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February 16, 2024

Ben Kaufman, Town Clerk
Town of Brookline
333 Washington Street
Brookline, MA 02445

**Re: Brookline Special Town Meeting of November 14, 2023 -- Case # 11247
Warrant Article # 1 (Zoning)**

Dear Mr. Kaufman:

Article 1 - Under Article 1 the Town made several revisions to its zoning by-law in three primary categories: 1) to amend the zoning by-law and zoning map to adopt a new "MBTA-CA Multifamily Overlay District" where multi-family developments are allowed as of right; 2) to amend the zoning by-law and zoning map to adopt a series of new Harvard Street Main Street Corridor Districts; and 3) to amend the zoning by-law to add Article XI, Harvard Street Form-Based Zones Standards. We approve Article 1, and the map amendments voted under it, except for text in Article XI of the by-law relating to form-based zones standards that requires a special permit for educational and childcare centers and text that requires site plan review for G.L. c. 40A, § 3 protected uses, that we disapprove because it conflicts with state law. We also offer comments provided below on the approved portions of Article 1 for the Town's consideration when applying the zoning amendments. We will return the approved maps to you by regular mail.

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

Our review of Article 1 is governed by G.L. c. 40, § 32. In her review of by-laws 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. 793, 795-96 (1986). 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.") "As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid." Bloom v. Worcester, 363 Mass. 136, 154 (1973). "

Article 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). 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. MBTA-CA Multifamily Overlay District

The stated purpose of the “MBTA-CA Multifamily Overlay District,” is to comply with the Town’s obligations under G.L. c. 40A, § 3A, (zoning requirements for MBTA Communities). Because the Executive Office of Housing and Livable Communities (HLC) has designated the Town as a Rapid Transit Community, the Town’s deadline for submitting a District Compliance Application to HLC was December 31, 2023. See “Compliance Guidelines for Multi-family Zoning Districts Under Section 3A of the Zoning Act” (Compliance Guidelines), Section 9, p. 15.

We understand that the Town has submitted its District Compliance Application to HLC for that Office’s determination whether the Town has met its Section 3A obligation to adopt at least one zoning district that meets the requirements of the statute. The Attorney General’s approval of the by-law amendments pursuant to her review authority in G.L. c. 40, § 32 means that the by-law amendments will have lawful effect once the Town completes the posting/publishing requirements of G.L. c. 40, § 32. However, the Town must obtain HLC’s determination that the Town has complied with Section 3A.

We are also informed that the Town has submitted to HLC an Economic Feasibility Analysis and request for approval of the zoning by-law’s affordability requirements (Section 4.08) as they apply to Section 3A multi-family units. This HLC approval is required because the Town’s affordability requirements exceed those established by the Compliance Guidelines. See Section 4 (b) “Affordability Requirements” at p. 7 (“For purposes of making compliance determinations with Section 3A, EOHLC will consider an affordability requirement to be consistent with as of right zoning as long as the zoning requires not more than 10 percent of the units in a project to be affordable units...”). If HLC does not approve the Town’s request, the Town should consult with Town Counsel about a future by-law amendment to clarify the affordability requirements for Section 3A multi-family units.

IV. Article XI’s Form Based Zoning Provisions

Under Article 1 the Town also voted to add a new Article XI, “Harvard Street Form-Based Zones Standards,” that establishes the zoning requirements for buildings and land uses along the Harvard Street-Main Street Corridor. See Sections 11-1.01 and 11-2.02. ¹ Article XI establishes three “base zones” within the Harvard Street-Main Street Corridor: (1) the Harvard Street-Main Street Zone (H-MS); (2) the Harvard Street-Main Street Transitional Zone (H-MST); (3) and the Harvard Street-Main Street Neighborhood Zone (H-MSN). Sections 11-2.05, 11-206, and 11-207

¹ These Form-Based Zones Standards do not apply to the Section 3A multi-family units authorized by MBTA-CA Multifamily Overlay District provisions.

establish physical character and use requirements for the H-MS, H-MST, and H-MSN base zones, respectively and include illustrations that describe and show examples of the physical form, character and standards imposed in each base zone.

Section 11-2.05 states that the intent of the H-MS base zone is to provide a “mixed-use pedestrian-oriented environment” that includes medium-to-large building footprints, high intensity mixed-use buildings and housing choices within a short walking distance to retail uses and food establishments. The H-MS base zone includes one subzone, “H-MS-O,” where active and passive uses are encouraged on a commercial use’s ground floor. Sections 11-2.05 (C) through H impose lot size, open space, setback, building height, frontage, façade, and ground floor standards for buildings within the H-MS base zone.

