 12, 2021, we placed this by-law submission on "hold" pending receipt of the documents necessary to conduct our review pursuant to G.L. c. 40, § 32 and G.L. c. 40A, § 5. On November 15, 2021, we received a completed by-law submission from the Town and notified the Town of our new 90-day deadline (February 13, 2022). On December 2, 2021, we elected to proceed under the defect waiver provisions of Chapter 299 of the Acts of 2000 for Articles 13, 14, 15, 17, 18 and 19. In a certification received March 8, 2022, the Town Clerk affirmed that the notice was posted and published in accordance with the provisions of Chapter 299, and that no claims were filed with the Office of the Town Clerk within 21 days of publication. For this reason, the Attorney General is authorized by Chapter 299 to waive (and does so waive) the defects.

[2] The new Reference Table states that it is intended as a "quick reference" guide but people should "refer to the narrative portion of the [the] Zoning Bylaw for detailed information."

B. Renewable/Alternative Energy Uses

The Reference Table, along with the Town's existing use regulations, regulates renewable/alternative energy manufacturing facility and renewable/alternative energy research and development facility. The by-law allows these uses by right in the BC, BG and Industrial Districts; allows them special permit or site plan approval in the R-66 district; and prohibits them in the R-30 and R-11 districts. The by-law does not define "renewable/alternative energy manufacturing facility" or "renewable/alternative energy research and development facility." General Laws Chapter 164, Section 1, defines the term "renewable energy" to include several non-fossil fuel energy sources or technologies including solar photovoltaic or solar thermal electric energy. In addition, G.L. c. 164, § 1 defines the term "'alternative energy development", to include solar energy. Although the Town does not define these terms, the Town categorizes renewable/alternative energy manufacturing facility and renewable/alternative energy research and development facility with their solar uses and solar regulations. To the extent that the Town's regulation of renewable/alternative energy manufacturing facilities or renewable/alternative energy research and development facilities includes solar energy systems or facilitating structures that come within the scope of G.L. c. 40A, § 1A and § 3, the Town must apply this portion of the Reference Table, as well as its existing use regulations, consistent with the solar protections in G.L. c. 40A, § 3, as discussed above. The Town should consult with Town Counsel with any questions on this matter.

II. Agricultural Uses

A. Riding Stables and Livery

The Reference Table and the Town's existing use regulations allow the use of "riding stable" in all districts by special permit except the Industrial District where it is prohibited; and allow the use of "Livery" by right in the Industrial District and by special permit in all other districts. The by-laws do not define the terms "riding stable" or "livery." However, a "riding stable" is generally defined as: "a place where horses are kept for people to ride." See Riding Stable, Collins Dictionary Online, https://www.collinsdictionary.com/us/ (last visited, May 4, 2022). See also Merriam-Webster Dictionary Online, http://www.m-w.com (last visited, May 4, 2022) (defining "stable" as "a building in which domestic animals are sheltered and fed, especially such a building having stalls or compartments.") The term "livery" is generally defined as: "the feeding, stabling, and care of horses for pay." See Livery, Merriam-Webster Dictionary Online, http://www.m-w.com (last visited, May 4, 2022). As discussed below, riding stables and liveries may be considered an agricultural use entitled to agricultural protections.

The Town must apply the by-law consistent with G.L. c. 40A, § 3, that 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 agriculture and includes the raising of horses and the "keeping of horses as a commercial enterprise," 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.

The raising of livestock, including horses and the keeping of horses as a commercial enterprise, are included in the definition of agriculture and enjoy the protections accorded to agriculture under state law. Riding stables and liveries that meet the definition of "farming" or "agriculture" enjoy the protections given to agriculture under G.L. c. 40A, § 3. 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: (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.[6]

B. Dog Kennels

The Reference Table and the Town's existing use regulations allow dog kennels by special permit in the R-66, R-30, and R-11 districts, prohibit the use in the B-C and B-G districts, and allow the use by right in the Industrial district. Dog 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). In instances where a dog kennel enjoys the protections given to agricultural uses under state law, the town cannot prohibit, require a special permit for, or unreasonably regulate the use. The Town should apply this portion of Reference Table along with the existing use regulations in a manner consistent with the protections given to agriculture under G.L. c. 40A, § 3. The Town should discuss any questions on this matter with Town Counsel.

