TOWN OF WINCHENDON

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Winchendon, Massachusetts, 01475-1758

The following amendments to the Winchendon Zoning Bylaws and General Bylaws were approved at the Special Town Meeting held on November 13, 2023 reconvened on December 11, 2023 and were approved by the Attorney General on April 25, 2024:

Article 17: Zoning Bylaws

Article 18: General Bylaws

Claims of invalidity by reason of any defect in the procedure of adoption or amendment may only be made within 90 days of the posting of this notice. Copies of the Zoning and General Bylaws may be found on the town website: Local Codes/ Ordinances/Bylaws | winchendonma (townofwinchendon.com)

Posted: 5/2/24

By: Robert S Marek
Winchendon Constable

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

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April 25, 2024

Wendy A. Stevens, Town Clerk
Town of Winchendon
109 Front Street
Department 3
Winchendon, MA 01475

Re: Winchendon Special Town Meeting of November 13, 2023 -- Case # 11284
Warrant Article # 17 (Zoning)
Warrant Article # 18 (General)

Dear Ms. Stevens:

Articles 17 and 18 - We approve Articles 17 and 18 from the November 13, 2023 Special Town Meeting.[1] Our comments regarding Articles 17 and 18 are provided below.

Article 17 - Under Article 17 the Town voted to amend the zoning by-laws by:

> accept[ing] the renumbering and revision of the Zoning Bylaw of the town from its original numbering, as amended through May 15, 2023, to the numbering or codification, arrangement, sequence and captions and the comprehensive revisions to the text of the Zoning Bylaw as set forth in the Final Draft of the Code of the Town of Winchendon, dated October 24, 2023; said codification of the Zoning Bylaw having been done under the direction of the Planning Board, and being a compilation and comprehensive revision of the present Zoning Bylaw, including amendments thereto. The Zoning Bylaw shall be codified as Chapter 300 of the "Code of the Town of Winchendon, Massachusetts."

The Town provided us with documents reflecting the amendments adopted under Article 17, including the "red-lined" revisions with new text shown in underline and deleted text shown in strikethrough. We offer comments for the Town's consideration regarding certain amendments adopted under Article 17. We also offer comments on certain existing text. Although the existing text is not amended under Article 17 (and therefore not before the Attorney General for review and approval), the Town may wish to consult with Town Counsel to determine whether any future amendments are needed to address the issues raised in this decision.

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[1] On March 12, 2024, by agreement with Town Counsel as authorized by G.L. c. 40, § 32, we extended the deadline for our review of Articles 17 and 18 for 45-days until April 27, 2024.

I. Section 300-5.2 – Schedule of Use Regulations

Under Article 17 the Town made certain identified changes to Section 300-5.2, "Schedule of Use Regulations," (Schedule). One change amends Section C, "Industrial Uses," line L, "Solar Energy collection system (See § 300-6.11 for limitations)" to add to every district "/SP" so that for each district it states "Y/SP" as follows (new text in underline):

		R80	R40	R10	C1	C2	I	PD
L.	Solar Energy collection system (See § 300-6.11 for limitations.)	Y/SP	Y/SP	Y/SP	Y/SP	Y/SP	Y/SP	Y/SP

A "Y" (yes) denotes a use permitted as of right and an "SP" (special permit) denotes a use permitted by special permit from the Board of Appeals. See Section 300-5.1, "Basic requirements." As amended, Schedule line L, shown above, denotes the use of solar energy collection system in all districts as "Y/SP" (yes/special permit). As written, it is unclear what the Town intends by the Schedule's text of "Y/SP" or how the use could be both as of right and by special permit. The Town regulates solar energy systems under Section 300-6.11 of the zoning by-laws. Section 300-6.11.B (3) and (4) provide as follows:

> (3) Ground-mounted solar energy collection systems are allowed by right in the R40, R80, C1, C2, and I Zones but shall be subject to the site plan review requirements of Article XII and the requirements of Subsections E through R.[2]
>
> (4) Other solar energy collection systems are allowed in all zoning districts by special permit issued by the Planning Board and the site plan review requirements of Article XII and the requirements of Subsections E through R.

The Town may wish to consult with Town Counsel regarding a future clarifying amendment.

II. Section 300-6.12 – Marijuana Related Text

Although much of the existing text in Section 300-6.12 was not amended under Article 17 and is therefore not before the Attorney General for review and approval, we offer comments for the Town's consideration regarding certain sections of the by-law and encourage the Town to consult with Town Counsel to determine if any future amendments to the by-law are needed.

