

**TOWN OF NAHANT**

**Planning Board**

**August 3, 2021, 6 PM**

**LOCATION: ZOOM CONFERENCING, NAHANT, MA**

**Meeting Minutes**

Dan Berman called the meeting to order at 6:10 pm, stating that the meeting was properly noticed, and called the roll of those members attending:

Daniel Berman, Chairman – Here  
Calvin Hastings, Vice Chairman – Here  
Shelia Hambleton Here  
Patrick O'Reilly – Here  
J Shannon Bianchi – Here  
Steven Viviano – Here  
Rob Steinberg, Recording Secretary – Here

Public in attendance:

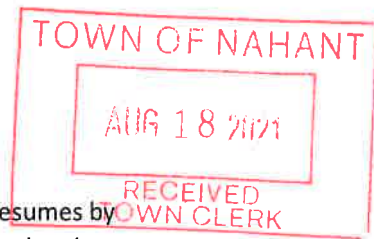
David Linhardt  
Building Inspector Wayne Wilson  
Tim McKay  
Robert Lambert  
Jeffrey Blake  
Steve Smith  
Eugene Canty  
Diane Monteith  
Emily Potts  
Christian Bauta

Dan Berman opened the meeting by asking members to review the minutes of the July 20, 2021 meeting.

Cal moved to approve the minutes of July 20, 2021, and Shannon seconded. The Board voted as follows:

Daniel Berman, Chairman – Yes  
Calvin Hastings, Vice Chairman – Yes  
Shelia Hambleton – Yes  
Patrick O'Reilly – Yes  
J Shannon Bianchi – Abstained  
Steven Viviano – Yes  
Rob Steinberg, Recording Secretary – Yes





Dan said that the notice was posted for alternate members and stated we are asking for resumes by August 11, 2021, and the appointment will be made at a joint meeting of the Planning Board and Selectmen on Wednesday, August 18, 2021.

Dan then raised the issue of whether we want to formally recommend Shannon to the Open Space and Recreation Planning Committee. Sheila so moved, and Cal seconded. The vote was as follows:

Daniel Berman, Chairman – Yes  
Calvin Hastings, Vice Chairman – Yes  
Shelia Hambleton - Yes  
Patrick O'Reilly – Yes  
J Shannon Bianchi – Yes  
Steven Viviano – Yes  
Rob Steinberg, Recording Secretary – Yes

Dan then raised the issue of a possible working group to propose the marijuana zoning amendment. Dan asked Shannon if he called the Attorney General's Office about this question, and he said he hasn't. Dan asked Jeff Blake for his advice. Rob and Shannon appointed to develop a proposed marijuana zoning amendment and regulation and committed to not violate the open meeting law by having serial meetings with additional members. Dan then suggested that a subcommittee be formed (subject to the open meeting law) to review the zoning by-law comprised of Shannon, Sheila, and Pat, presenting their recommendation to the PB. Dan noted the first task is to identify issues where people have had difficulties, and then work on solutions. Steve Viviano indicated his interest in offering suggestions to the subcommittee, as did the Building Inspector. Dan said that all subcommittee meetings would be noticed and open, and anyone was welcome to attend and offer suggestions.

Rob so moved, seconded by Steve. The vote was as follows:

Daniel Berman, Chairman – Yes  
Calvin Hastings, Vice Chairman – Yes  
Shelia Hambleton - Yes  
Patrick O'Reilly – Yes  
J Shannon Bianchi – Yes  
Steven Viviano – Yes  
Rob Steinberg, Recording Secretary – Yes

Dan then turned to issues related to 2A Wilson Road. Dan noted that a building permit was issued for the demolition and reconstruction of what was Dunkin Donuts without a prior Special Permit, which is a condition of the by-laws and a condition of another Special Permit. Dan wants to catch-up with the situation to have them apply for a Special Permit for construction as well as for a change of use. Dan noted that the Building Inspector believes the building permit is valid. The Building Inspector explained why he thought the conditions that would bring this before the Planning Board do not exist. He said that the building is not more nonconforming by the demolition and new construction so it doesn't require a Special Permit. He also said that he had no notice of the conditions in the Special Permit. Sheila said the Special Permit was recorded. The Building Inspector said he is not obligated to

TOWN OF NAHANT  
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TOWN CLERK

determine whether a Special Permit is need and Dan asked whose obligation is it to make such a determination that all requirements are met. Jeff Blake said the requirements should be in the Town records, but the issue seems to be an enforcement issue. Dan noted that the by-law doesn't allow a building to be rebuilt without a Special Permit unless done within two years after being destroyed by fire.

