DAIN | TORPY

Susan C. Murphy
617.542.0424
smurphy@daintorpy.com

MEMORANUDM

To: Emily Wentworth
Michael Silveira

CC: Jennifer Gay Smith
John J. Coughlin, Town Counsel

From: Susan C. Murphy, Special Counsel

Re: Legal Questions related to Recommendations of the ADU Study Committee

Below is the list of questions (in bold) provided for review with responses following each question.

1. **Scope of Charge – An individual member of the ADU Study Committee and a couple members of both the Planning Board and the public have suggested that the Study Committee exceeded the scope of Article 27 of the 2021 Warrant, particularly when studying and recommending elimination of the familial restriction for ADUs. The Chairs of the Planning Board and the Study Committee noted in response that the warrant article gave the Study Committee broad authority "…to amend any other provisions of the Zoning By-law reasonably related to the creation of accessory dwelling units (whether attached or detached)…" Could you please confirm whether or not the Study Committee acted within the scope?**

   The Recommended Motion for Article 27 of the 2020 Annual Town meeting provided as follows (broken into subparts for ease of reading):

   That the Town establish a committee, to be known as the ADU Study Committee,

   - for the purpose of reviewing:
     - the merits of this Warrant Article and/or
     - the merits of amending the provisions of the Hingham Zoning Bylaw, Section V-K, or
     - other applicable provisions of the Zoning By-law,

     to allow detached accessory dwelling units **and/or**
   - to amend any other provisions of the Zoning By-law reasonably related to the creation of accessory dwelling units (either attached or detached), **and**
   - to submit a written report to the Planning Board setting forth whether the Committee recommends in favor of any such amendment(s) and the reasons for such recommendations. If any amendments are recommended, the Committee shall include in its report its proposed changes.

   Based on the language of the Recommended Motion, all aspects of the Report of the ADU Study Committee is within the scope of the charge of Town Meeting.

2. **Zoning Amendment Process – The Planning Board's responsibilities following issuance of the Study Committee's report includes: "hold at least one public meeting in advance of the December 1 deadline for submission of zoning amendments as set forth in Article 2, Section 7 of the Hingham General By-laws, to determine if the Planning Board will elect to submit, or to support the submission of, one or more zoning amendments based on the report of the Committee." Thereafter a minimum of one, and often multiple, public hearings will be held by the Board before a final recommendation is made by the Board to Town Meeting. Could you map out the likely process and timeline for zoning amendments based on MGL c. 40A, s. 5 as modified by the Housing Choice legislation since this is the first potential article that would be affected locally?**

   The role of the Planning Board and the process and timeline for zoning amendments related to the ADU bylaw is the same as all zoning amendments. The Committee has fulfilled the charge of Town Meeting by submitting a report with recommendations and proposed changes to the existing ADU bylaw and the Planning Board has held at least one meeting to discuss the recommendations. The Planning Board should now decide which, if any, of the recommendations it wishes to submit by December 1 as a zoning amendment warrant article for the 2023 Town Meeting. In addition, the Planning Board may submit different or additional changes to the ADU bylaw or any other provisions of the Zoning By-Law. The timeline should follow the Board's usual hearing and warrant article submittal process.

   Under Chapter 40A, s. 5, as modified, the adoption of zoning that allows detached ADUs by special permit requires a majority vote at Town Meeting (rather than a 2/3 vote). Based on the current definition of ADU under the Hingham Zoning By-Law, the recommended changes to the By-Law to allow detached units and related dimensional and like modifications appear to qualify for a majority vote. The final determination is made by the Town Moderator but that would not occur until closer to Town Meeting. We are still reviewing whether the proposed removal of the family requirement would be eligible for a majority vote or would require a 2/3 vote.

3. **Family Occupancy Limitations as Zoning Purpose – The Study Committee found no legitimate zoning purpose served by limiting ADU occupancy to related household. Could you briefly outline the case law on this matter and the cautions raised by the Attorney General's review of Section V-K in 2018?**

   There are two different aspects to the applicability of fair housing laws. The first is whether a municipality has adopted a zoning bylaw that on its face or as implemented violates fair housing laws. The second is whether a property owner, in leasing out a dwelling unit, is doing so in compliance with any applicable fair housing laws. The second issues is raised in Question 4 below.

