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October 24, 2005

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Re: Town of Framingham Zoning By-Law Amendments
Adopted at Special Town Meeting on August 3, 2005
Response to Letters of South Middlesex Non-Profit Housing
Corporation dated August 25, 2005 and September 9, 2005

Dear Ms. Gunagan:

This letter is in response to your letters of September 8, 2005 and September 12, 2005, wherein you copied me on two letters sent to you by South Middlesex Non-Profit Housing Corporation ("SMNPHC"), the first dated August 25, 2005 ("August letter"), and the second dated September 9, 2005 ("September letter"), with enclosures. For the reasons described below, it is the Town of Framingham's position that the Town Meeting's Amendments to its Zoning By-Law ("Amendments") which were adopted at a Special Town Meeting on August 3, 2005 are proper, in accordance with G.L. c. 40A, §3 and other pertinent statutes, are very similar to other zoning bylaws approved by the Office of the Attorney General, and should be approved by the Attorney General in this instance in accordance with G.L. c. 40, §32.

ANALYSIS

A. The Attorney General's Scope of Review of the By-Law Amendments Under G.L. c. 40, §32 is a Limited One, and the Attorney General is Required to Approve Said Amendments if They Are Capable of any Legal Application

The authority of local governments to regulate the use of private property through zoning is based in the state's generalized police power. See generally Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Inherent to this expansive regulatory power is the

understanding that local government must have the flexibility to address rapidly changing local conditions. Zoning regulations will be found to be constitutionally valid unless clearly arbitrary and unreasonable and unless they have no substantial relation to the public health, safety, morals or general welfare. See id.

The power of the Attorney General to disapprove by-laws pursuant to G.L. c. 40, §32 (“Section 32”) is a limited one. See Concord v. Attorney Gen., 336 Mass. 17, 24-25 (1957). Every “presumption is to be made in favor of the validity of municipal by-laws.” Town of Amherst v. Attorney Gen., 398 Mass. 793, 796 (1986). If a proposed by-law is capable of any interpretation or application that would make it a legal one, then it must be approved under Section 32. See Concord v. Attorney Gen., 336 Mass. at 24-25. “The Massachusetts Constitution reaffirms the customary and traditional liberties of the people with respect to the conduct of their local government . . . Art. 2, §1, of the Amendments to the Constitution of Massachusetts (“Home Rule Amendment”), as amended by art. 89. In the exercise of this right to local government, towns have the power to pass by-laws for the purpose of preserving peace and order. G.L. c. 40, § 21. The town exceeds its power only when it passes a by-law inconsistent with the Constitution or laws of the Commonwealth.” See Town of Amherst, 398 Mass. at 796. Accordingly, bylaws can be invalidated only when they violate the Constitution or laws of the Commonwealth. There is no evidence that the Amendments should not be approved, especially taking into account the deferential standard of review that the Attorney General is required to apply when reviewing by-laws.

Contrary to the assertions made by SMNPHC in its August and September letters, the Town has complied with all legal requirements, both procedurally and substantively, in its adoption of the Amendments at the Special Town Meeting. The Amendments in no way violate any protections of the Constitution, and SMNPHC makes no claim to that effect. Furthermore, despite SMNPHC’s claims that the Amendments violate G.L. c. 40A, §3 (hereinafter referred to as the “Dover Amendment” or “Section 3”), the Amendments do not violate either the language or intent of Section 3 and are instead a means by which to better ensure compliance with the requirements of this section of the law. As established below, there is no support for SMNPHC’s claim that the courts of the Commonwealth forbid the use of site plan review prior to the issuance of a building permit, as a means to identify which aspect of the proposed project may be subject to “reasonable regulations” in accordance with Section 3. Instead, Section 3 envisions that Dover Amendment uses are to be reviewed prior to issuance of a building permit. A community cannot “reasonably regulate” the height and bulk of structures, and determine yard sizes, lot areas and setbacks, all permitted under the Dover Amendment, without a process that allows for a review of these project components in connection with the issuance of a building permit. See generally Trustees of Boston College v. Board of Aldermen of Newton, 58 Mass.App.Ct. 794 (2003). Although it is clear that Section 3 requires that Dover Amendment uses be shown significant deference, it is equally clear that, wherever possible, these uses are expected to comply with reasonable zoning requirements. See id.

