June 14, 2021

TO: Finance Committee

 Charlie Seelig

FR: Mark Bobrowski

RE: Zoning Diagnostic

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As promised, I have reviewed Halifax’s existing zoning by-law (ZBL) to point out internal inconsistencies, noncompliance with statute or case law, and omissions that should be addressed. These are the basic goals of a zoning recodification. It is not the intent of this

memorandum to identify master plan objectives that represent a change in policy. I used the

version of the ZBL available online in my work (Revised through May of 2018).

**General Comments:**

One goal of a recodification is to create an expandable format for the new ZBL, with chapters that make sense. My usual suggestion is as follows:

Chapter 1. Purpose, Authority, Applicability

Chapter 2. Establishment of Districts

Chapter 3. Use Regulations

Chapter 4. Dimensional and Bulk Requirements

Chapter 5. Nonconformities

Chapter 6. General Regulations (Signs, Parking, Lighting, etc.)

Chapter 7. Special Nonresidential Regulations (Adult Uses, Wireless, etc.)

Chapter 8. Special Residential Regulations (Estate Lots, Multifamily, ADUs, B&B, etc.)

Chapter 9. Special Districts (Floodplain and other overlay districts).

Chapter 10. Administration and Enforcement.

Chapter 11. Definitions.

The existing ZBL has plenty of limitations. First and foremost, the by-law is poorly organized. The placement of material is random. The ZBL tends to hopscotch from one topic to another, with no particular rhyme or reason.

Second, the ZBL repeats a lot of the Zoning Act reiterating (unnecessarily) procedures for

notice, publication, and public hearings. I recommend eliminating this redundancy. If you think the public would be shortchanged, consider attaching the procedures to the application package handed out over the counter at the Building Department. For example, a petitioner for a variance would get instructions that include the procedures from the statute.

All references to dates would probably be rejected by the Attorney General's Office if the

ordinance was subject to his review. The AG's Office is of the opinion that preferential

treatment for established uses violates the uniformity requirement of G.L. c. 40A, s.4. This

interpretation can undo the very delicate political compromises that lead to the initial enactment.

I always recommend that parking, loading, screening, and signage provisions be loosened up by allowing special permit relief from strict requirements. This offers a more flexible approach to site planning and may present opportunities for public/private partnerships.

My overall impression is that the by-law is functional and comprehensive, but not well

structured.

**Specific Comments:** This will go easier if you read my comments while you flip through the existing ZBL.

**Article I.**

**Section 167-1 and 167-2:** The Home Rule Amendment, Article 89 of the Constitution, acts in conjunction with Chapter 40A to establish the authority of the zoning power. It should be cited.

The purpose clause should incorporate reference to 1975 Mass. Acts 808, s. 2A. The purposes suggested in section 2A have been cited as a guide to the legitimate exercise of the zoning power. See, e.g., *Sturges v. Town of Chilmark*, 380 Mass. 246, 253 (1980). These extensive powers are not to be narrowly interpreted. *Collura v. Town of Arlington*, 367 Mass. 881, 885 (1975)(citing *Decoulos v. City of Peabody*, 360 Mass. 428, 429 (1971)). Section 2A is reprinted, below:

The purposes of this act are to facilitate, encourage, and foster the adoption and modernization of zoning ordinances and by-laws by municipal governments in accordance with the provisions of Article 89 of the Amendments to the Constitution and to achieve greater implementation of the powers granted to municipalities thereunder.

This act is designed to provide standardized procedures for the administration and promulgation of municipal zoning laws. This section is designed to suggest objectives for which zoning might be established which include, but are not limited to, the following: -- to lessen congestion in the streets; to conserve health; to secure safety from fire, flood, panic and other dangers; to provide adequate light and air; to prevent overcrowding of land, to avoid undue concentration of population; to encourage housing for persons of all income levels; to facilitate the adequate provision of transportation, water, water supply, drainage, sewerage, schools, parks, open space and other public requirements; to conserve the value of land and buildings, including the conservation of natural resources and the prevention of blight and pollution of the environment; to encourage the most appropriate use of land throughout the city or town, including consideration of the recommendations of the master plan, if any, adopted by the planning board and the comprehensive plan, if any, of the regional planning agency; and to preserve and increase amenities by the promulgation of regulations to fulfill said objectives. Said regulations may include but are not limited to restricting, prohibiting, permitting or regulating:

1. uses of land, including wetlands and lands deemed subject to seasonal or periodic flooding;

2. size, height, bulk, location and use of structures, including buildings and signs except that billboards, signs and other advertising devices are also subject to the provisions of sections twenty-nine through thirty-three, inclusive, of chapter ninety-three, and to chapter ninety-three D;

3. uses of bodies of water, including water courses;

4. noxious uses;

5. areas and dimensions of land and bodies of water to be occupied or unoccupied by uses and structures, courts, yards and open spaces;

6. density of population and intensity of use;

7. accessory facilities and uses, such as vehicle parking and loading, landscaping and open space; and

8. the development of the natural, scenic and aesthetic qualities of the community.

However, a word of warning. If you list something as a purpose, plaintiffs may use it to claim standing. For example, the protection of views is not sufficient to claim standing unless the local ZBL specifically creates an interest in views. *Monks v. ZBA of Plymouth,* 37 Mass. App. Ct. 685 (1994).

**Section 167-3:** I like to put ***all*** definitions in the last Chapter as a glossary. Two choices for you to make: Keep the definitions up front? Add all definitions to the glossary in new Section 11? For example, Section 167-15 on Floodplain Protection has a lot of special definitions. Keep them where they are or put them all in the back?