1. Section 6.12.A – Purpose

Under Article 17, the Town made certain identified changes to Section 300-6.12.A (1), "Purpose," as follows (new text in underline and deleted text in strikethrough):

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[2] We note that Section 300-6.11.B (3) does not include the R10 district, but the Schedule indicates that the use is allowed by right in the R10 district. The Town should consult with Town Counsel to determine if a future amendment is needed to address this issue.

A. Purpose. The purpose of the bylaw is:

(1) To provide for the limited establishment of medical/adult use marijuana facilities (collectively, known hereafter as ~~Marijuana Facilities~~) "marijuana facilities") in appropriate places for such use and under conditions in accordance with Chapter 334 of the Acts of 2016, entitled, "Regulation and Taxation of Marijuana Act," as amended by Chapter 55 of the Acts of 2017, "An Act to Ensure Safe Access to Marijuana," and all regulations which have or may be issued by the Department of Public Health (DPH) and the Cannabis Control Commission (CCC), including, but not limited to, 105 CMR 725.00, et seq. and 935 CMR 500.00, et seq.

Section 300-6.12.A references 105 CMR 725.00 and the Department of Public Health. (DPH) As a result of Chapter 55 of the Acts of 2017 ("An Act to Ensure Safe Access to Marijuana"), the administration and oversight of medical marijuana use was transferred from the DPH to the Cannabis Control Commission (CCC). As part of the transfer of oversight and administration to the CCC, 105 CMR 725.000 *et seq.* was superseded by the CCC regulations governing marijuana use at 935 CMR 500.000 (Adult Use of Marijuana) and 935 CMR 501.000 (Medical Use of Marijuana). In light of this, the Town may wish to consult with Town Counsel to determine if a future amendment is needed.[3]

2. Section 6.12.D – Definitions

The CCC recently amended its regulations, 935 CMR 500.000 and 935 CMR 501.000, effective October 27, 2023. Certain of the Town's existing marijuana-related definitions now differ from the current CCC regulations such as "independent testing laboratory" and "marijuana retailer." The Town must ensure that its marijuana related definitions are applied consistent with the applicable statutes and regulations, including the CCC's definitions found in 935 CMR § 500.002 and 935 CMR 501.002. This is especially important given the court's holding in West Street Associates LLC v. Planning Board of Mansfield, 488 Mass. 319 (2021) that towns are preempted from adopting by-law requirements that conflict with the CCC regulations.

Section 300-6.12.D defines the term "marijuana retailer," as follows:

An entity licensed to purchase and transport marijuana and marijuana products from marijuana facilities and to sell or otherwise transfer marijuana and marijuana products to marijuana facilities and to consumers.

This definition differs from the CCC's definition that defines a Marijuana Retailer as:

[A]n entity licensed to purchase, Repackage, White Label, and transport Marijuana or Marijuana Product from Marijuana Establishments and to Transfer

[3] Several definitions in Section 300-6.12.D also reference 105 CMR 725.00. The Town may wish to consult with Town Counsel regarding whether a future amendment to these provisions is needed.

> or otherwise Transfer this product to Marijuana Establishments and to sell to Consumers. Unless licensed, retailers are prohibited from offering Marijuana or Marijuana Products for the purposes of on-site social consumption on the Premises of a Marijuana Establishment.

The by-law's definition of "marijuana retailer" differs from the CCC's definition in that the by-law definition is not as broad as the CCC definition that authorizes a Marijuana Retailer to "Repackage, [and] White Label" (as those terms are defined in the CCC regulations) marijuana or marijuana products from a marijuana establishment. In addition, the by-law's definition refers to a "Marijuana Facility" rather than a "Marijuana Establishment." The Town may wish to consult with Town Counsel to determine if a future by-law amendment is needed to address these issues.

3. Section 6.12.F – Application Requirements for all Marijuana Facilities

The existing text in Section 300-6.12.F (2), "Additional Requirements," Subsection (a), "Use Requirements," prohibits social consumption establishments "absent a positive vote by ballot question presented to the voters of the Town at a biennial state election pursuant to MGL c. 94G, § 3 (b)." Section 3 (b) was recently amended by Chapter 180 of the Acts of 2022 to amend ballot vote authorization process and also authorize an alternative approval process by way of by-law adoption. The Town should consult with Town Counsel with any questions on this issue.

