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Emailed

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November 15, 2023

Jayne Marie Davolio, Town Clerk
Town of Millbury
101 Main Street
Millbury, MA 01527

Re: Millbury Annual Town Meeting of May 2, 2023 --- Case # 10973
Warrant Articles # 21 and 22 (Zoning)
Warrant Article # 4 (General) [1]

Dear Ms. Davolio:

Article 22 - Under Article 22, a citizen's petition, the Town voted to adopt a temporary moratorium by-law to halt the permitting of multi-family housing until after November 17, 2024. The by-law contends that the Town's "zoning by-law does not contain sections which specifically address the creation of multi-family dwellings," and that a recent increase in multi-family developments in the Town "may have an adverse or unintended effect on community character and existing neighborhoods." As such, the by-law asserts, the moratorium is needed to "allow sufficient time to engage in a planning process to address the effects of such structures and uses in the Town and to enact bylaws in a manner consistent with sound land use planning goals and objectives." We cannot determine that Article 22 was enacted to assist a legitimate planning purpose because, at the time of the vote on Article 22 and contrary to the by-law's assertion, the Town's zoning by-law included extensive provisions on multi-family housing, and the stated fear of "adverse effects...on community character" cannot serve as a legitimate planning purpose for a moratorium. Because the moratorium on new multi-family dwellings adopted under Article 22 has no presently discernible legitimate zoning purpose, we disapprove it.

We emphasize that our disapproval of Article 22 in no way implies any position on the policy views that may have led to the adoption of the by-law amendment. The Attorney General's limited standard of review requires her to approve or disapprove by-laws based solely on their consistency with state and federal 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).

This decision briefly describes the by-law and the Town's existing zoning provisions regarding multi-family dwellings; discusses the Attorney General's standard of review of zoning

[1] We issued our decision on Articles 4 and 21 on July 27, 2023.

by-laws under G.L. c. 40, § 32; and then explains why, governed as we are by that standard, we disapprove Article 22.

I. Article 22 and Existing Zoning Provisions Impacting Multi-Family Dwellings

A. Moratorium

Under Article 22, the Town voted to amend the zoning by-law, Article 4 Special Regulations, by adding a new Section 53, "Temporary Moratorium on Multi-Family Dwelling Units." The by-law seeks to impose a moratorium on any permits for new multi-family units through November 17, 2024, as follows:

> Section 53 Temporary Moratorium on Multi-Family Dwelling Units
>
> **53.1 Purpose.** In recent years, the preponderance, rate and volume of multi-family residential permitting and construction within the Town of Millbury have proceeded at levels that substantially vary from the community's prior experience. These changes to local development patterns may potentially have an adverse or unanticipated effect on community character and existing neighborhoods. While the Town of Millbury Zoning Bylaws does not contain sections which specifically address the creation of multi-family dwellings, there is a community need to establish thoughtful criteria for consideration and approval of multi-family dwelling units within neighborhood contexts and within downtown Millbury. In order for the Town to undertake comprehensive planning to formulate and adopt such criteria under zoning, the Town intends to adopt a temporary moratorium on the consideration and approval of multi-family proposals under the Zoning Bylaws.
> **53.2 Definitions.** For the purposes of this section, "Multi-Family Dwelling" shall be defined as "a building with 3 or more dwelling units or 2 or more buildings on the same lot with more than 1 residential dwelling unit in each building."
> **53.3 Moratorium.** Notwithstanding any other provision in the Zoning Bylaw to the contrary, no special permit or site plan review approval for multi-family housing, may be issued until after November 17, 2024. The purpose of this temporary moratorium is to allow sufficient time to engage in a planning process to address the effects of such structures and uses in the Town and to enact bylaws in a manner consistent with sound land use planning goals and objectives.

