



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

WESTERN MASSACHUSETTS DIVISION

1350 MAIN STREET

SPRINGFIELD, MASSACHUSETTS 01103-1629

TEL: (413) 784-1240

FAX: (413) 784-1244

MARTHA COAKLEY
ATTORNEY GENERAL
www.mass.gov/ago

April 23, 2010

Julie S. Smith, Town Clerk
549 Main Street
Chatham, MA 02633

**RE: Chatham Special Town Meeting of September 30, 2009 – Case # 5350
Warrant Article # 3 (Zoning)**

Dear Ms. Smith:

Article 3 – We return with the approval of this Office, except as indicated below, [see **pp. # 4 and 5 for Disapprovals #1 and #2 of #2**] the amendments to the Town's zoning by-law adopted under this Article on the warrant for the Chatham Special Town Meeting that convened on September 30, 2009.

On January 25, 2010, the Attorney General and Town Counsel elected to proceed under Chapter 299 of the Acts of 2000 (which amends G.L. c. 40, § 32) by agreeing to extend the 90-day period for the Attorney General's review of Article 3 for an additional 90-day period. Therefore, our review period expires on April 25, 2010. Our comments on these amendments to the Town's zoning by-law are detailed below.

I. Attorney General's Standard of Review and General Zoning Principles.

We acknowledge the letters and materials sent to our Office, both in favor of and opposing the amendments adopted under Article 3. These letters and materials have aided our review. 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.

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).

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).

We are aware of the concern that the proposed by-law violates the "uniformity principle" reflected in G.L. c. 40A, § 4, since it regulates business uses differently depending upon whether they qualify as formula business establishments. General Laws Chapter 40A, Section 4, requires, "Any zoning ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted." "The uniformity requirement is based upon principles of equal treatment . . ." SCIT, Inc. v. Planning Board of Braintree, 19 Mass. App. Ct. 101, 107 (1984). In evaluating whether different treatment violates the uniformity principle, "[p]rimary attention is . . . focused on the reasonableness of such classification." Williams, American Land Planning Law § 32:1 (Rev. ed. 2003). "[A] classification as the means for attaining a permissible end is not to be declared invalid 'if any state of facts reasonably can be conceived that would sustain it.'" Caires v. Building Comm'r of Hingham, 323 Mass. 589, 596-97 (1949) (quoting Rast v. Van Deman & Lewis Co., 240 U.S. 342, 357 (1916)). Given that aesthetics is a proper object of zoning, zoning regulations may legitimately distinguish among uses that have different impacts on neighborhood aesthetics without offending the uniformity principle embodied in G.L. c. 40A, § 4.

II. Summary of Article 3 and General Comments.

The amendments adopted under Article 3 make various amendments to the Town's zoning by-laws to create a new layer of regulation for those commercial establishments that qualify under the definition of "formula business establishment." The stated purpose of the amendments is "to help protect Chatham from the intrusions of chain stores and franchises

("Formula Business Establishments") and the potential negative impact they would have on the Town's special character, local business-based economy, economic vitality, and historical relevance and experience."¹ The amendments make five separate amendments to the Town's zoning bylaw as detailed below.

First, the amendments add a new subsection 5 to Section VII of the Town's zoning by-laws, Special Regulations, Subsection A, General Standards. This new subsection 5 requires formula business establishments to obtain both a special permit and site plan approval. Second, the amendments add a definition for "formula business establishment" in the zoning by-laws by adding a new subsection 44, "Formula Business Establishment" to Section II, Definitions. Third, the amendments add a new criterion to the review of special permit applications by adding a new subsection j to "Section VIII.C, Special Permit Procedures, Subsection 4, Criteria." Fourth, the amendments add a new criterion to be considered in review of nonconforming lots by adding a new subsection 11 to "Section V. Nonconforming Lots, Buildings and Uses, Subsection B. Enlargement, Extension or Change." Finally, the amendments add a new use category "Formula Business Establishment" to Appendix I, Schedule of Use Regulations. These amendments to the Schedule of Use Regulations indicate that formula business establishments will be allowed by special permit in the "SB" (Small Business), "GB" (General Business), and "I" (Industrial) districts.

As an initial matter, we construe the proposed definition of "formula business establishment" to mean that a business would so qualify based upon a specified number of enumerated physical characteristics, rather than on the ownership of the business. 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). The Town must apply the amendments consistent with this interpretation, and our approval of the amendments is limited to this interpretation. We recommend the Town consult with Town Counsel regarding the proper application of the amendments in this regard.

We note that, unlike similar by-laws which this Office has previously approved,² Chatham's proposed amendments apply to a business that meets at least two of the eleven enumerated items in the definition of formula business establishment. In comparison, the Nantucket by-law applies to businesses that matched three out of four criteria, and the Dennis by-law requires businesses to match three out of six criteria. While we note the concerns of some that the Chatham amendments may classify many businesses as "Formula Business

¹ Letter dated September 8, 2009, from Gloria Freeman and Norman Pacun to William G. Hinchey, Town Manager.

