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October 29, 2018

Eileen A. McCracken, Town Clerk
Town of Hingham
210 Central Street
Hingham, MA 02043

Re: Hingham Annual Town Meeting of April 23, 2018 – Case # 8859
Warrant Articles # 21, 22, 23, 24, 25, 26, 27, and 32 (Zoning)
Warrant Articles # 28 and 33 (General)

Dear Ms. McCracken:

Article 26 - Based on the Attorney General's standard of review, we approve Article 26 from the Hingham April 23, 2018, Annual Town Meeting.[1] However, for the reasons explained below, the Town should consult closely with Town Counsel before applying the amended by-law to avoid violating federal and state anti-discrimination laws.[2]

In this decision, we summarize the amendments proposed under Article 26 and the Attorney General's standard of review of town by-laws under G.L. c. 40, § 32, and then explain why, governed by that standard of review, we approve Article 26. We emphasize that our approval in no way implies any agreement or disagreement with the policy views that led to the passage of the by-law. The Attorney General's limited standard of review requires her to approve or disapprove by-laws based solely on their consistency with state law, not on any policy views she may have on the subject matter or wisdom of the by-law. Amherst v. Attorney General, 398 Mass. 793, 795-96, 798-99 (1986). The state constitution's Home Rule Amendment, as ratified by the voters themselves in 1966, confers broad powers on individual cities and towns to legislate in areas that previously were under the Legislature's exclusive control. Towns have used these home-rule powers to adopt and amend by-laws that allow or prohibit certain uses and structures within their borders. Andrews v. Amherst, 68 Mass. App. Ct. 365, 367-368 (2007). The Supreme Judicial Court has upheld such by-laws and has overturned the Attorney General's disapproval of them where they did not create any specific conflict with state law. Amherst, 398 Mass. at 799; *see also*

[1] In a decision issued on June 5, 2018, we approved Articles 21, 22, 23, 24, 25, 27, 28, and 32. In a decision issued on July 31, 2018, we approved Article 33.

[2] We understand that the Town worked closely with Town Counsel on the proposed by-law amendments. These efforts have aided us in our review of the by-law.

Milton v. Attorney General, 372 Mass. 694, 696 (1977) (holding that a by-law prohibiting self-service gas stations was not inconsistent with state law and that the Attorney General erred in concluding it was). The Attorney General thus has no power to disapprove a by-law merely because a town has chosen a certain approach to a perceived problem.

I. Description of Article 26.

Article 26 makes several changes to the Town's zoning by-laws pertaining to Accessory Dwelling Units (ADU). An ADU is defined as "a second self-contained dwelling unit within a single-family dwelling, which second dwelling unit is subordinate in size to the principal dwelling and otherwise complies with the provisions of this Section V-K." Section V-K (2) (b). One change amends Section III-A, the Town's Schedule of Uses, to allow ADUs by special permit in the Town's Residence Districts A, B, C, D, and E and Business Districts A and B. Accessory dwelling units are prohibited in all of the Town's other zoning districts.

Another change amends Section V to add a new subsection K "Accessory Dwelling Units." The stated purposes of the new ADU by-law include enabling single-family home owners to share space and the burdens of homeownership with family members while also protecting the stability, property values, and residential character of the surrounding neighborhood and providing housing units for family members with diverse housing needs, including family members with mental and physical disabilities. Sections V-K (1) (a) and (b). To accomplish these purposes, Section V-K authorizes ADUs by special permit subject to certain eligibility, dimensional, and design requirements. Sections V-K (3), (4), and (5). One of the eligibility requirements provides that the owner of the single-family home occupy the principal dwelling or accessory dwelling and that a family member occupy the other unit. Section V-K (3) (b). "Family member" is defined as "a person related to the owner by blood, adoption or marriage, and may also include domestic help and caregivers." Section V-K (2) (b).

II. The Attorney General's Standard of Review and General Zoning Principles.

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, in order to disapprove a by-law (or any portion thereof), the Attorney General must cite an inconsistency between the by-law and the state Constitution or laws. Id. at 796. "As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid." Bloom v. Worcester, 363 Mass. 136, 154 (1973). "The legislative intent to preclude local action must be clear." Id. at 155. Massachusetts has the "strongest type of home rule and municipal action is presumed to be valid." Connors v. City of Boston, 430 Mass. 31, 35 (1999) (internal quotations and citations omitted).

Article 26 as an amendment to the Town's zoning by-laws, must be accorded deference. W.R. Grace & Co. v. Cambridge City Council, 56 Mass. App. Ct. 559, 566 (2002) ("With respect

