



*Town of Arlington
Legal Department*

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To: Town Meeting Members

Cc: Arlington Board of Selectmen
Adam Chapdelaine, Town Manager
John Leone, Town Moderator

Date: April 21, 2021

Re: Zoning Updates for Town Meeting

Mr. Moderator and Members of Town Meeting, I write to provide you two updates for your information and consideration in advance of the 2021 Town Meeting and beyond. First, permit me to outline the impacts of Chapter 358 of the Acts of 2020 ("An Act Enabling Partnerships of Growth") passed in January of 2021, relative to Zoning Bylaw Amendments generally, and the specific proposals before you in this Town Meeting season. Second, allow me to summarize the Attorney General's Decision regarding Warrant Article No. 17 of the 2020 Special Town Meeting for the Members' understanding and future reference.

The Act: Zoning Amendments & Housing Choice Law

Chapter 258 of the Acts of 2020 (“The Act,” also known in relevant parts as “Housing Choice Law”) made some of the most significant changes to G.L. c. 40A (the Zoning Act) in many years. The critical pieces for Town Meeting’s understanding are three fold. The Act:

1) *Provides Additional Definitions for Zoning Terms in c. 40A sec. 1A*

The Act provided specific definitions within c. 40A for terms which were previously undefined, including “Accessory Dwelling Units.” Setting aside the substance of Article 43 before you, it is important for local zoning bylaw definitions and Zoning Act definitions to be compatible. The recommended vote from the ARB on Article 43 relative to Accessory Dwelling Units aligns our proposed local definition with the State’s definition appropriately.

2) *Changes Quantum of Votes Required for Certain Zoning Bylaw Amendments*

Prior to passage of the Act all amendments to local zoning bylaws required a 2/3rds vote of positive action by Town Meeting pursuant to c. 40A sec. 5. As revised, c. 40A sec. 5 requires a *simple majority* of Town Meeting to approve certain categories of zoning amendments including:

- a. Bylaws that allow multifamily housing, mixed-use, accessory dwelling units, or open-space residential developments as of right;
- b. Bylaws that allow multifamily housing, mixed-use, or an increase in density in multifamily or mixed-used developments, accessory dwelling units, or parking reductions in residential or mixed-use developments by special permit;
- c. Bylaws that permit Transfer of Development Rights (“TDR”) zoning or natural resource protection zoning in exchange for concentration of development in areas that a municipality deems “most appropriate,” but which cannot result in a reduction in the maximum number of housing units that could be developed within Town;
- d. Bylaws that amend existing zoning regulations to relax bulk and height of structures, yard sizes, lot area, setbacks, open space, parking and building coverage requirements to allow for additional housing units; and
- e. Adoption of “Smart Growth” Zoning Districts pursuant to c. 40R.

Article 43 (Accessory Dwelling Units) is the only article the ARB has recommended for positive action that is subject to the revised simple majority quantum of vote in this year's Town Meeting.¹

3) Institutes New MBTA Community Requirements

The Act also created a new section 3A under Chapter 40A, mandating that each "MBTA Community" (including Arlington) establish a zoning bylaw that provides for at least one multi-family district of "reasonable size" for as-of-right multi-family housing. Section 3A further details statutory minimums for such multi-family housing zoning districts including:

- a. Multi-family districts must have a minimum gross density of 15 units per acre;
- b. Not be subject to age restrictions and suitable for families with children;
- c. Be located not more than one-half mile from a commuter rail station, subway station, ferry terminal, or bus station.

As further detailed in the ARB's Report to Town Meeting under Article 37, there are financial penalties for failure to establish or maintain compliant MBTA Community multi-family zoning districts under the revised Zoning Act. However, given the timing of both the Act's passage and the lack of further detailed guidance from the State to date on this provision, the ARB recommends taking more time to develop any proposals relative to the MBTA Community districts in Arlington. It is nonetheless important for Town Meeting to understand that the Town could lose access to important funding resources if compliance standards are not met in the future.

For further reading on the implications of the Act, please see the attached summary from the Executive Office of Housing & Economic Development's "Guidance for Local Officials on Determining Voting Thresholds for Zoning Ordinances and Bylaws."

