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July 22, 2025

Carin A. Kale, Town Clerk
Town of Hamilton
P.O. Box 429
Hamilton, MA 01936

Re: Hamilton Annual Town Meeting of April 5, 2025 - Case # 11741
Warrant Articles # 4-1, 4-2, 4-3, 4-4, 4-5, 4-6, 4-7, and 4-8 (Zoning)

Dear Ms. Kale:

Articles 4-1, 4-2, 4-3 4-4, 4-6, 4-7, and 4-8 – We approve the zoning by-law amendments adopted under Articles 4-1, 4-2, 4-3, 4-4, 4-6, 4-7, and 4-8 at the Hamilton Annual Town Meeting of April 5, 2025. Our comments on Articles 4-7 and 4-8 are provided below.

Article 4-5 - By agreement with Town Counsel pursuant to G.L. c. 40, § 32, we have extended our deadline for a decision on Article 4-5 for 60 days. Our decision on Article 4-5 will now be due on **September 21, 2025**. The signed extension agreement is attached.

Article 4-7 – Under Article 4-7, the Town amended Section 10.6, "Site Plan Review" and Section 11 by deleting text shown in strikethrough and inserting new text shown in bold and underline all as shown in a documents labeled Appendix I. Except for text that prohibits the filing of a building permit until the Planning Board approves the site plan, that we disapprove because it conflicts with G.L. c. 40A, § 7, we approve Article 4-7. See 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). In addition, we offer comments below for the Town's consideration regarding certain approved portions of Article 4-7.

I. Summary of the Article 4-7

The new Section 10.6 requires site plan review for: (1) new construction and certain changes to existing structures; (2) uses that require over five parking spaces, including hospitals, camps, churches, farm stands, multi-family structures, government buildings, and building in commercial or office use; (3) certain industrial and scientific research uses; (4) certain stables providing boarding or services for more than six horses; (5) greenhouses for commercial production of plants or produce; (6) alterations which increase the commercial, industrial, institutional, or multi-family floor area within an existing building or which change the number of separately leasable or saleable spaces within an existing building; and (7) wind energy facilities in the Commercial Overlay District. Section 10.6.4. "Projects Requiring Approval." Section 10.6.5

allows an abbreviated site plan review for certain projects and Section 10.6.6 exempts certain projects from the site plan review process. Section 10.6.10 imposes site plan review criteria and standards to guide the Planning Board in its review of a site plan application. Section 10.6.12, "Final Action," authorizes the Planning Board to approve the site plan, approve it with conditions, or deny it.

II. Section 10.6.4's Prohibition on Applying for a Building Permit Until a Site Plan is Approved Conflicts with G.L. c. 40A, § 7

Section 10.6.4 prohibits an applicant from applying for a building permit until the Planning Board approves the site plan as follows (with emphasis added):

> Projects Requiring Approval. No Building Permit shall be **applied for or** issued for any construction or alteration subject to this Section, as specified below, until a site plan has been approved by the Planning Board as set forth herein.

We disapprove and delete the text above in bold and underline because it is inconsistent with G.L. c. 40A, § 7. General Laws Chapter 40A, Section 7 authorizes the Building Inspector to withhold a building permit where there is a violation of the Town's zoning by-laws as follows:

> The inspector of buildings, building commissioner or local inspector, or if there are none, in a town, the board of selectmen, or person or board designated by local ordinance or by-law, shall be charged with the enforcement of the zoning ordinance or by-law and shall withhold a permit for the construction, alteration or moving of any building or structure if the building or structure as constructed, altered or moved would be in violation of any zoning ordinance or by-law; and no permit or license shall be granted for a new use of a building, structure or land which use would be in violation of any zoning ordinance or by-law.

There is no provision in G.L. c. 40A, §7 that authorizes the Town to prohibit the filing of a building permit. Rather under Section 7, the Building Inspector is authorized to withhold a building permit if the applicant failed to receive site plan approval. Because the Town cannot prohibit an applicant from filing a building permit application until the applicant receives site plan approval, the above text in bold and underline conflicts with G.L. c. 40A, §7 and we disapprove it.

III. Comments on Section 10.6's Approved Provisions

A. Site Plan Review for G.L. c. 40A, § 3 Protected "Dover Amendment" Uses

Section 10.6.4 requires site plan review for uses that enjoy G.L. c. 40A, § 3, "Dover Amendment" protections, including schools, churches, farmstands, greenhouses, and stables. We approve Section 10.6.4's site plan requirement for these uses, but site plan review for Dover Amendment protected uses is limited to the application of reasonable regulations provided in G.L. c. 40A, § 3. Jewish Cemetery Assoc. of Mass., Inc. v. Bd. of Appeals of Wayland, 85 Mass. App. Ct. 1105, *2 (2014) (upholding site plan review by-law applicable to Dover Amendment protected uses but limited to imposing reasonable regulations on protected uses).

