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TO: Patrick Reffett
Zoning By-Law Review Committee
FR: Mark Bobrowski
RE: Zoning Diagnostic

As promised , I have reviewed Hamilton's existing zoning by-law (ZBL) to point out internal inconsistencies, noncompliance with statute or case law, and omissions that should be addressed. These are the basic goals of a zoning recodification. It is not the intent of this memorandum to identify master plan objectives that represent a change in policy. I used the May 2012 version of the ZBL available online in my work.

General Comments:

One goal of a recodification is to create an expandable format for the new ZBL, with chapters that make sense. My usual suggestion is as follows:

Chapter 1. Purpose, Authority, Applicability

Chapter. Establishment of Districts

Chapter. Use Regulations

Chapter 4. Dimensional and Bulk Requirements

Chapter 5. Nonconformities

Chapter 6. General Regulations (Signs, Parking, Lighting, etc.)

Chapter 7. Special Nonresidential Regulations (Adult Uses, Wireless, etc.)

Chapter 8. Special Residential Regulations (Accessory apartments, etc.)

Chapter 9. Special Districts (Floodplain and other overlay districts).

Chapter 10. Administration and Enforcement.

Chapter 11. Definitions.

The existing ZBL is quite comprehensive. It has also has some limitations. First and foremost, the by-law is poorly organized. The placement of material is random. The ZBL tends to hopscotch from one topic to another, with no particular rhyme or reason.

Second, there are no Tables of Uses, Dimensional Regulations or Parking. I think a primary goal of the recodification ought to be the creation of these Tables. I've attached Wenham's Use Table to give you an idea of the final product.

Third, the ZBL repeats a lot of the Zoning Act reiterating (unnecessarily) procedures for notice, publication, and public hearings. I recommend eliminating this redundancy. If you think the public would be shortchanged, consider attaching the procedures to the application package handed out over the counter at the Building Department. For example, a petitioner for a variance would get instructions that include the procedures from the statute.

All references to dates would probably be rejected by the Attorney General's Office if the ordinance was subject to his review. The AG's Office is of the opinion that preferential treatment for established uses violates the uniformity requirement of G.L. c. 40A, s.4. This interpretation can undo the very delicate political compromises that lead to the initial enactment.

I always recommend that parking, loading, and signage provisions be loosened up by allowing special permit relief from strict requirements. This offers a more flexible approach to site planning and may present opportunities for public/private partnerships.

My overall impression is that the by-law is functional and comprehensive, but not well structured.

Specific Comments: This will go easier if you read my comments while you flip through the existing ZBL.

Section I: The purpose clause should incorporate reference to 1975 Mass. Acts 808, s. 2A. The purposes suggested in section 2A have been cited as a guide to the legitimate exercise of the zoning power. See, e.g., *Sturges v. Town of Chilmark*, 380 Mass. 246, 253 (1980). These extensive powers "are not to be narrowly interpreted." *Collura v. Town of Arlington*, 367 Mass. 881, 885 (1975)(citing *Decoulos v. City of Peabody*, 360 Mass. 428, 429 (1971)).

Similarly, the Home Rule Amendment, Article 89 of the Constitution, acts in conjunction with Section 2A to establish the purposes and authority of the zoning power. It should be referenced in a separate section stating the "Authority" by which the zoning power may be implemented.

Section I: A and B. I don't see any reason to keep these provisions. Land subject to flooding is controlled by your Flood Plan District. Wetlands are controlled by state law and your local wetlands by-law, if any.

Section II: No comments. Obviously, the contract will result in a new Zoning Map.

Section III: These rules pertaining to nonconformities should be deleted and a new, more modern set of rules for nonconforming uses and structures should be added to conform with recent case law. There were a half-dozen decisions in the 1990-2015 period that fundamentally changed practice here. Your existing section is also short of the standards imposed by *Blasco v. Board of Appeals of Winchendon*, 31 Mass. App. Ct. 32 (1991), in which the court required all available changes to nonconformities to be listed in the ordinance. Some provisions run counter to the holding in *Bjorklund v. Norwell*, 450 Mass. 357 (2008).

Subsection 8, which allows a dwelling to be placed on its own lot if the dwelling existed at the time of the ZBL's adoption, does not take into account the recent SJC ruling in *Palitz v. Tisbury Zoning Bd. of Appeals*. Your approach runs fundamentally counter to the ruling. I will explain more later, but you can Google the case if your curiosity gets the better of you.

