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December 3, 2018

Diane Packer, Town Clerk
Town of Natick
13 East Central Street
Natick, MA 01760

Re: Natick Special Town Meeting of October 2, 2018 -- Case # 9159
Warrant Articles # 2 and 3 (Zoning)
Warrant Article # 4 (General)

Dear Ms. Packer:

Under Articles 2 and 4 of the October 2, 2018 Special Town Meeting, the Town voted to amend its zoning and general by-laws (respectively) to allow for adult use marijuana establishments by special permit in an overlay district and to establish an adult use marijuana establishment licensing requirement. We approve the amendments adopted under Articles 2 and 4, and the map amendments related to Article 2.

Under Article 3, the Town voted to extend its existing temporary moratorium on marijuana establishments for an additional six months through June 30, 2019 "to ensure Natick has a comprehensive Zoning By-law on Adult Use Marijuana in place." As explained below, the extension of the moratorium on recreational marijuana establishments adopted under Article 3 does not continue to have a discernible legitimate zoning purpose because the Town has now completed the planning process that served as the reason for the moratorium. In addition, the Town did not follow the required G.L. c. 40A, § 5 Planning Board hearing process for the extension of the temporary moratorium voted under Article 3. For these reasons, we disapprove the extended moratorium adopted under Article 3. We explain our decision below.

I. SUMMARY OF BY-LAW AND WARRANT TEXT

As brief background, in October 2017 (before the Cannabis Control Commission issued its final regulations) the Town adopted a temporary moratorium regarding recreational marijuana establishments (Section III-K) through "December 31, 2018 or six (6) months from the date of adoption of regulations to implement the Acts by the Cannabis Control Commission, whichever is later." We approved that by-law on April 4, 2018 (Case # 8779).

Under Article 3 of the October 2, 2018 Special Town Meeting, the Town voted to extend the moratorium from December 31, 2018 to June 30, 2019 so that, as amended, it would read as follows (deletion in strike-through and new text in italics):

Section III-K: Marijuana Establishments

A. PURPOSE

This moratorium is intended to provide restrictions that will allow the Town of Natick ("Town") adequate time to consider whether and/or how to allow or prohibit marijuana establishments and related uses, in accordance with applicable state laws and regulations, and to undertake a planning process as described herein. By vote at the Massachusetts state election on November 8, 2016, the voters of the Commonwealth approved "The Regulation and Taxation of Marijuana Act"...Among other requirements, pursuant to the Acts, the Cannabis Control Commission is charged with promulgating future regulations regarding administration and implementation of the Acts. Regulations to be promulgated by the Cannabis Control Commission are expected to provide guidance in the licensing and regulation of marijuana establishments.

The regulation of marijuana establishments raises novel and complex legal, planning, and public safety issues, among others. In turn, the Town needs time to study and consider the regulation of marijuana establishments and other related uses, so that it will have the opportunity: to address such novel and complex issues; to study and consider the potential impacts of such establishments and other related uses on adjacent uses and on the general public health, safety and welfare; to study and consider the potential impact of the Acts, and any future regulations on local zoning; and to undertake a planning process to appropriately address these considerations through zoning bylaws and other applicable bylaws and regulations, consistent with state laws and future regulations. A temporary moratorium on the use of land and structures in the Town for marijuana establishments and related uses will allow the Town sufficient time to engage in a planning process to address zoning issues and the effects of such establishments and use in the Town, and to enact bylaws in a manner consistent with sound land use planning goals and objectives, the Acts, and future regulations.

B. TEMPORARY MORATORIUM

The use of land or structures for marijuana establishments as defined in Massachusetts General Laws Chapter 94G, Section 1 and as may otherwise be defined by Massachusetts law or regulation, to include, without limitation, all marijuana cultivators, marijuana testing facilities, marijuana product manufacturers, marijuana retailers, on-site consumption of marijuana at a marijuana retailer location, any other types of licensed marijuana-related businesses, and the conducting of any such activity for commercial purposes by whichever name used, and any related use, shall not be permitted in any zoning district in the Town so long as this moratorium is effective, as set forth in Section C below. Use variances shall be strictly prohibited. During this moratorium, the Town shall undertake a planning process consistent with the purposes set forth herein.