General Laws Chapter 40A, Section 3 protects various uses from a Town's zoning power, including agriculture, educational uses, religious uses, and childcare facilities as follows:

> No zoning . . . by-law . . . shall . . . prohibit unreasonably regulate, or require a special permit for the use of land for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, nor prohibit, unreasonably regulate or require a special permit for the use, expansion, reconstruction or construction of structures thereon for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, including those facilities for the sale of produce, wine and dairy products.....
>
> No zoning . . . by-law shall…prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes…; 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 city or 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.

Together, these provisions establish that a Town by-law may not unreasonably regulate, prohibit, or require a special permit for agricultural uses, educational uses, religious uses, and childcare facilities, but may impose reasonable regulations, including in eight areas for religious, education and childcare uses as follows: the bulk and height of structures, yard sizes, lot area, setbacks, open space, parking and building coverage requirements. See The Bible Speaks v. Bd. of Appeals of Lenox, 8 Mass. App. Ct**.** at 33. Local zoning requirements serving "legitimate municipal purposes" may be applied to Dover Amendment uses. Trustees of Tufts Coll. V. City of Medford, 415 Mass. 753, 757-758 (1993) (citing MacNeil v. Town of Avon, 386 Mass. 339, 341 (1982).

As in Jewish Cemetery Assoc., it appears reasonable for the Town to use a limited site plan review as the process by which it reasonably regulates Dover Amendment protected uses, including imposes requirements on bulk and height of structures, yard sizes, lot area, setbacks, open space, parking and building coverage requirements for religious, educational and childcare uses. The Town should consult closely with Town Counsel during the site plan review process so that Section 10.6 is a limited site plan review of G.L. c. 40A, § 3 protected uses. The Town should discuss this issue in more detail with Town Counsel.

B. Section 10.6.4's Site Plan Review for Government Uses

Section 10.6.4 requires site plan review for government uses that require more than five parking spaces. We approve this portion of Section 10.6.4. However, the Town's authority to regulate state and federal entities is limited. "The doctrine of essential governmental functions prohibits municipalities from regulating entities or agencies created by the Legislature in a manner that interferes with their legislatively mandated purpose, absent statutory provisions to the

contrary." Greater Lawrence Sanitary Dist. v. Town of North Andover, 439 Mass. 16 (2003); see also Teasdale v. Newell & Snowling Const. Co., 192 Mass. 440 (1906) (holding local board of health could not require state park commissioners to obtain license to maintain stable on park land). Similarly, municipalities may not regulate federal governmental entities in a manner that impedes with their purpose. Cf. First Nat'l Bank v. Missouri, 263 U.S. 640, 656 (1926) (state laws may not regulate federal entities if "such laws interfere with the purposes of their creation [or] tend to impair or destroy their efficiency as federal agencies"); Palfrey v. City of Boston, 101 Mass. 329 (1869) (federal internal revenue stamps not subject to state or local property tax). The requirement for site plan review for government uses cannot impermissibly interfere with the operation of state or federal entities. The Town should discuss the proper application of this section with Town Counsel.

C. Section 10.6.10's Requirement Regarding Infrastructure Capacity

Section 10.6.10 (6) requires the Planning Board to review site plans for consistency with infrastructure capacity, including water supply, utilities, drainage and streets. The application of Section 10.6.10 (6) to site plan review for a multi-family structure as required under Section 10.6.4 (2) could raise concern under federal and state law, including the federal Fair Housing Act (FHA) and Massachusetts Anti-Discrimination Law. The Town should consult with Town Counsel to determine if future amendments are needed to address this issue, as discussed below.

As part of the site plan review process, Section 10.6.10 (6) authorizes the Planning Board to consider the relationship of the proposed multi-family structure requiring more than five parking spaces and the Town's infrastructure capacity. In applying this site plan provision, the Town should be aware of recent Land Court decisions analyzing the question whether a potential impact on essential public services, is a lawful consideration in the context of multi-family housing. In two recent decisions the Land Court determined that consideration of potential increased costs for educating school-aged children is not a lawful consideration when reviewing a special permit application for multi-family housing.

In Bevilacqua Co. v. Lundberg, No. 19 MISC 000516 (HPS), 2020 WL 6439581, at *8–9 (Mass. Land Ct. Nov. 2, 2020), judgment entered, No. 19 MISC 000516 (HPS), 2020 WL 6441322 (Mass. Land Ct. Nov. 2, 2020) the court ruled that the Gloucester City Council's denial of a special permit to construct an eight-unit multi-family building based on the potential fiscal impact of the proposed development on the Gloucester public schools was "legally untenable." Id. at *9. Because the right to a public education is mandated and guaranteed by the Massachusetts Constitution (see McDuffy v. Secretary of the Executive Office of Educ., 415 Mass. 545, 621 (1993) and Hancock v. Comm'r of Education, 443 Mass. 428, 430 (2005)), "[a denial of] a special permit to build housing because the occupants of that housing might include children who will attend public schools is [a denial of the children's] constitutional right under the Massachusetts Constitution to a public education." Bevilacqua Co., 2020 WL 6439581, at *8 (citing McDuffy and Hancock). "Therefore, notwithstanding the fiscal impact to a municipality from the construction of housing that may result from the obligation to educate children in the public schools, fiscal impact, as a reason for denying permits to construct housing, must give way when it runs afoul of the constitutional obligation of Massachusetts municipalities to provide a public education to all children." Id. at *9.

