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September 29, 2023

Amanda J. Cannon, Town Clerk
Town of Lancaster
701 Main Street
Lancaster, MA 01523

Re: Lancaster Special Town Meeting of November 14, 2022 – Case # 10850
Warrant Articles # 3, 5, 6, and 7 (Zoning) [1]

Supplemental Decision

Dear Ms. Cannon:

Article 3 – Under Article 3 the Town voted to amend its zoning by-laws to add a new Article XIX, "North Lancaster Smart Growth Overlay District." We approve Article 3, and the related map amendment. We will return the approved map to you by regular mail.

In this supplemental decision we describe the by-law amendments; discuss the Attorney General's limited standard of review of town by-laws under G.L. c. 40, § 32; and then explain why, governed as we are by that standard, we approve Article 3.

I. Summary of Article 3

A. Article 3's Substantive Provisions

The new Article XIX, "North Lancaster Smart Growth Overlay District," encourages smart growth in accordance with G.L. c. 40R to provide more housing opportunities through mixed-use developments. The new Article XIX was adopted by a simple majority vote of Town Meeting. General Laws Chapter 40R establishes the procedures a municipality must follow to establish and

[1] In a letter issued to the Town on March 20, 2023 we placed Articles 3, 5, 6, and 7 on "Hold" pending receipt of all the required information under G.L. c. 40, § 32, and c. 40A, § 5. On May 23, 2023, we received a completed submission and notified the Town of our new 90-day deadline (August 21, 2023). In a decision issued on August 18, 2023, we approved Articles 5 and 6, placed Article 3 on "299 hold" due to a procedural defect in the planning board hearing notice pursuant to G.L. c. 40A, § 5, and extended our deadline for a decision on Article 7 for sixty days until October 20, 2023.

amend a Smart Growth Zoning District, including allowing such by-laws to be adopted by a simple majority vote. We offer comments on Article 3 regarding why Article 3 qualified for the simple majority vote authorized by the amendments to G.L. c. 40A, § 5 and c. 40R, § 3. We also offer comments regarding the exemption for temporary and political signs located within the development project.

B. Article 3's Procedural History

General Laws Chapter 40A, Section 5 requires a properly noticed Planning Board hearing for a town to adopt zoning by-law amendments such as the one proposed in Article 3. Here the Town conducted its Planning Board hearing on Article 3 on June 8, 2022. The notices for the hearing were properly posted in the Town Hall and published twice in a newspaper of general circulation as required by Section 5. However, copies of the notice were not sent to the Department of Housing and Community Development (now known as the Executive Office of Housing and Livable Communities (EOHLC)), the regional planning agency, and to the planning board of each abutting city and town ("Government Entities"), as required by G.L. c. 40A, § 5.

In instances where a town does not provide timely notice of the Planning Board hearing to the Government Entities, the statute authorizes the town to obtain waivers of notice from the Government Entities. See G.L. c. 40A, § 5. After the November 14, 2022 Special Town Meeting Lancaster obtained waivers of notice from all the Government Entities.

On January 9, 2023, the Town Clerk submitted the by-laws adopted at the November 14, 2022 Special Town Meeting to this Office. However, because not all the required information was submitted to this Office, we placed the submission on "hold." On August 18, 2023, we elected to proceed under the provisions of G.L. c. 40 § 32 (as amended by Chapter 299 of the Acts of 2000) (Chapter 299). Chapter 299 allows the Attorney General to direct the Town Clerk to post and publish a notice of the defect and allows for objections or claims to be filed regarding the procedural defect. [2]

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[2] General Laws Chapter 40, Section 32, ¶ 2 provides in relevant part as follows:

> Notwithstanding the provisions of the preceding paragraph, if the attorney general finds there to be any defect in the procedure of adoption or amendment of any zoning by-law relating to form or content of the notice of the planning board hearing prescribed in section 5 of chapter 40A, or to the manner or dates on which said notice is mailed, posted or published as required by said section 5, then instead of disapproving the by-law or amendment because of any such defect, the attorney general may proceed under the provisions of this paragraph. If the attorney general so elects, written notice shall be sent to the town clerk within a reasonable time setting forth with specificity the procedural defect or defects found, including a form of notice thereof . . . The town clerk shall forthwith post the notice in a conspicuous place in the town hall for a period of not less than 14 days, and shall publish it once in a newspaper of general circulation in the town. The notice shall state that any resident, the owner of any real property in the town, or any other party entitled to notice of the planning board hearing, who claims that any such defect was misleading or was otherwise prejudicial may, within 21 days of the publication,

On September 18, 2023, the Town Clerk certified that the notice of defect was posted and published in accordance with the provisions of Chapter 299 with a publication date of August 25, 2023 and certified no claims were filed with the Town Clerk. However, on September 25, 2023, the Town Clerk filed a corrected certification with our Office stating that the correct publication date was September 1, 2023 (not August 25, 2023 as previously certified) and certifying that a claim had been filed within 21 days of the September 1, 2023 publication date from Mr. Russell Williston. As required by Chapter 299, the Town Clerk submitted a copy of the letter to this Office. Mr. Williston's letter includes statements contending that the notice defect – failure to mail notice to the required Governmental Entities, was misleading or otherwise prejudicial.