The Amendments are a direct response to the continual evolution of judicial interpretations of Section 3 over the past decade, specifically the precise role that courts envision municipalities should take when reviewing Dover Amendment uses. The Amendments were

adopted by the Town to replace currently existing provisions that either had become ineffective in helping the Town to meet its responsibilities under Section 3, or were contrary to the deference intended to be shown to such uses. It is not, nor will it always be, an easy task to achieve the appropriate balance between protected uses and reasonable zoning regulations, as intended by the Dover Amendment. The Town believes that the Amendments will provide the best possible means to achieve this balance. For this reason, and for the other reasons set forth in this letter, the Town respectfully requests that the Office of the Attorney General approve the Amendments adopted by the Town.

B. The Amendments Were A Proper Legislative Act by the August 3, 2005 Special Town Meeting and Must be Regarded as Presumptively Valid

Keeping in mind the deferential standard of review that the Attorney General must employ when examining a bylaw enactment under Section 32, we now address the principal arguments raised by SMNPHC in its letters. A party attacking a zoning amendment has the burden of proof, requiring that he prove by a preponderance of the evidence that the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals, or general welfare. See McLean Hospital Corp. v. Town of Belmont, 56 Mass. App. Ct. 540, 547 (2002). For the reasons described herein, SMNPHC cannot meet its burden of proving that the Amendments are arbitrary, unreasonable or substantially unrelated to the public health, safety, morals or general welfare.

SMNPHC states in its August Letter that the Amendments were a response to pressure from a local Framingham citizen group known as Stop Tax Exempt Private Properties Sprawl (“STEPPS”) and that the underlying motives for the Amendments were as a “means to halt SMNPHC’s plans” to use its Framingham property as a drug rehabilitation facility, and that the Amendments merely constitute an attempt by the Town to have “an opportunity to regulate multiple facets of a development unrelated to reasonable dimensional restrictions” so that the Town could “severely curtail the perceived proliferation of non-profit educational uses in the Town.” See SMNPHC August letter, at pp. 1-2.

SMNPHC’s assertions are based predominately upon its fear that the Amendments will be applied to its property. As might be anticipated from any property owner whose property may be affected by changes in zoning, SMNPHC seeks to counter the lawful action of the citizens of the Town by arguing that the changes were proposed solely as a means by which to cause it harm. However, despite SMNPHC’s claims to the contrary, the adoption, amendment, or repeal of local zoning by-laws “by the voters at town meeting is not only the exercise of an independent police power; it is also a legislative act carrying *a strong presumption of validity*.” See Durand v. Bellingham, 400 Mass. 45, 50-51 (2003) (emphasis added), citing Sylvania Elec. Prods. Inc. v. Newton, 344 Mass. 428,433 (1962). “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.” Id., citing Crall v. Leominster, 362 Mass. 95, 101 (1972). “Such an analysis is not affected by consideration of the various possible motives that may have inspired legislative action.” Id., citing Merriam v. Secretary of the Commonwealth, 375 Mass. 246, 253 (1978).

Despite all the varying opinions that may have been voiced by the citizens of the Town prior to the adoption of the Amendments (the expressions of which is an integral part of our democratic process), the Town's decision to amend the Zoning By-Law ("By-Law") at this time was the culmination of a lengthy review process undertaken by the Framingham Planning Board and other town officials over approximately a two year period. The process that resulted in the issuance of the Notice of the Public Hearing for the Amendments in July, 2005, predates by years the date that SMNHPC purchased the parcel at 517 Winter Street in Framingham. Therefore, SMNHPC's assertions that the Amendments were proposed in response to SMNHPC's acquisition of 517 Winter Street is directly contradicted by the uncontroverted facts that both the need for and the review process that resulted in the Amendments originated before SMNHPC's acquisition of the Winter Street parcel.

