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OFFICE OF THE ATTORNEY GENERAL

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December 21, 2018

James F. Hegarty, Town Clerk
Town of Southborough
17 Common Street
Southborough, MA 01772

**Re: Southborough Special Town Meeting of May 22, 2018 -- Case # 9074
Warrant Articles # 1 and 3 (Zoning)
Warrant Article # 5 (General)**

Dear Mr. Hegarty:

Article 1 - We approve the by-law amendments adopted under Article 1 from the Special Town Meeting of May 22, 2018, except for the new Section 174-25 (B) (A) which provides as follows:

A. Five members of the Board shall be present at every hearing. Four members may hold a hearing and act on the matter before the Board, provided that the interested parties assent thereto before the hearing opens. Any hearing may be adjourned for any reason by the Board, or by any member in case of the absence of a quorum, to a later date by a statement to that effect at the hearing, and the hearing as so adjourned from time to time may be held without any further notice, unless the Board shall vote that such notice shall be given.

As explained herein, we disapprove Section 174-25 (B) (A) in its entirety because it: (1) unlawfully interferes with the Zoning Board of Appeals' (ZBA) statutory authority and the rights given to applicants under G.L. c. 40A and c. 40B (pp. 3-4) and (2) conflicts with the notice requirements of the state Open Meeting Law (p. 5).¹

We approve the remaining portions of the by-law. As further explained below, however, the Town must apply the remaining by-law provisions in a manner consistent with the powers and duties granted to the ZBA under G.L. c. 40A and c. 40B and c. 268A, the state Conflict of Interest Law.

¹ In a decision issued September 19, 2018, we approved the by-law amendments adopted under Article 3, and in a decision issued November 15, 2018, we approved the by-law amendments adopted under Article 5.

In our decision below, we summarize the by-law adopted under Article 1 and the Attorney General’s standard of review of town by-laws, and then explain why, based on that standard of review, we disapprove certain text and approve the remaining portions of the by-law.

I. Summary of Article 1

Under Article 1 (a citizen-petitioned Article), the Town voted to amend its zoning by-laws to regulate the conduct, meetings, and hearings of the Town’s ZBA. Article 1 adds a new Section 174-25 (B), “Zoning Board of Appeals: Meetings; Hearings; Quorum,” that requires all five members of the ZBA to be present at every hearing and imposes a four-member quorum requirement. Article 1 also adds a new (unnumbered) section, “Zoning Board of Appeals: Conduct.” Specifically, the new by-law provides in pertinent part as follows (emphasis supplied):

B. Zoning Board of Appeals: Meetings; Hearings; Quorum

A. Five members of the Board shall be present at every hearing. Four members may hold a hearing and act on the matter before the Board, provided that the interested parties assent thereto before the hearing opens. Any hearing may be adjourned for any reason by the Board, or by any member in case of the absence of a quorum, to a later date by a statement to that effect at the hearing, and the hearing as so adjourned from time to time may be held without any further notice, unless the Board shall vote that such notice shall be given.

B. The Board will hold public hearings on all applications submitted to it. A quorum shall consist of four members or their alternates. No member shall appear or represent any person in any matter pending before the Board. No member shall hear or decide an appeal in which he or she is directly or indirectly interested in a personal or financial sense.

* * *

Zoning Board of Appeals: Conduct

A. Zoning Board of Appeals (ZBA) members are municipal employees covered by the conflict of interest law (Chapter 268A of the General Laws).

B. In addition to complying with the requirements of Mass General Law Chapter 268A, members and alternates are required to file any necessary Conflict of interest (COI) Forms with the Town Clerk and Board of Selectmen before a case related to such a conflict is heard.

The explanation in the Warrant Article provides that the intent of the by-law amendments is to “require a quorum of four (4) members of the Zoning Board of Appeals . . . to hold public hearings.” During our review of the amendments adopted under Article 1, we received several communications urging both our approval and disapproval of the by-law on various grounds. We appreciate this input because it has informed our decision and highlighted the importance of these issues to the Town and its residents. However, the Attorney General may not base her decision on the policy arguments for or against a by-law but rather reviews by-laws solely for conflict with state law. Amherst v. Attorney General, 398 Mass. 793, 798-99 (1986).

