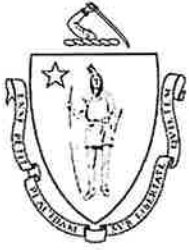


Posted by Town Clerk on Dec. 1, 2023



THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

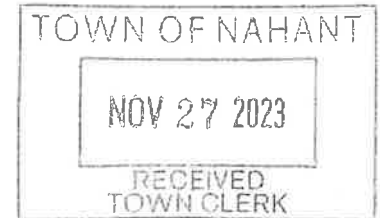
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November 27, 2023

Diane M. Dunfee, Town Clerk  
Town of Nahant  
334 Nahant Road  
Nahant, MA 01909



**Re: Nahant Annual Town Meeting of May 20, 2023 -- Case # 11033**  
**Warrant Article # 24 (Zoning)**  
**Warrant Articles # 22, 23, 24 (General)**

Dear Ms. Dunfee:

**Article 24** – Under Article 24 the Town amended both its general and zoning by-laws to allow short term rentals (STRs) in the Town. We approve Article 24 because it does not conflict with state law, including G.L. c. 39, § 10, c. 40A, § 5, and c. 64G. Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986) (requiring inconsistency with state law or the Constitution for the Attorney General to disapprove a by-law).

We emphasize that our decision in no way implies any agreement or disagreement with the policy views that may have led to the passage of the by-law amendments. The Attorney General's limited standard of review requires her to approve or disapprove by-laws based solely on their consistency with state law, not on any policy views she may have on the subject matter or wisdom of the by-law. Amherst, 398 Mass. at 795-96. During our review of the by-law, we received correspondence from several town residents urging our disapproval on grounds that a floor amendment to Article 24 conflicts with G.L. c. 39, § 10 and c. 40A, § 5. We appreciate these comments as they have aided our review. However, as explained below, the arguments advanced in the oppositions do not provide us with grounds to disapprove Article 24 under our limited standard of review.

This decision describes the by-law amendments; discusses the Attorney General's limited standard of review of town by-laws under G.L. c. 40, § 32; and then explains why, governed as we are by that standard, we approve Article 24.

**I. Summary of Article 24**

Under Article 24 the Town voted to amend both its general and zoning by-laws to allow

STRs in the Town. As to its general by-laws, the Town voted under Article 24 to add a new Article XIX, "Short-Term Rentals," that establishes a registration requirement for STRs (as that term is defined in Section 2, "Definitions"). The new Article XIX limits the total number of annual STRs in the Town to four percent of the total number of legal dwellings in the Town as determined by the Assessor's Office. Section 3, "Requirements." Section 3 (2) requires STRs operators (as defined in Section 2) to register with the Board of Selectmen. Section 3 also requires STRs to comply with the state Sanitary Code and Building Code; requires STRs to maintain liability insurance, prohibits them from being rented at an hourly rate or for less than twenty-four hours; prohibits them from being used for commercial events; and requires them to maintain off-street parking as required under the Town's zoning by-laws. Sections 4 and 5 require STRs operators to provide information to renters and provide information to abutters, respectively. The new Article XIX provides for the imposition of non-criminal disposition for violations of its provisions and provides an effective date of the by-law 120 days after the Town satisfies the requirements of G.L. c. 40, § 32.

As to the Town's zoning by-laws, the Town voted under Article 24 to add new definitions related to STRs as follows:

**Non-Owner Occupied Short-Term Rental:** A dwelling unit made available for Short-Term Rental that is neither the Principal Residence of the owner, nor is located within the same residential building as the owners Principal Residence.

**Owner Occupied Short-Term Rental:** The Short-Term Rental of a dwelling unit of no more than the number of lawful bedrooms within such dwelling unit that is the Principal Residence of its operator.

**Owner Adjacent Short-Term Rental:** A residential unit offered as a Short-Term Rental which is not the owner's Principal Residence but which is located within the same dwelling and/or parcel as the Principal Residence.

**Short-Term Rental Operator** -The person or persons offering a dwelling unit or bedroom for short-term rental, who may be either the owner or the primary leaseholder of the dwelling unit with the written permission of the property owner and the condominium association if applicable.