Over the past several years, the Town had become increasingly aware that existing provisions in the By-Law were no longer appropriate to comply with the direction of the courts, and as some of these provisions had been added at different times they now were subject to conflicting and inconsistent interpretations regarding their application to review of Section 3 uses. One of the purposes of the ongoing review process was to respond to the direction set forth by the courts of the Commonwealth in recent years in interpreting the scope and nature of municipal rights and responsibilities under Section 3. For example, one section of a prior version of the Bylaw completely shows Section 3 uses were exempted from site plan review. This exception is not supported by recent case law. See Campbell v. City Council of Lynn, 415 Mass. 772, 778 (1993) ("[L]ocal officials *may not grant blanket exemptions* from the requirements [identified in Section 3] to protected uses . . . officials may, however, on an appropriate showing, decide that facially reasonable zoning requirements . . . cannot be applied . . . because application of the requirements would nullify the protection granted to the use . . .") (emphasis added); Trustees of Tufts College v. Medford, 415 Mass. 753, 760 (1993) ("Because local zoning laws are intended to be uniformly applied, an educational institution . . . bears the burden of proving that the local requirements are unreasonable as applied to it . . . *local officials may not grant blanket exemptions* from the requirements to protected uses") (emphasis added); and Green v. Central Middlesex Ass'n for Retarded Citizens, 64 Mass.App.Ct. 1106 (2005) (unpublished 1:28 decision) (Requirements of a by-law are presumptively valid under the Dover Amendment and require an educational institution to prove local requirements are unreasonable as applied to it; a town may not choose to grant blanket exceptions to such uses).

The courts have clarified in recent years that "the Dover Amendment is intended to encourage a degree of accommodation between the protected use and matters of critical municipal concern." Trustees Of Boston College v. Board Of Aldermen Of Newton, 58 Mass. App. Ct. 794, 801, fn.7 (2003), citing Trustees of Tufts College v. Medford, 415 Mass. 753, 760 (1993); Martin v. The Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 434 Mass. 141, 144, (2001). The Town had found that, under the existing provisions of the By-Law, it was no longer able to provide for a clear and uniform system that allowed for "balanced accommodation" between the protected uses and matters of critical municipal concern. The Amendments resulted from a review process that sought to reconcile these inconsistencies, to improve the overall functioning of the By-Law regarding these uses, and to respond to recent

court decisions that have provided further guidance on how to properly bring about the delicate balance required under the Dover Amendment. The Amendments were not directed to a specific parcel of land, although the Winter Street parcel and other parcels may be subjected to its provision.

C. Site Plan Review may be Applied to Dover Amendment Uses Consistent with State Law

SMNPHC argues in its August letter that the Amendments represent a decision to subject Section 3 uses to site plan review. This is not correct. Rather, the Amendments represent a decision by the Town to no longer “exempt” certain uses, including Section 3 uses, from site plan review and to instead require uniformity in the application of these provisions of the By-Law. Despite SMNPHC’s beliefs that blanket exemptions are the only proper way in which to address Section 3 uses, granting blanket exemptions from local zoning requirements is exactly what the courts have found to be inappropriate in recent years. See Trustees of Tufts College, 415 Mass. at 760; City Council of Lynn, 415 Mass. at 778 (1993); Central Middlesex Ass’n, 64 Mass. App. Ct. at 1106 (2005).