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 1, 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 v. Amherst, 68 Mass. App. Ct. 365, 367-368 (2007). 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. Grounds for Disapproval of Section 174-25 (B) (A)

A. Section 174-25 (B) (A) Conflicts with General Laws Chapter 40A and Chapter 40B

Section 174-25 (B) (A) requires all five members of the ZBA to be present at every hearing. However, Section 174-25 (B) (A) also allows four members to hold a hearing “provided that the interested parties assent thereto before the hearing opens.” As further explained below, Section

174-25 (B) (A) is inconsistent with state law because it: (1) limits the ZBA's ability to carry out its statutory powers and duties pursuant to G.L. c. 40A and c. 40B and (2) deprives an applicant or landowner of the rights given under G.L. c. 40A and c. 40B.

General Laws Chapter 40A and Chapter 40B provide applicants and landowners with certain rights, such as the right to a ZBA hearing and a ruling on an application for a special permit, a request for a variance, an appeal of a Zoning Enforcement Officer's (ZEO) decision, or a request for a comprehensive permit and the right to finality and certainty in local decisions and relief. *See* G.L. c. 40A, §§ 9, 10, 15, 17 and c. 40B. To further these rights, a ZBA has numerous statutory powers and duties that it must fulfill under G.L. c. 40A and c. 40B and the ZBA must often work within prescribed time limits. For example, G.L. c. 40A, the state Zoning Act, provides that is "designed to provide standardized procedures for the administration and promulgation of municipal zoning laws." Section 2A of the Acts of 1975. In addition, the legislative goal of G.L. c. 40A's provisions is to provide local zoning decisions with a measure of finality so that those governed by those decisions, including applicants and landowners, can rely on such decisions. *See, e.g., Kramer v. Zoning Bd. of Appeals of Somerville*, 65 Mass. App. Ct. 186, 192-93 (2005) ("The statutes of limitation for judicial review of special permit decisions exist to promote finality and to preclude attacks indefinitely on decisions which have already been tested in the hearing process.") Section 174-25 (B) (A) cannot be implemented in a way that provides finality and certainty in local ZBA decisions because the section, as written, does not allow the Town or applicants to determine who qualifies as an "interested party" and whether five ZBA members or four ZBA members are required for a hearing.

By requiring the ZBA to receive approval of the "interested parties" before it can conduct a hearing with four members, the by-law interferes with the ZBA's ability to carry out its statutory powers and duties and interferes with the rights of applicant and landowners. For example, because the by-law does not define who qualifies as an "interested party," there is significant uncertainty as to who would be required to "assent" to a hearing with only four ZBA members. This uncertainty in identifying who is an "interested party" interferes with the ZBA's ability to conduct the required public hearings expeditiously and schedule adjourned sessions at reasonable times. Moreover, the ZBA's decision would lack finality or certainty because of the risk that a previously unidentified "interested party" will come forward and challenge the validity of a four-member board's action.

The finality and certainty of ZBA decisions would be undermined for the additional reason that Section 174-25 (B) (A) both requires five ZBA members to be present at ZBA hearings and allows four ZBA members to conduct a hearing. It is impossible for the Town or an applicant to determine how many ZBA members are required to be present at a hearing and to know when the requirements of Section 174-25 (B) (A) have been satisfied. Because of the internally inconsistent quorum requirements, the Town cannot implement Section 174-25 (B) (A) in a manner that provides for the required administrative process and finality and certainty in local land use decisions under G.L. c. 40A and c. 40B. Therefore, Section 174-25 (B) (A) is inconsistent with G.L. c. 40A and c. 40B and must be disapproved and deleted on these grounds.

B. Section 174-25 (B) (A)'s Text that Allows for No Notice for Adjourned Hearings Conflicts with the Open Meeting Law

Section 174-25 (B) (A) provides that hearings may be adjourned to a later date and may be held “without any further notice.” Although we disapprove Section 174-25 (B) (A) in its entirety, we additionally disapprove the text “and the hearing as so adjourned from time to time may be held without any further notice, unless the Board shall vote that such notice shall be given” because it is inconsistent with the state’s Open Meeting Law, G.L. c. 30A, §§ 18 through 25.

The Open Meeting Law (“OML”) requires that a public body post notice of any meeting at least 48 hours prior to such meeting. G.L. c. 30A, § 20 (b). Section 20 (c) provides that notices for meetings of local public bodies shall be filed with the municipal clerk and posted in a manner conspicuously visible to the public at all hours in or on the municipal building in which the clerk’s office is located. A “meeting” is defined as “a deliberation by a public body with respect to any matter within the body’s jurisdiction.” G.L. c. 30A, § 18. For purposes of the Open Meeting Law, “deliberation” is defined, in part, as “an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction.” *Id.* Any adjourned meetings or hearings of the ZBA must comply with the notice requirements of the Open Meeting Law.² Therefore, it is inconsistent with the OML to provide that a hearing may be adjourned to a later date without further notice.