B. Existing By-law Provisions on Multi-Family Dwellings

The Town's zoning by-law in effect as of May 2023 includes extensive regulations on multi-family dwellings. Section 12. 4 "Site Plan Review," applies to multi-family dwellings (and other listed uses) as follows:

12.41 Applicability. The site plan review provisions shall apply to the following types of structures and uses:

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(b) Any new construction of a multi-family dwelling or expansion, renovation or change of use of an existing building or structure in any district where such construction, expansion, renovation, or change of use will result in the creation of one or more multi-family dwelling units.

Section 12.4

The requirements for site plan review applications are extensive, including the filing of the following impact statements: Traffic impact assessment (Section 12.44(f)(1); Environmental Impact Assessment (Section 12.44(f)(2)); Fiscal Impact Assessment (Section 12.44(f)(3)); and Historic Impact (Section 12.44(f)(3). [2]

The by-law also imposes a special permit requirement on multi-family uses in certain districts. The by-law details that multi-family dwellings are allowed by special permit in a Residential I and Residential II district "provided that it is serviced by public sewerage and public water." Section 22.21 and Section 22.22. The use of "multifamily addition or renovation to an existing structure" is allowed by special permit in a Residential III district. Section 22.23. The by-law also allows multi-family dwellings in a Suburban District by special permit and with special lot size requirements:

23.2 In a Suburban District, the following principal uses are permitted if granted a Special Permit for an exception by the special permit granting authority:
• Multifamily dwelling, provided that it is serviced by public sewerage and public water, and provided that access from a major street as herein defined does not require use of a minor street substantially developed for single-family homes. In a Suburban Zone for dwelling units in excess of one, increase the minimum lot area requirement by 10,000 s.f. per additional dwelling unit, plus 5,000 sf per additional bedroom.

Section 23.2. The by-law also allows multi-family dwellings by special permit in the Business I district. Section 25.21.

The Town has created three special districts where multi-family dwellings are allowed by special permit: the Bramanville Village District (Section 24); the Adaptive Reuse Overlay District (Section 28); and the Route 146 Highway Corridor Overlay District (Section 48).

The zoning by-law includes "Use, Dimensional and Parking Requirements" that govern

[2] We encourage the Town to consult with Town Counsel regarding the application of these site plan review requirements to uses allowed as of right. For uses allowed as-of-right, site plan review is limited to the regulation of the use rather than its prohibition. Y.D. Dugout, Inc. v. Bd. of Appeals of Canton, 357 Mass. 25, 31 (1970).

multi-family dwellings (including other uses). Section 28.7 (3)(a). And the Town has imposed "Special Density Provisions" on multi-family dwellings in the Business I District. Section 32.8.

II. Attorney General's Standard of Review of Zoning By-laws

Our review of Article 22 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 local and State provisions before the local regulation has been held invalid." Bloom v. Worcester, 363 Mass. 136, 154 (1973).

Article 22, 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). "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.'" Id. at 51 (quoting Crall v. City of Leominster, 362 Mass. 95, 101 (1972)). 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. Municipal Authority to Adopt a Temporary Moratorium

As a general matter, the Town has the authority to "impose reasonable time limitations on development, at least where those restrictions are temporary and adopted to provide controlled development while the municipality engages in comprehensive planning studies." Sturges v. Chilmark, 380 Mass. 246, 252-253 (1980). Such a temporary moratorium is within the Town's zoning power where there is a need for "study, reflection and decision on a subject matter of [some] complexity..." W.R. Grace v. Cambridge City Council, 56 Mass. App. Ct. 559, 569 (2002) (City's temporary moratorium on building permits in two districts was within city's authority to zone for public purposes).