On September 28, 2023, this Office approved Article 3 with a comment that no claims had been filed pursuant to Chapter 299. However, based on the corrected certification from the Town Clerk, we now issue this supplemental decision acknowledging the filing of Mr. Williston's letter, and explaining why we have determined that Mr. Williston's letter does not qualify as a valid Chapter 299 objection or claim and therefore, we approve Article 3.

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

Our review of Article 3 is governed by G.L. c. 40, § 32. Under 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.") "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 3, 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

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> file with the town clerk a written notice so stating and setting forth the reasons supporting that claim. Forthwith after the expiration of said 21 days, the town clerk shall submit to the attorney general either (a) a certificate stating that no claim was filed within the 21-day period, or (b) a certificate stating that one or more claims were filed together with copies thereof. . . If no claim was made, the attorney general may waive any such defect; but if any claim is made then the attorney general may not waive any such defect. . . .

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. Analysis of Article 3's Consistency with State Law

The by-law amendments proposed by Article 3 pose no procedural or substantive conflict with state law, as explained below.

A. Procedural Requirements of G.L. c. 40A, § 5

As to the procedural requirements in G.L. c. 40A, § 5 and G.L. c. 40 § 32 (as amended by Chapter 299 of the Acts of 2000), we cannot conclude that Mr. Williston's letter is a "valid claim" under Chapter 299 that requires this Office to disapprove Article 3. We explain our decision in more detail below.

In his letter Mr. Williston claims that failure of the Town to send the June 8, 2022 Planning Board hearing notice to the Government Entities was misleading and prejudicial. But any claim that the failure to send notice to the Governmental Entities was misleading or prejudicial belongs to the Governmental Entities, not to Mr. Williston. And after receiving a copy of Article 3, the Government Entities here have all filed waivers of late notice and have not asserted any claim that the lack of timely mailed notice was misleading or prejudicial. Nor have they provided any comments objecting to Article 3.

Mr. Williston also claims that some of abutting cities and towns would have provided comments to the Town opposing the by-law and that this information would have affected the Planning Board's recommendation to Town Meeting or Town Meeting's vote. These claims are purely speculative, especially because the Government Entities (including the abutting cities and towns) waived their timely notice. In these circumstances we cannot determine that the Town's failure to provide timely notice of the hearing to the Government Entities was "misleading or otherwise prejudicial" as required by Chapter 299. See e.g., Hallenborg v. Town Clerk of Billerica, 360 Mass. 513, 529-530 (1971) ("amendments of zoning by-laws or ordinances ought not to set aside lightly as invalid because of trivial procedural defects in their adoption...at the behest of persons who have not shown themselves to be prejudiced significantly by the procedural deficiencies"). For these reasons, we cannot conclude that the letter filed by Mr. Williston qualifies as a valid claim under Chapter 299.

Because we have determined that the letter filed by Mr. Williston does not constitute a valid claim as required by Chapter 299, the Attorney General is authorized by Chapter 299 to waive (and does so waive) the defect pertaining to Article 3. We approve Article 3 because we conclude that Article 3 is not in conflict with state law.

B. Housing Choice and Majority Vote

Article 3 was adopted pursuant to G.L. c. 40R, which encourages "smart growth" zoning. The Town complied with all the procedural requirements in G.L. c. 40A, § 5 and c. 40R for a smart growth zoning by-law amendment, and the motion under Article 3 passed by a simple majority

vote of 509 in favor and 228 opposed. Article 3 passed by the correct quantum of vote under the amendments to G.L. c. 40A, § 5 and c. 40R, § 3, included in Chapter 358 of the Acts of 2020. Chapter 358, the "housing choice" legislation, is intended to promote housing production by making it easier for cities and towns to approve housing-supportive zoning amendments. The legislation authorizes towns to adopt certain zoning by-law amendments through a simple majority vote as opposed to the two-thirds majority vote traditionally required by G.L. c. 40A, § 5. Zoning by-law amendments that adopt a smart growth by-law in accordance with G.L. c. 40R, § 3, may be adopted by simple majority vote. (Chapter 358, Sections 19 and 27). [3] Therefore, Article 3 passed by the correct quantum of vote.

