

Aspinwall, Charles

From: pderensis@aol.com
ent: Sunday, January 21, 2018 2:01 PM
To: twt1237@aol.com
Cc: Porter, Mark; Aspinwall, Charles; kvn.feeney@gmail.com; John Connolly
Subject: Re: substance abuse disorder facilities

Tom

This citizen article (copy below) is problematic because its attempt to separate substance abuse facilities from other medical facilities for different treatment under the zoning bylaws of the town of Canton is likely to be found to be “discriminatory” by the Atty General under the town of Milford decision, likely resulting in formal disapproval when the article, if adopted at town meeting, is submitted to the Attorney General as required by law for approval.

In summary form, the issue is that those patients having substance abuse disorders are considered “disabled”: under the Americans With Disabilities Act the “disabled” need to be treated the same as the “able”.

If we approached this subject matter differently with a new article to be placed on the warrant by the BOS now, and said that these substance abuse facilities are included in the definitions of hospitals and convalescent nursing facilities, how can we rezone all these medical facilities to locations where sound land use planning would demonstrate a better fit?

We could suggest rezoning the parcel from business to adjacent residential use as we understand from the discussion yesterday that this site immediately abuts a residential zone, or we can suggest a zoning ban for all medical facilities including substance abuse facilities from business districts entirely and allow all medical facilities by special permit somewhere else in town but then where?

With more guidance as per above, we could draft an article for the BOS to consider adding to the warrant to carry out the intent of the citizen petitioners?

Paul DeRensis

On Saturday, January 20, 2018, Tom Theodore <twt1237@aol.com> wrote:

Sent from my iPhone

BOS (S)

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February 26, 2018

VIA FEDERAL EXPRESS

John H. Connolly, Chairman
Board of Selectmen
Town of Canton
Memorial Hall
801 Washington St.
Second Floor
Canton, MA 02021

RE: Town Meeting
Citizen's Article Proposing Amendment to Zoning By-Laws Section 11.0
Definitions of 'Nursing or Convalescent Home' and 'Hospital'

Dear Mr. Connolly and Board:

This firm represents Armando Petruzziello, 225 Turnpike Investment, LLC, or nominee ("Turnpike Investment"), which parties retain an option to purchase the property located at 225 Turnpike Street in Canton, Massachusetts (the "Property"). The Property is located in a Business Zoning District (the "B District")¹ and, accordingly, pursuant to the Canton Zoning By-Laws (the "By-Laws"), Turnpike Investment may use the Property for a 'Nursing or Convalescent Home' or 'Hospital' as of right.

Turnpike Investment plans to use the Property for a Medically Monitored Inpatient Detoxification Facility, pursuant to Department of Health Regulations 105 C.M.R. §164.133 (an "MMID Facility"). On December 15, 2017, Turnpike Investment sought the formal determination of Canton Building Commissioner, Edward Walsh (the "Building Commissioner") that an MMID Facility falls within the definition of a 'Nursing or Convalescent Home' pursuant to the By-Laws. On or about December 27, 2017, the Building Commissioner issued a formal determination that an MMID Facility is not a 'Nursing or Convalescent Home' under the By-Laws. On or about January 22, 2018, Turnpike Investment timely appealed the Building Commissioner's determination (the "Zoning Appeal"). The Zoning Appeal is set for hearing on March 22, 2018.

It has now come to our attention that a certain Petition Article, a copy of which is attached hereto as Exhibit A, has been submitted for consideration to the Town for inclusion in

¹ A portion of the Property is also located in a Single Residence "B" District.

the 2018 Warrant at Town Meeting (the “Article”). The Article seeks to amend the By-Laws by deleting the current definitions of ‘nursing or convalescent home’ and ‘hospital’ and replacing them with the following:

Nursing or convalescent home: Any building with sleeping rooms where persons are housed or lodge and furnished with meals and nursing care for hire. This excludes BSAS licensed Substance Abuse facilities under Department of Health Regulations 105 CMR 164.133 (Medically Monitored Inpatient Detoxification facilities).

Hospital: An institution providing primary health services and medical or surgical care to persons, primarily inpatients, suffering illness, disease, injury, and other physical or mental conditions and including, as an integral part of the institution, related facilities, including laboratories, outpatient facilities, training facilities, medical offices, and staff residences. This excludes medical settings which are exclusively a BSAS licensed Substance Abuse facilities under Department of Health Regulations 105 CMR 164.133 (Medically Monitored Inpatient Detoxification facilities).

