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June 9, 2023

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



**Re: Lancaster Special Town Meeting of January 28, 2023 -- Case # 10857
Warrant Article # 1 (Zoning)**

Dear Ms. Cannon:

Article 1 – Under Article 1, the Town voted to rezone certain property from the Residential District to the Enterprise District. After complying with the requirements of G.L. c. 40A, § 5, Town Meeting passed Article 1 by a vote of 674 in favor to 275 opposed. As explained in more detail below, we approve Article 1, and the related map amendment, from the January 28, 2023 Lancaster Special Town Meeting. See Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986) (requiring inconsistency with state law or the constitution for the Attorney General to disapprove a by-law). We will return the approved map to you by regular mail.

During the course of our review, we received several oppositions from citizens of the Town urging us to disapprove Article 1 on various grounds as well as a communication from Town Counsel urging our approval of Article 1. We appreciate these communications as they have aided our review. As explained below, the arguments advanced in the oppositions do not provide us with grounds to disapprove Article 1 under our limited standard of review. In approving Article 1, we note that our approval in no way implies agreement or disagreement with any policy views that may have led to the passage 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 law, not on any policy views she may have on the subject matter or wisdom of the by-law. Amherst, 398 Mass. at 795-96, 798-99.

This decision describes the by-law amendment; discusses the Attorney General's limited standard of review of town by-laws under G.L. c. 40, § 32; and then explains why, governed as we are by that standard, we approve Article 1.

I. Summary of Article 1

Under Article 1, the Town voted as follows:

To see if the Town will vote to amend the Official Zoning Map of the Town of Lancaster, 220 Attachment 2, by rezoning a portion of the parcel identified as Assessor's Map 8, Lot 45 of Lancaster, located within the Residential District, to the Enterprise District, such that the entirety of said parcel is located within the Enterprise District, and as further shown on a plan entitled "Proposed Re-Zoning Plan, Lancaster, MA," dated 8/31/22 and on file with the Town Clerk.

The certified vote also included a thumbnail picture of the map amendment that is reproduced below:¹



The counted vote for Article 1 was 674 in favor; 275 opposed and 1 abstention. The Moderator declared that the vote under Article 1 passed by a 2/3 majority (70.9%).

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

Our review of Article 1 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

¹ Although difficult to read on the thumbnail version of the map shown above, the certified map for Article 1 submitted by the Town shows that the large portion of the property in green is the proposed Enterprise re-zoning; the portion of the property in orange is the Enterprise zoning district; and the portion of the property in pink is the EZ-A Retail Sub-District.

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). “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). “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. We Approve Article 1 Because the Town Complied with the Procedural Requirements of G.L. c. 40A, § 5 and the Rezoning is Within the Town’s Zoning Power

A. The Town Complied with G.L. c. 40A, § 5

General Law Chapter 40A, Section 5 establishes the required procedure that the Town must follow when amending its zoning by-laws, as follows:

No zoning...by-law or amendment thereto shall be adopted until after the planning board in a...town has...held a public hearing thereon...at which interested persons shall be given an opportunity to be heard....Notice of the time and place of such hearing, of the subject matter, sufficient for identification, and of the place where texts and maps thereof may be inspected shall be published in a newspaper of general circulation in the...town once in each of two successive weeks, the first publication to be not less than fourteen days before the day of said hearing, and by posting such notice in a conspicuous place in the...town hall for a period of not less than fourteen days before the day of said hearing. Notice of said hearing shall also be sent by mail, postage prepaid to the department of housing and community development, the regional planning agency, if any, and to the planning board

of each abutting city and town.

As part of the by-law submission process under G.L. c. 40, § 32, the Town must submit to the Attorney General “a certified copy of such by-law with a request for its approval, a statement clearly explaining the proposed by-law, including maps and plans if necessary, and adequate proof that all of the procedural requirements for the adoption of such by-law have been complied with.” As part of this requirement, the Town submitted Form 7, including the required attachments, demonstrating that the Town complied with the procedural requirements of G.L. c. 40A, § 5 prior to the Town Meeting vote under Article 1.