Section IV: This is the introduction, in most Towns, to the Use Table.

Section V.A: Residential Districts

* Table all principal and accessory uses.

* All of the exempt uses in G.L. c. 40A, s. 3 are inconsistent with statute - agriculture, church, schools, should be brought into line.

* Home occupations are always difficult. I have a model that I've used that we'll discuss at the proper time.

* That's quite a set of options for accessory apartments and conversions. Why?

* The OSFPD was mentioned as a target in the RFP. I'll want to hear more about this when we meet.

Section V.B: Business Districts

* Table all principal and accessory uses.

* All of the exempt uses in G.L. c. 40A, s. 3 are inconsistent with statute - agriculture, church, schools, should be brought into line.

* Many of the business uses - e.g., restaurant, business or professional office, retail, repair shop, public utility - are undefined.

* Adult Uses: The by-law is OK. But has anyone done the math? Subsection 2 provides seven (!) spacing requirements. This use must be provided a "reasonable opportunity" to operate. If the spacing requirements do not leave enough area, this opportunity is unconstitutionally denied. See *D.H.L. Associates, Inc. v. Board of Selectmen of Tyngsborough.*

Section V.C: Conservancy District

I'm not sure what the intent of this district is. However, in *SCIT, Inc. v. Planning Board of Braintree*, the Appeals Court found it illegal to confer on local boards "a roving and virtually unlimited power to discriminate as to uses between landowners similarly situated." In *Gage v. Town of Egremont*, the Supreme Judicial Court ruled that not *all* uses in a district could be placed on special permit. "[A] zoning by-law must permit at least one use in each zoning district as a matter of right." In *Boch v. Planning Board of Tisbury*, the Land Court ruled that the SCIT doctrine is applicable in overlay districts. The Conservancy District may contemplate no use as of right (other than exempt agricultural or educational uses) in violation of the doctrine.

Section V.D: Groundwater Protection Overlay District

The Commonwealth has a model GPOD and I have recently adapted it for several towns. Your by-law looks like a slightly older version. Consider substitution if you have the mapping.

Section V.E: Senior Housing

I assume this was adopted for a specific proposal. If it needs a tweak, tell me why.

Section V.F: Flood Plain District

No comments. Looks like the most recent FEMA model. I like to put ***all*** definitions in the last Chapter as a glossary. Two choices: Keep the definitions at Section in V.F? Add all definitions to this glossary (you do this already with adult uses)? This applies to many other parts of the ZBL, too.

Section V.G: Commercial Overlay

It's unusual to do this type of zoning with an overlay district. Why isn't this a Euclidean district like any other?

Section V.H: Estate Overlay

Same comments as for Conservancy. In fact, the West Stockbridge Great Estates Overlay District was nullified by the Land Court due to a *SCIT* defect.

Section V.I: Willow Street:
Same comments as for Commercial Overlay.

Section VI: These dimensional requirements for the Residential, and Business Districts ought to be put in a Table of Dimensional Regulations. Dimensional requirements for the overlay districts ought to be placed in the sections that handle the subject matter.

Section VI:D: The parking space requirements should be put in a table. There are no landscaping requirements. A special permit mechanism should be inserted to allow for flexibility without the need of a variance.

Section VI.E: A special permit mechanism should be inserted to allow for flexibility without the need of a variance.

Section VI.G: Just how do you get the affordable unit? I did not see a mention of a special permit, which would be illegal anyway. *Wall Street Development v. Planning Board of Westwood.* We need to discuss the mechanics of this exaction.

Section VI.H: In *Y.D. Dugout v. Board of Appeals of Canton*, the Supreme Judicial Court defined its understanding of site plan review as: "regulation of a use rather than its prohibition . . . (guiding) us in interpreting the (by-law) . . . as contemplating primarily the imposition for the public protection of reasonable terms and conditions." The Supreme Judicial Court has repeatedly focused on this pronouncement to distinguish site plan review from the special permit process. See *Prudential Ins. Co. of America v. Board of Appeals of Westwood.* Site plan review can only be used to shape a project.

* You don't define the powers of the ZBA.

* There is no appeal provision.

Will otherwise exempt uses - churches, schools, child care - be subject to site plan review? If so, what will the standard be?

It's unusual to see the ZBA serving as the site plan review authority.