The Article’s proposed amendment of the By-Laws is contrary to the express provisions of the Massachusetts Zoning Act, G.L. c. 40A, § 3, ¶ 4, and it is therefore illegal. Specifically, the Petition would amend the By-Laws to discriminate against disabled persons by prohibiting the construction and operation of MMID Facilities. G.L. c. 40A, § 3, ¶ 4 states:

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.

(emphasis added)

Indeed, the Massachusetts Office of the Attorney General has offered specific guidance on precisely this issue. Attached hereto as Exhibit B is a June 12, 2017 letter from the Attorney General regarding a substantially similar matter in Millbury, Massachusetts. The letter states, in relevant part:

[W]here 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.

....

Persons suffering from drug addiction are considered disabled under G.L. c. 40A, § 3, and facilities that serve this population are entitled to protections of the statute. See S. Middlesex Opportunity Council, Inc. v. Town of Framingham, 752 F. Supp. 2d 85, 95 (D. Mass. 2010) (“Federal regulations define ‘handicap’ to include drug addiction or alcoholism that ‘substantially limits one or more major life activities.’”); Granada House, Inc. v. City of Boston, 1997 WL 106688 at *9 (Mass. Super. Feb. 28, 1997) (“Massachusetts would look to federal law, including the [Fair Housing Act], in interpreting the phrase ‘disabled person’ and ‘persons with disabilities’, and that by so doing, the [Massachusetts Zoning Act] must be read to bar the City’s discriminatory treatment of a group home for recovering drug and alcohol users under the Code.”); Spectrum Health Systems, Inc. v. City of Lawrence, No. 2015-288-C (Essex Superior Ct.) (“Based upon the record now before this Court, the plaintiff Spectrum is entitled to those protections set out under G.L. Ch. 40A, § 3, as amended.”).

(emphasis added)

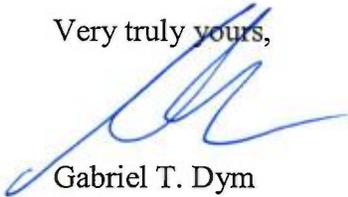
Here, because the Petition specifically targets MMID Facilities and treatment of disabled persons, and imposes additional restrictions not imposed on other similar uses, the Petition is facially invalid and illegal as it facially discriminates against disabled persons in violation of G.L. c. 40A, §3, ¶4.

Turnpike Investment demands that the Town withdraw the Article from inclusion in the 2018 Warrant at Town Meeting. Should the Board fail to do so, Turnpike Investment has authorized me to pursue all available remedies.

Please be advised that this letter is written without waiver of Turnpike Investment’s rights and remedies, at law or in equity, all of which are hereby expressly reserved.

Should you have any further questions concerning this matter, please do not hesitate to contact me.

Very truly yours,



Gabriel T. Dym
GTD/var
Enclosures

cc: (via Federal Express and electronic mail where indicated)

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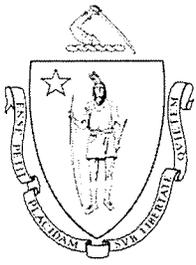
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EXHIBIT A

EXHIBIT B



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

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June 12, 2017

Jayne Marie Davolio, Town Clerk
Town of Millbury
127 Elm Street
Millbury, MA 01527-2632

**Re: Millbury Special Town Meeting of January 3, 2017 - Case # 8248
Warrant Articles # 3 and 4 (Zoning)**

Dear Ms. Davolio:

Article 4 – We must disapprove Article 4 because it is inconsistent with the Massachusetts Zoning Act (G.L. c. 40A, § 3, ¶ 4), (and as discussed below, potentially the Americans with Disabilities Act (42 U.S.C. §§, 12132 et seq.), the Rehabilitation Act (29 U.S.C. § 794(a)), and the Fair Housing Act (42 U.S.C. § 3604(f)(1) et seq.)), in its differing treatment of facilities that serve disabled persons. The reasons for our disapproval are explained below.¹

This letter briefly describes Article 4; discusses the Attorney General's 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 must disapprove the Article because it is in conflict with state and federal law. We emphasize that our disapproval in no way implies 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 v. Attorney General, 398 Mass. 793, 795-96, 798-99 (1986).