Dan noted that the Building Inspector isn't authorized to make a determination that a building is not nonconforming – under by-law Section 7.03(D)(3), the special permit granting authority must make that finding. Wayne Wilson noted he sent an email alerting the PB in February and Dan acknowledged the PB missed it, and that is why we are not stopping the project. Wayne noted that the by-law is confusing and should be cleared up.

If there are condition on a permit and it is recorded, someone needs to have the responsibility for finding the condition. Wayne noted there is nowhere on a building application where there is a reference to disclosing conditions on constructions so building inspector knows the property is subject to following conditions. Dan reiterated that we are the special permit granting authority both for change of use and for construction, despite Wayne's belief there was no need for a construction special permit.

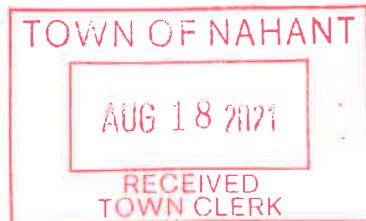
Dan said he is not comfortable saying the permit is valid but can retroactively make them valid if the owner/operator applied for a special permit for construction and for change of use. Dan said he expects the applications. Steve Smith said we are nearly ready to file for a change in use permit now that the operator has signed the lease. Steve said they will be providing as-built drawings and a survey for a site plan for the application for demolition and construction. Sheila noted that we have 65 days to hold a hearing. Steve noted for the change-of-use permit application, they need the parking plan, plot plan, and architectural rendering for how the floor space will be used. Dan noted that we will want to hold a hearing on both applications at the same time.

Steve Smith argued that the footprint of the Tides did not change, and that the parking spaces are the same as when construction was approved despite the extension of outdoor dining.

Dan concluded the discussion by asserting that it must be made clear (1) who has the responsibility to identify applicable building restrictions that are properly recorded and filed with the Town, and (2) how such restrictions get put in front of the Building Inspector prior to the issuance of any building permit.

Dan then noted we will be asked by the Selectmen to develop a by-law on accessory and in-law dwelling, and to appoint a representative to the new short term housing committee that will address air b and b's and the like. Dan also stated that we will be receiving an approval not required plan for the coast guard housing, because they aren't changing any roads.

Dan then turned to Northeastern. Dan said that the request for site plan review was not filed with the Planning Board last week, but that under our rules, it is being filed today as presented to a regularly scheduled meeting of the Planning Board. He also noted that several members of the Planning Board received the materials only today. Counsel for Northeastern said the Town Clerk's stamp has a date on



it which was the date it was given to the Town, and that is when the filing was made, but he said the point is taken and Northeastern will reserve its right to object.

Dan said that we are only prepared for a preliminary discussion since the materials for site plan review were just provided to the Planning Board. Dan asked Northeastern's counsel to present a summary of the proposal. Counsel (David Linhardt) said separate NOIs were submitted to the ConComm for expansion of educational facility and for the seawater plant, but the whole project is included in the site plan presented to the Planning Board. Counsel said that there are two points of inquiry – is the proposed use Dover protected and are the Dover protected uses reasonable under the zoning parameters subject to the inquiry( such as height, parking, etc.) Counsel said that they have sought to comply with zoning requirements. Counsel said it thus must be presumed the underlying zoning requirements are reasonable.

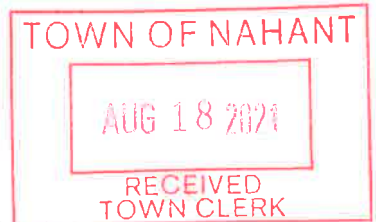
Dan's initial reaction is that we will spend some time on the second prong, because it may take some effort to determine how zoning requirements apply given it is an unusual structure and an unusual zone to build in.