However, in Zuckerman v. Hadley, 442 Mass. 511, 520-521 (2004) the Supreme Judicial Court articulated clear limits on the municipal power to adopt a moratorium: "Except when used to give communities breathing room for periods reasonably necessary for the purposes of growth

planning generally, or resource problem solving specifically, as determined by the specific circumstances of each case, such [moratorium] zoning ordinances do not serve a permissible public purpose, and are therefore unconstitutional." Id., 442 Mass. at 520-521 (citing Sturges, 380 Mass. at 257 (1980)). The Zuckerman court rejected Hadley's assertion that it needed a permanent cap on the number of building permits because the pressures of growth posed potential detrimental effects on the town's finances and character. Id. at 518-519. "Neither the desire for better fiscal management nor the revenue-raising limitations imposed by Proposition 2 1/2, G.L. c. 59, § 21C, is a proper basis on which to adopt a zoning ordinance intended to limit growth or the rate of growth in a particular town for the indefinite future." Id. at 520, citing 122 Main St. Corp. v. Brockton, 323 Mass. 646, 650 (1949) ("not within the scope of [zoning] to enact zoning regulations for the purpose of assisting a municipality ... to inflate its taxable revenue"); Simon v. Needham, 311 Mass. 560, 566 (1942) ("zoning by-law cannot be used primarily as a device to maintain a low tax rate"). Although the rate-of-development by-law at issue in Zuckerman was for an unlimited duration, the court made clear that even a temporary moratorium must be limited to only that period of time reasonably necessary to accomplish a legitimate planning process. "Where the needs of a town to plan for an aspect of growth prove to exceed the time limits of a bylaw, the town may extend the restriction for such limited time as is reasonably necessary to effect its specific purpose." Id. at n. 16.

IV. Analysis of Article 22's Temporary Moratorium

A. The Moratorium is Not Grounded in a Legitimate Planning Process

Applying these principles to the proposed building moratorium in Article 22, we determine that the moratorium does not reflect a legitimate planning process. We cannot conclude that the moratorium could be considered reasonable under the Zuckerman standard because it does not appear to be tied to a legitimate planning purpose.

Article 22 represents that the existing zoning by-law did not "contain sections which specifically address the creation of multi-family dwellings," and that a moratorium is needed "to undertake comprehensive planning to formulate and adopt such criteria under zoning." Article 22. However, the existing zoning by-law extensively addresses multi-family dwellings including where they can be located and under what requirements. See supra, pp. 2-4. The stated need to fill the gaps in the existing zoning by-law thus cannot serve as a legitimate planning purpose for the moratorium.

The other stated need for the moratorium, "adverse or unanticipated effect on community character and existing neighborhoods" due to a recent increase in multi-family dwelling unit construction, also does not qualify as a legitimate planning purpose. We recognize the Town's concerns about the municipal services and fiscal impact of multi-family developments. However, the "fiscal constraints" argument was soundly rejected by the Zuckerman court: "Neither the desire for better fiscal management nor the revenue-raising limitations imposed by Proposition 2 1/2, G.L. c. 59, § 21C, is a proper basis on which to adopt a zoning ordinance intended to limit growth or the rate of growth in a particular town for the indefinite future." Zuckerman, 442 Mass. at 520. Put simply, the Sturges and Zuckerman holdings establish that a building moratorium passes constitutional muster only when it is used for a legitimate planning process for a reasonable

time period, and not when it is used as a tool to stop growth per se. See Zuckerman, 442 Mass. at 519-520 ("Through zoning bylaws, a town may allow itself breathing room to plan for the channeling of normal growth; it may not turn that breathing room into a choke hold against further growth."); see also Beck v. Raymond, 118 N.H. 793, 801 (1978) ("Prevent[ing] the entrance of newcomers in order to avoid burdens upon the public services and facilities ... is not a valid public purpose.")