For the reasons provided in more detail above, we disapprove Section 174-25 (B) (A) in its entirety because it: (1) unlawfully interferes with the ZBA’s statutory authority and the rights given to applicants under G.L. c. 40A and c. 40B, and (2) conflicts with the notice requirements of the state Open Meeting Law.

IV. Comments on the Remaining Portions of the By-law

A. Statutes Regulating Zoning Boards of Appeal

As detailed below, the Town must apply the remaining portions of the by-law consistent with the various statutes that govern a Zoning Board of Appeals.

i. General Laws Chapter 40A and the By-law’s Quorum Requirement

General Laws Chapter 40A, Section 12, provides that a Town shall establish a ZBA by by-law consisting of three or five members. Section 12 also requires the ZBA to adopt rules governing its conduct “for purposes of this chapter.” In addition, G.L. c. 40A, Section 14, grants specific powers and duties to the ZBA, including the power: (1) to hear and decide appeals from zoning

² Our office has advised public bodies that, where a public body decides to continue a discussion to another time, the Open Meeting Law requires that the public body treat the continued discussion as though it is a new meeting for purposes of notice posting. See Attorney General’s Frequently Asked Questions at <https://www.mass.gov/service-details/frequently-asked-questions-about-the-open-meeting-law-meetings-notices-and-minutes>.

enforcement actions under G.L. c. 40, § 8; (2) to hear and decide special permit applications pursuant to G.L. c. 40A, § 9; and (3) to hear and decide variance applications pursuant to G.L. c. 40A, § 10.

The Town's existing zoning by-law, Section 174-25 (A), "Board of Appeals," establishes a five-member ZBA appointed by the Board of Selectmen. The existing by-law authorizes the ZBA to hear and decide zoning enforcement actions as provided by G.L. c. 40A, §§ 8, 14, and 15; to serve as a Special Permit Granting Authority; and to hear and decide variances. *See* Section 174-25 (A) (1), (2), and (3). The new Section 174-25 (B) (adopted under Article 1) provides that a quorum of the ZBA shall be four ("A quorum shall consist of four members or their alternates."). Because, by statute, at least four of the five members of the ZBA are needed to grant a special permit or variance and to reverse any order or decision of a ZEO (*see* G.L. c. 40A, §§ 9 and 15, respectively) we cannot conclude that a four-member quorum requirement for the Town's ZBA is inconsistent with G.L. c. 40A.³ However, for the reasons explained below, the Town should consult closely with Town Counsel before applying the by-law to avoid constructive approvals under G.L. c. 40A, §§ 9 and 15.

General Law Chapter 40A, Section 9, makes it clear that the special permit granting authority:

shall hold a public hearing for which notice has been given as provided in section eleven, on any application for a special permit within sixty-five days from the date of filing of such application . . . The decision of the special permit granting authority shall be made within ninety days following the date of such public hearing. . . . Failure by the special permit granting authority to take final action within . . . ninety days . . . shall be deemed to be a grant of the special permit.

General Laws Chapter 40A, Section 15, directs the ZBA to make its decision within one hundred days after the date an application is filed and provides that the ZBA's failure to do so will result in a constructive grant of approval. *See Capone v. Zoning Bd. of Appeals of Fitchburg*, 389 Mass. 617, 621-622, (1983) (failure of the ZBA to perform all of the statutorily required actions within the timeframe provided for in the statute will result in the constructive grant of the relief sought). Such time constraints imposed under G.L. c. 40A, §§ 9 and 15, "induce the board to act promptly." *Capone*, 389 Mass. at 623. Failure to comply with Sections 9 and 15's time requirements could result in an application's constructive approval. We suggest that the Town discuss this issue in more detail with Town Counsel.