According to Form 7, the Planning Board held a hearing on Article 1 on December 12, 2022 and provided notice of its hearing by publication and posting, all as required by G.L. c. 40A, § 5. Notice of the Planning Board hearing was first published in the newspaper on November 25, 2022 (17 days before the date of the hearing) and was published for a second time the next succeeding week on December 2, 2022. Notice of the Planning Board hearing was posted on November 22, 2022 (20 days before the hearing). The Town Clerk also certified that notice of the Planning Board’s hearing was sent to the Department of Housing and Community Development,² the Town’s Regional Planning Agency, and to the planning boards of each abutting city and town, on November 23, 2022 (19 days before the hearing), as required by G.L. c. 40A, § 5. The published and posted notices of the Planning Board’s hearing sufficiently identified the zoning proposal to be discussed at the hearing as follows:

The...Planning Board will hold a public hearing...for a requested Amendment to the Zoning Map pursuant to Section 220-58 of the Lancaster Zoning Bylaws. The petition seeks to change the zoning district of certain land to be include[d] within the Enterprise District. The land subject to the proposed zone change is described as follows:

A portion of Assessors’ Map 8, Lot 45 currently situated in the Residential District and bounded as follows:

Easterly By another portion of Assessors’ Map 8, Lot 45 situated in the Enterprise District and by the westerly borders of Assessors’ Map 9, Lot 4, and Assessors’ map 13, Lots 5 and 10;

Southerly: By the northerly border of Assessors’ Map 13, Lot 10;

Westerly: By the northerly border of Assessors’ Map 13, Lot 10 and the easterly border of Assessor’s Map 13, Lot 1;

Northerly: By the southerly borders of Assessors’ Map 8, Lots 39, 39A, 37H and 37F; the easterly boarders of Assessors’ Map 8, Lots 40E, 40D and 40C and the southerly borders of Assessor’s Map 8, lots 43 and 44.

² The Department of Housing and Community Development is now called the Executive Office of Housing and Livable Communities. See Chapter 7 of the Acts of 2023.

Being the same land shown as “proposed Enterprise Zone” and “[‘]100’ No Build Buffer” on a sketch entitled “Proposed Re-Zoning Plan, Lancaster, MA” which also shows the land’s northern boundary as “New Proposed Enterprise District Zoning Line” on file with the Office of Community Development and Planning, 701 Main Street, Lancaster, MA, 978-365-3326 Ext. 1081.

The Planning Board’s required notices sufficiently communicated that it intended to hold a hearing on a proposed zoning amendment seeking to rezone “certain land to be include[d] within the Enterprise District” and provided that the land to be rezoned was a “portion of Assessors’ Map 8, Lot 45, currently situated in the Residential District” and that the land is shown on a sketch entitled “Proposed Re-Zoning Plan, Lancaster, MA” on file in the Town’s Office of Community Development and Planning.” The Planning Board held a hearing on December 12, 2022 on the proposed rezoning, and following that hearing, it “unanimously voted for a positive determination on this article and recommends that Town Meeting approve it.” Based on the foregoing, we find that the Town complied with the procedural requirements of G.L. c. 40A, § 5.

B. Article 1 is Within the Town’s Zoning Power

As part of the Town’s bylaw submission, the Town provided us with a copy of the Planning Board’s report to Town Meeting where the Planning Board reported that “rezoning this land is in the best interests of the Town and its residents” and after its analysis the Planning Board “unanimously voted for a positive determination of this article and recommends that Town Meeting approve it.” See Planning Board Report entitled “Town of Lancaster Planning Board, Approved on: December 12, 2022; Article # 1 Proposed Amendment to Town of Lancaster Zoning Map (Frank Streeter, Chair, Lancaster Planning Board)” (hereinafter “Planning Board Report”). The Planning Board’s Report provided a summary of the Article as well as an analysis of the merits and concerns related to Article 1. As explained by the Planning Board, the Article “proposes that the Town change its existing Zoning Map to rezone approximately 120 acres of land from the Residential zoning district to the adjacent Enterprise Zone (EZ) zoning district” and that the land to be rezoned “is part of Lancaster Assessor’s Map 8, Lot 45, which lies to the west of Lunenburg Road behind the ‘Dunkin’s’ restaurant and extends nearly to Interstate I-190.”