[6] The Reference Table and the Town's existing use regulations also prohibit in all districts the use (for agricultural purposes) of "[f]loodlights constituting hazard to pedestrians or vehicles." As discussed herein, the Town cannot require a special permit for, unreasonably regulate, or prohibit such 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. The Town should consult with Town Counsel to ensure the proper application of this portion of the by-laws to parcels that are entitled to agricultural protections.

noncommercial private restricted landing areas mandated under G. L. c. 90, § 39B, fourth par., or the continuing authority of the division under the aeronautics code over aircraft landing areas that do not fall within the narrow definition of a noncommercial private restricted landing area."). The Town should discuss with Town Counsel the application of the Roma decision to these by-law provisions.[7]

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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October 28, 2022

Denise Graffeo, Town Clerk
Town of Tewksbury
1009 Main Street
Tewksbury, MA 01876

Re: Tewksbury Annual Town Meeting of May 2, 2022 -- Case # 10508
Warrant Articles # 29 and 30 (Zoning)
Warrant Article # 24 (General)

Dear Ms. Graffeo:

Article 30 - We approve Article 30, and the related map amendment, from the May 2, 2022 Tewksbury Annual Town Meeting.[1] We will return the approved map to you by regular mail.

Article 29 - Under Article 29, the Town voted to "amend the Zoning Bylaw by replacing the current bylaw on file with the Town Clerk's Office dated October 2021 with the Zoning Bylaw and Appendix A."

We approve Article 29 except for certain text in: (1) Section 2 requiring a "Medical Marijuana Treatment Center" to be a "not-for-profit entity," that we disapprove because it conflicts with 935 CMR 500.002 and 501.002; and (2) Section 3.7 requiring an "open meeting" before the Zoning Board of Appeals can grant a reasonable accommodation that we disapprove because it imposes a burden on disabled persons protected by the Fair Housing Act.

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

Our review of Article 29 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

[1] In a decision issued August 8, 2022, we approved Article 24.

(Mass. Land Ct., 2005) ("To allow individual towns and cities to veto the creation and ongoing operation of landfills would sabotage the stated goal of ensuring sufficient waste disposal capacity in the Commonwealth."); Town of Warren v. Hazardous Waste Facility Site Safety Council, 392 Mass. 107 (1984) (invalidating local by-law that sought to prohibit the import of hazardous waste from outside the town limits.) In addition, G.L. c. 111, § 150A authorizes the DEP to issue regulations setting the criteria for approval of site assignments for solid waste facilities and provides a uniform process for siting these facilities.

Towns are precluded from adopting by-laws that prohibit solid waste facilities on land zoned for industrial use. The Town cannot apply Sections 5.4.2 (C)(1) and (15) to uses in the Town's industrial districts because such application would conflict with G.L. c. 40A, § 9. The Town should consult closely with Town Counsel when applying the by-law text to ensure the Town does not violate the protections in G.L. c. 40A, § 9.

B. Section 5.4.2 (C)(10) and (16) – Slaughterhouses and Piggeries

Section 5.4.2 (C) prohibits certain agricultural uses including slaughterhouses and piggeries. In applying these provisions, the Town must ensure that agricultural activities that may qualify for agricultural protections, such as the keeping and raising of swine and cattle for food purposes, are applied consistent with G.L. c. 40A, § 3, that provides exemption from local zoning by-laws for certain agricultural uses, 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 agriculture and includes cultivation and harvesting of agricultural commodities, dairying and the raising of livestock," 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: (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 Town must ensure that Sections 5.4.2 (C)(10) and (16) prohibiting slaughterhouses and piggeries are not applied to agricultural activities that may qualify for agricultural protections under G.L. c. 40A, § 3. The Town should consult with Town Counsel with any questions on this issue.

C. Section 5.4.2 (C)(13) – Mobile Homes

Section 5.4.2 (C)(13) prohibits trailer parks and mobile homes in all zoning districts in the Town. The Town must apply this prohibition consistent with G.L. c. 40A, § 3 that allows for mobile homes in certain situations, and provides in relevant part:

> No zoning ordinance or by-law shall prohibit the owner and occupier of a residence which has been destroyed by fire or other natural holocaust from placing a manufactured home on the site of such residence and residing in such home for a period not to exceed twelve months while the residence is being rebuilt. Any such manufactured home shall be subject to the provisions of the state sanitary code.

