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November 7, 2011

Dawn E. Rickman, Town Clerk
300 Main Street
Wellfleet, MA 02667

**RE: Wellfleet Annual Town Meeting of April 25, 2011 - Case # 5883
Warrant Articles # 35, 36, and 37 (Zoning)**

Dear Ms. Rickman:

Articles 35 and 36 - We approve the amendments to the Town by-laws adopted under these Articles on the warrant for the Wellfleet Annual Town Meeting that convened on April 25, 2011, except as provided below. **[See page # 6 for Disapproval # 1 of 1]**

The by-law amendments make a number of changes to the Town's zoning by-laws which are detailed below but which can be summarized as follows: fast food restaurants and formula restaurants are prohibited in all zoning districts, and formula businesses are allowed by special permit in the Town's commercial district. Our comments on Articles 35 and 36 are detailed below.¹

I. 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 with every "presumption made in favor of the validity of municipal by-laws." Amherst v. Attorney General, 398 Mass. 793, 796 (1986). In order to disapprove any portion of a proposed by-law, the Attorney General must cite an inconsistency between the by-law adopted by the Town and the Constitution or laws of the Commonwealth. Amherst v. Attorney General, 398 Mass. at 796.

¹ On August 4, 2011, the Attorney General's deadline for action on Articles 35 and 36 was extended for an additional 90 days under the authority conferred by G.L. c. 40, § 32, as amended by Chapter 299 of the Acts of 2000. Therefore, our deadline for action on the by-laws is November 7, 2011.

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. “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 v. IDC Bellingham, LLC, 440 Mass. 45, 51 (2003) (quoting Crall v. City of Leominster, 362 Mass. 95, 101 (1972)). A zoning by-law must be approved unless “the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals, or general welfare.” Johnson v. Town of Edgartown, 425 Mass. 117, 121 (1997).

II. Summary of Articles 35 and 36 and General Comments.

a) Article 35 – Prohibition on Fast Food Restaurants and Formula Restaurants.

The by-law amendments adopted under Article 35 make a number of changes to the Town’s zoning by-laws pertaining to Fast Food Restaurants and Formula Restaurants. One change adds new definitions of “Restaurant, Fast Food” and “Restaurant, Formula” to Section II of the Town’s zoning by-laws.² Another change amends the Town’s Use Regulations Table by adding “Restaurant, Fast Food” and “Restaurant, Formula Regulations” and prohibiting such uses in all of the Town’s zoning districts. The final change adds a new Section 6.29, “Fast Food and Formula Restaurant Prohibition,” to the Town’s zoning by-laws. The new Section 6.29 provides that Fast Food and Formula Restaurants are prohibited in all of the Town’s zoning districts in “order to preserve and protect the unique and locally-oriented community experience in Wellfleet, and all that this offers to its citizens and tourists alike as a treasured destination.” Section 6.29, “Purpose.”

b) Article 36 – Formula Business by Special Permit.

The by-law amendments adopted under Article 36 make a number of changes to the Town’s zoning by-laws pertaining to Formula Businesses. One change adds a new definition of “Business, Formula” to Section II of the Town’s zoning by-laws. Another change amends the Town’s Use Regulations Table by adding “Business, Formula.” Article 36 also allows Formula Businesses by special permit in the Town’s Commercial District and prohibits them in all of the Town’s other zoning districts. Article 36 also adds a new Section 6.30, “Formula Business Special Permit,” which provides additional standards and criteria for the grant of special permits for Formula Businesses. These new standards and criteria are in addition to the Town’s existing standards and criteria that apply to all special permit applications.

² The new definitions of “Restaurant, Fast Food” and “Restaurant, Formula Business” are discussed at p.4, Section III.

c) General Comments.