In reaching this decision we are also guided by recent Land Court decisions analyzing whether a municipality may deny a special permit for multi-family housing based on fiscal concerns. In Bevilacqua Co. v. Lundberg, No. 19 MISC 000516 (HPS), 2020 WL 6439581, at *8-9 (Mass. Land Ct. Nov. 2, 2020), judgment entered, No. 19 MISC 000516 (HPS), 2020 WL 6441322 (Mass. Land Ct. Nov. 2, 2020) the court ruled that the Gloucester City Council's denial of a special permit to construct an eight-unit multi-family building based on the potential fiscal impact of the proposed development on the Gloucester public schools was "legally untenable." Id. at *9. The Land Court explained that because the right to a public education is mandated and guaranteed by the Massachusetts Constitution, (see McDuffy v. Secretary of the Executive Office of Educ., 415 Mass. 545, 621 (1993) and Hancock v. Comm'r of Education, 443 Mass. 428, 430 (2005)), "[a denial of] a special permit to build housing because the occupants of that housing might include children who will attend public schools is [a denial of the children's] constitutional right under the Massachusetts Constitution to a public education." Id. at *8 (citing McDuffy and Hancock). "Therefore, notwithstanding the fiscal impact to a municipality from the construction of housing that may result from the obligation to educate children in the public schools, fiscal impact, as a reason for denying permits to construct housing, must give way when it runs afoul of the constitutional obligation of Massachusetts municipalities to provide a public education to all children." Id. at *9. [3]

Similarly, in 160 Moulton Drive LLC v. Shaffer, No. 18 MISC 000688 (RBF), 2020 WL 7319366, at *13-15 (Mass. Land Ct. Dec. 11, 2020), judgment entered, No. 18 MISC 000688 (RBF), 2020 WL 7324778 (Mass. Land Ct. Dec. 11, 2020), the court rejected a town's argument that the financial impact of educating the number of school-aged children projected to live in a set

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[3] The Bevilacqua decision also raises, but does not resolve, the question whether consideration of fiscal impacts from increase in demands on other essential public services is similarly unlawful in the context of multi-family housing:

> Generally, a municipality may not condition the availability of fundamental public services, such as fire protection, on the ability of any particular member of the public to pay taxes sufficient to support those services. Emerson College v. City of Boston, 391 Mass. 415 (1984) (city may not charge "augmented fire services availability" fee for fire protection for properties requiring additional protection). That prohibition against denying members of the public the right to fundamental public services based on ability to pay is especially applicable when it comes to the right to a public education mandated and guaranteed by the Massachusetts Constitution.

Id. at *8.

of apartments would be greater than the increased tax revenue, thus making the apartment use "substantially more detrimental" (in the language of the applicable by-law) than the existing restaurant use. As the Land Court made clear, "[t]he Town cannot deny a permit on the grounds that its own property tax scheme is insufficient to provide for the needs of its inhabitants. Whether the Town has enough funds to provide public education for its school-aged children is simply not a matter for the Board to consider in reviewing special permit applications." Id. at *14 (citing Bevilacqua at *8-9). [4]

B. The Moratorium Must Be Analyzed in the Context of G.L. c. 40A, § 3A, "Multi-Family Zoning as-of-right in MBTA Communities."

We are also guided in this decision by the Legislature's directive to increase multi-family housing units as reflected in G.L. c. 40A, § 3A, "Multi-family zoning as-of-right in MBTA communities." Section 3A requires that MBTA Communities (of which Millbury is one) "shall have a zoning ordinance or by-law that provides for at least 1 district of reasonable size in which multi-family housing is permitted as of right; provided, however, that such multi-family housing shall be without age restrictions and shall be suitable for families with children." Id. It is true that the statute does not require MBTA Communities to build multi-family housing; it requires only that they zone for multi-family housing. Even so, the statute reflects the legislative purpose of reasonable access to housing by requiring communities to allow for multi-family housing as of right.[5]

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[4] The court in 160 Moulton Drive LLC appears to share the Bevilacqua court's question of whether increased demand for *any* essential public service is a lawful consideration when reviewing a special permit for multi-family housing:

> Denial of a special permit on the grounds that increased tax revenue would not support the education of the children living therein is tantamount to conditioning the availability of public services on the ability of the residents to pay for them, which I find to be unreasonable and arbitrary. See Emerson College v. City of Boston, 391 Mass. 415 (1984).

Id. at *14.