SMNPHC’s August Letter further argues that the practical effect of the Amendments will require that its property be subject to site plan review should the Town ultimately determine that SMNPHC’s proposed use is a Dover Amendment use.¹ However, what SMNPHC has failed to acknowledge is that, if strictly applied, the prior version of Section III.A.1.i. of the By-Law would most likely have resulted in an outright prohibition of SMNPHC’s proposed use of its property pursuant to Section III.A.1.i.(1) – (9). Application of this now repealed section of the By-Law would have, at the very least, subjected SMNPHC to site plan review pursuant to Section III.A.1.a.i.(10)-(14). Despite the fact that Section IV.I.2. exempted Section 3 uses from the requirements of site plan review under that Section of the By-Law, it is not necessarily true that it would have exempted SMNPHC’s property from the provisions of site plan review as defined under the prior Section III.A.1.i.(10). The problem of conflicting provisions is one of the problems that the Town endeavored to eliminate through the Amendments.

SMNPHC also mischaracterizes the nature of site plan review permitted under the By-law and the Amendments thereto. Site plan review is not a zoning restriction or limitation. The

¹ This is a determination that the Town has not yet been able to make, based on the fact that SMNPHC has failed to fully address the Town’s ongoing requests for supporting documentation and further information on the educational services that are expected to be provided at this site. To date, SMNPHC’s responses to the Building Commissioner’s denial of its application for a “Change of Use” have included providing documentation of its non-profit status and some additional information on what aspects of its program it believes meet the “educational” requirement for protection pursuant to Section 3. It appears that SMNPHC’s interpretation of Section 3 is that once a non-profit organization determines that its proposed use is a Dover Amendment use, the Town is prohibited from conducting any additional form of review to determine if what is being proposed actually meets the legal requirements of Section 3 to be afforded the protections of that section. SMNPHC’s assertions are obviously not consistent with case law under the Dover Amendment. In addition, despite the fact that SMNPHC stated it would provide other information as requested by the Building Commissioner to insure compliance with local zoning and with state building code, no further information has been forthcoming. Instead, SMNPHC has appealed the decision of the Building Commissioner to the Town’s Zoning Board of Appeals.

Supreme Judicial Court has recognized site plan review as “regulation of a use rather than a prohibition . . . contemplating primarily the imposition for the public protection of reasonable terms and conditions.” Y.D. Dugout, Inc. v. Board of Appeals of Canton, 357 Mass. 25, 31 (1970). The conclusion that “site plan review has to do with *regulation of permitted uses, not their prohibition*, as would be the case with a special permit or a variance” has been repeatedly affirmed by the Courts. Osberg v. Planning Bd. of Sturbridge, 44 Mass. App. Ct. 56, 57 (1997) (emphasis added), citing Bowen v. Board of Appeals of Franklin, 36 Mass. App. Ct. 954, 955 (1994). SMNPHC further fails to recognize the critical distinction that the site plan review contemplated by the Amendments is required to be performed in association with the issuance of a building permit (allowing a project to proceed) and not a special permit (which is discretionary in nature). Therefore, any assertion by SMNHPC that site plan review would result in an outright denial of its project is not supported as a matter of fact or law.

In reliance on its misunderstandings of the law as enumerated above, SMNPHC further argues that the prior version of Section IV.I.2. of the By-Law “specifically (and properly)” exempted all Section 3 uses from site plan review and is in keeping with the holding of The Bible Speaks v. Board of Appeals of Lenox, 8 Mass. App. Ct. 19 (1979). SMNPHC specifically asserts that the Appeals Court in The Bible Speaks “invalidated the provisions of a local zoning ordinance that imposed certain site plan requirements on educational uses.” See SMNPHC’s August Letter, p. 3. A balanced reading of The Bible Speaks, however, leads more logically to the conclusion that the Appeals Court’s findings in that case do not support the assertion that the case stands for a general ban on application of site plan review to Section 3 uses. In actuality, The Bible Speaks Court found that “the full impact of the [site plan] requirements . . . must also be appraised in light of the provisions of § 6 of the by-law, which makes educational uses, such as the plaintiff’s, special exceptions *dependent on the discretionary grant of a special permit by the board.*” See id. at 32 (emphasis added). The extensive site plan review utilized in The Bible Speaks was not limited to reasonable dimensional considerations identified within Section 3 or to any identified health and safety concerns associated with the site. Instead, the process constituted “an assessment of the probable impact of its project on attendance in the public schools, increase in vehicular traffic, increases in municipal service costs, load on public utilities or the future demand for them, public safety, police and fire protection, changes in surface drainage, increased consumption of water and increase in refuse disposal.” See id. at n.12.

