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December 23, 2021

Michele Bissonnette, Town Clerk
Town of Wareham
54 Marion Road
Wareham, MA 02571

Re: Wareham Annual Town Meeting of June 12, 2021 -- Case #10324
Warrant Articles # 12, 13, 15, and 26 (Zoning)
Warrant Article # 24 (General)

Dear Ms. Bissonnette:

Article 26 - Under Article 26 the Town voted to amend its zoning by-laws to add new sections regulating g the construction of affordable housing units. The new sections impose various requirements on the construction of affordable housing units so that the affordable housing units can be included in the town's Subsidized Housing Inventory (SHI). We approve Article 26 because it does not present a clear conflict with the state's affordable housing laws, including G.L. c. 40B, §§ 20-23, 760 CMR § 56.00, and the Department of Housing and Community Development's (DHCD) Guidelines for Comprehensive Permit Projects and SHI. 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).[1]

In this decision, we summarize the by-law amendments adopted under Article 26 and the Attorney General's standard of review of town by-laws and then explain why, based on our standard of review, we approve Article 26.

As with our review of all by-laws, we emphasize that our approval does not imply any agreement or disagreement with the policy views that led to the passage of the by-law. 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, 398 Mass. at 795- 96, 798-99.

[1] In a decision issued on September 27, 2021, this Office approved Articles 12, 13, 15 and 24 and extended our deadline for a decision on Article 26 for an additional 60 days until November 25, 2021. On November 24, 2021 we extended our deadline for a decision on Article 26 for an additional 30 days until December 25, 2021.

I. Summary of Article 26

Under Article 26 the town voted to amend the zoning by-laws to add a new section 830, "Local Initiative Program - Local Action Units - Affordable Housing -New Construction," and a new section 840, "Local Initiative Program - Local Action Units -Affordable Housing - Existing Properties." The purpose of the new sections 830 and 840 is to (1) allow the town's residents to have control over and benefit from the state's affordable housing requirements by allowing the residents "to use the State's minimum zoning allowances, as conditioned with this zoning by-law" and (2) to create affordable housing that will be included in the town's SHI. Subsections 831 and 841.

Section 830 authorizes single family and two-family residences to be constructed under the by-law's development standards if one hundred percent of the units are deed restricted as affordable. Subsection 832. Subsection 833 imposes development standards. including lot size, setbacks, building footprint, and water and sewer use. See subsections 833.1, 833.2, 833.3, and 833.4, respectively. As to lot size requirements, subsection 833.1 requires the property to (1) be shown on a plan approved before January 1, 1976; (2) contain at least 5,000 square feet; (3) have fifty feet of frontage; and (4) be combined in common ownership with other lots because of changes to the town's zoning by-laws. Subsection 833.1 also requires the lot to "conform with and compliment other lots and homes in the neighborhood." A property owner must file a "Local Action Unit" application with the board of selectmen that includes plans or assessor records showing the lots along with the application and inspectional service fees. If the application is approved by the board of selectmen, then the property owner can (1) sell the property; (2) develop the property and then sell it; or (3) develop the property and then rent it. Regardless of the option chosen by the property owner, the property shall be subject to specific deed restrictions as set for in subsections 833.7, "Deed Restrictions"

Section 840 authorizes the owner of a single-family residence to construct an in-law apartment or a traditional apartment subject to the requirements of section 840 if the unit is deed restricted as affordable. Subsection 842. Subsection 843 imposes development standards on the property, including lot size, setbacks, building footprint, water and sewer use, and access and egress. See subsections 843.1, 843.2, 843.3, 843.4, and 843.5, respectively. Subsection 843.6 requires in-law apartments to consist of one bedroom or less, and include a kitchen area, bathroom, and sitting area. A property owner must also file a "Local Action Unit" application with the board of selectmen.

Both sections 830 and 840 include a provision authorizing the by-law to be suspended when the town achieves its ten percent affordable housing goal. If the town falls below the ten percent threshold, then the town shall re-institute the by-law until the town achieves the ten percent threshold.