But our principal issue is the first prong, does Dover apply? Dan noted that the question is whether the proposed use is protected by Dover. Counsel says that the question is irrelevant because NU is complying with the zoning by-laws. Dan said there is a question whether Dover protection is available. He said the first question is whether Dover is applicable. The second question is about what NU plans to do and build on the site. Counsel said that there isn't an issue whether Dover applies because NU is building for a nonprofit educational purpose. Dan noted that Nahant representatives were told at Massachusetts legislature hearings both two years ago and again last week that the *Seventh Day Adventist v. Burlington* case says Dover doesn't apply in a natural resource area, so Nahant is protected from Northeastern's construction plans even without the proposed legislative change under discussion. Dan asked NU for a legal memo outlining its position on that case.

Shannon asked about a statement of NU in the July 28 cover letter to the submission to the Town that states that the Building Inspector will determine compliance with parking and dimensional requirements. Dan stated that he doesn't agree with that conclusion. Counsel for NU noted that site plan review is within PB jurisdiction. However, he stated that they are proposing construction consistent with underlying zoning laws so no relief is being sought from the Planning Board. Counsel said that, if the zoning law requires x number of parking space, we are providing it.

Dan said you are asking for relief from a prohibition on construction in a natural resource area so your proposal clearly is not in compliance with all zoning rules. Dan said you are applying for site plan approval that you are entitled to relief from natural resource area because the Dover Amendment protects you. Counsel for NU disagreed.

Steve noted that zoning map shows the natural resource area for the NU land and then asked whether the "P" meaning permitted for an educational institution. Dan noted that it is permitted only to the extent permitted by the Dover Amendment. So, the first prong of the analysis is whether the proposal is protected by the Dover Amendment and the Dover Amendment application doesn't come down to a P.



Rob asked whether they believe they need to be before the PB given that NU noted that the only permit they need is Conservation Committee approval when appearing before that Board. Counsel said that this site plan review is not a decision whether to allow the project to proceed. Thus, it is not appealable because it is a regulatory act of providing conditions, not a final decision. What the PB is doing is a review and not deciding whether this is a good project for Nahant.

Rob then asked whether, for example, NU has to show parking is sufficient for the uses of the building? NU's counsel responded NU will just do what the code tells them to do. Rob stated it is disingenuous to take the position, for example, that the zoning law allows 120 parking space so we will have 120 parking spaces when you know you need 250 and there will be people parking all over the town. Rob said I am putting you on notice that I don't accept and others members of the PB may not accept your claims just because you say you will comply without knowing if you actually can.

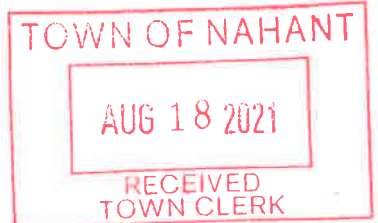
Dan noted that the zoning laws were not designed to address a 55,000 square foot building. Dan also noted that we can't determine reasonableness unless you allow us to know what you intend to do, stating that we won't know what conditions should be added, for example, for parking, and what is reasonable if you don't let us know your expectations for use.

Rob stated that the drawings provided to us showed a building completely hidden by trees from most visual angles. Rob asked do these drawings represent what the building will look like 30 years or 20 years after construction is completed? Rob noted that visual aesthetics may not be part of our review but you provided these drawings which show the building has virtually no adverse visual impact for a reason and have raised the issue but the PB needs to understand what the drawings are actually showing.

Dan asked, given that all submitted views of the building show nothing visible other than trees, aren't there big windows where you can see the ocean? NU representatives, in essence, said they can't answer the question because they don't know what a "big" window is, and referred the Board to renderings in their filings. Rob said it was these kinds of refusals to provide information that frustrated the Conservation Commission. Rob said it is a yes or no question – are you going to have unobstructed windows of say 4 feet or 8 feet looking out to the ocean? NU's representatives did not provide an answer. Dan asked for a rendering of what the building will look like immediately after construction and 6 months after construction.