As required by G.L. c. 40A, 5, the Planning Board held a hearing on December 12, 2022 regarding Article 1. At the hearing, the Planning Board heard a presentation by the Town Administrator, accepted residents’ comments and reviewed a Concept Plan dated November 22, 2022. Although members of the Planning Board expressed some concerns about the zoning change, the Planning Board concluded that “the overall benefits would be positive for the Town.” The Planning Board’s Report articulates that the land to be rezoned “is an isolated residential district that would be better suited to commercial use with appropriate buffer zones to shield it from adjacent residentially zoned land” and that the land “has been identified as being for commercial development in Town plans for well over 20 years including being part of the Town’s existing Integrated Planning Overlay District (IPOD)...which permits large scale commercial development.” In addition, the Planning Board’s analysis considered that because the site is an existing earth removal site this “past use makes the site better for development than

locating new development in a presently forested area or on another undisturbed site.” In addition, the Planning Board Report noted that for the portion of the property that is already zoned in the EZ district, the site could accommodate approximately 1.2 million square feet of commercial space as presently zoned and therefore “it is highly likely that significant commercial development of some sort will occur on this site in the future...” The Planning Board Report further concluded that a rezoning of the land “should lead to increased commercial development, which will help to diversify the Town’s tax base, improve financial stability and potentially moderate the property tax burden on residents over time.”

Town Meeting considered Article 1 at a Special Town Meeting held on January 28, 2023 and after such consideration, Town Meeting voted to approve Article 1 by a vote of 674 in favor and 275 opposed, resulting in Article 1 passing with 70.9% of the vote. In reviewing Article 1, we are mindful that “[z]oning 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). 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). A zoning by-law must be approved unless “the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals or general welfare.” Johnson v. Town of Edgartown, 425 Mass. 117, 121 (1997).

Based upon the documents submitted to us by the Town pursuant to G.L. c. 40, 32, and our standard of review, we cannot conclude that the Town’s vote under Article 1 lacks a legitimate planning purpose, or is “arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals, or general welfare.” Id. On the contrary, the documents submitted by the Town reflect that Article 1 was thoughtfully considered by the Planning Board and subsequently recommended to Town Meeting with a “positive determination” and that Town Meeting voted to approve the rezoning by a vote in excess of the two-thirds vote required by G.L. c. 40A, § 5. Because Article 1 is consistent with state law, we approve it. Amherst, 398 Mass. at 795-96 (requiring inconsistency with state law or the constitution for the Attorney General to disapprove a by-law).

IV. The Arguments Raised in the Oppositions do not Furnish the Attorney General with Grounds to Disapprove the Rezoning

A. Assertion that Article 1 is a Repetitive Petition Barred by G.L. c. 40A, § 5

During our review of Article 1, we received oppositions contending that Article 1 is a “repetitive petition for a zoning change that was defeated at a Special Town Meeting in Lancaster on November 14, 2022” and therefore G.L. c. 40A, § 5 bars the Town from reconsidering the article for two years. See January 25, 2023 letter from Ms. Ogilvie to Attorney General Campbell.³ We have considered these assertions but determine that in the circumstances

³ See also February 15, 2023 letter and email from Mr. Zidek to AAG Caprioli contending that Article 1 “is an exact duplicate of a zoning amendment that was just defeated last November. This repetition of a duplicated, defeated zoning amendment before the two-year bar is an infraction of Massachusetts General

here, G.L. c. 40A, § 5 is not a bar to the adoption of Article 1 and thus does not provide grounds to disapprove Article 1.

General Laws Chapter 40A, Section 5 addresses the subject of repetitive zoning petitions and provides in relevant part as follows (with emphasis added):

No proposed zoning...by-law which has been unfavorably acted upon by a...town meeting shall be considered by the...town meeting within two years after the date of such unfavorable action unless the adoption of such proposed...by-law is recommended in the final report of the planning board.