II. Attorney General's Standard of Review and General Preemption Principles

Our review of Article 26 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, in order to disapprove a by-law (or any portion thereof), the Attorney General must cite an inconsistency between the by-law and the state Constitution or laws. Id. at 796. "As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid." Bloom v. Worcester, 363 Mass. 136, 154 (1973). 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).

Because Article 26 is an amendment to the town's zoning by-laws Article 26 must be accorded deference. W.R. Grace & Co. v. Cambridge City Council, 56 Mass. App. Ct. 559, 566 (2002) ("With respect to the exercise of their powers under the Zoning Act, we accord municipalities deference as to their legislative choices and their exercise of discretion regarding zoning orders."). When reviewing zoning by-laws for consistency with the Constitution or laws of the Commonwealth, the Attorney General's standard of review is equivalent to that of a court. "[T]he proper focus of review of a zoning enactment is whether it violates State law or constitutional provisions, is arbitrary or unreasonable, or is substantially unrelated to the public health, safety or general welfare." Durand v. IDC Bellingham, LLC, 440 Mass. 45, 57 (2003). Because the adoption of a zoning by-law by the voters at Town Meeting is both the exercise of the town's police power and a legislative act, the vote carries a "strong presumption of validity." Id. at 51. "Zoning has always been treated as a local matter and much weight must be accorded to the judgment of the local legislative body, since it is familiar with local conditions." Concord v. Attorney General, 336 Mass. 17, 25 (1957) (quoting Burnham v. Board of Appeals of Gloucester, 333 Mass. 114, 117 (1955)). "If the reasonableness of a zoning bylaw is even 'fairly debatable, the judgment of the local legislative body responsible for the enactment must be sustained.'" Durand, 440 Mass. at 51 (quoting Crall v. City of Leominster, 362 Mass. 95, 101 (1972)). Nevertheless, where a zoning by-law conflicts with state or federal law or the Constitution, it is invalid. See Zuckerman v. Hadley, 442 Mass. 511, 520 (2004) (rate of development by-law of unlimited duration did not serve a permissible public purpose and was thus unconstitutional). In general, a municipality "is given broad authority to establish zoning districts regulating the use and improvement of the land within its borders." Andrews v. Amherst, 68 Mass. App. Ct. 365, 367-368 (2007). However, a municipality has no power to adopt a zoning by-law that is "inconsistent with the constitution or laws enacted by the [Legislature]..." Home Rule Amendment, Mass. Const. amend. art. 2, § 6.

During our review of Article 26 we received correspondence suggesting that they by-law may be inconsistent with state law, including G.L. c. 40A. We appreciate this input as it has informed our review of the by-law and emphasized the importance of the issues at stake. As explained in more detail below, based on our standard of review we have determined that the concerns raised in the correspondence do not provide grounds for us to disapprove Article 26. However, we strongly encourage the Town to consult closely with Town Counsel regarding the application of the by-law in light of the issues outlined below.

III. State Laws Governing the Creation of Low- or Moderate-Income Housing

General Laws Chapter 40B, Sections 20-23, commonly known as the Comprehensive Permit Law, establishes the process for granting "comprehensive permits" for the construction of subsidized low- or moderate-income housing. The purpose of comprehensive permits is to streamline the process for developing affordable housing by consolidating local permitting. Comprehensive permits are granted by local zoning boards of appeal and may supersede various local requirements and regulations, including zoning. In cities and towns where less than ten percent of the housing units is low- or moderate-income housing, the denial of a comprehensive permit application or the imposition of conditions that render a proposed development uneconomic may generally be appealed to the state Housing Appeals Committee.

In order to facilitate the construction of low or moderate-income housing, DHCD established a Local Initiative Program (LIP) that allows the state to work with municipalities and developers in order to create low- or moderate-income housing. The LIP is administered by DHCD and is designed to give cities and towns more flexibility in their efforts to provide low and moderate-income housing. Two types of housing projects are supported by the LIP: (1) Local Initiative Projects, which are developed through the comprehensive permit process authorized by M.G.L. Chapter 40B, and (2) Local Action Units (LAU), which are developed through a city or town's zoning or permit issuance process. All low- and moderate-income units developed through the LIP and meeting all of DHCD's regulatory requirements are eligible for inclusion in a city or town's SHI. The DHCD established guidelines that govern the LIP and provide guidance to local public officials, housing developers, and other interested parties. DHCD's G.L. c. 40B Guidelines, Section VI (the "LIP guidelines"), subsection C ("Local Action Units"), are available at:

https://www.mass.gov/files/documents/2017/10/10/guidecomprehensivepermit.pdf .

