

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

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MARTHA COAKLEY
ATTORNEY GENERAL

September 17, 2008

Joyce A. Bradshaw, Town Clerk
120 Main Street
North Andover, MA 01845

RE: North Andover Annual Town Meeting of May 13, 2008 - Case # 4829
Warrant Articles # 27, 34, and 41 (General)
Warrant Articles # 35, 36, 37, 38, 39, 40, 42, 43, and 44 (Zoning)

Dear Ms. Bradshaw:

Articles 27, 34, 35, 36, 38, 39, 40, 41, 42, 43, and 44 - We return with the approval of this Office the amendments to the Town by-laws adopted under these Articles on the warrant for the North Andover Annual Town Meeting that convened on May 13, 2008, and the maps pertaining to Articles 38 and 44.

Article 27 - The amendments adopted under Article 27 add to the Town's general by-laws a new by-law pertaining to eminent domain. The proposed by-law limits the Town's eminent domain power to address the United States Supreme Court's case of Kelo v. New London, 545 U.S.469 (2005).

In approving the proposed by-law amendment, we caution the Town that the breath of the restriction on eminent domain may entail impediments to the Town's recourse to statutes authorizing the acquisition of properties where ultimate ownership is vested in private parties. For example, we call the Town's attention to G.L. c. 121B, which pertains to housing and urban renewal. We suggest that the Town discuss this issue in more detail with Town Counsel.

Article 37 - We return with the approval of this Office the amendments adopted under this Article, except as provided below. [see page 2 for Disapproval # 1 of 2 and see page 3 for Disapproval # 2 of 2]

The amendments adopted under Article 37 make a number of changes to Section 16 of the Town's zoning by-laws to create a third Corridor Development District, Corridor Development District 3 ("CDD3"). One change amends Section 16.4, "Corridor Development District 3 (CDD3) – Permitted Uses." As amended, Section 16.4 would have provided in



pertinent part as follows (with emphasis added):

In the Corridor Development District 3, no building or structure shall be reconstructed, erected, altered or used for any other purpose than the following:

* * *

17. Day Care Center by Special Permit

We disapprove and delete the above underlined text from Section 16.4 as inconsistent with the protections accorded to day care centers under G.L. c. 40A, § 3. **[Disapproval # 1 of 2]** General Laws Chapter 40A, § 3, provides in pertinent part as follows:

No zoning . . . bylaw in any . . . town shall prohibit, or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. As used in this paragraph, the term “child care facility” shall mean a day care center or a school age child care program, as those terms are defined in Section nine of chapter twenty-eight A.

General Laws Chapter 40A, Section 3, states that a Town cannot prohibit or require a special permit for those child care facilities defined in G.L. c. 28A, § 9. The Town’s definition of day care center for the most part mirrors the definition of “Day Care Center” in G.L. c. 28A, § 9. Therefore, the Town is prohibited from requiring a special permit for day care centers. For this reason, we disapprove and delete Section 16.4 (17) as indicated above in underline.

We next call the Town’s attention to Table 1, “Summary of Use Regulation.” As amended, Table 1 prohibits congregate housing, and nursing and convalescent homes in the new CDD3 District. In approving this portion of the Table 1, we caution the Town that G.L. c. 40A, § 3, prohibits discrimination against disabled persons and provides in pertinent part as follows:

Notwithstanding any general or special law to the contrary, local land use and health and safety laws, regulations, practices, ordinances, by-laws and decisions of a city or town shall not discriminate against a disabled person. Imposition of health and safety laws or land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size or other unrelated persons shall constitute discrimination. The provisions of this paragraph shall apply to every city or town, including, but not limited to the city of Boston and the city of Cambridge.

To the extent that a specific congregate housing, or nursing or convalescent home satisfies the conditions for residential dwellings, the Town cannot apply or enforce its by-laws in

a way that treat such uses with any less deference given to other similar residential dwellings. We suggest that the Town discuss this issue in more detail with Town Counsel.