The Town should consult with Town Counsel with any questions on this issue.

D. Section 5.4.2 (C)(14) – Airports

Section 5.4.2 (C)(14) prohibits airports in all zoning districts in the Town. General Laws Chapter 90, Section 39B requires MassDOT review and approval of local laws that regulate "the use and operation of aircraft." However, local laws that regulate only the use of land and affect only private non-commercial restricted landing areas (PRLAs), do not require MassDOT approval. See Roma v. Board of Appeals of Rockport, 478 Mass. 580, 592 n. 9 (2018) ("Nothing in this opinion is intended to disturb either the notice and safety requirements for noncommercial private restricted landing areas mandated under G. L. c. 90, § 39B, fourth par., or the continuing authority of the division under the aeronautics code over aircraft landing areas that do not fall within the narrow definition of a noncommercial private restricted landing area."). The Town should discuss with Town Counsel the application of the Roma decision to this by-law provision.[2]

V. Section 6.2 – Signs

In applying the new Section 6.2 regarding sign regulations, the Town should be mindful of the case of Reed v. Gilbert, Arizona, 135 S. Ct. 2218 (2015), where the United State Supreme Court held that content-based sign regulations are unconstitutional if they are not narrowly tailored to serve a compelling state interest.

Based upon our standard of review, we do not have the factual record necessary to determine whether Section 6.2 would be subject to strict scrutiny and, if so, whether it is

[2] MassDOT's Aeronautics Division contact information is: Tracy W. Klay, Deputy General Counsel, MassDOT and MBTA, 10 Park Plaza, Room 7760, Boston, MA 02116, and at: Tracy.Klay@state.ma.us.

151B, § 4, ¶ 6. Both the Act and c. 151B, prohibit towns from using their zoning powers in a discriminatory manner, i.e., using its 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 discriminatory impact cases, once it has been shown that a neutral action has a discriminatory impact, the burden shifts to the defendant to show that its actions furthered a legitimate bona fide government interest and that no alternative would serve that interest with less discriminatory effect. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 939 (2d Cir.) (1988).

Based on the Attorney General's limited standard of review, we cannot conclude that the by-law's bedroom limitation necessarily violates the FHA or G.L. c. 151B. However, we suggest that the Town discuss this text with Town Counsel, including whether this text needs further amendment at a future Town Meeting and whether it should be enforced in light of the FHA and G.L. c. 151B.

B. Section 7.1 (G) – Related Persons Occupancy Limitation

Section 7.1 (G) limits occupancy of the family suite to "[n]o more than 3 related persons." Although we approve Section 7.1 (G)'s occupancy restrictions, we suggest that the Town discuss this provision with Town Counsel to ensure that it is applied consistently with the FHA and G.L. c. 151B, as detailed above. Prohibiting occupancy to a group of three related persons may have the unintended result of unfairly limiting or interfering with the housing opportunities available to members of a protected class in violation of the FHA or G.L. c. 151B. See, e.g., Inclusive Communities Project, Inc., 135 S.Ct. at 2521-22 ("zoning laws…that function unfairly to exclude minorities from certain neighborhoods…reside at the heartland of disparate impact liability"); *see also* G.L. c. 151B § 4 (4A) (prohibiting interference with the right to equal enjoyment of housing opportunity). The Town should consult with Town Counsel with any questions on this issue.

VII. Section 7.3 – Adult Uses

Section 7.3 regulates the location of adult use establishments. See Section 7.3.1, "Purpose." Section 7.3.2 requires a special permit for the operation of an adult use establishment. Adult uses are allowed by special permit in the Industrial 1, Industrial 2 and Office Research District, and are prohibited in all other districts. See Section 7.3.3 (A) Section 5.4.3, Appendix A, Table of Uses. Section 7.3.5 requires that the Planning Board "shall not issue a special permit unless" it makes certain findings. We offer comments for the Town's consideration on Section 7.3.