   In the Attorney General's decision regarding the existing ADU bylaw for attached ADUs, dated October 29, 2018, the Attorney General approved the ADU bylaw but cautioned the Town to ensure that it implements and enforces the bylaw in accordance with applicable law. The primary concern was whether the definition of "family" used in the ADU bylaw is significantly broad to avoid potential discriminatory exclusion of persons from housing. In particular, the decision states:

> 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).

When the Planning Board recommended the adoption of the existing ADU bylaw, it took into account the holdings in the following cases:

- Village of Belle Terre v. Boraas, 416 US 1 (1974) – upholding an ordinance which defined "family" without limiting as to familial relationship

- Moore v. City of East Cleveland, 431 US 494 (1977) – ruling against a definition that did limit familial relationships (the definition would not have allowed a grandparent to live with a grandchild) and in doing so distinguishing it from Belle Terre.

- Rosenberg v City of Boston (2010 Land Court Case) – this case addressed a City ordinance limiting the number of unrelated college students in a single unit; in ruling in favor of the ordinance, the Court referenced similar findings to the SCOTUS cases regarding the preservation of neighborhoods.

The definition adopted for Hingham's attached ADU bylaw is similar to the definition upheld in the Belle Terre decision.

> The word 'family' as used in the ordinance means, '(o)ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family. Id. at 1537.

In allowing the definition, the Supreme Court found that there was a legitimate zoning purpose to the provision. In the Rosenberg decision, the Land Court found "that the Amendment to the Code is rationally related to a legitimate public purpose and, therefore, does not violate the Equal Protection Clause of the United States Constitution or the Constitution of the Commonwealth of Massachusetts.

As noted above, protecting residential character and similar amenities and protecting against unhealthy or unsafe conditions are legitimate public purposes." This is a lower court decision of limited precedential value in Massachusetts but is the most current decision on a similar issue.

There have been no substantive changes in federal or state law since the adoption of the 2018 ADU bylaw which indicates that the purpose stated for the original adoption of the family requirement is no longer valid. In addition, to the extent fair housing laws address "families", they speak more to familial status, prohibiting discrimination against families with children. It is worth noting, however, that many of the norms that applied at that time of the 1974 Belle Terre decision have progressed in relation to non-discrimination and civil rights. As this is a fast-evolving aspect of the law, it is not possible to predict whether federal or state law (including zoning laws under Chapter 40A, or related case law) will be modified in the future to limit the ability of municipalities to define "family".

For further information, see:

The federal Fair Housing Act, 42 U.S.C. 3601 et seq., prohibits discrimination by direct providers of housing, such as landlords and real estate companies as well as other entities, such as municipalities, banks or other lending institutions and homeowners insurance companies whose discriminatory practices make housing unavailable to persons because of race or color, religion, sex, national origin, familial status, or disability. See summary at https://www.justice.gov/crt/fair-housing-act-1#relig

Massachusetts list of protected individuals is more extensive and can be seen here: https://www.mass.gov/service-details/overview-of-fair-housing-law. See also the provisions of MGL Chapter 151B (https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter151B).

4. **Fair Housing Law – Questions arose during the presentation of the Study Committee's report to the Board about the application of Fair Housing Laws to ADUs. Could you confirm whether these would material affect how an owner would select a tenant or thereafter manage the occupancy of the ADU? If the family restriction is eliminated, could an owner still choose to create an ADU for family members?**

First, the Town cannot provide legal advice to individual homeowners as to the landlord/tenant law and each owner seeking to create an ADU should ensure that they are complying with the law. We can note that, with respect to leasing to families with children, there are exemptions under federal and state housing laws for owner-occupied dwellings. As a detached unit, by definition, is not in the same dwelling as the owner, homeowners would need to seek advice as to whether a detached unit would qualify for the exemption.

The second question is whether an owner could still choose to create an ADU for family members. We are aware of no law that requires an owner to market and rent an ADU once it is created to unrelated third parties, but if an owner chose to do so, they must confirm that they are marketing and renting the property in accordance with fair housing laws (to the extent applicable).

5. **Occupancy Term – The Study Committee recommended a specific occupancy term for the unit not occupied by the property owner in order to limit transient uses such as short term rentals and guesthouses. Many communities require a covenant be put on record acknowledging the term. The Town of Norwell also adopted an injunctive relief process and reimbursement of legal expense requirement. The Attorney General has not yet weighed in on the enforcement mechanism. Could you please confirm that the Planning Board, if it opts to advance a warrant article this year, could modify the suggested language during the public hearing process?**

   There are a number of questions in the above item which we address separately below.