LAUs that meet the LIP criteria and are suitable for inclusion in the LIP may be included in the town's SHI. Local Action Units are authorized pursuant to some type of local action; for example, a local land use provision, as a condition of a variance or special permit issued by the planning board or zoning board of appeals, or as an agreement between the town and a developer to convert and rehabilitate municipal buildings into housing. Only units meeting the criteria in DHCD's Guidelines will be approved as LAUs, included in the LIP, and added to the community's SHI.

It appears that Article 26 is the town's attempt to ensure that certain affordable housing units will be included in the town's SHI. While we conclude that Article 26 is not in conflict with the state's affordable housing laws, we offer the following comments for the town to consider when it applies sections 830 and 840 to ensure its affordable units are included in the town's SHI.

IV. Comments on Article 26' Local Initiative Program- Local Action Units

As an initial matter, one of the purposes of both section 830 and 840 is to "create affordable housing units that shall be included in the town's SHI. Section 831 "Purpose" and section 841, "Purpose." However, an affordable housing unit created under a LIP must meet the DHCD's LIP

requirements and must be approved by DHCD before it is included in a town's SHI. The town may wish to amend sections 830 and 840 to make it clear that DHCD's approval is needed before any units are included in the town's SHI.

A. Comments on Section 830, Local Initiative Program – Local Action Units - Affordable Housing - New Construction"

Under section 830 the town allows the construction of single- or two-family residences subject to certain requirements in order for such dwellings to be included in the town's SHI. Our comments on section 830 are provided below.

1. Section 832 "General Requirements"

Section 832 "General Requirements," defines "Affordable" as "being able to be bought or rental [sic] by someone whose total annual household income does not exceed 80% earnings of the Area Median Income (AMI) or less, as identified by HUD's median family incomes, derived from the American Community Survey and/or the Massachusetts Department of Housing and Community Development Income guidelines." Although G.L. c. 40B, 760 CMR § 56.00 and DHCD's Guidelines do not define "Affordable" they do define "Income Eligible Household" as follows:

> "'Low or moderate income housing'", any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute, whether built or operated by any public agency or any nonprofit or limited dividend organization.

G.L. c. 40B, § 20

> Income Eligible Household – means a household of one or more persons whose maximum income does not exceed 80% of the area median income, adjusted for household size, or as otherwise established by the Department in guidelines. For homeownership programs, the Subsidizing Agency may establish asset limitations for Income Eligible Households by statute, regulations, or guideline. In the absence of such provisions, Income Eligible Households shall be subject to asset and/or other financial limitations as defined by the Department in guidelines

760 CMR § 56.02

> Income Eligible Household – means a household of one or more persons whose maximum income does not exceed 80% of AMI, or as otherwise established by these Guidelines.

Section I.A, "Definitions," of DHCD's Guidelines for G.L. c. 40B Comprehensive Permit Projects Subsidized Housing Inventory, dated December 2014 (DHCD Guidelines)

The town may wish to amend the definition of "Affordable" to match the definitions of "Income Eligible Household" provided under state law.

2. Section 833 "Development Standards-General"

a. Subsection 833.1 "Lot Size"

Subsection 833.1 imposes dimensional requirements on lots developed under the by-law. Specifically, the lot must be shown on a plan created and approved prior to January 1, 1976, and which contains at least five thousand square feet of area and fifty feet of frontage and "shall be a lot that was joined in common ownership with others" due to previous changes in the town's zoning. Subsection 833.1 also requires the lot to "conform with and compliment other lots and homes in the neighborhood." Subsection 833.1 must be applied consistent with the laws applicable to lots that have "merged" as required by G.L. c. 40A. In addition, to avoid a due process challenge, the town may wish to consult with Town Counsel regarding a future amendment to the by-law to establish standards and criteria to determine what it means to "conform with and compliment other lots and homes in the neighborhood.