Although Section 7.3.2 requires a special permit and authorizes that the Planning Board may impose conditions, safeguards and limitations on the adult use establishment and Section 7.3.5 requires that the Planning Board "shall not issue a special permit unless, without exception," it finds the by-law criteria has been satisfied, these sections do not clearly specify when a special permit must or should be granted for an adult entertainment use. A grant of

unbridled discretion violates the First Amendment. See Showtime Entertainment, LLC v. Town of Mendon, 885 F. Supp. 2d 479, 489 (2012) ("In sum, because it fails to provide narrow and objective standards, the town's special permit by-law vests excessive discretion in the Planning Board"); Venuti v. Riordan, 521 F. Supp. 1027 (D. Mass. 1981) (invalidating entertainment licensing statute because "on its face [it] delegates complete discretion to licensing authorities and contains no standards whatsoever.")

In Showtime, 885 F. Supp. 2d at 479, the Court struck down special permit language similar to that in Tewksbury's by-law.[4] The Court noted that the Mendon by-law did not define what conditions were sufficient for a special permit to be granted and that the use of the word "may" allowed the Mendon Zoning Board of Appeals to deny a permit application based on undefined criteria, even if all of the enumerated prerequisites for a permit had been met. "[T]he bare text of the by-law provides no definite standard for when the Zoning Board should grant a special permit – it only defines when it must not." Id. at 487.

The Showtime court concluded that the Mendon by-law, as a prior restraint on speech, failed to overcome "a heavy presumption against its constitutional validity." Id. quoting Southeastern Promotions, 420 U.S. at 558. "To overcome this presumption, a governmental entity must prove that its ordinance contains 'narrow, objective and definite standards' to guide the licensing authority in deciding whether to issue a permit." Id. quoting New England Reg'l Council of Carpenters v. Kinton, 284 F. 3d 9, 21 (1st Cir. 2002). See also FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 226 (1990) ("[A]n ordinance which…makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.") Because the Mendon by-law contained no narrow or objective standards and vested excessive discretion in the Zoning Board, it was an invalid prior restraint on speech. Showtime, 885 F. Supp. 2d at 489-490.

The Town cannot apply these sections in a manner that grants unlimited discretion to the Planning Board because the grant of unbridled discretion violates the First Amendment. Showtime, 885 F. Supp. 2d at 489. The Town should consult with Town Counsel on the proper application of these sections.

In addition, Section 7.3.3 imposes several conditions on adult entertainment establishments. One condition limits the hours of several adult uses, including a limitation on an adult use establishment between the hours of 4:00 P.M. and 12:00 Midnight. A building size and hours condition was previously rejected by the court in Showtime Entertainment LLC v. Town of Mendon, 769 F.3d 61 (1st Cir. 2014). The court determined Mendon could not justify imposing the limitation on adult entertainment uses when they were not imposed on any other large commercial structure in the town. Id. at 74 ("It is thus unclear, and Mendon does not clarify, what particular negative effect the size and height of an adult-entertainment business would have on the rural aesthetics that is not shared by all other large, commercial structures (including those already operating in the Adult-Entertainment Overlay District."). Further, the hours limitation was invalid because "Mendon…appears to have differentiated between speakers

[4] The Mendon by-law stated in relevant part: "Adult entertainment enterprises *may be allowed* in the Overlay District only by Special permit granted by the Board of Appeals." See Showtime, 885 F. Supp. 2d at 482 (emphasis supplied).

for reasons 'unrelated to the legitimate interests that prompted the regulation,' a fact that flies in the face of Mendon's claim that the bylaws in fact further a substantial, content-neutral, interest in rural aesthetics." Id. quoting Nat'l Amusements, Inc. v. Town of Dedham, 43 F. 3d 731, 738 (1st Cir. 1995). The Town must be prepared to prove that any conditions or limitation imposed on an adult entertainment establishment are narrowly tailored such that "the means used to achieve [the government's] interest are the least restrictive available. Showtime Entertainment, LLC. v. Town of Mendon, 472 Mass. 103 (2015) (invalidating Town's complete ban on service of alcohol on premises because it was "substantially broader than necessary.") The Town should discuss this issue in more detail with Town Counsel.

VIII. Section 7.4 – Large Scale Ground Mounted Solar Photovoltaic Facility

As part of the zoning recodification under Article 29, the zoning by-law includes Section 7.4, "Large Scale Ground Mounted Solar Photovoltaic Facility" (solar by-law). The solar by-law "regulates the creation of new large-scale ground-mounted solar photovoltaic installations" (large-scale solar installations) by providing standards related to the placement, monitoring and removal of solar installations. Section 7.4.1, "Purpose." Among other purposes, the solar by-law states that it is intended to "address public safety" and minimize the impacts on scenic, natural and historic resources. Section 7.4.1. The by-law reduces the minimum lot size for a large-scale solar installation from 20 acres (see existing Section 6608 (a)) to five acres. See Section 7.4.5 (A).