In addition, under Article 24 the Town voted to add a new Section 4.06A, "Short Term Rentals," that designates the Board of Appeals as the special permit granting authority for non-owner occupied STRs in the Town and establishes the criteria to be considered by the Board of Appeals in granting a special permit. Finally, under Article 24 the Town amended its Table of Use Regulations to allow STRs as follows:

| Description of Use                     | R-1 | R-2 | B-1 | B-2 | NR | P |
|----------------------------------------|-----|-----|-----|-----|----|---|
| Short-Term Rental – Non-Owner Occupied | N   | N   | SP  | SP  | N  | N |
| Short-Term Rental-Owner Adjacent       | P   | P   | P   | P   | N  | N |
| Short-Term Rental-Owner Occupied       | P   | P   | P   | P   | N  | N |

Article 24 was amended on the floor of Town Meeting to prohibit non-owner occupied STRs in the Town's residential zones, as indicated above in bold and underline.<sup>1</sup>

## **II. The Attorney General's Standard of Review of General and Zoning By-laws**

Our review of Article 24 is governed by G.L. c. 40, § 32. Under 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.") "As a general proposition the cases dealing 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 v. Worcester, 363 Mass. 136, 154 (1973). "

Article 24, 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). However, a municipality has no power to adopt a zoning by-law that is "inconsistent with the constitution or laws enacted by the [Legislature]." Home Rule Amendment, Mass. Const. amend. art. 2, § 6.

## **III. Article 24 is Consistent with G.L. c. 64G's Requirements for STRs**

General Laws Chapter 64G, "Room Occupancy Excise," imposes requirements for STRs, including Section 14 that authorizes towns to adopt by-laws that: (1) regulate the class of operators of STRs; (2) limit the number of days STRs may be rented; (3) impose fees for STRs; and (4) impose penalties for a violation of the by-law's provisions, including a civil penalty as follows:

A . . . town, by . . . by-law, may regulate operators registered pursuant to section 67 of chapter 62C and impose penalties for the violation of such an ordinance or by-law. A . . . town, by . . . by-law, may:

(i) regulate the existence or location of operators under this section within the city or town, including regulating the class of operators and number of local licenses or permits issued to operators under this section and the number of days a person may operate and rent out an accommodation in a calendar year;

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<sup>1</sup> Article 24 as printed in the Town Meeting Warrant allowed non-owner occupied by special permit in the Town's residential districts. However, an amendment was proposed and approved on the floor of Town Meeting to prohibit non-owner occupied STRs in the residential districts.

(ii) require the licensing or registration of operators within the city or town; provided, however, that a city or town may: (A) accept a certificate of registration issued to an operator in accordance with section 67 of chapter 62C in lieu of requiring an operator to obtain a local license or registration under this section; or (B) issue a provisional license or registration to permit an operator to offer accommodations on temporary or seasonal basis;

(iii) require operators to demonstrate that any properties or premises controlled, occupied, operated, managed or used as accommodations subject to the excise under this chapter are not subject to any outstanding building, electrical, plumbing, mechanical, fire, health, housing or zoning code enforcement, including any notices of violation, notices to cure, orders of abatement, cease and desist orders or correction notices;

(iv) require properties or premises controlled, occupied, operated, managed or used by operators as an accommodation subject to the excise under this chapter to undergo health and safety inspections; provided, however, that the cost of any inspection conducted under this section shall be charged to and solely paid by the operator under this section; provided further, that after any initial health and safety inspection, the city or town may determine the frequency of any subsequent inspections;

(v) establish a civil penalty for violation of an ordinance or by-law enacted pursuant to this section; provided, however, that a city or town that suspends or terminates an operator's right to operate an accommodation for a violation of any ordinance or bylaw shall notify the commissioner of revenue of the suspension or termination; and

(vi) establish a reasonable fee to cover the costs associated with the local administration and enforcement of regulating operators and accommodations.

In addition to a town's authority to impose regulations on STRs under G.L. 64G, towns have authority through their Home Rule powers to adopt by-laws regulating STRs. See Styller v. Zoning Board of Appeals of Lynnfield, 487 Mass. 588, 599 (2021) (local regulation of STRs within town's zoning powers because STRs affect community stability); see also Airbnb, Inc. v. City of Boston, 386 F. Supp. 3d 113, 120-122, 124-125 (2019) (STR ordinance imposing penalties on booking agents for booking "ineligible unit" and requiring information about location and type of rental unit survives preliminary injunction motion). For these reasons, we approve Article 24.