Although G.L. c. 40A, § 5 limits a Town Meeting's re-consideration of a zoning amendment for two years if it was unfavorably acted upon by a prior Town Meeting, the plain wording of the statute makes it clear that this time bar *does not apply* if the adoption of the proposed by-law "is recommended in the final report of the planning board." The Town has certified on Form 7 that "within the two years prior to this town meeting, either: (1) No unfavorable action was taken on any of the above articles, or (2) the Planning Board recommended the adoption thereof." Indeed, the materials submitted by the Town show that the Planning Board recommended the adoption of Article 1 at the January 28, 2023 Special Town Meeting. See Form 7, Attachment 5; the Planning Board Report. In addition, according to documents on the Town's website as well as information provided by Town Counsel, the Planning Board also recommended the adoption of this rezone at the November 14, 2022 Special Town Meeting under Article 4.^{4,5}

Here, because "the adoption of such proposed...by-law [was] recommended in the final report of the planning board," G.L. c. 40A, § 5's two-year prohibition against reconsidering a zoning article that was unfavorably acted upon by a prior Town Meeting does not apply. See Penn v. Barnstable, 96 Mass. App. Ct. 205, 206-207; 212-213(2019) (the two-year prohibition in G.L. c. 40A, § 5 on reconsidering a failed zoning ordinance applied when the Planning Board voted four to one *not to recommend* the adoption of the zoning change and the city council thereafter failed to pass the zoning ordinance by a two-thirds vote); see also Kitty v. City of

Law Chapter 40a, Section 5."

⁴ See Planning Board's Minutes of October 6, 2022 ("Member Dickinson moves that the Board issue a positive recommendation in regard to the change to the zoning map and Mike Favreau seconds. VOTE: (5-0-0).") at: https://www.ci.lancaster.ma.us/sites/g/files/vyhlf4586/f/minutes/10-6-22_pb_minutes.pdf; see also November 14, 2022 Special Town Meeting Warrant, Article 4 ("Planning Board Recommendation: Affirmative Action) at: https://www.ci.lancaster.ma.us/sites/g/files/vyhlf4586/f/uploads/stm_warrant_11.14.22_executed2.pdf

⁵ See May 18, 2023 letter from Town Counsel Ivria G. Fried to AAG Caprioli, pg. 2, stating "Here, the Lancaster Planning Board held a hearing on the proposed amendment to Enterprise Zoning District map on October 6, 2022, after which the Planning Board recommended acceptance of the zoning map amendment. The matter was added to the November 14, 2022, Special Town Meeting warrant as Article 4." See also Id. at pg. 3, stating "the Planning Board recommended adoption of the Enterprise Zoning District map amendment in its final report before the November 14, 2022 and the January 28, 2023, Special Town Meetings."

Springfield, 343 Mass. 321, 324 1961) (holding that because the zoning change was recommended by the report of the planning board, the two year ban would “not prevent a renewed presentation of the proposed ordinance within two years” of the original vote if done in accordance with the required notice and hearing procedures of G.L. c. 40A). For this reason, this assertion does not provide the Attorney General grounds to disapprove Article 1.

B. Assertion that the Zoning Map was Misleading

During our review, we received an opposition alleging that the map amendment related to the Article was misleading. See March 8, 2023 email from Mr. Williston to the Municipal Law Unit (The article states that the rezone is shown on a plan entitled “Proposed Re-Zoning Plan, Lancaster, MA dated 8/31/2022” but “I’ve since learned that this plan does not seem to exist and the town refused to provide it prior to the hearing and meeting.”) Contrary to this assertion, the map amendment adopted under Article 1 is referenced in the by-law filing submitted to this office several times, as follows:

- Planning Board Hearing Notices state that the property to be rezoned is: “Being the same land shown as “proposed Enterprise Zone” and 100’ No Build Buffer” on a sketch entitled “Proposed Re-Zoning Plan, Lancaster, MA” which also shows the land’s northern boundary as “New Proposed Enterprise District Zoning Line” on file with the Office of Community Development and Planning...”

- Article 1 of the Warrant states: “To see if the Town will vote to amend the Official Zoning Map of the Town of Lancaster, 220 Attachment 2, by rezoning a portion of the parcel identified as Assessor’s Map 8, Lot 45 of Lancaster, located within the Residential District, to the Enterprise District, such that the entirety of said parcel is located within the Enterprise District, and as further shown on a plan entitled “Proposed Re-Zoning Plan, Lancaster. MA,” dated 8/31/22 and on file with the Town Clerk; or act in any manner relating thereto.”