SMNPHC assumes that merely because the general site plan review defined under Section IV.I. can in some instances require a variety of different reports, that therefore all of these requirements will be applied to Section 3 uses. Nothing in the language of the Amendments supports such a conclusion. The Town obviously will be limited by the previously cited cases to insure that site plan review of any Section 3 use is implemented in a manner that does not infringe upon the rights afforded those uses pursuant to Section 3. In fact, the Amendment to Section IV.I.3.b. states that “[t]he Planning Board, at its discretion and based on a preliminary assessment of the scale and type of development proposed, may waive or modify the requirements for submission of any of the elements in Subsection 5 and the development impact standards in Subsection 6. Such waiver shall be issued in writing with supporting reasons.”

The Attorney General should be aware that the Town is mindful of the cautionary language provided by your office regarding the application of site plan review to Section 3 uses:

It is our view that the requirement for site plan review is not facially inconsistent with state law to ascertain whether a protected use complies with reasonable regulations concerning yard size, lot area, setbacks, open space, parking, and building coverage requirements. However, we caution the town not to implement site plan review in a manner that infringes on the rights given under G.L. c. 40A, Section 3.

See Danvers #2366 (Attorney General's Office, The Municipal Law Unit, March 19, 2003).²

Contrary to SMNPHC's assertions, it is not necessary for the Town to have fashioned a separate form of site plan review or to craft specific language that defines the exact process to be applied to Section 3 uses. "Under the Dover Amendment, which places restrictions on municipal zoning of nonprofit education institutions, it is not necessary that local zoning requirements be drafted specifically for application to educational use in order to be considered reasonable." Trustees of Boston College v. Board of Aldermen of Newton, 58 Mass. App. Ct. 794, 802 (2003).

In further support of its argument that site plan review as applied to Section 3 uses is per se improper, SMNPHC also cites to a footnote in Petrucci v. Board of Appeals of Westwood, 45 Mass. App. Ct. 818, 824, n.9 (1998). According to SMNPHC, this footnote stands for the proposition that "the proposed exempt [Section 3] use could not be made subject to either variance procedures or site plan review, a conclusion in accord with Trustees of Tufts College v. Medford." SMNPHC August Letter, p. 4. However the exact statement by the Appeals Court in the Petrucci footnote was:

The commissioner and the board determined that, short of relocation, Petrucci would have to obtain a variance, after site plan review. On Petrucci's second motion for partial summary judgment, the [lower court] judge ruled that the proposed exempt use could not be made subject to either variance procedures or site plan review, a conclusion in accord with Trustees of Tufts College v. Medford, 415 Mass. 753, 760, 765 (1993). The board has not questioned that ruling in this appeal.

The Appeals Court included the above-quoted text in footnote 9 to indicate that the board had not chosen to question the lower court's ruling on appeal. Petrucci did not adjudicate the question.

² In addition to the Town of Danvers, the towns of Burlington, Groton Concord, and Sudbury, as well as the cities of Marlborough and Newton, to name only a few, have by-laws or ordinances that do not exempt Section 3 uses from site plan review, but instead implement the use of site plan review in such a manner that does not infringe upon the rights afforded to those uses. The Attorney General has approved the by-laws in the towns mentioned, notwithstanding the fact that they do not confer blanket exemptions on Dover Amendment uses from site plan review, and therefore may permit appropriately tailored site plan review to such uses within the parameters of Section 3.

In no way can it be said that this footnote constitutes a wholesale adoption by the Appeals Court of the premise that site plan review can never be applied to Section 3 uses in association with a building permit.