I also recommend a definition for any term used to allow a use, unless that term is self-explanatory. You have no definitions for uses whatsoever. Accordingly, all of your commercial uses are undefined, including:

Office

Retail

Municipal and utility uses

Restaurant

Greenhouse

There are plenty of others undefined. Some definitions ought to simply rely on the State Building Code to avoid confusion (height, basement, cellar, bedroom).

**Article II.**

**Section 167.4:** I don’t like to state purposes for the underlying districts. The purpose of each district is to allow what’s allowed in the Use Table with the dimensional attributes set forth in the Dimensional Table. Too often, lay people latch on to such purpose clauses to their detriment.

**Article III.**

As to specific uses, theres a lot of work to be done on those governed by G.L. c. 40A, s. 3, the Dover Amendment. These uses are allowed in all districts as of right. I generally recommend repeating the words of the statute instead of inventing a local variation on the theme: So, church or other place of worship” becomes land or structures for religious purposes; Same with “schools: public, religious, sectarian or private” which is referred to as educational purposes on land owned or leased by the commonwealthor any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation.” Same with child care center or school aged child care program, also protected by the Dover Amendment.

The same is true for agricultural uses, also regulated by G.L. c. 40A, s. 3. The statute gives a blanket exemption to farms with five acres or two qualified acres. Others may be locally regulated. Your by-law allows “agricultrure, horticulture, and floriculture” but does not specify any qualifying acreage. So a small farm may be permitted as of right. Is this what you intended?

Then there are some uses that probably need rethinking. The Legislature passed a “short-term rental” law in 2018, and an “Accessory Dwelling Unit” law in 2021. Home occupations are allowed as of right. As the Town grows, home businesses tend to become a problem. Drive-in facilities should require a special permit.

Consider our review of the Use Table to be a once-in-a-decade opportunity to rethink allowed or prohibited uses after the pandemic, the death of local retail, and remote work.

**Section 167-7.D** This section on “specific use regulations” buries the headlines. Each use should have its own Subsection with the limitations set forth therein.

Adult Uses can be reasonably regulated with regard to time, place, and manner, but only if the protected speech itself is not the target of the rules. Your ZBL properly acknowledges this.

**Section 167-8:** Woefully short. These rules pertaining to nonconformities should be deleted and a new, more modern set of rules for nonconforming uses and structures should be added to conform with recent case law. There were a half-dozen decisions in the 1990-2015 period that fundamentally changed practice here. Your existing section is also short of the standards imposed by *Blasco v. Board of Appeals of Winchendon*, 31 Mass. App. Ct. 32 (1991), in which the court required all available changes to nonconformities to be listed in the ordinance. Some provisions run counter to the holding in *Bjorklund v. Norwell*, 450 Mass. 357 (2008). It would help to add some carve-outs for those situations in which alteration of a nonconforming single family home is deemed not to result in an increase to the nonconforming nature of the structure. This has worked well in the era following *Bjorklund v. Norwell*, 450 Mass. 357 (2008). By an amendment in 2016, permissible “nonuse” may now be expanded to three years (from two).

**Article IV.**

Looks solid.

**Article V.**

**Section 167-13 and 167-14:** That’ quite a sign by-law!! Move these sections to a chapter with other general regulations, including parking, loading, screening, lighting, and other performance standards.

I recommend that each of these provisions have a clause that offers, by special permit, some relief. For example, larger signs or more signs could be authorized by special permit (instead of a variance) where no detriment will result. Similarly, parking requirements could be reduced to avoid too much unneeded asphalt.

**Article VI.**

**Sections 167-21:** The Planning Board should have a like section.

As to special permits, the criteria are weak in A(2). I usually recommend this:

Special permits shall be granted by the Special Permit Granting Authority as specified herein only upon its written determination that the adverse effects of the proposed use will not outweigh its beneficial impacts to the town or the neighborhood, in view of the particular characteristics of the site, and of the proposal in relation to that site. In addition to any specific factors that may be set forth in this ordinance, the determination shall include consideration of each of the following:

1. Social, economic, or community needs which are served by the proposal;

2. Traffic flow and safety, including parking and loading;

3. Adequacy of utilities and other public services;

4. Neighborhood character and social structures;

5. Impacts on the natural environment; and

6. Potential economic impact, including fiscal impact on city services, tax base, and employment.

**Section 167.23:** “Noncriminal disposition” usually moves gradually to a $300 fine. Your bylaw starts there. First offense should perhaps be $50 or $100?

**Section 167-28:** In *Y.D. Dugout v. Board of Appeals of Canton*, 357 Mass. 25, 31 (1970), the Supreme Judicial Court defined its understanding of site plan review as: “regulation of a use rather than its prohibition . . . (guiding) us in interpreting the (by-law) . . . as contemplating primarily the imposition for the public protection of reasonable terms and conditions.” The Supreme Judicial Court has repeatedly focused on this pronouncement to distinguish site plan review from the special permit process. See *Prudential Ins. Co. of America v. Board of Appeals of Westwood*, 23 Mass. App. Ct. 278 (1986); *Auburn v. Planning Bd. of Dover*, 12 Mass. App. Ct. 998 (1981).

You need decision making, lapse, and appeal provisions.

**NEW SECTIONS:** Consider adding a new section that puts all Dover Amendment uses - schools, churches, and child care - on a modified site plan review that allows for implementation of the reasonable regulations called for in G.L. c. 40A, s. 3 concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.

Consider adding a new section addressing “requests for reasonable accommodation.” Such requests are made under federal and state laws protecting recovering drug and alcohol abusers and often are a trap for the unwary.

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I hope my comments will prove useful. Please let me know if you have any questions.