b. Subsection 833.3 "Size"

Subsection 833.3 imposes dimensional requirements on dwelling units constructed under the by-law, including lot coverage requirements and a building height requirement. However, Section VI.B.4, "Design and Construction Standards" of the DHCD's Guidelines allows square footage requirements that may be greater than what is allowed under subsection 833.3. The town may wish to amend subsection 833.3 to be consistent with the DHCD's Design and Construction Standards.

c. Subsection 833.5 "Permitting"

Subsection 833.5 requires the property owner to file a "Local Action Unit" application with the board of selectmen. However, the DHCD's Guidelines require the LIP Application for Local Action Units to be signed by the town's chief executive officer. The application must also be accompanied by DHCD's LIP Regulatory Agreement and Declaration of Restrictive Covenants for LAUs (the "Regulatory Agreement"), which includes the terms of affordability and the rights and responsibilities of the parties and an Affirmative Fair Housing Marketing and Resident Selection Plan ("AFHMP") that a developer or owner must follow in marketing and selecting residents for the units. DHCD must approve the application and documents before any dwelling unit is included in the town's SHI. The town may wish to amend subsection 833.5 to be consistent with DHCD's application process.

d. Subsection 833.7 "Deed Restriction Requirement"

Subsection 833.7 requires an owner to place a deed restriction on the property at the time of sale in order to keep the affordability restrictions in place. DHCD requires deed restrictions for LIP LAUs that comply with its Guidelines. A deed restriction imposed under section 830 that conflicts with DHCD's requirements may result in the dwelling unit not being included in the town's SHI. The town may wish to amend subsection 833.7 to be consistent with DHCD's deed restriction requirements.

e. Subsection 833.8

Subsection 833.8 suspends the by-law's provisions once the town achieves a ten percent affordable housing goal but shall re-institute the by-law if the town falls below the ten percent threshold. Specifically, subsection 833.8 provides as follows:

> Once the Town has achieved it's 10% affordable housing goal, it shall suspend this by-law until the next Census which will determine if the Town has fallen below the 10% threshold, at which time, the Town shall re-institute this bylaw until the Town achieves the 10% threshold again.

While a zoning by-law can provide when its provisions will end or expire, it is unclear what the town means by the "Town shall re-institute" Section 830 until the town achieves the ten percent threshold. Pursuant to G.L. c. 40, § 32 and c. 40A, § 5 only Town Meeting can amend the town's zoning by-law to add a by-law provision. Thus, once the provisions of section 830 expire because the town achieved its ten percent affordable housing ratio, a Town Meeting vote is needed to amend the zoning by-laws to "re-institute" section 830. The town should discuss the proper application of this provision issue in more detail with Town Counsel.

In addition, according to DHCD, subsection 833.8 misinterprets what is required to achieve the ten percent affordable housing goal and fails to acknowledge that a community must *maintain* a ten percent ratio for purposes of G.L. c. 40B's comprehensive permit provisions. A town's affordable housing percentage is determined by dividing the number of SHI-eligible units by the number of year-round housing units as reported by the latest decennial U.S. Census. Even if the Census-based denominator does not change for a decade, the number of SHI-eligible units is subject to reduction if units do not retain the SHI eligibility (e.g., because an affordability restriction expires and/or other requirements of the guidelines are no longer met). The town may wish to amend subsection 833.8 to be consistent with how DHCD determines a town's ten percent affordable housing goal.

B. Comments on Section 840, "Local Initiative Program – Local Action Units - Affordable Housing – Existing Properties"

Under section 840 the town imposes requirements for the construction of "in-law" apartments or the addition of a traditional apartment to existing single-family homes in order for such units to be included in the town's SHI. DHCD's Guidelines, Subsection D apply to accessory apartments and states that "No mandatory requirements applying to accessory apartments authorized under the ordinance or bylaw shall conflict with the LIP requirements."[2] Our comments on section 840 are provided below.

[2] DHCD's Guidelines do not have a definition of "accessory apartment," but do state that "the creation of accessory housing units within existing owner-occupied homes is a way to increase the supply and diversity of housing types." A unit that is attached to an existing owner-occupied home might also be considered an accessory apartment. However, these guidelines assume an owner-occupied residence that the housing unit is an accessory to, and it is not clear from section 840 whether the single-family residence to which the apartment may be added must be owner-occupied.