- The Certified Vote for Article 1 states: “To see if the Town will vote to amend the Official Zoning Map of the Town of Lancaster, 220 Attachment 2, by rezoning a portion of the parcel identified as Assessor’s Map 8, Lot 45 of Lancaster, located within the Residential District, to the Enterprise District, such that the entirety of said parcel is located within the Enterprise District, and as further shown on a plan entitled “Proposed Re-Zoning Plan, Lancaster, MA,” dated 8/31/22 and on file with the Town Clerk; or act in any manner relating thereto.”

In addition, the Town provided this Office with a certified map entitled “Proposed Re-Zoning Plan, Lancaster, MA.” The provided certified map matches the thumbnail map included in the Warrant for Article 1 as well as the thumbnail map included in the certified vote submitted to this Office under Article 1. Based on the Attorney General’s standard of review, this assertion does not provide us with grounds to disapprove Article 1.

C. Assertions Related to Alleged Deficiencies in the Citizen Petition Process

During our review, we received oppositions urging our disapproval of Article 1 and asserting several issues related to the citizen petition process and the scheduling of Town Meeting including that: (1) the Special Town Meeting was scheduled beyond the 45-day period stated in G.L. c. 39, 10; (2) the Planning Board hearing notice states that the zoning petition is by the Board of Selectmen not a citizen petition; and (3) the Town Administrator, rather than the citizen petitioners, made a presentation regarding Article 1 at the Planning Board hearing. These assertions do not provide the Attorney General with grounds to disapprove Article 1.

In determining whether a by-law is inconsistent with the Constitution and laws of the Commonwealth, the Attorney General has available to her the materials which the Town Clerk is required to submit pursuant to G.L. c. 40, § 32:

. . . . a certified copy of such by-law with a request for its approval, a statement clearly explaining the proposed by-law, including maps and plans if necessary, and adequate proof that all of the procedural requirements for the adoption of such by-law have been complied with.

The Attorney General's review under G.L. c. 40, § 32 is limited to the text "of the proposed by-law . . . and adequate proof that all of the procedural requirements for the adoption of such by-law have been complied with." We generally interpret the phrase "procedural requirements" in G.L. c. 40, § 32 to refer primarily if not exclusively to those established by statute as basic conditions essential to the validity of Town Meeting action, rather than all possible procedural requirements (such as rules of order) that might govern the conduct of Town Meeting itself.

General Laws Chapter 40, Section 32 does not confer upon the Attorney General the plenary power to determine all issues relevant to whether the legislative process by which the Amendment was adopted violated the laws and Constitution of the Commonwealth. Moreover, not every procedural error is necessarily fatal. Therefore, we conclude that the Attorney General may not invalidate the amendment adopted under Article 1 based on assertions relating to the citizen petition process or the presentation at the Planning Board hearing. Instead, this determination is best left for a court, which, if a case were properly initiated, would be better equipped to find the facts on a fuller factual record.

D. Discriminatory Effect of Holding Special Town Meeting on a Saturday

During our review we received oppositions requesting that we disapprove Article 1 because: (1) the Town held the Special Town Meeting on a Saturday and this was "a first for Lancaster" and (2) holding Town Meeting on a Saturday was an "infringement on religious liberties" for those residents who observe the sabbath, including those of Seventh Day Adventist and Orthodox Jewish faiths. See Ogilvie letter. We acknowledge that when scheduling a Town Meeting, it may be difficult to find a date or time that is workable for everyone in the Town. However, we cannot conclude that holding Town Meeting on a Saturday provides us with grounds to disapprove the by-law. The Town's by-laws contain no day or time restrictions

governing the scheduling of Town Meeting, and therefore there is nothing in the Town's by-laws that prohibits Town Meeting from taking place on a Saturday. Moreover, there is nothing in the state law that prohibits a Town Meeting from taking place on a Saturday. In addition, G.L. c. 39, § 10 provides that the warrant for a Town Meeting will to be called "under the hands of the selectmen" and authorizes the Selectmen when calling a Town Meeting to state "the time and place of holding the meeting." For these reasons, this assertion does not provide us with grounds to disapprove Article 1.

V. Conclusion

For the reasons set forth herein, we approve Article 1, and the related map amendment.

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,

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

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cc: Town Counsels Ivria G. Fried and Christopher Heep