In further support of its assertion that site plan review of Section 3 uses is impermissible, SMNPHC next references a decision of the Land Court, Trustees of Boston College v. Board of Aldermen of the City of Newton, Misc. Case No. 121573 (Mass. Land Ct. 1987). This case, while instructive, does not rise to the level of precedent and is actually of little assistance to SMNPHC's argument.³ In this case, the Land Court (Sullivan, C.J.) held not that the site plan review provisions of the City of Newton's ordinance "as applied to non-profit religious and educational uses, violates the provisions of G.L. c. 40A, § 3," but rather the following:

Upon consideration of the *foregoing facts and arguments* and in light of the case law I find that Section 30-24 of the Newton Zoning Ordinance, *as applied* to non-profit religious and educational uses, violates the provisions of G.L. c. 40A, s.3, and further *that the conditions imposed by the site plan approval exceed in general the proper scope of site plan review* and constitute as a whole an unreasonable interference with the protected statutory use.

Id. at 15 (emphasis added). Again, the Land Court did not find site plan review inappropriate in all instances, but that in this case the application of site plan review by the City of Newton under the facts of the particular case had exceeded the allowable scope of review pursuant to Section 3.

The Appeals Court's consideration of a subsequent case, involving the same parties, further negates SMNPHC's argument that site plan review is always inappropriate when applied to Section 3 uses. Instead, the Appeals Court held:

The Dover Amendment is intended to encourage a degree of accommodation between the protected use and matters of critical municipal concern. (citations omitted). Here, unfortunately, those accommodations effectively were negated when the proposed order failed to attract a super majority of the board, resulting in denial of the permits. *Moreover, that denial also put aside any opportunity for the board reasonably to regulate a permitted use through site plan review.* See Osberg v. Planning Bd. of Sturbridge, 44 Mass. App. Ct. 56, 57, 687 N.E.2d 1274 (1997), and cases cited.

Trustees of Boston College v. Board of Aldermen of Newton, 58 Mass. App. Ct. 794, 800 (2003) (emphasis added). Thus, the Appeals Court's decision in this later case actually is in opposition to SMNPHC's assertion that the application of site plan review to Section 3 uses is per se improper.

³ In fact, this case appears to only have ever been cited once by the Land Court in its subsequent decisions. In that instance, it was cited for the proposition that courts must be "careful to establish a nexus between the legitimate goal of the challenged regulation and its effect on the proposed project and the institution's plans." Assembly of God Church of Attleboro v. Zoning Board of Appeals of Attleboro, Misc. Case Nos. 224472, 224930 (Mass. Land Ct. 1999).

Finally, it must be emphasized that the cases cited by SMNPHC considered the use of site plan review in combination with the special permit process, not the issuance of a building permit as applicable to the Amendments in this instance. SMNPHC has not presented a supportable argument that the courts in the Commonwealth have conclusively determined that site plan review is impermissible for review of Section 3 uses. Instead SMNPHC has merely shown support for the Attorney General's determination that site plan review is not facially inconsistent with state law, but must instead be implemented in a manner that does not infringe on the rights under Section 3.

D. SMNPHC's Claim that the Town failed to Provide Adequate Notice as to the Amendments' General Intent Lacks Merit and is Unsupported by Case Law

SMNPHC's remaining arguments in its August Letter all deal with the issue of notice and focus on the differences between the language of the Warrant as compared to the language of the final Amendments adopted by Town Meeting. According to SMNPHC, the August 3, 2005 Special Town Meeting could not change the language of the proposed Amendments to be more expansive or have any greater impact than the language that was originally included in the Warrant and specifically identified as part of the Planning Board Hearing Notice. See SMNPHC August Letter, Issues 2-4.