Dan noted there is an application fee of \$400 to help cover the cost of advertising the hearing. Counsel for NU said there is no hearing that is going to occur. Jeff Blake said the PB has discretion to open up a hearing, and that Site Plan Review is akin to a variance in which there are hearings. Blake said if the PB typically has hearings for Site Plan Review and Special Permits, then we should have one here. Counsel for NU said that the PB is making a "staff level" decision, and a hearing isn't warranted. Dan pointed out that the members of the Planning Board are all elected officials of the Town.

Dan said your submissions show that you own to the low water mark but the deed states you own only to the high water mark. Counsel for NU asked why that is material. Dan said we are reluctant to approve a plan that shows you own land you don't own. Cal said the deed clearly says the property line



along the water is to the high water mark, and Cal says it does impact, and is relevant to, zoning review. Cal said we can't approve a site plan that does not accurately describe the site. Dan said we can't approve a plan that claims you own land you don't own.

Rob asked how long the review process lasts, and Dan answered 60 days from the trigger date of the filing. The PB's position is that the review period started today, although NU's position is that they filed on Wednesday, July 28 and seemed to potentially take the position that the review period should begin from that date.

Pat asked to attached the AG letter to these minutes, and Rob agreed that he would make the AG letter from March 5, 2018 an official part of these minutes when submitted.

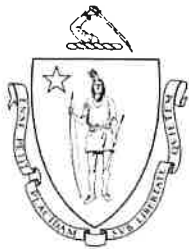
Dan then asked for a motion to close the meeting. Cal so moved, seconded by Sheila. The Board voted as follows:

Daniel Berman, Chairman – Yes  
Calvin Hastings, Vice Chairman – Yes  
Shelia Hambleton - Yes  
Patrick O'Reilly – Yes  
J Shannon Bianchi – Yes  
Steven Viviano – Yes  
Rob Steinberg, Recording Secretary – Yes

Meeting adjourned at 9:28 pm.

Meeting Minutes prepared by Recording Secretary Rob Steinberg.

Approved by Planning Board on August 17, 2021



THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

CENTRAL MASSACHUSETTS DIVISION

10 MECHANIC STREET, SUITE 301

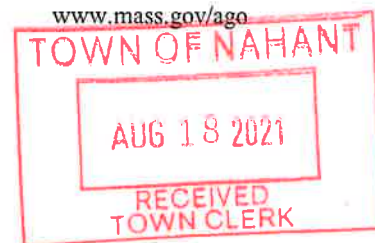
WORCESTER, MA 01608

MAURA HEALEY  
ATTORNEY GENERAL

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March 5, 2018

Margaret R. Barile, Town Clerk  
Town of Nahant  
334 Nahant Road  
Nahant, MA 01908



**Re: Nahant Annual Town Meeting of April 29, 2017 - Case # 8580  
Warrant Article # 35 (Zoning)  
Warrant Articles # 21 and 36 (General)**

Dear Ms. Barile:

**Article 35** – We approve Article 35 (“Site Plan Review for Religious and Educational Uses and Certain Child Care Centers”) from the Nahant Annual Town Meeting of April 29, 2017 because, on the limited record required for the Attorney General’s G.L. c. 40, § 32 by-law review process, we cannot determine that the application of the regulations to a G.L. c. 40A, § 3 protected use is facially unreasonable. Such a determination would require a complete factual record not available to the Attorney General under G.L. c. 40, § 32, and the resolution of disputed issues of fact better left for a court. *See Martin v. the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 434 Mass. 141, 151 (2001) (the “reasonableness of a local zoning requirement will depend on the particular facts of each case.”). However, we urge the Town to consult closely with Town Counsel during the site plan review process to ensure that the Town applies the by-law consistent with the limited use of site plan approval for protected uses under G.L. c. 40A, § 3.<sup>1</sup>

**I. Attorney General’s Standard of Review and General Zoning Principles.**

Pursuant to G.L. c. 40, § 32, the Attorney General has a “limited power of disapproval,” and “[i]t is fundamental that every presumption is to be made in favor of the validity of municipal by-laws.” *Amherst*, 398 Mass. at 795-96. The Attorney General does not review the policy arguments for or against the enactment. *Id.* at 798-99 (“Neither we nor the Attorney General may comment on the wisdom of the town’s by-law.”) Rather, in order to disapprove a by-law (or any portion thereof), the Attorney General must cite an inconsistency between the by-law and the state Constitution or laws. *Id.* at 796. “As a general proposition the cases dealing

<sup>1</sup> In a decision issued November 7, 2017 we approved Articles 21 and 36.

with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid.” Bloom, 363 Mass. at 154 (emphasis added). “The legislative intent to preclude local action must be clear.” Id. at 155. Massachusetts has the “strongest type of home rule and municipal action is presumed to be valid.” Connors v. City of Boston, 430 Mass. 31, 35 (1999) (internal quotations and citations omitted).