³ State law provides as a general rule that a majority of a council or board is a quorum, and a majority of the quorum can act. *Merrill v. Lowell*, 236 Mass. 463, 467 (1920); *see also Clark v. City Council of Waltham*, 328 Mass. 40, 41 (1951). In addition, where a general law says that a body or type of body has a set number of members, then unless a general or special law says otherwise, G.L. c. 4, § 6, clause 5, sets the quorum at a majority of that number.

ii. *General Laws Chapter 40B and the By-law's Quorum Requirement*

General Laws Chapter 40B, Section 21, details the procedural requirements for the ZBA hearings and decisions on comprehensive permits for the construction of low or moderate-income housing. Among other things, the ZBA is required to hold a public hearing within thirty days after receiving the application, and to “render a decision, based upon a majority vote of said board, within forty days after the termination of the public hearing.” G.L. c. 40B, § 21. The statute also provides that “[i]f said hearing is not convened or a decision is not rendered within the time allowed, unless the time has been extended by agreement between the board and the applicant, the application shall be deemed to have been allowed and the comprehensive permit or approval shall forthwith issue.”

Because, by statute, a three-member majority of the ZBA's five-member board is needed to grant a comprehensive permit under G.L. c. 40B, the by-law's four-member quorum requirement may not be applied to votes of the ZBA on comprehensive permits under G.L. c. 40B. If the Town applied the four-member quorum requirement to an application for a comprehensive permit under G.L. c. 40B, the Town would be in violation of that statute. We suggest that the Town discuss these issues in more detail with Town Counsel.

B. Other Statutory Considerations

The Town must apply the new Section 174-25 (B) consistent with state conflict of interest and ethics laws.

The by-law prohibits a ZBA member from appearing or representing any person in any matter pending before the ZBA. The by-law also prohibits a member from hearing or deciding an appeal on a matter in which he or she is directly or indirectly interested in a personal or financial sense. Finally, the by-law requires ZBA members and alternates to file any conflict of interest form with the Town Clerk and Board of Selectmen before a case related to such conflict is heard.

General Laws Chapter 268A, the state's conflict of interest and financial disclosure laws, govern the conduct of local officials, including ZBA members. More specifically, G.L. c. 268A, § 17 (c), prohibits a municipal employee, “otherwise than in the proper discharge of official duties,” from acting as an agent or attorney for anyone other than the municipality in connection with any particular matter in which the municipality is a party or has a direct and substantial interest. In addition, G.L. c. 268A, § 19, prohibits a municipal employee from knowingly participating in any particular matter in which the employee or a business organization in which the employee serves as an officer, director, trustee, partner or employee has a financial interest.⁴ Finally, G.L. c. 268A, § 23, imposes standards of conduct that are applicable to all public employees. Section 23 (b) (3), the so-called “appearances” section, prohibits a public employee from acting in a manner that would cause a reasonable person to conclude that anyone could influence the employee improperly or unduly enjoy the employee's favor in the performance of

⁴ The statute includes a disclosure and waiver provision that applies in some circumstances. *See* G.L. c. 268A, § 19 (b) (1).

his or her official duties. Section 23 (b) (3) requires the employee to dispel any such “appearance” by making a written disclosure of the relevant facts.

The by-law’s text “in a personal or financial sense” is not defined. It is also unclear what “Conflict of Interest Forms” the by-law requires. In order to avoid a vagueness challenge, the Town may want to define what it means by “personal and financial sense” and specify what Conflict of Interest Forms a ZBA member needs to file. Because Towns are expressly permitted to adopt more stringent standards than those contained in G.L. c. 268A,⁵ we cannot conclude that the provision prohibiting ZBA members from acting on certain matters and requiring members to file Conflict of Interest Forms is inconsistent with state law. However, such provisions must be applied consistently with G.L. c. 268A, §§ 17, 19, and 23. The Town may wish to discuss these issues in more detail with Town Counsel and the State Ethics Commission.

V. Conclusion

Because Section 175-25 (B) (A)’s internally inconsistent quorum requirement interferes with the ZBA’s ability to conduct its statutory functions and because the text “and the hearing as so adjourned from time to time may be held without any further notice, unless the Board shall vote that such notice shall be given” is inconsistent with the required notice requirements of the OML we are compelled to disapprove and delete Section 174-25 (B) (A) in its entirety. Because we cannot conclude that the remaining portions of Article 1 are inconsistent with state law, we approve them. However, the Town should discuss with Town Counsel the proper application of the new by-law, as detailed herein.

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 Aldo A. Cipriano

⁵ See G.L. c. 268A, § 23 (e) (“Nothing in this section shall preclude any such constitutional officer or head of such agency from establishing and enforcing additional standards of conduct.”)