C. EXPIRATION

For the reasons set forth above *and to ensure Natick has a comprehensive Zoning By-law on Adult Use Marijuana in place* and notwithstanding any other provision of the Natick Zoning Bylaws to the contrary, the temporary moratorium set forth in Section B above shall be ~~in effect through December 31, 2018 or six (6) months from the adoption of regulations to implement the Acts by the Cannabis Control Commission, whichever is later,~~ *in effect through June 30, 2019*, unless extended, modified or rescinded by a subsequent action of Town Meeting.

* * * * *

The warrant includes the following explanatory text regarding Article 3:

[T]he purpose of said moratorium extension is to allow the Town of Natick adequate time to consider whether and/or how to allow, prohibit and/or regulate marijuana establishments and related uses as outlined in the Acts, in accordance with applicable state laws and regulations, and to undertake an appropriate planning process.

II. ATTORNEY GENERAL’S STANDARD OF REVIEW OF ZONING BY-LAWS.

Pursuant to G.L. c. 40, § 32, the Attorney General has a “limited power of disapproval,” and “[i]t is fundamental that every presumption is to be made in favor of the validity of municipal by-laws.” Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986). The Attorney General does not review the policy arguments for or against the enactment. Id. at 798-99 (“Neither we nor the Attorney General may comment on the wisdom of the town’s by-law.”) 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). “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 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). 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)). 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.

III. ANALYSIS OF MORATORIUM LENGTH.

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 when the stated intent is to manage a new use, such as adult use recreational marijuana establishments and related uses, and there is a stated need for “study, reflection and decision on a subject matter of [some] complexity...” W.R. Grace, 56 Mass. App. Ct. at 569 (City’s temporary moratorium on building permits in two districts was within city’s authority to zone for public purposes).

Section III-K(A) of the by-law states that the purpose of the temporary moratorium is to provide the Town “time to consider whether and/or how to allow or prohibit marijuana establishments and related uses, in accordance with applicable state laws and regulations, and to undertake a planning process as described herein.” Further, the Town has explained that it “needs time to...undertake a planning process to appropriately address these considerations through zoning bylaws and other applicable bylaws and regulations.” *Id.* Because the final version of the Cannabis Control Commission (CCC) regulations on the Adult Use of Marijuana (935 CMR 500.00) were filed with the Secretary of State on March 9, 2018, it was reasonable in October 2017 for the Town to adopt a moratorium for a limited period of time to study the CCC regulations and develop zoning and other by-laws in light of the regulations.

However, the Town has not provided, and we cannot discern, a legitimate zoning purpose for any present extension of the moratorium from December 31, 2018 to June 30, 2019. The Town has adopted a comprehensive zoning by-law regulating where, and under what conditions, adult use recreational marijuana establishments will be allowed in the Town (Article 2, Special Town Meeting of October 2, 2018, approved herein); and a comprehensive general by-law adopting a licensing requirement for adult use marijuana establishments (Article 4, Special Town

Meeting of October 2, 2018, approved herein). Importantly, neither of these by-laws triggers the requirement for a local ballot vote under G.L. c. 94G, § 3,¹ and thus, after approval by this Office, the by-laws need only be posted and published pursuant to G.L. c. 40, § 32 to have lawful effect. (See explanatory note below, p. 7). The votes approving Articles 2 and 4 reflect the reality that the Town has completed the planning process that served as the purpose for the original temporary moratorium. Thus, we cannot see how an extension of the moratorium period through June 30, 2019 would presently be considered reasonable under the Sturges standard, because it does not appear to be tied to a legitimate planning need.

No Massachusetts appellate court has defined what number of months or years qualifies as a “reasonable time limitation[] on development...” Sturges, 380 Mass. at 252-253, and this determination will depend upon the facts of each case. We recognize that every town’s planning needs are different, and that some towns have professional planning staff while other towns rely solely upon volunteer planning board members. However, an extension of the moratorium a full eight months after the time the Town has completed its planning process and adopted comprehensive by-laws is likely to be determined unconstitutional because it is not tied to legitimate planning needs. See Zuckerman v. Hadley, 442 Mass. 511, 520-521 (2004) (Noting that “the town has had more than ample time to fulfill [the] legitimate purpose” of the initial moratorium adoption.) The Zuckerman holding is a useful guardrail for towns considering the adoption of moratoriums: “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. at 520-521 (citing Sturges, 380 Mass. at 257).