Article 35, as an amendment to the Town’s zoning by-laws, must be accorded deference. W.R. Grace & Co. v. Cambridge City Council, 56 Mass. App. Ct. 559, 566 (2002) (“With respect to the exercise of their powers under the Zoning Act, we accord municipalities deference as to their legislative choices and their exercise of discretion regarding zoning orders.”). 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. “Zoning has always been treated as a local matter and much weight must be accorded to the judgment of the local legislative body, since it is familiar with local conditions.” Concord v. Attorney General, 336 Mass. 17, 25 (1957) (quoting Burnham v. Board of Appeals of Gloucester, 333 Mass. 114, 117 (1955)). “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)). Nevertheless, where a zoning by-law conflicts with state law or the constitution, it is invalid. See Zuckerman v. Hadley, 442 Mass. 511, 520 (2004) (rate of development by-law of unlimited duration did not serve a permissible public purpose and was thus unconstitutional).

Based on our standard of review, we approve Article 35. However, we urge the Town to consult carefully with Town Counsel during the site plan review process, as discussed in more detail below.

## **II. Summary of Article 35.**

Article 35 proposes to amend several sections of the Town’s zoning by-law to impose regulations for land or structures for uses protected under G.L. c. 40A, § 3. Primarily, the Article adds a new section 9.09A, “Site Plan Review for Religious and Educational Uses and Certain Child Care Centers.” The new section 9.09A imposes a site plan review requirement for “religious and educational uses and child care centers otherwise subject to G.L. c. 40A, s. 3.” Section 9.09A (C) provides that the scope of the site plan review shall be limited to 2 inquiries:

1. Whether the use qualifies for protection under G.L. c. 40A, s. 3; and, if so,



2. What reasonable regulations concerning the bulk and height of [s]tructures and determining [y]ard sizes, lot area, setbacks, open space, parking and building coverage requirements, if any, should be imposed on the use.

### III. Site Plan Review for G.L. c. 40A, § 3 Uses.

General Laws Chapter 40A, Section 3, protects various uses from a town's zoning power, including the "educational use[s], religious use[s], or child care center[s]." The statute protects educational and religious uses as follows:

No zoning ordinance or by-law shall...prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes...; provided, however, 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.

The protections for child care uses are detailed in slightly different language:

No zoning ordinance or bylaw in any city or town shall prohibit, or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; provided, however, 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.

Together these provisions establish that a Town by-law may not prohibit, or require a special permit for, educational, religious, or child care uses, but may impose reasonable regulations in eight areas: the bulk and height of structures, yard sizes, lot area, setbacks, open space, parking and building coverage requirements. *See The Bible Speaks v. Bd. of Appeals of Lenox*, 8 Mass. App. Ct. 19, 33 (1979) ("The Legislature did not intend to impose special permit requirements, designed under [G.L. c. 40A, § 9], to accommodate uses not permitted as of right in a particular zoning district, on legitimate educational uses which have been expressly authorized to exist as of right in any zone.") The Supreme Judicial Court has indicated that local zoning requirements serving "legitimate municipal purposes" may be applied to Dover Amendment uses. *Trustees of Tufts Coll. v. City of Medford*, 415 Mass. 753, 757-758 (1993) (citing *MacNeil v. Town of Avon*, 386 Mass. 339, 341 (1982)). In addition, the Appeals Court recently upheld a site plan review requirement for Dover Amendment uses, limited to the application of reasonable regulations as set forth in G.L. c. 40A, § 3, as "consistent with a reasonable reading of the Dover Amendment, G.L. c. 40A, § 3, and *The Bible Speaks v. Board of Appeals of Lenox*, 8 Mass. App. Ct. 19, 31 (1978)." *Jewish Cemetery Assoc. of Mass., Inc. v. Bd. of Appeals of Wayland*, 85 Mass. App. Ct. 1105, \*2 (2014).