¹ Members may take note that some of the proposed revisions regarding mixed-use residential development in to permissible Industrial Uses under Article 35 could potentially be presented as a separate article subject to a simple majority vote. However, given the timing of the passage of the Act the ARB had already developed much of its proposal for Industrial Districts in one comprehensive article which requires a 2/3rds majority vote under Article 35.

Attorney General's Office Decision re: 2020 STM Article 17

As Town Meeting knows, all Town Bylaws and Zoning Bylaws are subject to review and approval by the Attorney General's Municipal Law Unit pursuant to G.L. c. 40 sec. 32. Following submission of the Town Meeting-approved bylaw amendments from the November 2020 Special Town Meeting, the Municipal Law Unit offered the following comment in its March 18, 2021 Decision otherwise approving the bylaws amendments submitted from the 2020 Special Town Meeting:²

Article 17 - Article 17 amends the Town's zoning by-laws, Section 3, "Administration and Enforcement," Subsection 3.1 (B), "Building Inspector; Enforcement," to add additional text to the end of Subsection 3.1 (B), as follows (new text in underline):

No person shall erect, construct, reconstruct, convert or alter a structure, or change the use or lot coverage, increase the intensity of use, or extend or displace the use of any structure or lot without applying for and receiving the required permit(s) from the Building Inspector. No such permit shall be issued until the Building Inspector finds that the applicant is in compliance with the applicable provisions of Title VI, Article 7 of the Town Bylaws.

Subsection 3.1 (B) as amended requires compliance with Title VI, Article 7 of the Town's general by-laws before the Building Inspector shall issue a "permit." Title VI, Article 7 of the Town's general by-laws pertains to "Notice of demolition, open foundation excavation, protected tree removal, new construction or large additions" and requires that prior to the commencement of certain site work or within seven calendar days of the filing of an application for a building permit, the owner will give notice to all abutters within 200 feet of such site work. See Title VI, Article 7 (A).

It is unclear what the Town means by "permit" and whether this refers to a building permit. However, Subsection 3.1 (B) cannot be applied to authorize the withholding of the building permit for failure to comply with the general by-law requirements in Title VI, Article 7, as explained in more detail below.

The State Building Code ("Code") governs the issuance of a building permit. See State Building Code, 8th Edition, 780 C.M.R. §§ 105.3.1. More specifically, the Code requires the Building Inspector (as Code Enforcement Officer under the Code) to issue a building permit where the applicant has demonstrated compliance with the Code and the town's zoning by-

² The MLU also provided comment under Special Town Meeting Article 8's quorum provisions for the Affordable Housing Trust Fund Board of Trustees, noting that a quorum is a majority of members regardless of any vacancy or absences on such Board pursuant to the Open Meeting Law.

laws. 780 C.M.R. § 105.3.1; see also G.L. c. 40A, § 7. In addition, G.L. c. 40A, § 7 authorizes the withholding of a building permit only if the applicant's proposed project is in violation of the town's zoning by-laws. Thus, a town cannot withhold a building permit for failure to comply with a town's general (non-zoning) by-law requirements. The Town must apply Subsection 3.1 (B) consistent with the requirements of the State Building Code. The Town should discuss any questions on this issue with Town Counsel.

In brief, while to this Office's recollection of the Meeting, the proponent of Article 8 merely intended to create a cross-reference in the Zoning Bylaw to the Town Bylaw's "Good Neighbor" notification requirements, the Municipal Law Unit stressed that issuance of a Building Permit cannot ordinarily be predicated upon compliance with a Town Bylaw (as opposed to a Zoning Bylaw). There are modest exceptions to this general rule, including the subject of Article 7 at this 2021 Town Meeting because state law specifically authorizes *both* zoning and town bylaw requirements regarding earth (and rock) removal. Nonetheless, for both this Office and Town Meeting, the Attorney General's MLU affirmed a conservative interpretation of the general rule that building permits may not be conditioned on compliance with Town Bylaws, which also effectively means that those matters which are not the legal subjects of zoning cannot serve as predicates to the issuance of building permits.