I. Description of Article 4.

Article 4 proposes to amend the Town's zoning by-law by adding a new (un-named) Section 54 as follows:

Any Methadone Treatment Center, Facility, Clinic, Service Center and/or, any similar type program (hereinafter Methadone Clinic) that dispenses, prescribes,

¹ In a decision issued April 11, 2017 we approved Article 3.

administers, allocates, delivers, hands out, or uses in any way, Methadone, or any synthetic version of the same or similar type drug form, may not operate and/or locate within one thousand (1,000) feet of a public school, private school, parochial school, Town or Commonwealth of Massachusetts approved charter school, a public or privately accredited preschool, accredited headstart facility, vocational school, college or university, or a Town and/or state public park or playground which is located within the Town of Millbury's boundaries. The distance between any school, park or playground, as herein described, and a proposed Methadone Clinic, will be determined by a straight line drawn between the closest boundary lot line of the Methadone Clinic to the closest boundary lot line of the school and/or park/playground as herein described.

Similar uses in the Town are not subject to such a buffer zone requirement. For example, the Town allows "nursing, convalescent or rest home, hospital" by right in the Town's Residential Districts, Suburban Districts, Bramanville Village District, Industrial I District, and the Town's Business Districts. The Town also allows a "residential social service facility" by special permit in the Residential Districts, the Suburban Districts, and the Business Districts, with no buffer zone requirement. *See* Zoning By-law, Article 2, District Regulations.

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

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 796.² "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, 363 Mass. at 154 (emphasis added). "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 4, 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

² The Attorney General also reviews by-laws for consistency with the federal constitution and statutes. This is because towns draw their legislative power from the state's Home Rule Amendment, Mass. Const. amend. art. 2, § 6 (as amended by amend. art. 89), which allows a town to exercise, subject to certain limits, "any power or function which the general court has power to confer upon it." and the Legislature has no power to confer on a town the power to enact by-laws contrary to federal law.

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.

III. Article 4 Discriminates Against Disabled Persons in Violation of the Massachusetts Zoning Act, G.L. c. 40A, § 3, ¶ 4.

The Massachusetts Zoning Act, G.L. c. 40A, § 3, ¶ 4 prohibits town by-laws that have a discriminatory effect on disabled persons, 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.

Persons suffering from drug addiction are considered disabled under G.L. c. 40A, § 3, and facilities that serve this population are entitled to the protections of the statute. *See* S. Middlesex Opportunity Council, Inc. v. Town of Framingham, 752 F. Supp. 2d 85, 95 (D. Mass. 2010) (“Federal regulations define ‘handicap’ to include drug addiction or alcoholism that ‘substantially limits one or more major life activities.’”) (citation omitted); Granada House, Inc. v. City of Boston, 1997 WL 106688 at *9 (Mass. Super. Feb. 28, 1997) (“Massachusetts would look to federal law, including the [Fair Housing Act], in interpreting the phrase ‘disabled person’ and ‘persons with disabilities’, and that by so doing, the [Massachusetts Zoning Act] must be read to bar the City’s discriminatory treatment of a group home for recovering drug and alcohol users under the Code.”); Spectrum Health Systems, Inc. v. City of Lawrence, No. 2015-288-C (Essex Superior Ct.) (“Based upon the record now before this Court, the plaintiff Spectrum is entitled to those protections set out under G.L. Ch. 40A, § 3, as amended.”).

The Town's by-law seeks to impose a buffer-zone requirement on a use described as: "Methadone Treatment Center, Facility, Clinic, Service Center and/or, any similar type program (hereinafter Methadone Clinic)." Although this use is not defined in Article 4 or elsewhere in the existing Zoning By-law, the by-law appears to target facilities that dispense Methadone. Methadone treatment is an established treatment for opioid addiction. *See* Massachusetts Office of Consumer Affairs and Business Regulation, Bulletin 2015-05 "Access to Services to Treat Substance Use Disorders; Issued July 31, 2015, "Medically Assisted Therapies." ³ On its face the by-law imposes a buffer zone requirement on facilities that treat disabled individuals – a buffer zone requirement that the Town does not impose on any similar use. By singling out substance abuse treatment providers for additional land use restrictions not imposed on similar uses in Town the by-law facially discriminates against disabled persons in violation of G.L. c. 40A, § 3. *See Brockton Fire Department v. St. Mary Broad Street, LLC*, 181 F. Supp. 155, 157 (D. Mass. 2016) (ruling that the City could not enforce the Massachusetts Sprinkler Law, G.L. c. 148, § 26H, against sober homes because such enforcement would constitute "facially disparate imposition of the Sprinkler Law on a group residence sheltering disabled individuals."); *see also Jeffrey's House, Inc. v. City of Fitchburg*, 2016 WL 4926415 at *7 (D. Mass. 2016) (Because the Massachusetts Sprinkler Law "imposes a health and safety requirement on sober homes... which is not imposed on homes housing families and certain unrelated groups of a similar size" it "runs afoul of the [Massachusetts Zoning Act] where it is a 'facially disparate' statute which 'shall constitute discrimination.' ") (internal citations omitted). ⁴ Because of this conflict with G.L. c. 40A, § 3, we must disapprove the by-law.