As in *Jewish Cemetery Assoc.*, it appears reasonable for the Town to use a limited site plan review as the process by which it regulates the bulk and height of structures, yard sizes, lot area, setbacks, open space, parking and building coverage requirements for such statutorily

protected uses. It should be noted that site plan approval acts as a method for regulating as-of-right uses rather than prohibiting them. Y.D. Dugout, Inc. v. Bd. of Appeals of Canton, 357 Mass. 25, 31 (1970). Where “the specific area and use criteria stated in the by-law [are] satisfied, the [reviewing] board [does] not have discretionary power to deny...[approval], but instead [is] limited to imposing reasonable terms and conditions on the proposed use.” Prudential Ins. Co. of America v. Westwood, 23 Mass. App.Ct. 278, 281-82 (1986), quoting from SCIT, Inc. v. Planning Bd. of Braintree, 19 Mass. App. Ct. 101, 105 n.12 (1984). We urge the Town to consult closely with Town Counsel during the site plan review so that the by-law is not utilized as the basis for a discretionary special permit type of review, rather than a limited site plan review of the eight allowable uses in G.L. c. 40A, § 3 (the bulk and height of structures, yard sizes, lot area, setbacks, open space, parking and building coverage requirements).

The Town should also be aware of the protections afforded to disabled persons under G.L. c. 40A, § 3, ¶4:

Notwithstanding any general or special law to the contrary, local land use and health and safety laws, regulations, practices, ordinances, by-laws and decisions of a city or town shall not discriminate against a disabled person. Imposition of health and safety laws or land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size or other unrelated persons shall constitute discrimination.

Uses that qualify as educational, religious or child care pursuant to G.L. c. 40A, § 3 may also qualify for the protections accorded to disabled persons under G.L. c. 40A, § 3, ¶4. For example, persons recovering from or receiving treatment for addiction to alcohol or drugs are disabled individuals for the purposes of the Americans with Disabilities Act, 42 U.S. C. §§ 12102 (2) (B) (C), and a substance abuse treatment center is likely to be protected under G.L. c. 40A, § 3, ¶4. See e.g., Granada House, Inc. v. City of Boston, 1997 WL 106688 (Mass. Super. Ct.) (the Zoning Act bars the City’s discriminatory treatment of a group home for recovering drug and alcohol users.).

Finally, certain religious or educational uses protected under G.L. c. 40A, § 3 may also be protected by the Fair Housing Act (FHA), the Americans with Disabilities Act (ADA), and/or the Rehabilitation Act (RA). See, e.g., South Middlesex Opportunity Council, Inc. v. Town of Framingham, 752 F.Supp.2d 85, 95 (D. Mass. 2010) (Residential substance treatment centers are covered by the FHA because federal regulations define “handicap” to include drug addiction or alcoholism); Safe Haven Sober Houses, LLC v. Good, 82 Mass. App. Ct. 1112, \*3 (2012); Innovative Health Systems v. City of White Plains, 931 F.Supp. 222 (S.D.N.Y. 1996) (the ADA and Section 504 of the Rehabilitation Act apply to zoning enforcement activities; and zoning board decision reversing issuance of building permit to outpatient alcohol and drug dependence program violated those statutes.).

In conclusion, we approve the by-law adopted under Article 35 on the Attorney General’s limited standard of review of town by-laws under G.L. c. 40, § 32. However, we strongly encourage the Town to consult with Town Counsel during any site review process because of the protections afforded to educational, religious, and child care uses in G.L. c. 40A, § 3.

**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 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 approved by the Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,

MAURA HEALEY  
ATTORNEY GENERAL

*Margaret J. Hurley*

By: Margaret J. Hurley  
Chief, Central Massachusetts Division  
Director, Municipal Law Unit  
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Worcester, MA 01608  
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cc: Town Counsel Daniel G. Skrip