Section VII: I recommend a definition for any term used in the Table of Uses, unless that term is self-explanatory. As I've already noted, many are now undefined. Some definitions ought to simply rely on the State Building Code to avoid confusion (height, basement, cellar, bedroom).

Section VIII.G: The state law now allows for a penalty of $300 per offense.

Section IX.D.

* I don't see any standards for the grant of a special permit. Standards are required by G.L. c. 40A, s. 9. Try this:

  Special permits shall be granted by the Special Permit Granting Authority as specified herein only upon its written determination that the adverse effects of the

proposed use will not outweigh its beneficial impacts to the town or the neighborhood, in view of the particular characteristics of the site, and of the proposal in relation to that site. In addition to any specific factors that may be set forth in this ordinance, the determination shall include consideration of each of the following:

1. Social, economic, or community needs which are served by the proposal;

2. Traffic flow and safety, including parking and loading;

3. Adequacy of utilities and other public services;

4. Neighborhood character and social structures;

5. Impacts on the natural environment; and

6. Potential economic impact, including fiscal impact on city services, tax base, and employment.

* Do you allow use variances or not? The statute requires you to be clear on this. There hasn't been one upheld by an appellate court since 1975.

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I hope my comments will prove useful. Please let me know if you have any questions. See you on the 12th.

Section 4.0 USE REGULATIONS

4.1 TABLE OF USE REGULATIONS

The Table of Use Regulations below specifies the uses permitted in each district and, when a special permit or variance is required, identifies the Special Permit Granting Authority (SPGA) for each.

CATEGORY	USE	DISTRICT		DESCRIPTION
		RES	BUS	
RESIDENTIAL				
	Single Family	Y	Y	
	Multi- Family	N	N	
	Multi-Family Unit in Senior Housing Overlay District (SHOD)	PB	PB	
	Flexible Development	PB	N	
INSTITUTIONAL AND EXEMPT				
	Educational	Y	Y	Use of land or structures 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
	Cemetery	BA	BA	
	Hospital or sanitarium	BA	BA	
	Religious Use	Y	Y	Use of land or structures for religious use
	Day Care, Adult	BA	BA	
	Day Care, Child	Y	Y	This does not include Family Day Care (large or small)
	Municipal	BA	BA	
	Essential Services	BA	BA	
AGRICULTURAL				
	Agriculture, horticulture, floriculture or viticulture on a parcel of five (5) or more acres	Y	Y	
	Facilities for the sale of produce, and wine and dairy products, exempt by statute	Y	Y	
	Agriculture, non-exempt	BA	BA	

CATEGORY	USE	DISTRICT		DESCRIPTION
		RES	BUS	
	Raising and keeping of animals, non-exempt	BA	BA	
	Greenhouse or Nursery, non-exempt	BA	BA	
	Commercial stable on less than five acres	N	N	
COMMERCIAL				
	Educational, non-exempt	BA	BA	
	Animal clinic or hospital	N	N	
	Kennel	N	N	
	Private club or lodge	N	BA	
	Nursing or convalescent home	BA	BA	
	Funeral home	N	N	
	Hotel or motel	N	N	
	Bed and Breakfast	BA	BA	
	Store, retail or wholesale with manufacturing on premises	N	Y	
	Motor vehicle sales and/or rental	N	N	
	Motor vehicle, general and body repair	N	N	
	Motor vehicle, light services	N	BA	
	Restaurant	N	Y	
	Restaurant, drive-in	N	N	
	Storage of motor vehicles or boats	N	Y	
	Business or professional office including medical	N	Y	
	Bank or financial agency	N	Y	
	Commercial recreation, indoor	N	N	
	Commercial recreation, outdoor	N	N	
	Service establishment, personal	N	Y	
	Service establishment, general	N	Y	
	Wireless Communication Facility	PB	PB	
	Laundry or dry cleaning facility	N	N	
	Printing, newspaper or job	N	BA	
	Camp	BA	BA	
INDUSTRIAL				
	Manufacturing	N	N	Includes light or heavy manufacturing
	Warehouse	N	N	Includes wholesale, self-