IV. Article 4 May Also Violate the ADA, the Rehabilitation Act, and the Fair Housing Act.

The Americans with Disabilities Act (42 U.S.C. §§, 12132 et seq.) ("ADA"), the Rehabilitation Act (29 U.S.C. § 794(a)) ("RA"), and the Fair Housing Act (42 U.S.C. § 3604(f)(1) et seq.) ("FHA") all prohibit municipal by-laws from discriminating against disabled persons.⁵ "Under the ADA and FHA, a public entity such as the [Town] is prohibited from implementing a zoning scheme that treats disabled individuals differently than non-disabled individuals." *U.S. v. City of Baltimore*, 845 F.Supp. 2d 640, 647-648 (D. Md. 2012) (Baltimore's zoning code requirement that residential substance abuse treatment programs obtain a conditional ordinance before locating in any district for which they were otherwise eligible was facially discriminatory in violation of the ADA and FHA).⁶ "[C]ourts have found ADA and FHA violations not only in cases of specific zoning actions such as outright permit denials, but also in cases of burdensome procedural zoning requirements uniquely placed on disabled individuals."

³ See *Bulletin 2015-02: Issued July 31, 2015*.

⁴ Article 4 may also be found to violate the protections for educational uses in G.L. c. 40A, § 3. Several courts have ruled that substance abuse treatment centers qualify as educational uses under that statute. *See e.g. Spectrum Health Systems, Inc. v. City of Lawrence*, No. 2015-288-C (Essex Superior Ct.). Whether a court would find the 1000-foot buffer requirement in Article 4 to qualify as a "reasonable regulation concerning ... setbacks..." allowed by G.L. c. 40A, § 3, ¶ 2 is a fact-specific analysis beyond the by-law review process in G.L. c. 40, § 32.

⁵ Because the analysis under the ADA and the RA is substantially the same, we hereafter refer only to the ADA.

⁶ The Article's definition of "Methadone Clinic" is broad enough to include residential facilities that administer Methadone, thus triggering Fair Housing Act protections.

Id. at 648 (collecting cases). Even if a local ordinance or by-law does not use the word “disability” it can be found to discriminate against disabled persons if the effect is to impose unique land use burdens on disabled persons. Community Housing Trust v. Dep’t of Consumer & Regulatory Affairs, 257 F.Supp.2d 208, 224-25 (D.D.C. 2003) (District of Columbia requirement that community based residential facilities obtain a certificate of occupancy expressly targeted individuals with disabilities, even if it did not use the word “disability,” and was thus facially discriminatory).

Here Article 4 does not use the word “disabled.” However, by specifically targeting “Methadone Treatment Centers[s]” for an additional land use requirement (a 1,000-foot buffer zone) not imposed on similar uses, it facially discriminates against disabled persons. See Community Housing Trust, 257 F.Supp.2d at 222-224 (by singling out community based residential facilities for certificate of occupancy requirement, ordinance facially violated FHA). If Article 4 were subject to a challenge under the ADA and FHA, an affected Methadone Treatment Center would have to show that a “protected characteristic played a role in” the Town’s decision to treat such Centers differently from other land uses. Id. at 225-226. Because such a proof would require analysis of a full factual record beyond the documents submitted to the Attorney General for review under G.L. c. 40, § 32, we cannot conclude that Article 4 necessarily violates the ADA and FHA, but we caution the Town that the Article would be vulnerable to such a challenge.

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,

MAURA HEALEY
ATTORNEY GENERAL

Margaret J. Hurley

By: Margaret J. Hurley
Chief, Central Massachusetts Division
Director, Municipal Law Unit
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(508) 792-7600 ext. 4402

cc: Town Counsel Brian Falk