G.L. c. 40A, § 5 states that "no defect in the form of any notice shall invalidate any zoning ordinance or by-laws unless such defects is found to be misleading." The leading case which addresses the adequacy of notice, as well as subsequent changes to proposed amendments prior to final adoption by a town, is Town of Burlington v. Dunn, 318 Mass. 216 (1945). According to the Supreme Judicial Court in Dunn, G.L. c. 39, § 10 requires only that:

[T]he warrant shall state the subjects to be acted upon at the meeting and that no action shall be valid unless the subject matter thereof is contained in the warrant. This means only that the subjects to be acted upon must be sufficiently stated in the warrant to appraise voters of the *nature of the matters* with which the meeting is authorized to deal. It does not require that the warrant contain an accurate forecast of the precise action which the meeting will take upon those subjects.

Id. at 219 (emphasis added). As SMNPHC notes, the Town posted and published a Warrant for a Special Town Meeting to be held on August 3, 2005. Because the Warrant indicated that the proposed amendments were to deal with Sections III.A.1. and IV.I., these references were enough to put the public on notice that changes were being considered to these sections of the By-Law.

In the present case, it became apparent as part of the public hearing process that deletion of the original language identified in the Warrant left residual provisions in the By-Law that would be rendered substantively meaningless or confusing by the Amendments. It is perfectly acceptable and understandable that there should be changes to the text of the proposed amendments after the hearing before the Planning Board because "the purpose of such public

hearing is to obtain public sentiment so that proper revisions can be made.” Doliner v. Town Clerk of Millis, 343 Mass. 10, 13 (1961). Insofar as these sections were corollary provisions of the original Sections III.A.1. and IV.I. of the Zoning By-Law, the Special Town Meeting decided to delete such provisions that would become meaningless or to amend the language to provide the needed clarity, to avoid future confusion as to their meaning or application. These deletions and amendments did not fundamentally change the character of the Amendments; rather they instead were designed to perfect the implementation of the proposed Amendments.⁴ See Dunn, 318 Mass. at 218-219.

SMNPHC’s reference to Fish v. Town of Canton, 322 Mass. 219 (1948), in support of its notice argument is completely misplaced. In Fish, the Supreme Judicial Court addressed the extreme instance of a case where the town stated in its warrant that it intended to amend a particular section of its Zoning By-Law, when indeed it was looking to either completely repeal or effect major revisions to its entire by-law. See id. In contrast, in the case of Framingham, the Town proposed, considered, and voted to amend the language of Sections III.A.1. and IV.I., as identified in the Warrant and in the notice, which is fully consistent with and permissible under the holding in Dunn. The repeal of the corollary provisions of the By-law that were not specifically identified in the warrant or public hearing notice were nonetheless within the general identity of the proposed amendments and were designed merely to harmonize, perfect and give true effect to the proposed amendments of Section III.A.1. and IV.I. See Fish, 322 Mass. at 223, citing Dunn, 318 Mass. at 218-219.

In the current instance, the warrant sufficiently apprised the voters of the subject matter of the vote. See id. All of the provisions of the Amendments were within the reasonable notice of the Warrant and notice. See Johnson v. Town of Framingham, 354 Mass. 750 (1968). The Town was within its right at the Special Town Meeting to vote to pass the Articles as written “or take any other action thereon.” Nelson v. Town of Belmont, 274 Mass. 35, 42-43 (1931) “It is a settled principle that warrants for town meetings are to be liberally interpreted and are not to be construed with great strictness. It is sufficient if intelligible notice of the subject to be considered is given. Substantial certainty as to the nature of the business to be acted upon is all that is required”. Id.