The existing text in Section 300-6.12.F (2) (f) requires a buffer zone from a marijuana facility to certain other uses including schools and provides that it shall be "measured by a straight line from the point of the front door which the proposed marijuana facility is to be located to the property line of the facility in question." The CCC regulations, 935 CMR 500.110 (3), "Buffer Zone," require a buffer zone between a marijuana establishment and a school to be measured in a straight line from the *geometric center* of the marijuana establishment to the *geometric center* of the school entrance, as follows:

> The buffer zone distance of 500 feet shall be measured in a straight line from the geometric center of the Marijuana Establishment Entrance to the geometric center of the nearest School Entrance, unless there is an Impassable Barrier within those 500 feet; in these cases, the buffer zone distance shall be measured along the center of the shortest publicly-accessible pedestrian travel path from the geometric center of the Marijuana Establishment Entrance to the geometric center of the nearest School Entrance.

Because towns are prohibited from imposing restrictions on marijuana establishments that conflict with the CCC regulations, the Town should discuss the proper application of the existing text with Town Counsel to ensure it is applied consistent with the CCC regulations. West Street Associates LLC, 488 Mass. at 319 (towns are preempted from adopting by-law provisions that impose different requirements on marijuana establishments than those requirements imposed by the CCC.).

III. Site Plan Related Text

1. Section 300-12.6 – Site Plan Evaluation

The Town's existing text (not amended under Article 17 and therefore not now before the Attorney General for review and approval), Section 300-12.6, "Site Plan Evaluation," identifies the considerations to be reviewed as part of the site plan review, including Subsection Q that provides as follows:

> Consider Winchendon's resources. The applicant should be prepared to adequately describe the likely demands on local infrastructure, schools and municipal services and offer proposals to mitigate such demands on the Town's ability to provide such services to the project.

In applying this existing provision, the Town should be aware of recent Land Court decisions analyzing the question whether a potential impact on essential public services, including education of children, 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." Id. 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 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).

Id. at *14.

B. FHA and MA Anti-Discrimination Law Requirements

The requirement that the applicant for a multi-family structure project must describe the project's demands on local infrastructure, schools and municipal services also raises concerns considering the Town's obligation to comply with the provisions of FHA and G.L. c. 151B. These statutes broadly prohibit discrimination in housing based on certain characteristics including race, color, religion, sex, gender identity, sexual orientation, familial status, national origin, handicap and ancestry. See 42 U.S.C. § 3604 and G.L. c. 151B, § 4, ¶¶ 4A and 6. The FHA and the Massachusetts Anti-Discrimination Law prohibit towns from using their zoning powers in a discriminatory manner, meaning in a manner that has the purpose or effect of limiting or interfering with housing opportunities available to members of a protected class.

Violations of the FHA and G.L. c. 151B occur when a town uses its zoning power to intentionally discriminate against a member of a protected class or when such zoning power has

a discriminatory impact on members of a protected class. See, e.g., Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc., 135 S.Ct. 2507, 2521-22 (2015) (recognizing disparate impact discrimination under the FHA); Burbank Apartments Tenant Ass'n v. Kargman, 474 Mass. 107 (2016) (recognizing disparate impact discrimination under G.L. c. 151B). Discriminatory impact can occur when a zoning rule, neutral on its face, "disproportionately disadvantages members of a protected class." Burbank Apartments, 474 Mass. at 121 (discussing disparate impact in housing).

The Town should consult closely with Town Counsel during the site plan review process in light of these court decisions.

Article 18 - Under Article 18 the Town voted to amend the general by-laws by:

> accept[ing] the renumbering and revision of the various bylaws of the Town from their original numbering or their numbering in the former General Bylaw compilation, as amended through May 15, 2023, to the numbering or codification, arrangement, sequence and captions and the comprehensive revisions to the text of the General Bylaws as set forth in the Final Draft of the Code of the Town of Winchendon, dated September 28, 2023; said codification having been done under the direction of the Board of Selectmen and Town Attorney, and said Code being a compilation and comprehensive revision of the present bylaws of the Town. All bylaws of a general and permanent nature, as amended, heretofore in force and not included in the Code shall be repealed, except that such repeal shall not affect any suit or proceeding pending as the result of an existing law, and such repeal shall not apply to or affect any bylaw, order or article heretofore adopted accepting or adopting the provisions of any statute of the Commonwealth. These bylaws shall be referred to as the "Code of the Town of Winchendon, Massachusetts."

The Town provided us with documents reflecting the amendments adopted under Article 18, including the "red-lined" revisions with new text shown in underline and deleted text shown in strikethrough. We offer the following comments for the Town's consideration regarding certain provisions.