As an initial matter, we note that a municipality's broad zoning power includes the authority to preserve neighborhood aesthetics. "[A]esthetics alone may justify the exercise of the police power . . ." John Donnelly & Sons, Inc. v. Outdoor Advertising Board, 369 Mass. 206, 218 (1975). The Supreme Judicial Court has opined that the preservation of neighborhood aesthetics is a constitutional exercise of the zoning power. *See, e.g.,* Opinion of the Justices, 333 Mass. 773 (1955) (approving creation of Nantucket historic district); Opinion of the Justices, 333 Mass. 783 (1955) (approving creation of Beacon Hill historic district). *See also* Johnson, 425 Mass. at 124 (1997) (zoning regulations may be "bolstered by the need to protect the amenities and character of a rural resort, such as the Vineyard, in order to assist its economic stability, including its shellfish industry and tourism."). Where a legislative body has concluded that a zoning measure is appropriate to preserve the aesthetic character of the community, "a court can hardly take the view that such legislative determination is so arbitrary or unreasonable that it cannot be comprehended within the public welfare." Opinion of the Justices, 333 Mass. 783, 787 (1955). However, the Town's zoning power may *not* be used to regulate ownership without regard to differences in its use. *See* CHR General, Inc. v. City of Newton, 387 Mass. 351 (1982) (invalidating zoning ordinance that restricted conversion of apartment units to condominiums, where ownership had no bearing on use of land). *Cf.* Goldman v. Town of Dennis, 375 Mass. 197 (1978) (upholding zoning regulation prohibiting conversion of summer cottages to single family use, where ownership change would exacerbate nonconforming use).

In addition, while a town may consider an intended use's visual impact on the aesthetic qualities of the neighborhood, it is not a proper object of zoning to consider a proposed use's economic impact on surrounding businesses. *See* Circle Lounge & Grille v. Board of Appeals of Boston, 324 Mass. 427, 429-30 (1949).

In light of these court decisions, we are concerned that the "Purpose" sections of Articles 35 and 36 contain several references to locally owned and operated businesses. For example, Article 35 provides that "Wellfleet is traditionally home to small, *locally owned and operated businesses.*" Section 6.29, "Purpose" (emphasis supplied). Article 35 also provides that fast food and formula restaurants are prohibited in the town "in order to preserve and protect the unique and *locally-oriented community experience* of Wellfleet. . . ." Section 6.29, "Purpose" (emphasis supplied). Likewise, Article 36 provides that formula businesses "will have a negative impact on the town's historical and cultural relevance, unique Cape Cod rural character, and overall attractiveness as a small town, *locally-oriented* tourist destination." Section 6.30.1, "Purpose" (emphasis supplied).

It cannot be overstated that the amendments adopted under Articles 35 and 36 cannot be applied so as to protect locally owned and operated businesses from business competition. *See* Circle Lounge & Grille, 324 Mass. at 429-30. In addition, similar by-laws in other states have been challenged based upon the Commerce Clause of the United States Constitution. *See e.g.,* Cachia v. Islamorada, 542 F.3d 839 (11th Cir. 2008) (because an ordinance's complete prohibition of formula fast food restaurants disproportionately targeted restaurants operating in interstate commerce, the ordinance must be supported by a legitimate local purpose and the municipality must have no reasonable alternative to achieve that purpose); Island Silver & Spice, Inc. v. Islamorada, 542 F.3d 844 (11th Cir. 2008) (striking down ordinance that effectively

excluded national chain stores as impermissibly burdening interstate commerce, since no legitimate local purpose was shown). Bans on formula fast food restaurants have been upheld in other states. *See e.g., Mead Square Commons, LLC v. Village of Victor*, 930 N.Y.S.2d 431 (Sept. 30, 2011) (upholding ban on formula fast-food restaurants because the ban treats all similarly situated owners identically and is based on neutral planning and zoning principles). However, no court in this jurisdiction has considered such a challenge. Moreover, the Attorney General’s review of the by-laws does not and cannot include the kind of factual inquiry a court must make in the course of resolving such challenges. Therefore, we express no view on how a court might resolve such a challenge based on a full factual record.