Section 7.4.3 (C) requires a special permit from the Planning Board for all large-scale solar installations. In addition, Section 7.4.4 requires site plan approval for all large-scale solar installations. We note that Section 5.4.1 (C), "Permitted [Uses] in All Districts," allows, in all districts, "[u]ses to the extent protected or exempt pursuant to G.L. c. 40A, § 3 or other state law." Therefore, Section 5.4.1 allows large-scale solar installations in all districts in the Town by special permit, even though Section 7.4 is silent as to any particular district requirements for the placement of large-scale solar installations.[5]

We approve Section 7.4 because it is designed to promote (rather than limit) the development of solar energy, and thus does not violate the solar protections in G.L. c. 40A, § 3, which require that any burdens placed on solar energy be reasonable and justified by a sufficiently strong legitimate municipal interest grounded in public health, safety or welfare. See Tracer Lane, 489 Mass. at 782 (concluding that in the absence of a reasonable basis grounded in public health, safety or welfare, Waltham's prohibition of solar energy systems, including an access road, in all but one or two percent of the municipality's land area is impermissible under G.L. c. 40A, § 3).

We also note that Section 7.4.2 provides that it applies only to "large-scale ground-mounted solar photovoltaic installations" and defines a large-scale ground-mounted facility as one that is "not roof-mounted." The zoning by-law is silent as to any regulation of roof-mounted

[5] Section 5.4.3, Appendix A, "Table of Uses," does not include a line for large-scale ground-mounted solar photovoltaic facilities and therefore does not reflect the amendments adopted under the Section 7.4. The Town should consult with Town Counsel to determine if an amendment to the Table of Uses is needed at a future Town Meeting to address this issue.

or small-scale solar installations except for Section 5.4.1 (C), "Permitted [Uses] in All Districts," that allows in all districts "[u]ses to the extent protected or exempt pursuant to G.L. c. 40A, § 3 or other state law." Because roof-mounted and small-scale sola installations are protected by G.L. C. 40A, § 3, Section 5.4.1 allows roof-mounted and small-scale solar installations by right in all districts in the Town, despite the by-law's failure to list these as specific uses.[6]

IX. Section 8.7 – Marijuana Establishments and Medical Marijuana Treatment Centers

Section 8.7 regulates Marijuana Establishments (ME) and Medical Marijuana Treatment Centers (MMTC) and permits them for purposes of cultivation, product manufacturing of marijuana, research and testing laboratories for recreational marijuana use, and the dispensing of medical marijuana products. We offer comments on Section 8.7 for the Town's consideration.

A. Section 8.7.1 – Purpose

Section 8.7.1 provides that the by-law is subject to the provisions of "G.L. c. 40A, G.L. c. 94G and 105 CMR 725.000." (emphasis added). However, as a result of Chapter 55 of the Acts of 2017 ("An Act to Ensure Safe Access to Marijuana"), in December of 2018, the administration and oversight of medical marijuana use was transferred from the Massachusetts Department of Public Health (DPH) to the CCC. As part of the transfer of oversight and administration from DPH to CCC, 105 CMR 725.000 *et seq*. has been superseded by the CCC regulations governing marijuana use at 935 CMR 500.00 ("Adult Use of Marijuana") and 935 CMR 501.00 ("Medical Use of Marijuana"). The Town may wish to update this citation at a future Town Meeting.[7]

B. Section 8.7.3 – Additional Requirements/Conditions

Section 8.7.3 (C)(2), "Location," requires a marijuana establishment to be setback 500 feet from a pre-existing public or private school providing education for grades kindergarten to 12th grade, and states that the setbacks shall be measured as follows: "to be measured in a straight line from the nearest point of the properly line in question to the nearest point of the property line where the Marijuana Establishment is or will be located[.]" The Town should ensure that Section 8.7.3 (C)(2) is applied consistent with the CCC regulations (effective January 8, 2021), Section 935 CMR 500.110 (3)(a), "Buffer Zones," that establishes how buffer zones are measured from schools, 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

[6] Section 5.4.3, Appendix A, "Table of Uses," does not list roof-mounted or small-scale solar installations as uses. The Town should consult with Town Counsel to determine if a future clarifying amendment is needed.