Section 11-2.06 states that the intent of the H-MST base zone is to provide a “walkable neighborhood to mixed-use environment” that includes medium-to-large building footprints, high intensity mixed-use buildings and housing choices within walking distance to retail uses and food establishments. The H-MST includes one subzone, “H-MST-L” that prohibits commercial uses and only allows residential uses. Section 11-2.06 (B). Similar to Section 11-2.05, Section 11-2.06 imposes lot size, open space, setback, building height, frontage, façade, and ground floor standards for buildings within the H-MST base zone.

Section 11-2.07 states that the intent of the H-MSN base zone is to provide a walkable neighborhood environment of detached, small-to-medium buildings with modest-intensity mixed-use buildings and housing choices within a short walking distance to retail and food services. Similar to Section 11-2.05 and Section 11-2.06, Section 11-2.07 imposes lot size, open space, setback, building height, frontage, façade, and ground floor standards for buildings within the H-MSN base zone.

Section 11-3 provides the requirements, along with illustrations, for building frontage, including shopfronts, entryways, stoops, and porches and Section 11-4 provides design requirements for other building forms including active ground floor designs, roofs, windows, and building facades. Section 11-5 imposes site development standards for accessory structures, for large site developments, open space, lighting, screening, sustainable building requirements, and commercial signage. Section 11-7 establishes the uses that are allowed in the form based zones and lists them in a Use Table. See Section 11-7.02. Section 11-8 provides incentives for buildings that include ground floor commercial uses and authorizes the Town to require public improvements, including access ramps, traffic signals, bicycle racks, and planting public shade trees.

Section 11-9 includes the site plan review provisions for the Harvard Street-Main Street Corridor and is used to ensure “conformance with” Article XI and address potential development impacts. Section 11-9.01. Section 11-9 creates four types of site plan review: (1) Standard Project Site Plan and Design Review; (2) Large Project Site Plan and Design Review; (3) Minor Site Plan and Design Review; and (4) Administrative Site Plan and Design Review. Section 11-9.02. Finally, Section 11-10 defines terms used throughout Article XI.

A. Form-Based Zoning

Form-based zoning provisions are within a Town's zoning powers. See Big Block Development Group v. Holder, 2019 WL 1645626 (2019) * 1 (Mass. Land Ct.) (form-based zoning provisions applicable to an Overlay District were valid and an unambiguous exercise of the Town's zoning powers) The purpose of form-based zoning is "to promote denser, more walkable neighborhoods that include mix residential and commercial uses." Id. Form-based zoning is part of the "smart growth" movement and is defined as:

land development regulations that fosters predictable built results and high-quality public realm by using physical form (rather than separation of uses) as the organizing principle for the code.

Id.

Form-based codes include building standards for a particular area that address size, design, location, building and architectural features such as windows, doors, public space, and include an administrative approval process. Form-based codes have been described as removing complexity and ambiguity in conventional zoning codes and replacing them with highly descriptive regulations that are easy to understand and implement. Because Article XI is the precisely the type of form-based zoning that is within the Town's zoning powers, we approve it, except for the text identified below that we disapprove for the reasons stated.

B. Disapproved Text

1. *Child Care and Education Uses*

Section 11-7.02.A, "Use Table," is the Use Table for the form-based zones and as to child day care centers and educational services provides as follows (with emphasis added):

Use Category	H-MS	H-MS-O	H-MST	H-MST-L	H-MSN
Child Day Care Center	<u>SP</u>	A	A	<u>X</u>	<u>SP</u>
Educational Services	<u>SP</u>	A	A	<u>X</u>	<u>SP</u>

Child day care centers and educational services are allowed by special permit (SP) in the H-MS and H-MSN base zones and prohibited (X) in the H-MST-L base zone. We disapprove the special permit requirement and the prohibition on these uses as shown above in bold and underline because G.L. c. 40A, § 3 precludes towns from requiring a special permit for or prohibiting educational and child care uses:

No zoning . . . by-law shall prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such 3 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 . . .

General Laws Chapter 40A, Section 3 provides exemptions from local zoning for the use of land or structures for educational purposes on land owned or leased by the Commonwealth or any of its agencies, subdivisions, or bodies politic or by any nonprofit educational corporation, and certain childcare facilities. Trustees of Tufts College v. Medford, 415 Mass. 753, 765 (1993) (a local zoning law that imposes a special permit requirement on educational uses improperly restricts the protected use and is invalid); The Bible Speaks v. Bd. of Appeals of Lenox, 8 Mass. App. Ct. 19, 33 (1979) (“The Legislature did not intend to impose special permit requirements, designed under [G.L. c. 40A, § 9], to accommodate uses not permitted as of right in a particular zoning district, on legitimate educational uses which have been expressly authorized to exist as of right in any zone.”). Because the Use Table requires a special permit for educational and child care uses in the H-MS and H-MSN base zones and prohibits these uses in the H-MST-L base zone, the text conflicts with G.L. c. 40A, § 3. Therefore, we disapprove and delete the letters “SP” and “X” in the Use Table under the H-MS, H-MSN, H-MST-L as indicated in bold and underline above.