E. The Amendments Sufficiently Describe How Site Plan Review Should be Applied to Section 3 Uses and Sufficiently Guide the Discretion of the Building Commissioner

SMNPHC argues in its September Letter that the By-Law does not specifically define what provisions in Section IV.I. will be applied to Section 3 uses, and therefore the Amendments are “fatally flawed because [they do] not offer any standard for how Site Plan Review applies to

⁴ If the Attorney General should reach the unlikely conclusion that the technical conforming ancillary amendments of the non-Section III.A.1. and IV.1 provisions that were made to give effect to the main revisions are somehow procedurally defective on notice grounds, G.L. c. 40A, § 5 clearly indicates that the Attorney General may disapprove those technical ancillary amendments while approving the main amendments to Section III.A.1 and IV.1 that indisputably satisfied the notice requirements.

a Dover Amendment protected use.” However, the Town is not required to include such a provision in the By-Law because the Commonwealth has already provided the relevant standard in Section 3. This section clearly states 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.” Greater specificity in the By-Law could run afoul of state direction under Section 3, create needless confusion, and possibly negate the Town’s effort to maintain neutrality in application of the By-Law.

As explicated above, the Town understands and recognizes that not all of the provisions of Section IV.I. would be applicable to Dover Amendment uses because state law limits the application of site plan review in such circumstances. The Town included an amendment to this section (now Section IV.I.3.b) which states that the Planning Board “may waive or modify the requirements for submission of any of the elements in Subsection 5 and the development impact standards in Subsection 6” to allow for the necessary flexibility in dealing with a variety of uses, including Section 3 uses. What will be required from a Section 3 applicant for site plan review will depend upon, be reflective of, and conditioned by with “reasonable regulation” is permitted within the contours of Section 3.

In Framingham, the Building Commissioner also serves as the Zoning Enforcement officer and he/she is the “gate keeper” who initially, and routinely, makes determinations as to whether a use complies with local zoning. See Fitzsimmons v. Board of Appeals of Chatham, 21 Mass. App. Ct. 53, 56 (1985). Given the great variety of factual considerations associated with different types of Section 3 uses, every property will require the evaluation of different factors, but always as in keeping with the requirements of Section 3. Based on a determination of the Building Commissioner, different applicants may be required to provide a slightly differing set of documentation, which could range from a mere written description of the proposed project to plans, drawings and full narratives. The Building Commissioner must then make an initial determination regarding what "reasonable regulation" might require further site plan review by the Planning Board and will advise the applicant as to the nature and particulars of the documentation that should be submitted to permit this review to occur.

By way of example, in response to SMNPHC’s application, the Building Commissioner specifically informed SMNPHC that it needed to submit “An off-street parking plan and lot in compliance with the Town Zoning By-Laws, Section IV.B.1 “Number of space required” for a residential care facility as one space for every four (4) occupants plus one per two (2) employees. The Planning Board will review the parking lot under Site Plan review.” See August 11, 2005 Letter to SMNPHC from Joseph Mikielian, Building Commissioner, Town of Framingham. This response gave SMNPHC a clear and specific indication that Site Plan review would include (but not necessarily be limited to) parking requirements for the proposed use, which is clearly in keeping with both the language and intent of Section 3.

CONCLUSION

For the foregoing reasons, the Town respectfully submits that the Amendments adopted at the August 3, 2005 Special Town Meeting are fully consistent with applicable law and were

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adopted in accordance with proper procedures and notice. None of the reasons advanced in the South Middlesex Non-Profit Housing Corporation's letters of August 25, 2005 and September 9, 2005 warrant rejection of the Amendments. The Amendments are consistent with (and nearly mirror in some instances) site plan review by-laws approved by the Office of the Attorney General on past occasions. Under G.L. c. 40, §32 and applicable case law, the Town of Framingham respectfully requests the Office of the Attorney General to approve the By-Law Amendments approved by the Framingham Special Town Meeting of August 3, 2005.

If you have need any further information or have any questions regarding the Amendments or this letter, please give me a call.

Very truly yours,

/s

Christopher J. Petrini
Town Counsel

cc: Framingham Board of Selectmen
Framingham Planning Board
Framingham Zoning Board of Appeals
George P. King, Jr., Town Manager
John W. Grande, Planning Board Administrator
Joseph R. Mikielian, Building Commissioner
Eugene F. Kennedy, Zoning Board of Appeals

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