The Bevilacqua decision also raises, but does not resolve, the question whether consideration of fiscal impacts from potential increase in demands on other essential public services is similarly unlawful in the context of multi-family housing:

> Generally, a municipality may not condition the availability of fundamental public services, such as fire protection, on the ability of any particular member of the public to pay taxes sufficient to support those services. Emerson College v. City of Boston, 391 Mass. 415 (1984) (city may not charge "augmented fire services availability" fee for fire protection for properties requiring additional protection). That prohibition against denying members of the public the right to fundamental public services based on ability to pay is especially applicable when it comes to the right to a public education mandated and guaranteed by the Massachusetts Constitution.

Id. at *8.

Similarly, in 160 Moulton Drive LLC v. Shaffer, No. 18 MISC 000688 (RBF), 2020 WL 7319366, at *13-15 (Mass. Land Ct. Dec. 11, 2020), judgment entered, No. 18 MISC 000688 (RBF), 2020 WL 7324778 (Mass. Land Ct. Dec. 11, 2020), the court rejected the town's argument that the financial impact of educating the number of school-aged children projected to live in the apartments would be greater than the increased tax revenue, thus making the apartment use "substantially more detrimental" (in the language of the applicable by-law) than the existing restaurant use. "The Town cannot deny a permit on the grounds that its own property tax scheme is insufficient to provide for the needs of its inhabitants. Whether the Town has enough funds to provide public education for its school-aged children is simply not a matter for the Board to consider in reviewing special permit applications." Id. at *14 (citing Bevilacqua Co., 2020 WL 6439581 at *8-9).

The court in 160 Moulton Drive LLC echoed the Bevilacqua court's question whether increased demand for any essential public service is a lawful consideration when reviewing a special permit for multi-family housing:

> Denial of a special permit on the grounds that increased tax revenue would not support the education of the children living therein is tantamount to conditioning the availability of public services on the ability of the residents to pay for them, which I find to be unreasonable and arbitrary. See Emerson College v. City of Boston, 391 Mass. 415 (1984).

160 Moulton Drive, 2020 WL 7319366 at *14.

In light of the holdings in Bevilacqua and 160 Moulton Drive LLC that the potential fiscal impact of educating school-age children is a legally untenable ground for denial of a permit for multi-family housing, and the open question whether a reviewing board may consider the impact on other essential public services, we strongly encourage the Town to consult closely with Town Counsel regarding whether the site plan criteria in Sections 10.6.10 (6) should be enforced when reviewing a site plan application for a multi-family structures and whether it should be amended at a future town meeting.

D. Section 10.6.12's Final Action on Site Plan

Section 10.6.12 authorizes the Planning Board to approve, approve with cautions, and deny a site plan. We approve Section 10.6.12. However, the Planning Board authority to disapprove site plan review for as-of-right uses is limited. Site plan approval acts as a method for reasonably regulating as-of-right uses rather than for prohibiting them. Y.D. Dugout, Inc. v. Bd. of Appeals of Canton, 357 Mass. 25, 31 (1970). Where "the specific area and use criteria stated in the by-law [are] satisfied, the [reviewing] board [does] not have discretionary power to deny…[approval], but instead [is] limited to imposing reasonable terms and conditions on the proposed use." Prudential Ins. Co. of America v. Westwood, 23 Mass. App. Ct. 278, 281- 82 (1986), quoting from SCIT, Inc. v. Planning Bd. of Braintree, 19 Mass. App. Ct. 101, 105 n.12 (1984). Therefore, the Town cannot deny site plan approval for by-right uses, including Dover Amendment protected uses. The Town should discuss this issue in more detail with Town Counsel.

Article 4-8 - Under Article 4-8, the Town amended Section 9.2, Flood Plain Overlay District," by deleting text shown in strikethrough and inserting new text shown in bold and underline all as shown in a document labeled Appendix J. The Town amended Section 9.2 as part of a federal requirement for communities that choose to participate in the National Flood Insurance Program (NFIP).

Section 9.2 appears to follow the "Massachusetts 2020 Model Floodplain Bylaw" provided by the Massachusetts Department of Conservation and Recreation Flood Hazard Management Program. (DCR Flood Hazard Management Program). See https://www.mass.gov/guides/floodplain-management#-2020-massachusetts-mo. The DCR Flood Hazard Management Program is the state coordinating office for the NFIP and, according to their website, they have provided the Model Floodplain Bylaw to Massachusetts communities "to assure that their local bylaws…contain the necessary and proper language for compliance with the" NFIP. For this reason, we approve Article 4-8. The Town should consult with Town Counsel and the DCR Flood Hazard Management Program with any questions regarding the application of Section 9.2.

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.

Very truly yours,

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cc: Town Counsel Thomas W. McEnaney