1. Section 842 "General Provisions"

Section 842 authorizes a single-family residence to construct an "in-law" apartment or add a traditional apartment subject to the provisions of section 840 as long as the unit is deed restricted as "Affordable." Section 842 defines "Affordable" as "being able to be bought or rental [sic] by someone whose total annual household income does not exceed 80% earnings of the Area Median Income (AMI) or less, as identified by HUD's median family incomes, derived from the American Community Survey and/or the Massachusetts Department of Housing and Community Development Income guidelines." As provided, in more detail above in our comment under section 832, the town may wish to amend the definition of "Affordable" to match the definition provided in G.L. c. 40B, § 20, 760 CMR 56.02, and DHCD's Guidelines.

2. Section 843 "Development Standards – General"

a. Subsection 843.3 "Size"

Subsection 843.3 imposes a size limitation on the construction of an addition for an in-law or traditional apartment, including lot coverage and height requirements. Similar to subsection 833.3 above, Section VI.B.4, "Design and Construction Standards" of DHCD's Guidelines includes square footage requirements that may be greater than what is allowed under Subsection 843.3. The town may wish to amend subsection 843.3 to be consistent with the DHCD's Design and Construction Standards.

b. Subsection 843.6 "In-Law Conversions"

Subsection 843.6 defines an in-law apartment as an apartment that consists of one bedroom or less with a kitchen area, bathroom, and sitting area. Subsection 843.6 also authorizes the board of selectmen to grant a deed restriction that allows the in-law apartment to be rented so long as the rent does not exceed a rental amount that is affordable to people who meet fifty percent of the Area Median Income as determined by the U.S. Department of Housing and Urban Development.

Section VI.B.4, "Design and Construction Standards" of DHCD's Guidelines includes square footage requirements that may be greater than what is allowed under subsection 843.6. The town may wish to amend subsection 843.6 to be consistent with the DHCD's Design and Construction Standards.

Also, as to the deed restriction requirements, DHCD requires deed restrictions for LIP LAUs that comply with its Guidelines. Therefore, a deed restriction imposed by the town under this bylaw that DHCD determines to conflict with its requirements may result in DHCD determining that it will not approve the unit as a LAU unit. The town should consult with Town Counsel on this issue.

c. Subsection 843.7 "Permitting"

Subsection 843.7 requires the owner of the in-law apartment to file "a 'Local Action Unit' Application with the board of selectmen." However, more will be required of the owner and the town to meet DHCD's LIP program requirements for LAU accessory apartments. DHCD's LIP program requirements for accessory apartments include the submission of the LIP Application for Accessory Apartments, which must be signed by the owner as well as the municipal Chief Executive Officer. This application must be accompanied by the LIP Regulatory Agreement for Affordable Accessory Apartments and an Affirmative Fair Marketing Plan that meets the requirements of DHCD's guidelines applicable to accessory apartments. DHCD's approval of the Application for Accessory Apartments is contingent upon its approval of the Affirmative Fair Marketing Plan and execution of the Regulatory Agreement for Affordable Accessory Apartments. SHI inclusion is in turn contingent on this approval.

d. Subsection 844.0

Subsection 844.0 suspends the by-law's provisions once the town achieves its 10% affordable housing goals but shall re-institute the by-law if the town falls below its 10% threshold. As provided in more detail above in subsection 833.0, once the provisions of section 840 expire because the Town achieved its ten percent affordable housing ratio, a vote of Town Meeting to amend the zoning by-law to "re-institute" section 840 is required. The town should discuss this issue in more detail with Town Counsel. In addition, the town may wish to amend subsection 844.0 to be consistent with how DHCD determines a town's ten percent affordable housing goal.

V. Conclusion

Because we find no conflict between Article 26 and the Constitution or laws of the Commonwealth, we approve Article 26. However, we suggest that the town discuss the application of the by-law with Town Counsel and DHCD to ensure it is applied consistent with the state's affordable housing laws.

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 Richard Bowen