We note that what may qualify as a reasonable time period for a moratorium will vary depending upon the facts and circumstances in each community. See Sturges, 380 Mass. at 257 (“[A]s a practical matter we have never dealt with a zoning regulation in a vacuum. The circumstances existing in a municipality have always been considered in the process of passing on the constitutionality of a zoning provision.”) See also Zuckerman, 442 Mass. at n. 16 (“Where the needs of a town to plan for an aspect of growth prove to exceed the time limits of a bylaw,

¹ The statute creates the following process for by-laws and ordinances that would *prohibit* or *limit the number of* establishments (as opposed to by-laws and ordinances that would reasonably regulate their operation, which will continue to be adopted by Town Meeting or City Council):

- (a) Through December 31, 2019, towns/cities in which a majority of voters voted no on Question 4 on the 2016 state election ballot, entitled “Legalization, Regulation, and Taxation of Marijuana”) (“Question 4”) may adopt a by-law or ordinance at Town Meeting or City Council;
- (b) After December 31, 2019, towns/cities in which a majority of voters voted no on Question 4 may adopt a by-law/ordinance at Town Meeting/City Council *and* must have the by-law/ordinance approved at a municipal election; and
- (c) Towns/cities in which a majority of voters voted yes on Question 4 may adopt a by-law/ordinance at Town Meeting/City Council *and* must have the by-law/ordinance approved at a municipal election.

the town may extend the restriction for such limited time as is reasonably necessary to effect its specific purpose”). We conclude only that, based on the circumstances presented here, there appears to be no current legitimate zoning purpose for the Town’s extension of the moratorium through June 30, 2019.

IV. PROCEDURAL DEFICIENCIES IN PLANNING BOARD HEARING PROCESS.

As required by G.L. c. 40, § 32, the Town filed with this Office the Town Meeting votes along with the documents intended to qualify as “adequate proof that all of the procedural requirements for the adoption of such by-law[s] have been complied with.” G.L. c. 40, § 32. The filed documents include a copy of the Planning Board hearing notice (as posted in Town Hall and as mailed to abutting cities and towns, DHCD, and the regional planning agency); a copy of the hearing notice as published in the newspaper; and a copy of the written report of the Planning Board documenting the Board’s recommendations. (*See* Form 7 and attachments 2-5.) None of these documents mention the prospect of extending the temporary moratorium or reflect any deliberation by the Planning Board regarding Article 3 – they all refer to the proposed zoning by-law amendments regulating where, and under what conditions, adult use marijuana establishments will be allowed in Town. As such, it does not appear that the Planning Board held a hearing on Article 3 as required by G.L. 40A, § 5. Even if the Planning Board did hold a hearing on Article 3, the notice of hearing was deficient in that it did not mention the topic of extending the temporary moratorium, pursuant to G.L. c. 40A, § 5, which requires “[n]otice of the time and place of such public hearing, [and] of the subject matter, sufficient for identification.” Because the Town did not comply with the G.L. c. 40A, § 5, Planning Board hearing requirements, this serves as an additional ground for our disapproval of Article 3.²

V. CONCLUSION.

To summarize, we approve the adult use recreational marijuana establishments zoning by-law amendments adopted under Article 2; and the adult use recreational marijuana establishments licensing by-law adopted under Article 4; but disapprove the extended moratorium adopted under Article 3 because it appears to have no current legitimate zoning purpose in light of the Town’s votes under Articles 2 and 4, and because the Town failed to follow the statutory requirements for a Planning Board hearing on Article 3. Please feel free to contact this Office with any questions about this decision.

² We recognize that the posted and published notice of the Planning Board hearing refers to consideration of “zoning amendments include, but is (*sic*) not limited to, replacing and/or modifying the existing Section III-K ‘Marijuana Establishments’...” and that the existing Section III-K is the original temporary moratorium. However, the remainder of the notice refers to the proposed zoning by-law amendments allowing for recreational marijuana establishments, and the word “moratorium” is not in the notice of hearing or the Planning Board report. Thus, there is insufficient notice of the subject matter of the hearing, and no indication that the Planning Board held a hearing on the proposed moratorium extension in Article 3.

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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