   With respect to the requirement of a covenant, the Attorney General's office has approved bylaws in other towns that contain this requirement so, to date, their office has not identified any inconsistency of such a cap with state law.

   As to the term itself, it would be recommended that the Town apply a term that is consistent with state law. Under recent case law it was found that rental of a single-family home for short-term rental is a commercial use and is not an appropriate accessory use for a single-family home. The standard that has been applied in cases of which we are aware is 30 days. The ADU Study Committee recommendation proposed 60 days for ADUs. The Planning Board should consider maintaining the thirty day requirement for consistency with existing law and similar bylaws in other communities.

   In addition, rather than including a minimum occupancy requirement in the ADU section of the By-Law, the Planning Board may wish to propose zoning amendments that specifically prohibit short-term rentals of less than thirty days. Such bylaws have been adopted in other communities and approved by the Attorney General. Specifically excluding short term rentals from the accessory uses allowed in the By-Law may also be worth consideration.

   The Norwell bylaw has not yet received approval from the Attorney General and therefore we hesitate to opine on whether Hingham could follow Norwell's proposed language. However, we suggest that, even if approved, the ADU By-Law would not be the appropriate location for such provisions. First, injunctive relief for zoning violations is already available to the Town and has been utilized in a recent case. Therefore, it is not necessary to add it specifically as to ADUs. Second, as a general rule in Massachusetts, a prevailing party is not entitled to attorneys fees unless the award of attorneys fees is specifically provided for by statute or in a commercial contract. We recommend that the Planning Board await the Attorney General's decision for the Norwell bylaw before proceeding with this type of provision.

   Finally, the above question asks about the ability to modify a zoning amendment during the public hearing process. The warrant article as submitted by the Planning Board on December 1st is the article that will appear in the warrant. There are two exceptions to this. First, the Select Board has had a practice of allowing the Planning Board to withdraw an entire zoning amendment prior to the Warrant going to print. In addition, the Planning Board could request that the Select Board substitute an article or place a new zoning amendment article after the December 1st deadline. Do so would likely require a new publication and hearing on the modified article.

If, as often occurs, the Planning Board recommends changes to the zoning amendment from the original warrant article, those changes can be included the Board's recommended motion. The Board's recommended motion is forwarded to the Advisory Committee and can also be included in the Planning Board's report to Town Meeting which appears in the Warrant. It should be noted that the Advisory Committee typical does, but is not required to, adopt the Recommended Motion of the Planning Board as its motion in the Warrant. If the Advisory Committee chose to, it could elect to recommend the original warrant article language as its Recommended Motion, a modified version of what the Planning Board recommended or a completely different motion. In such case, if the Planning Board did not agree with the Advisory Committee's motion, the Planning Board would need to make an affirmative motion on the floor of Town Meeting to substitute its recommended version for the Advisory Committee's motion in the Warrant.

That being said, if the Planning Board wishes to have a public discussion about various possible changes to the bylaw, it is recommended that the warrant article be over inclusive rather than under inclusive since it is easier to remove changes to a proposed bylaw and remain within the original scope while adding new provisions to a proposed amendment would raise a question as to whether the new change would remain within the original scope.

6. **ADU Cap – Members of the public suggested that the Town may be vulnerable to legal action if the ADU cap remains in plans. Some believe that the first homeowners seeking an ADU special permit after reaching the 2.5% cap may choose to sue the Town. Do you have an opinion you could share on this issue? Are caps legal? AG approved original cap in 2018 without comment. There are other statutory caps (liquor licenses, marijuana).**

We are not aware of any case law regarding a challenge to a zoning use cap. While not local zoning bylaws, there are examples of state laws that provide for caps on certain uses, such as marijuana establishments and liquor licenses. In addition, the Attorney General's office has approved bylaws with caps so, to date, their office has not identified any inconsistency of such a cap with state law.

As a final note, there are a number of questions and responses above that cite to the Attorney General's role in reviewing town bylaws. It should be noted that the Attorney General's office reviews bylaws for consistency with existing law. If a property owner were to ever challenge the legality of a zoning bylaw, the Attorney General's decision would be a factor, but would not be controlling. This is not common, but it can occur.