III. Definitions of “Formula Restaurant” and “Formula Business.”

The amendments adopted under Article 35 add the following definition of Formula Restaurant to Section 2 of the Town’s zoning by-laws:

Restaurant, Formula: A restaurant that stands alone or with other use(s), and which prepares food and beverage on site for sale to the public, and which is required by contractual or other arrangement or as a franchise to offer any of the following features: Standardized menu, trademark or service mark, defined as a word, phrase, symbol, design or logo, or a combination of words, phrases, symbols, designs and/or architecture, façade, or color scheme that identifies the restaurant as one (1) of twenty-five (25) or more other restaurants worldwide.

The amendments adopted under Article 36 add the following definition of Formula Business to Section 2 of the Town’s zoning by-laws:

Business, Formula: a retail trade business which does or is required by contractual or other arrangement or as a franchise to maintain any of the following features:

Standardized (formula) array of merchandise, exterior trademark or service mark, defined as a word, phrase, symbol or design, or a combination of words, phrases, symbols, designs, and/or architecture, façade that identifies the business as one (1) of twenty-five (25) or more other businesses worldwide.

Under these definitions a business qualifies as either a Formula Restaurant (and is therefore prohibited in all areas of the Town) or Formula Business (and is therefore allowed only by special permit in the Commercial District) based upon a specified number of enumerated physical characteristics, rather than on the ownership of the business. However, it bears repeating that the Town may not use its zoning power to regulate ownership without regard to differences in the proposed use. *See CHR General, Inc. v. City of Newton*, 387 Mass. 351 (1982) (invalidating zoning ordinance that restricted conversion of apartment units to condominiums, where ownership had no bearing on use of land). *Cf. Goldman v. Town of Dennis*, 375 Mass. 197 (1978) (upholding zoning regulation prohibiting conversion of summer cottages to single family use, where ownership change would exacerbate nonconforming use).

We also note that, unlike similar by-laws which this Office has previously approved, Wellfleet's proposed amendments apply to restaurants or businesses that meet any one of the enumerated items in the definitions of Formula Restaurant or Formula Business.³ However, because "every presumption is to be made in favor of the validity of municipal by-laws. . . ." Amherst v. Attorney General, 398 Mass. 793, 796 (1986), we are not in a position to disapprove Wellfleet's legislative decision to define Formula Restaurant or Formula Business more broadly than other jurisdictions.

While we approve the definitions of Formula Restaurant and Formula Business in the Wellfleet by-laws, we note that several of the "features" which serve to qualify a restaurant or business as a Formula Restaurant or Business may not be reasonably related to the by-laws' stated zoning purposes, including preserving the aesthetics of the Town.

The Town's authority to use its zoning power to regulate the interior features of business establishments is uncertain. Although "aesthetics alone may justify the exercise of the police power," John Donnelly & Sons, Inc. v. Outdoor Advertising Board, 369 Mass. 206, 218 (1975), Massachusetts courts have considered the exercise of the zoning power with respect to aesthetics only in the context of the regulation of an entity's exterior features, *i.e.*, features visible by the public from a public place. It is not apparent that "aesthetics" includes anything other than an entity's exterior features, which may reasonably be expected to impact a neighborhood's visual environment. For instance, in John Donnelly – a case concerning the regulation of off-site billboards – the Court condoned the use of the zoning power for aesthetic purposes in order to regulate the "visual pollution" of the physical environment. John Donnelly, 369 Mass. at 219. The Court noted that "*outdoor* advertising may be restrained in the interest of aesthetics." *Id.* (emphasis added). Similarly, in considering the constitutionality of the establishment of the Nantucket historic district, the Court noted that the legislation "applie[d] only to exterior architectural features subject to public view from a public place. It does not apply to . . . building features not subject to public view" Opinion of the Justices, 333 Mass. 773, 780-81 (1955).