[7] In addition, Section 8.7.4 (D) also refers to 105 CMR 725.000 instead of 935 CMR 500.000. The Town may wish to update this citation as well at a future Town Meeting.

> Marijuana Establishment Entrance to the geometric center of the nearest School Entrance.

The Town should consult with Town Counsel with any questions on this issue.

X. Appendix A – Table of Uses

A. Table A.2 and A3 – Residential Uses

Sections A.2 and A.3 of the Table regulate several types of congregate or group residences, including: (1) Congregate Residences are allowed (Y) in the Multifamily (MF) and Village Residential (VR) districts by right; allowed in the Mixed-Use Business (MUB), Town Center (TC), Westside Neighborhood Business (WNB), South Village Business (SB), General Business (GB), Industrial I (I1) and Office Research (OR) districts by a Planning Board special permit (PB) and prohibited (N) in all other districts [Table A.2 (j)]; (2) Assisted Living Residences are allowed in the MF and VR district by right; allowed in the TC, SB, GB, I1 and OR districts by a Planning Board special permit and prohibited in all other districts [Table A.2 (k)]; (3) A Continuing Care Retirement Community is allowed in the MUB district by right, allowed in the MF, VR, GB, I1, and OR district by a Planning Board special permit, and prohibited in all other districts [Table A.2 (l)]; and (4) Nursing Home, Rest Home, and Similar Long-Term Residential-Congregate Care uses are allowed by a Planning Board special permit only in the MF, TC, SB, GB, I1 and OR district and prohibited in all other districts [Table A.3 (d)].

The Town should consult with Town Counsel to ensure that it applies these portions of the Table consistent with G.L. c. 40A, § 3 that prohibits discrimination against disabled persons as follows:

> 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. The provisions of this paragraph shall apply to every city or town, including, but not limited to the city of Boston and the city of Cambridge.

B. Table A.3 - Public, Institutional, and Philanthropic Uses

Table Section A.3 (b) allows cemeteries (which may include a crematorium), by a Zoning Board of Appeals special permit (SP) in the Residence 40 (R40), Indusrial 1 (I1), and Industrial 2 (I2) districts and is prohibited in all other districts. The Town should consult closely with Town Counsel when applying this portion of the Table to any religious cemetery protected by the Dover Amendment, G. L. c. 40A, §3, ¶ 2 and/or the federal Religious Land Use & Institutionalized Persons Act, 42 U.S.C. §§ 2000cc et seq. ("RLUIPA").

C. Table A.4 – Commercial Uses

Table A.4 allows the use of a greenhouse in the VR, MUB, SB, GB and I1 districts by a planning board special permit and prohibits this use in all other districts in the Town. The Town must apply this portion of the Table consistent with G.L. c. 40A, § 3, that provides exemption from local zoning by-laws for certain agricultural uses. The use of a greenhouse in certain circumstances may enjoy the protections accorded to agriculture under G.L. c. 40A, § 3 and G.L. c. 128, § 1A. 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: (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 Town should consult with Town Counsel to ensure that this portion of the Table is applied consistent with G.L. c. 40A, § 3.

Table A.4 (u) allows the use of "postal service" by right in the TC, SB and GR districts, by a Planning Board special permit in the MUB, LB, I1, I2 and OR districts and this use is prohibited in all other districts. The term "postal service" is not defined in Section 2, "Definitions" or elsewhere in the zoning by-laws. Therefore, it is not clear what the Town means by "postal service." To the extent this portion of the Table relates to the United States Postal Service, the Town should be mindful that "[t]he doctrine of essential governmental functions prohibits municipalities from regulating entities or agencies created by the Legislature in a manner that interferes with their legislatively mandated purpose…or otherwise hinders the accomplishment of [their] statutory mandate." Greater Lawrence Sanitary Dist. v. Town of North Andover, 439 Mass. 16, 21-22 (2003). The Town should consult with Town Counsel regarding the proper application of this portion of the Table as well as the circumstances in which a "postal service" can be subject to the provisions of the by-law, including prohibitions or special permit requirements.

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,

MAURA HEALEY
ATTORNEY GENERAL

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cc: Town Counsel Kevin P. Feeley, Jr.