I. Chapter – 23 - Finances

Under Article 18, the Town amended Chapter 23, "Finances," Article II, "Revolving Funds," Section 23-10, "Authorized revolving funds," to amend the Table that identifies the Town's existing revolving funds. The Table includes columns that identify who is authorized to spend from each fund; the revenue sources for each fund; and the use of each fund. For several of the existing revolving funds, either the "revenue sources" or the "use of funds" columns (or both) are blank.[4]

[4] Information in the "revenue sources" and "use of funds" column is missing for the following revolving funds: extended day; damaged books; summer school; recycling; composing; arts lottery; and wetlands. Information in the "revenue sources" column is missing for the land use restitution and student parking fees revolving funds.

General Laws Chapter 44, Section 53E ½, requires revolving funds to be established by by-law. A by-law adopted pursuant to G.L. c. 44, § 53E ½, must specify: "(1) the program or activities for which the revolving fund may be expended; (2) the departmental receipts in connection with those programs or activities that shall be credited to the revolving fund; (3) the board, department or officer authorized to expend from such fund; and (4) any reporting or other requirements the...town may impose." The amended revolving fund Table in Section 23-10 does not include information for all the revolving funds about the use of the funds or the departmental receipts to be credited to the revolving fund, as required by G.L. c. 44 § 53E ½. The Town should consult with Town Counsel to determine whether a future amendment to Section 23-10 is needed address this issue.

II. Chapter 213 – Peddling and Solicitation

Under Article 18 the Town made a minor revision to Chapter 213, "Peddling and Soliciting," to change "non-criminal" to "noncriminal." We approve the identified change to Chapter 213. The remainder of the existing text in Chapter 213 was not amended and is therefore not before the Attorney General for review and approval. However, we offer comments for the Town's consideration regarding the existing text in Chapter 213.[5]

Chapter 213 provides as follows (new text in underline and deleted text in strikethrough):

§ 213-1. Written authorization from Town required.

> No solicitor, peddler, hawker, itinerant merchant, transient vendor or purchaser of merchandise shall go in or upon any private residences or premises in the Town of Winchendon, Massachusetts for the purpose of the sale or purchase of goods, wares, or merchandise, or for the soliciting of orders for the sale of purchases of the same, or for the purpose of disposing of, peddling or hawking the same, without first having been expressly authorized to do so in writing by the Board of Selectmen of the Town.

§ 213-2. Violations and penalties; enforcement.

> Everyone violating this bylaw shall be punished by a fine of $50 for each offense, which shall be recovered by any means available in law or in equity, including ~~non-criminal~~ noncriminal disposition in accordance with the provisions of MGL c. 40, § 21D. This bylaw may be enforced by any police officer of the Town of Winchendon.

The existing text of Section 213-1 requires a person to be "expressly authorized...in writing by the Board of Selectmen" before engaging in any solicitation activities but does not provide a definite time limit within which a decision to issue the permit will be made. In addition, the existing text does not provide any standards or criteria to guide the Board of Selectmen in determining whether to issue the permit. Solicitation, whether for commercial or

[5] It is unclear when the Town first adopted this text or when it was approved by our office, but it appears to have been many years ago under a prior Attorney General.

noncommercial purposes, is an activity that is entitled to some measure of protection under the First Amendment to the U.S. Constitution, as applied to the states through the Fourteenth Amendment. See Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) (commercial speech entitled to First Amendment protection); Riley v. Nat'l Fed'n for the Blind, 487 U.S. 781 (1988) (regulations of professional solicitation subject to First Amendment scrutiny); Benefit v. City of Cambridge, 424 Mass. 918, 922 (1997) ("soliciting contributions is expressive activity that is protected by the First Amendment"). For this reason, the regulation of solicitation and canvassing activities can constitute a prior restraint. See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 226 (1990) (requiring a permit or license to engage in First Amendment activity is a form of prior restraint). The Supreme Court has held that any permitting system for solicitation, which impinges on First Amendment activity, must set a definite time limit within which the decision maker must either issue the permit or go to court to enjoin the activity. "[A] prior restraint that fails to place limits on the time within which the decision maker must issue the license is impermissible." FW/PBS, Inc., 493 U.S. at 226.

The Town may wish to discuss these issues with Town Counsel to determine whether a future by-law amendment is needed.

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,

ANDREA JOY CAMPBELL
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cc: Town Counsel Jonathan G. Murray

A TRUE COPY ATTEST
Town Clerk
4-30-24