We remind the Town that by-laws adopted under Chapter 40R must be approved by this Office and by the EOHLC. While we approve Article 3, the Town must still comply with the provisions of G.L. c. 40R, § 4 by obtaining approval from EOHLC. The Town may not be eligible for financial and other incentives until it receives final approval from EOHLC. The Town should send the by-law amendments by email to the:

Executive Office of Housing and Livable Communities
100 Cambridge St, Suite 300, Boston, MA 02114
Attention: William Reyelt Principal Planner, Smart Growth Programs
william.reyelt@mass.gov

We suggest that the Town discuss any questions regarding the issues addressed above with Town Counsel. [4]

C. Section 220-97 (H) (3) (a)'s Exemption for Temporary Non-Commercial Event Signs and Political Signs Must be Applied Consistent with the First Amendment of the United States Constitution and with Article 16 of the Massachusetts Declaration of Rights

Section 220-97 imposes design standards on development projects as part of the G.L. c. 40R plan approval process. Section 220-97 (H) imposes design standards on signs within a development project and provides an exemption from its provisions for temporary signs and political signs as follows:

(3) Exemptions for temporary and distraction signs

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[3] The EOHLC has issued guidance on the recent housing choice legislation that can be accessed here:

https://www.mass.gov/info-details/housing-choice-and-mbta-communities-legislation

[4] General Laws Chapter 40R, Section 4 (b) provides that "[a]fter issuance of a letter of eligibility and upon application of the town with proof of adoption of the smart growth zoning district ordinance or by-law included in the application for a letter of eligibility, along with any amendment required by the department in the letter of eligibility, the department shall confirm its approval within 30 days of receipt of the application."

(a) Temporary posters for noncommercial events, political signs. Such signs are limited to a period of 45 days preceding and seven days after the relevant event and to not more than one, not to exceed 12 square feet, per residential premises in residential areas nor more than two, not exceeding 20 square feet each, on all other premises.

We approve Section 220-97 (H) (3) (a)'s exemption from the by-law's sign design requirements for temporary non-commercial event signs and political signs. However, the Town should be aware of the Supreme Court decision in Reed v. Gilbert, Arizona, 135 S. Ct. 2218 (2015), which held that the Town's content-based sign regulation was unconstitutional because it was not narrowly tailored to serve a compelling state interest.

The Town of Gilbert, Arizona adopted a comprehensive sign ordinance that required a sign permit for outdoor signs and exempted many types of signs from the permit requirement including political signs and temporary directional signs relating to a qualifying event. [5] However, such signs were subject to specific restrictions, including durational and size limitations. The Supreme Court held that Gilbert's sign ordinance was content based on its face because the restrictions placed on signs were based entirely on the communicative content of the sign. Because the sign ordinance was content based, the Court analyzed it using strict scrutiny.

Strict scrutiny requires the Court to determine whether: (1) the municipality demonstrated a compelling governmental interest and (2) whether the restriction is narrowly tailored to achieve that governmental interest. Id. at 2231. While the Court assumed for the sake of argument that the Town had compelling governmental interests in regulating signs, it found that the sign ordinance's distinctions were under-inclusive and therefore the ordinance was not narrowly tailored to further a compelling governmental interest and failed strict scrutiny review. Id. at 2232.

Section 220-97 (H) (3) (a) exempts temporary signs for non-commercial events and political signs from Section 220-97 (H)'s design requirements but imposes durational and size limitations on such signs. Based upon our standard of review, we cannot conclude that the Section 220-97 (H) (3) (a)'s exemption would be construed as content-based and subject to the strict scrutiny standard. And even if we were to conclude that Section 220-97 (H) (3) (a)'s exemption is content-based and thus subject to strict scrutiny, we do not have the factual record necessary to determine whether the amendments are narrowly tailored to serve a compelling municipal interest. Therefore, there is no basis to disapprove Section 220-97 (H) (3) (a)'s exemption for temporary non-commercial event signs and political signs. However, the Town may wish to discuss the Reed decision with Town Counsel. [6]

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[5] "Qualifying event" was defined in the ordinance as any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." Id. at 2225.

[6] The Town's existing zoning sign by-law includes the same exemption for temporary non-commercial event signs and political signs. See Section 220-30. The Town may wish to discuss this section with Town Counsel as well.

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 Ivria Glass Fried