[5] Section 3A was adopted in the context of a housing crisis that is urgent. The Commonwealth's housing shortage now affects residents at almost *all* income levels. Editorial, *A Hundred Years of Choking Housing Growth Catches Up with Massachusetts*, Bos. Globe, April 10, 2023. As the Department of Housing and Community Development (DHCD, now the Executive Office of Housing and Livable Communities) has recognized, "Massachusetts has among the highest, and fastest growing, home prices and rents of any state in the nation. Rising costs have dramatically increased financial pressures on low- and middle-income families, forcing them to sacrifice other priorities in order to pay housing costs."
https://www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities#why-is-multi-family-zoning-near-transit-and-in-neighboring-communities-important? (Last visited May 25, 2023).

This legislative purpose could not be served if a municipality could stop the construction of multi-family housing, for if one municipality could do so, we see no principled basis on which every other municipality could not do the same. The question is not whether a moratorium in Millbury alone would make it impossible to increase the number of housing units within the MBTA Communities. The question instead is whether the legislative purpose of reasonable access to housing could be achieved if every municipality put a stop to new construction of multi-family housing projects. *Cf.* St. George Greek Orthodox Cathedral of Western Mass., Inc. v. Fire Department of Springfield, 462 Mass. 120, 130 (2012) (invalidating Springfield ordinance where, "[i]f all municipalities in the Commonwealth were allowed to enact similarly restrictive ordinances and bylaws," legislative purpose would be frustrated); Connors, 430 Mass. at 41 (examining whether legislative purpose would be served "if each [governmental unit] could" depart from state law, as City of Boston had attempted). The answer to that question is clearly "no." In a very practical sense, one of the clearly discernible purposes of Section 3A could not be achieved in the face of municipalities' total ban of new construction for multi-family housing, even for a limited time period. [6]

The Zuckerman court itself recognized the wider negative impact of one municipality adopting a land-use growth restriction. The court viewed Hadley's rate-of-growth by-law, which limited the number of building permits that could be issued each year for single-family homes, as pushing off onto other municipalities its burden of accommodating new residents. Id. at 519-20. The Court explained that "[d]espite the perceived benefits that enforced isolation may bring to a Town facing a new wave of permanent home seekers, it does not serve the general welfare of the Commonwealth to permit one particular Town to deflect that wave onto its neighbors." Id. at 519.

VI. Conclusion

Because the eighteen-month moratorium on new multi-family dwellings adopted under Article 22 has no presently discernible legitimate planning purpose we disapprove it. Contrary to the representations made in Article 22, the Town has extensively planned for multi-family dwellings in its existing zoning by-law, and courts have rejected the notion that a fear of fiscal impacts from multi-family dwellings can qualify as a legitimate planning need for a moratorium. Based on the specific circumstances presented here, there appears to be no current legitimate zoning purpose for the Town's proposed ban on multi-family housing through November 17, 2024, especially considering the legislative directive in G.L. c. 40A, § 3A that MBTA Communities,

[6] We recognize that, pursuant to the DHCD/EOHLC Compliance Guidelines, Millbury's deadline for adopting a compliant zone is December 31, 2024, shortly after the proposed moratorium was scheduled to expire. See "Compliance Guidelines for Multi-Family Zoning Districts Under Section 3A of the Zoning Act," https://www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities#section-3a-guidelines (last visited November 10, 2023) An argument could be made that the Section 3A requirements and the DHCD/EOHLC Compliance Guidelines change the landscape such that a town would need to start a completely new planning process. However, the Town here did not cite the new requirements of Section 3A as a basis for its proposed moratorium, nor does the factual record support a conclusion that the moratorium was deemed necessary to facilitate the planning needed for Section 3A compliance. In any event, any such moratorium citing the new requirements of Section 3A must still meet the strict requirements of the Zuckerman test.

including Millbury, must allow for multi-family housing as of right in at least one zoning district.

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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A True Copy Attest: Jayne Marie Davolio
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November 20, 2023