to the exercise of their powers under the Zoning Act, we accord municipalities deference as to their legislative choices and their exercise of discretion regarding zoning orders."). When reviewing zoning by-laws for consistency with the Constitution or laws of the Commonwealth, the Attorney General's standard of review is equivalent to that of a court. "[T]he proper focus of review of a zoning enactment is whether it violates State law or constitutional provisions, is arbitrary or unreasonable, or is substantially unrelated to the public health, safety or general welfare." Durand v. IDC Bellingham, LLC, 440 Mass. 45, 57 (2003). Because the adoption of a zoning by-law by the voters at Town Meeting is both the exercise of the Town's police power and a legislative act, the vote carries a "strong presumption of validity." Id. at 51. "Zoning has always been treated as a local matter and much weight must be accorded to the judgment of the local legislative body, since it is familiar with local conditions." Concord v. Attorney General, 336 Mass. 17, 25 (1957) (*quoting* Burnham v. Board of Appeals of Gloucester, 333 Mass. 114, 117 (1955)). "If the reasonableness of a zoning bylaw is even 'fairly debatable, the judgment of the local legislative body responsible for the enactment must be sustained.'" Durand, 440 Mass. at 51 (*quoting* Crall v. City of Leominster, 362 Mass. 95, 101 (1972)). In general, a municipality "is given broad authority to establish zoning districts regulating the use and improvement of the land within its borders." Andrews, 68 Mass. App. Ct. at 367-368. However, a municipality has no power to adopt a zoning by-law that is "inconsistent with the constitution or laws enacted by the [Legislature]." Home Rule Amendment, Mass. Const. amend. art. 2, § 6.

III. G.L. c. 151B and the Fair Housing Act.

Both Federal and State law broadly prohibit discrimination in housing based on certain characteristics including race, color, national origin, and ancestry. *See, e.g.,* 42 U.S.C. § 3604 and G.L. c. 151B, § 4, ¶ 4A and 6.

The Fair Housing Act ("FHA") and the Massachusetts Anti-Discrimination Law, G.L. c. 151B, prohibit towns from using their zoning powers in a discriminatory manner, meaning in a manner that has the purpose or effect of limiting or interfering with housing opportunities available to members of a protected class. The FHA prohibits discrimination based on race, color, or national origin and provides in pertinent part that it shall be unlawful:

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

42 U.S.C. § 3604 (a).

"The phrase 'otherwise make unavailable or deny' encompasses a wide array of housing practices…and specifically targets the discriminatory use of zoning laws and restrictive covenants." Casa Marie, Inc. v. Superior Court of Puerto Rico for Dist. of Arecibo, 988 F.2d 252, 257 n. 6 (1st Cir. 1993). Similarly, G.L. c. 151B, § 4, forbids discrimination in housing based on race, color, national origin, or ancestry and prohibits any action that interferes with the right to equal enjoyment of housing opportunity secured by the statute. G.L. c. 151B, § 4, ¶ 4A, 6.

Violations of the FHA and G.L. c. 151B occur when a Town uses its zoning power to intentionally discriminate against a member of a protected class or when such zoning power has a discriminatory impact on members of a protected class. *See, e.g.,* Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc., 135 S.Ct. 2507, 2521-22 (2015) (recognizing disparate impact discrimination under the FHA); Burbank Apartments Tenant Ass'n v. Kargman, 474 Mass. 107 (2016) (recognizing disparate impact discrimination under G.L. c. 151B). Discriminatory impact can occur when a zoning rule, neutral on its face, "disproportionately disadvantages members of a protected class." Burbank Apartments, 474 Mass. at 121 (discussing disparate impact in housing). 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); *see also* Burbank Apartments, 474 Mass. at 121 ("There is no single test to demonstrate disparate impact.") (internal quotations and citations omitted).

IV. Analysis of the ADU By-law.

Although we approve the amendments adopted in Article 26, we suggest that the Town discuss with Town Counsel the by-law's provision restricting occupancy of ADUs to family members to ensure that it is applied consistently with the FHA and G.L. c. 151B. Restricting occupancy to persons related by blood, adoption, or marriage 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).

In addition, limiting occupancy using the "blood, adoption, marriage" definition of "family" may give rise to constitutional due process and equal protection concerns under certain circumstances. For example, the definition of "family member" for purposes of Section V-K is more restrictive than the definition of "family" that applies throughout the Town's other zoning by-law provisions. Section VI, "Definitions" defines "family" as "[o]ne or more persons of [a] recognized family relationship maintaining a common household, including domestic help." However, the ADU by-law defines "family member" as "a person related to the owner by blood, adoption or marriage, and may also include domestic help and caregivers." Section V-K (2) (b). It is unclear how the ADU by-law's more restrictive definition of family, excluding persons with a "recognized family relationship," advances the Town's legitimate zoning interests. More generally, the Town should review the application of the by-law with Town Counsel to ensure that prohibiting occupancy by non-family members seeking to "share space and the burdens of homeownership" serves a legitimate zoning objective. *See* Zuckerman v. Town of Hadley, 442 Mass. 511, 516 (2004) (zoning law is unconstitutional if it is "clearly arbitrary or unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.").

The Attorney General's review of a by-law is based primarily on the materials that G.L. c. 40, § 32, requires a town to submit: "a certified copy of such by-law with a request for its

approval, a statement clearly explaining the proposed by-law, including maps and plans if necessary, and adequate proof that all of the procedural requirements for the adoption of such by- law have been complied with." Thus, any determination that the Town does not have a legitimate zoning purpose for the ADU's occupancy restriction is best left for a court, which, if a case were properly initiated, would be better equipped to find the facts on a fuller factual record. The Town should consult with Town Counsel with any questions on this issue.

V. Conclusion.

Because we cannot conclude that the amendments adopted under Article 26 are clearly inconsistent with state law, we approve them. However, we strongly suggest that the Town discuss with Town Counsel whether the ADU's occupancy restrictions need further amendments in light of the prohibitions in the FHA and G.L. c. 151B.

Very truly yours,
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cc: Town Counsel John Coughlin