2. Site Plan Review for Dover Amendment Uses

Section 11-9.04 (6) imposes a site plan review requirement for agricultural, religious, educational, and child-care centers uses ² (so-called Dover uses that enjoy certain protections from local zoning pursuant to G.L. c. 40A, § 3) as follows:

All proposed uses of land protected under M.G.L. c. 40A, sec. 3 (i.e., agricultural, educational, religious, or child care uses) shall be subject to Site Plan and Design Review which shall be limited consistent with those statutory provisions. The purpose of this Section is to ensure that all such uses and facilities are reasonably regulated in regard to bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage.

The Applicability and Thresholds in Table 11-9.04.5-A apply to Dover Amendment Uses.

Section 11-9.04 (6) imposes site plan review for uses protected under G.L. c. 40A, § 3 and limits the use of site plan review to impose reasonable conditions in the areas allowed under Section 3. However, the above underlined text in Section 11-9.04 (6) subjects Dover Amendments uses to the processes and requirements of Standard Project Site Plan and Design Review and Large Project Site Plan and Design Review. The requirements for Standard Project and Large Project Site Plan and Design Review include a lengthy site plan review process that includes several public hearings, requires the site plan to include information well beyond the eight categories allowed under Section 3, and allows the Planning Board to deny Standard Project and Large Project Site Plan and Design review.

As provided in more detail above under our discussion of Section 11-7.02.A, G.L. c. 40A, Section 3 protects educational uses, religious uses, and child care centers. A town by-law may not

² Educational Services and Child Care Centers were allowed by special permit with site plan review in the H-MS and H-MSN base zones. However, we disapproved the special permit requirement for these uses because it conflicts with G.L. c. 40A, § 3 (See Section B (1) above discussing Section 11-7.02.A, provisions for Child Care Centers and Educational Services).

prohibit, or require a special permit for, educational, religious, or child-care uses, but may impose reasonable regulations in eight areas: the bulk and height of structures, yard sizes, lot area, setbacks, open space, parking and building coverage requirements. A site plan review requirement for Dover Amendment uses, limited to the application of reasonable regulations in the categories listed in G.L. c. 40A, § 3 is consistent with the Dover Amendment and G.L. c. 40A, § 3. Jewish Cemetery Assoc. of Mass., Inc. v. Bd. of Appeals of Wayland, 85 Mass. App. Ct. 1105, 7 *2 (2014) (a site plan review by-law applicable to Dover Amendment protected uses that is limited to imposing reasonable regulations on protected uses does not conflict with state law.) However, a town cannot impose site plan review requirements that exceed those eight categories allowed under Section 3. Nor can the Town prohibit an as-of-right uses entitled to zoning protections under G.L. c. 40A, § 3 by denying site plan approval. Site plan approval acts as a method for reasonably regulating as of right uses rather than for prohibiting them. Y.D. Dugout, Inc. v. Bd. of Appeals of Canton, 357 Mass. 25, 31 (1970). Where “the specific area and use criteria stated in the by-law [are] satisfied, the [reviewing] board [does] not have discretionary power to deny...[approval], but instead [is] limited to imposing reasonable terms and conditions on the proposed use.” Prudential Ins. Co. of America v. Westwood, 23 Mass. App. Ct. 278, 281- 82 (1986), quoting from SCIT, Inc. v. Planning Bd. of Braintree, 19 Mass. App. Ct. 101, 105 n.12 (1984). Because the Town cannot impose site plan review requirements that go beyond the eight categories allowed under Section 3 and cannot deny site plan approval for as-of-right protected Section 3 uses, we disapprove the text in Section 11-9.04 (6) in bold and underlined above (**The Applicability and Thresholds in Table 11-9.04.5-A apply to Dover Amendment Uses.**) that authorizes the Planning Board to impose site plan review requirements that are not allowed for protected uses.

C. Comments on Approved Portions of Article XI

1. *Community or Group Residence*

The Use Table requires a special permit for “Community or Group Residence” as follows:

Use Category	H-MS	H-MS-O	H-MST	H-MST-L	H-MSN
Community or Group Residence	<u>SP</u>	A	A	<u>SP</u>	A

“Community or Group Residence” is defined in Section 11-7.03 (9) (C) as follows:

Community or Group Residence. Residential occupancy of a dwelling unit by two or more housekeeping units where one or more occupying individuals are ‘handicapped’ as defined in 42 U.S.C. §3602 or have a ‘disability’ as defined in 42 U.S.C. §12102. Both terms are defined as a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment not including current, illegal use of or addiction to a controlled substance. Include facilities with the primary function of providing overnight sleeping accommodations in rooming units or bunk rooms to people experiencing homelessness. Includes residential occupancy in rooming units where room and board, personal services, and skilled nursing care or hospice care is provided to tenants but specifically excludes hospitals.