Table 1 would have also allowed Day Care Centers by special permit in the new CDD3 District as indicated by a “SP” in Table 1. We disapprove the entry for “Day Care Center” in Table 1 as inconsistent with the protections accorded to Day Care Centers under G.L. c. 40A, § 3. **[Disapproval # 2 of 2]**. As provided in more detail above, G.L. c. 40A, § 3, states that a Town cannot prohibit or require a special permit for those child care facilities defined in G.L. c 28A, § 9. Therefore, the Town cannot require special permits for day care centers. For this reason, we disapprove and delete the entry for Day Care Centers in Table 1.

Article 39 - The amendments adopted under this Article make a number of changes to the Town’s zoning by-laws pertaining to off-street parking. One change deletes Subsection 8.1 and inserts a new Subsection 8.1 “Off Street Parking and Loading.” As amended, Subsection 8.1 provides a Table of Off-Street Parking Regulations (“Table”). The Table includes the required number of off-street parking spaces for Day Care Centers, Elementary and Secondary Schools, College Universities, and Religious Centers. In approving these portions of the Table, we remind the Town of the protections accorded to these uses under G.L. c. 40A, § 3. General Laws Chapter 40A, Section 3, provides in pertinent part as follows:

No zoning . . . by-law shall prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements

No zoning . . . bylaw in any . . . town shall prohibit, or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. As used in this paragraph, the term “child care facility” shall mean a day care center or a school age child care program, as those terms are defined in Section nine of chapter twenty-eight A.

General Laws Chapter 40A, Section 3, states that a Town cannot prohibit, regulate, or restrict religious and educational uses and structures, or child care facilities, but authorizes the reasonable regulation of such uses in eight areas. These uses and structures may be subject to reasonable regulations pertaining to bulk and height of structures, yard size, lot area, setbacks, open space, parking, and building coverage requirements. It is our determination that the off-street parking space requirements are not facially inconsistent G.L. c.40A, § 3. However, as applied, to certain protected uses, the off-street parking space requirements might be found to be unreasonable. It is outside the scope of the Attorney General’s review to determine whether, as

applied, the off-street parking requirements required under the Table are unreasonable. We caution the Town that before it applies the off-street parking requirements to a specific protected use or structure, the Town discuss with Town Counsel, whether as applied, the requirements are reasonable, and therefore, lawful under G.L. c. 40A, § 3.

Article 42 - The amendments adopted under Article 42 amend the Town's zoning by-laws by deleting text and inserting new text in the definitions of "structure" and "temporary structure." In approving the changes to these definitions, we caution the Town that the State Building Code also defines these terms. It is consistent with state law for the Town to define these terms for the purpose of implementing and enforcing local law. However, for the purpose of implementing and enforcing the State Building Code, the Town must use the definitions provided in the State Building Code. Our approval of the amendments adopted under Article 42 is so limited.

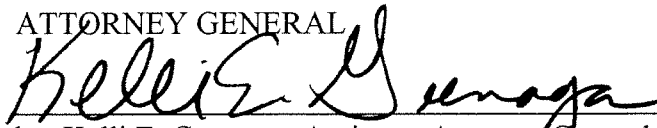
Note: Under G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the town has first satisfied the posting/publishing requirements of this section. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date that these posting and publishing requirements 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 voted by Town Meeting, unless a later effective date is prescribed in the by-law.

If the Attorney General has disapproved and deleted one or more portions of any by-law or by-law amendment submitted for approval, only those portions approved are to be posted and published pursuant to G.L. c. 40, § 32. We ask that you forward to us a copy of the final text of the by-law or by-law amendments reflecting any such deletion. It will be sufficient to send us a copy of the text posted and published by the Town Clerk pursuant to this statute.

Nothing in the Attorney General's approval authorizes an exemption from any applicable state law or regulation governing the subject of the by-law submitted for approval.

Very truly yours,

MARTHA COAKLEY
ATTORNEY GENERAL



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enc.

cc: Town Counsel