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April 23, 2013

Sandra J. Burgess, Town Clerk
Town of Amherst
4 Boltwood Avenue
Amherst, MA 01002

RE: Amherst Special Town Meeting of November 19, 2012 ----- Case # 6603
Warrant Articles # 10, 11, 13, 14, 15, and 17 (Zoning)
Warrant Articles # 9 and 19 (General)

Dear Ms. Burgess:

Articles 11, 13, 14, 15, and 17 - We approve the amendments adopted under these Articles at the Amherst Special Town Meeting which first convened on November 19, 2012. Our comments on Articles 13 and 17 are provided in more detail below.

Article 13 - The amendments adopted under Article 13 amend Section 3.321, pertaining to two-family detached dwelling "duplexes." In pertinent part, the amendments create Subsections 3.3210 and 3.3211, pertaining to owner occupied duplexes and non-owner occupied duplexes, respectively. More specifically, Subsection 3.3211 imposes certain standards and conditions on non-owner occupied duplexes including requiring the ongoing services of a qualified professional property management company, the presence of an on-site resident manager, or similar provision for proper management of the rental use as a condition of approving a special permit for such use.

In the course of our review of the amendments we received communication opposing the amendments adopted under Article 13 on, for the most part, policy grounds. This communication has aided our review. However, 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). The Attorney General does not review the policy arguments for or against the enactment. Id. at 798-99. Rather, 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. Id. 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, 440 Mass. at 51 (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).

Because we conclude, based on our standard of review, that the amendments adopted under Article 13 are consistent with state law, we approve them. However, we offer the following caution.

Based on our review it is unclear how the Town will determine whether a dwelling is a single or two family dwelling and is subject to the by-law requirements adopted under Article 13. If the Town uses information provided on the Town's assessor cards to make this determination, the Town should confirm that such information is up-to-date and accurate. We offer this caution because tax assessors' records of owners of real property may be updated once annually by tax assessors as of January 1st. See G.L. c. 60, § 3. We caution the Town to ensure that any determination of the by-law's applicability must be made on up-to-date and accurate information. We suggest that the Town discuss this issue in more detail with Town Counsel.

Article 17 - The amendments proposed under Article 17 were adopted as a result of a citizen's petition. The vote under Article 17 as certified by the Town Clerk provides as follows:

"to amend paragraph 5 of Section 3.3241 of the Amherst Zoning bylaws by adding the words in **boldface** and by deleting the words, phrases, sentences, or section in ~~strikethrough~~ as follows:

5. The proposed conversion shall be suitably located in the neighborhood in which it is proposed, as deemed appropriate by the Zoning Board of Appeals. The conversion, if in a residential district shall either: a) be located in an area that is close to heavily traveled streets, close to business, commercial and educational districts, or already developed for multi-family use **and shall require owner-occupancy or a resident manager in one of the units**; or b) be from one to two units. **In both instances one unit** ~~of which~~ shall be and shall remain owner-occupied, **a requirement** which shall be made a condition of any Special Permit issued ~~in such an instance~~.

In addition to the changes adopted under Article 17 as provided above, the text of Section 3.3241 was also the subject of a number of changes adopted by Town Meeting under Article 14. One change adopted under Article 14 inserts an entirely new paragraph 5 into Section 3.3241 and makes the existing text of paragraph 5 a new paragraph 6. Another change adopted under Article

14 amends the new paragraph 6 to provide as follows (deleted text in ~~strike~~through and new text in **bold**):

The proposed conversion shall be suitably located in the neighborhood in which it is proposed, as deemed appropriate by the ~~Zoning Board of Appeals~~ **Special Permit Granting Authority**. The conversion, if in a residential district shall either: a) be located in an area that is close to heavily traveled streets, close to business, commercial and educational districts, or already developed for multi-family use; or b) be from one to two units, one of which shall be and shall remain owner-occupied, which shall be made a condition of any Special Permit issued in such an instance.

Although the vote under Article 17 was a vote to amend paragraph 5 of Section 3.3241, we generously construe the vote as actually amending paragraph 6 of the new Section 3.3241 as voted by Town Meeting under Article 14. However, because the text voted under Article 17 still includes references to text that was changed under Article 14, (e.g., the words “Zoning Board of Appeals” were deleted and the words “Special Permit Granting Authority” were inserted), we strongly suggest that the Town consult with Town Counsel to determine the exact wording of paragraph 6 in Section 3.3241. The Town may also wish to discuss with Town Counsel whether the Town should revote the text of paragraph 6 in Section 3.3241 at a future Town Meeting.

Articles 9, 10, and 19 - We remind the Town that in a letter dated March 29, 2013, we approved the amendments adopted under these Articles.

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.

Very truly yours,

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cc: Town Counsel Joel Bard (via electronic mail)