The Use Table allows Community and Group Residences by special permit in the H-MS and H-MST-L base zones. We approve the special permit requirements for Community and Group Residences, but strongly encourage the Town to consult with Town Counsel regarding the appropriate application of this text and whether it should be amended at a future Town Meeting, in light of G.L. c. 40A, § 3, ¶ 4 that prohibits town by-laws that have a discriminatory effect on disabled persons, as follows:

Notwithstanding any general or special law to the contrary, local land use and health and safety laws, regulations, practices,...by-laws and decisions of a...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.

Persons suffering from drug and alcohol addiction are considered disabled under G.L. c. 40A, § 3, and facilities that serve this population are entitled to the protections of the statute. See S. Middlesex Opportunity Council, Inc. v. Town of Framingham, 752 F. Supp. 2d 85, 95 (D. Mass. 2010) (“Federal regulations define ‘handicap’ to include drug addiction or alcoholism that ‘substantially limits one or more major life activities.’”) (citation omitted); Granada House, Inc. v. City of Boston, 1997 WL 106688 at *9 (Mass. Super. Feb. 28, 1997) (“Massachusetts would look to federal law, including the [Fair Housing Act], in interpreting the phrase ‘disabled person’ and ‘persons with disabilities’, and that by so doing, the [Massachusetts Zoning Act] must be read to bar the City’s discriminatory treatment of a group home for recovering drug and alcohol users under the Code.”); Spectrum Health Systems, Inc. v. City of Lawrence, No. 2015-288-C (Essex Superior Ct.) (“Based upon the record now before this Court, the plaintiff Spectrum is entitled to those protections set out under G.L. Ch. 40A, § 3, as amended.”).

In addition, the Americans with Disabilities Act (42 U.S.C. §§, 12132 et seq.) (“ADA”), the Rehabilitation Act (29 U.S.C. § 794(a)) (“RA”), and the Fair Housing Act (42 U.S.C. § 3604(f)(1) et seq.) (“FHA”) all prohibit municipal by-laws from discriminating against disabled persons.³ “Under the ADA and FHA, a public entity such as the [Town] is prohibited from implementing a zoning scheme that treats disabled individuals differently than non-disabled individuals.” U.S. v. City of Baltimore, 845 F.Supp. 2d 640, 647-648 (D. Md. 2012) (Baltimore’s zoning code requirement that residential substance abuse treatment programs obtain a conditional ordinance before locating in any district for which they were otherwise eligible was facially discriminatory in violation of the ADA and FHA). “[C]ourts have found ADA and FHA violations not only in cases of specific zoning actions such as outright permit denials, but also in cases of burdensome procedural zoning requirements uniquely placed on disabled individuals.” Id. at 648 (collecting cases). Even if a local ordinance or by-law does not use the word “disability” it can be found to discriminate against disabled persons if the effect is to impose unique land use burdens on disabled persons. Community Housing Trust v. Dep’t of Consumer & Regulatory Affairs, 257 F. Supp.2d 208, 224-25 (D.D.C. 2003) (District of Columbia requirement that community based residential facilities obtain a certificate of occupancy expressly targeted individuals with disabilities, even if it did not use the word “disability,” and was thus facially discriminatory).

³ Because the analysis under the ADA and the RA is substantially the same, we hereafter refer only to the ADA.

Given these protections, we encourage the Town to consult with Town Counsel to ensure the proper application of the Use Table as well as to determine whether the Use Table should be amended at a future Town Meeting.

2. Denial of Site Plan

Section 11-9.05 (2) establishes the review procedures for Standard Site Plan Review and Large Project Site Plan Review, which applies to uses allowed as of right or by special permit in the form-based zones. Section 11-9.05 (2) (K) (4) authorizes the Planning Board to deny a site plan as follows:

(4) Conditions for Disapproval. The Planning Board may reject a site plan that:

(a) Fails to furnish adequate information required by the Town's by-laws and regulations; or

(b) Although proper in form the site plan depicts a use or structures so intrusive on the needs of the public in one regulated aspect or another that rejection by the Planning Board would be tenable.

The Town should consult very closely with Town Counsel before denying a site plan for as of right uses. As discussed in more detail above under Section B (2), for as of right uses, site plan review acts as a method for reasonably regulating as of right uses rather than for prohibiting them. Y.D. Dugout, Inc. v. Bd. of Appeals of Canton, 357 Mass. 25, 31 (1970). The Town should also consult with Town Counsel about a future amendment to Section 11-9.05 (2) (K) (4) to clarify site plan review decisions for as of right uses.

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 that 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 voted by Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,
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