CATEGORY	USE	DISTRICT		DESCRIPTION
		RES	BUS	
				storage, mini-warehouse or distribution facility
	Junkyard or automobile graveyard	N	N	
	Contractor's yard	N	N	
	Transport terminal	N	N	
ACCESSORY				
	Accessory apartment	BA	BA	
	Home occupation	BA	BA	
	Garage, private	Y	Y	For a total of three motor vehicles including up to 1 commercial vehicle
	Garage, private, for more than 3 motor vehicles or 1 commercial vehicle when one or more spaces is for rent	BA	BA	
	Temporary use/occupancy of mobile home, travel trailer, camper or similar vehicle	Y	Y	In compliance with Section 4.3.5
	Swimming pool	Y	Y	
	Family day care, large or small	Y	Y	
	Keeping of large animals at a density of more than one per acre	BA	BA	Examples include horses or cows
	Accessory scientific research or development	BA	BA	
OTHER USES				
	Drive-through windows	N	BA	
	Temporary farm stand	Y	Y	
	Temporary stands or booths for social, civic, or church functions	BA	BA	

4.2 PRINCIPAL USES

Except as provided by law or in this By-Law in each district, no building or structure shall be constructed, used, or occupied, nor shall land be used or occupied, except for the purposes permitted as set forth in the accompanying Table of Use Regulations.

4.2.1 By Right

A use listed in the Table of Use Regulations is permitted as of right in any district under which it is denoted by the letter "Y", subject to such restrictions as may be specified elsewhere in this By-Law.

Section 5.0 DIMENSIONAL REQUIREMENTS

5.1 TABLE OF DIMENSIONAL REQUIREMENTS

No building or structure shall be constructed nor shall any existing building or structure be enlarged or altered except in conformance with the following Table of Dimensional Requirements as to lot coverage, lot area, land area per dwelling unit, lot width, front, side and rear setbacks, and maximum height of structures except as may otherwise be provided elsewhere herein.

Table of Dimensional Requirements		
	Residential District	**Business District**
Lot Area	40,000 square feet	Dwelling: 40,000 square feet Non-residential Unit: 40,000 square feet
Frontage	170 feet	Dwelling: 170 feet Non-residential Unit: 170 feet
Lot Width	100 feet	Dwelling: 100 feet Non-residential Unit: 100 feet
Front Yard	20 feet	All structures: 20 feet. With approval of the Board of Appeals, setback may be established to match the actual setback or the average setback of buildings on adjacent lots.
Rear Yard	15 feet	Dwelling: 15 feet Non-residential Unit: 20 feet
Side Yard	15 feet	Dwelling: 15 feet Non-residential Unit: 20 feet
Maximum Height: Structure	35 feet	35 feet
Maximum Lot Coverage (percent)	50%	70%

5.2 SPECIAL REQUIREMENTS

5.2.1 Paper Streets

No house shall be built on any lot, nor permit therefor issued, until the street or streets upon which the frontage is measured are constructed in accordance with plans and specifications approved by the Planning Board or security acceptable to the Planning Board is furnished to assure completion of such construction. No house shall be occupied until such street or streets are constructed in accordance with

Section 6.0 PARKING AND LOADING REQUIREMENTS

6.1 TABLE OF PARKING REQUIREMENTS

Off-street parking spaces shall be provided for every new building, the enlargement of an existing building, the development of a new land use or any change in any existing use in accordance with the Table of Parking Requirements in this section. Off-street parking may be provided either outside or within a structure.

PRINCIPAL USE	PARKING REQUIREMENT
One or two family dwelling	Two parking spaces per dwelling unit
Nursing home, assisted living or senior housing facility	One parking space per two rooms
Place of public assembly	One parking space for each 4 seats. Where no fixed seats are used (as in a museum or terminal), one parking space per each 200 square feet of gross floor area
Retail business, personal or general service establishment	One parking space for each 200 square feet of gross floor area
Office, bank	One parking space for each 250 square feet of gross floor area
Restaurant	One parking space per four seats
All other permitted uses	Sufficient parking spaces to accommodate, under all normal conditions, the cars of occupants, employees, members, customers, or visitors of the premises, as may be determined by the Planning Board

6.2 SPECIAL REQUIREMENTS: RESIDENTIAL

6.2.1 Shared Parking

Notwithstanding any other provisions of this By-Law, common parking areas may be permitted by the Planning Board, subject to site plan approval, for the purpose of servicing two (2) or more principal uses on the same or separate lots, provided that:

1) Evidence is submitted that parking is available within four hundred (400) feet of the premises, which satisfies the requirements of this By-Law and has excess capacity during all or part of the day, which excess capacity shall be demonstrated by a competent parking survey conducted by a traffic engineer registered in the Commonwealth of Massachusetts.