² Chatham's proposed by-law is similar to the following by-laws previously reviewed by this Office: the Town of Nantucket (approved by this Office in a letter dated October 27, 2006); and the Town of Dennis (approved by this Office in a letter dated March 24, 2008).

Establishments,” thus requiring additional review for special permits and site plans, it is beyond the scope of our review to “comment on the wisdom of the town’s by-law.” Town of Amherst v. Attorney General, 398 Mass. 793, 798 (1986). Instead, “we accord municipalities deference as to their legislative choices.” W. R. Grace & Co.-Comm. v. Cambridge City Council, 56 Mass. App. Ct. 559, 566 (2002).

In addition, we caution the Town that the proposed amendments may be subject to a constitutional challenge under the theory that the amendments impermissibly burden interstate commerce. See Island Silver & Spice, Inc. v. Islamorada, 542 F.3d 844 (11th Cir. 2008) (striking down ordinance that effectively excluded national chain stores as violating dormant commerce clause, since no legitimate local purpose was shown). However, the Attorney General’s review of the proposed amendments does not and cannot include the kind of factual inquiry a court might make in the course of resolving such challenges. We therefore express no view on how a court might resolve such a challenge base on a full factual record.

III. Definition of “Formula Business Establishment.”

The amendments adopted under Article 3 define “Formula Business Establishment” as follows (with emphasis added):

‘Formula Business Establishment’ means a business which does or is required by contractual or other arrangement or as a franchise to maintain two (2) or more of the following items: standardized (Formula) array of services and/or merchandise including menu, trademark, logo, service mark, symbol, décor, architecture, façade, layout, uniforms, color scheme, or similar standardized features and which are utilized by ten (10) or more other businesses worldwide regardless of ownership or location.

We disapprove and delete the above underlined text (“or similar standardized features”) because it is not definite enough to provide prospective business owners and enforcing agents with adequate notice of whether a business is subject to regulation as a “formula business establishment.” In addition to failing to provide business owners with adequate notice of whether they qualify as formula business establishments, the vagueness inherent in the phrase “or similar standardized features,” coming as it does after a list of features that could encompass virtually any feature of a business’s use of a property, provides insufficient guidance for the Town’s permit granting authorities to determine what would qualify as “similar standardized features.” See Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 363-364 (“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). Because the text “or similar standardized features” is inadequately defined in the by-law, and provides virtually unfettered discretion to the permit-granting authorities to define what qualifies under this text, this text is disapproved and deleted. **[Disapproval #1 of #2]**

While we approve the remaining text in the definition of “Formula Business Establishment,” we note that several of the “items” which serve to qualify a business as a Formula Business Establishment do not appear to be reasonably related to the by-law’s stated zoning purpose of preserving neighborhood aesthetics. For example, because a business’ menu and uniforms only impact the business’ interior space and not its exterior façade, some may contend that such items should not be used to qualify a business as a Formula Business Establishment when the stated zoning purpose of the by-law is to preserve neighborhood aesthetics. However, based upon the Attorney General’s limited standard of review, and because review of a legislative enactment ordinarily goes beyond consideration of its stated purpose to consider whether it has any conceivable rational basis, we cannot conclude as a matter of law that such qualifying items as “menu” and “uniforms” are so arbitrary, unreasonable, or substantially unrelated to the public health, safety or general welfare as to merit disapproval by this Office.

IV. Special Permit Criteria.

The amendments adopted under Article 3 provide the following new criteria to section VIII.C, Special Permit Procedures (with emphasis added):

j. Impact on the neighborhood and Town visual character and of surrounding businesses of any formula business establishment.

We disapprove and delete the above-underlined text (“and of surrounding businesses”) because, while the 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 the impact on surrounding businesses. See Circle Lounge & Grille v. Board of Appeals of Boston, 324 Mass. 427, 429-30 (1949) (“It was no part of the purpose of zoning regulations to protect business from competition.”). [Disapproval #2 of #2]

The amendments adopted under Article 3 add the following criteria to Section V.Nonconforming Lots, Buildings and Uses, Subsection B. Enlargement, Extension or Change (with emphasis added):

11. Visual impact on the neighborhood *and neighboring uses* of any formula business establishment.

Because this criteria is limited to consideration of the “visual impact” of the formula business establishment we approve this text. However, we caution the Town that this criterion cannot be applied so as to protect “neighboring uses” from business competition. See Circle Lounge & Grille, 324 Mass. at 429-30. We recommend the Town consult with Town Counsel regarding the proper application of this text.

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.

Nothing in the Attorney General's approval authorizes an exemption from any applicable state law or regulation governing the subject of the by-law submitted for approval.

Very truly yours,

MARTHA COAKLEY
ATTORNEY GENERAL

Margaret J. Hurley

by: Margaret J. Hurley, Assistant Attorney General
Chief, Central Massachusetts Division
Director, Municipal Law Unit
One Exchange Place
Worcester, MA 01608
(508) 792-7600 x 4402

enc.

cc: Town Counsel (via email)