Applying these principles to the Wellfleet by-laws, some may contend that because a restaurant's menu or a business' array of merchandise only impacts the restaurant's or business' interior space and not its exterior façade, such items should not be used to qualify a business as a Formula Restaurant or Formula Business. However, based upon the Attorney General's limited standard of review, we cannot conclude as a matter of law that such qualifying items as "menu" and "array of merchandise" are so arbitrary, unreasonable, or substantially unrelated to the public health, safety or general welfare as to merit disapproval by this Office. However, we strongly urge the Town to consult with Town Counsel to determine the authority to regulate, through the zoning power, a business establishment's interior features that are not subject to public view from a public place.

³ In comparison, the Concord by-law applies to a business that meets at least two of the five enumerated items in the definition of formula business establishment; the Provincetown by-law applies to a business that matches three out of eight criteria; the Chatham by-law applies to a business that matches two out of eleven criteria; the Nantucket by-law applies to a business that matches three out of four criteria; and the Dennis by-law applies to a business that matches three out of six criteria.

IV. Additional Specific Comments on Section 6.30.

A. Subsection 6.30.3 “Standards and Criteria”.

Subsection 6.30.3 of the proposed by-law imposes additional standards and criteria on special permits for Formula Businesses and provides in pertinent part as follows:⁴

The property owner shall complete and submit an application for a Special Permit to the Planning Board in accordance with the Wellfleet Planning Board Guidelines and Procedures. The following standards and criteria shall apply to Special Permit applications under Section 6.30, in addition to the Special Permit Criteria imposed by Section 8.4.2:

1. Approval of the formula based business establishment will not substantially alter or detract from the established character or natural aesthetic of the location.
2. Approval of the formula based business establishment will contribute to a diverse and appropriate blend of businesses in its location.
3. The formula based business establishment will be compatible with existing surrounding uses; has been designed and will be operated in a non-obtrusive manner to preserve the location’s community character **and ambiance**; and the proposed intensity of uses on the site is appropriate given the uses permitted on the site and on adjoining sites.

* * *

7. Ensure compliance with the provisions of this Zoning Ordinance including parking and landscaping.

We disapprove and delete the above text in underlined and bold in Subsections 6.30 (1) and (3) (“or natural aesthetic” and “and ambiance”) because this text is void for vagueness. **[Disapproval # 1 of 1]** This text is not definitive enough to provide the special permit granting authority with adequate standards to determine whether to grant a special permit for a Formula Business. *See Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 363-364 (1973) (“Such vagueness would permit ‘untrammelled [administrative] discretion’ and arbitrary and capricious decisions...”). “A ‘statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.’” *Commonwealth v. Carpenter*, 325 Mass. 519, 521 (1950) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). This principle applies equally to municipal by-laws and regulations. *See Druzik v. Board of Health of Haverhill*, 324 Mass. 129, 134 (1949).

We also point out what appears to be a tension between certain subsections of Section 6.30. Section 6.30.1, “Purpose,” provides (with emphasis added) that Formula Businesses “will

⁴ Section 6.30.3 is very similar to the by-law provisions adopted by the Town of Dennis.

have a negative impact on the town's historical and cultural relevance, unique Cape Cod rural character, and overall attractiveness as a small town, locally oriented tourist destination.” However, Section 6.30.3 (1) provides (with emphasis added) that a Formula Business may be approved if it will not “*substantially* alter or detract” from the established character or natural aesthetic of the location. Based on this declaration of purpose in Section 6.30.1 that Formula Businesses will have a negative impact on the Town, it is unclear whether an applicant will be able to satisfy the “not *substantially* . . . detract” standard in Subsection 6.30.3 (1). We suggest that the Town discuss this issue in more detail with Town Counsel and consider a future amendment of the by-law.

Finally, Section 6.30.3 (7) includes the word “ordinance”. It is conventional to refer to towns as having “by-laws” and cities as having “ordinances.” The Town may wish to amend this text at a future Town Meeting.

Article 37 – We remind the Town that in a decision dated August 4, 2011, we approved the amendments adopted under this Article.

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 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.

Very truly yours,

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