#### **IV. Opposition to Article 24 Does Not Provide Grounds for Disapproval**

During our review of Article 24 we received correspondence asserting that the floor amendment was not within the scope of the Article and was not discussed at a planning board hearing. However, for the following reasons, we cannot conclude that the floor amendment voted under Article 24 conflicts with G.L. c. 39, § 10, or c. 40A, § 5.

A. Warrant Article 24 and Town Meeting Vote.

The Town Meeting Warrant proposed that non-owner occupied STRs would be allowed by special permit in the Town's residential districts. A floor amendment changed non-owner occupied STRs to a prohibited use in the Town's residential districts. The opponent alleges that this floor amendment was outside the scope of Town Meeting's authority under G.L. c. 39, § 10.

General Laws Chapter 39, Section 10 requires that "[t]he warrant for all town meetings shall state the time and place of holding the meeting and the subjects to be acted upon thereat." The subject matter requirement of G.L. c. 39, §10, "means only that the subjects to be acted upon must be sufficiently stated in the warrant to apprise voters of the nature of the matters with which the meetings authorized to deal. It does not require that the warrant contain an accurate forecast of the precise action which the town meeting will take on these subjects." Johnson v. Town of Framingham, 354 Mass. 750 753 (1968) (citations and internal quotations omitted). A warrant complies with Section 10 if it indicates "with substantial certainty the nature of the business to be acted on." Tuckerman v. Moynihan, 82 Mass 562, (1933), quoting, Coffin v. Lawrence, 143 Mass 110, 122 (1886).

Based upon this standard, we determine that the motion (reflecting the floor amendment) was within the scope of the warrant. Under Article 24 the Town gave notice that it was seeking to add new general and zoning by-laws to allow STRs in the Town. While the Warrant proposed to allow non-owner occupied STRs by special permit in the Town's residential districts, its residents were on notice that allowing STRs in Town was going to be discussed. The details concerning the siting of STRs (which zones and under what regulations) were within the scope of the warrant article. This conclusion is bolstered by the fact that the Town Moderator, who is charged with the initial determination regarding whether a motion is "within the scope of the article" pursuant to G.L. c. 39, § 15, ruled that the motion was within the scope of Article 24.

B. Planning Board Hearing and Town Meeting Vote.

The opposition alleges that the floor amendment to prohibit non-owner occupied STRs in the Town's residential zones was not discussed at a properly notice planning board hearing.

General Laws Chapter 40A, Section 5 requires a planning board hearing before a zoning by-law may be adopted. The notice for such planning board hearing must be posted and published pursuant to Section 5. The notice that was properly posted and published for Article 24 provided that the Planning Board would have a hearing with "respect to defining short-term rentals, permitting such rentals for certain owner-occupied properties, while requiring nonowner-occupied properties to obtain a special permit from the Zoning Board of Appeals, and amending the Table of Uses accordingly, as well as creating a duration requirement for renting of rooms to roomer and lodgers."

The Town satisfied the requirements of G.L. c. 40A, § 5 by holding a properly noticed Planning Board hearing on March 13, 2023. Nothing in G.L. c. 40A, § 5, (nor c. 40, § 32), prohibits Town Meeting from changing the text of a proposed zoning by-law after the planning board hearing. In fact, the planning board hearing process contemplates "perfecting" the text of a

proposed zoning by-law. Burlington v. Dunn, 318 Mass. 216, 218-219 (1945) (“it is at least very unusual to require or to hold successive public hearings in respect to perfecting amendments”). Only when the fundamental character or identity of the proposal is changed will another planning board hearing be required. Id. at 218-219. The function of the planning board is “preliminary and advisory only” and that the planning board can “finally settle nothing.” Id. at 218. Regardless of the action of the planning board on a petition, interested parties have the further opportunity to be heard at a Town Meeting. Id. at 218; see also, Hallenborg v. Town Clerk of Billerica, 360 Mass. 513, 518 (1971).

Here, we cannot conclude that Town Meeting’s vote on the floor amendment (prohibiting non-owner occupied STRs in the residential zones rather than allowing them by special permit) changed the fundamental character or identity of the Article so to require another Planning Board hearing.

### C. Conduct at Town Meeting

The opposition to Article 24 also asserts deficiencies in the conduct of Town Meeting, including that: (1) there was not enough time allotted to discuss the floor amendment; and (2) residents with children were not allowed to bring their children into Town Meeting. These assertions do not provide the Attorney General with grounds to disapprove Article 24.

The Attorney General’s review under G.L. c. 40, § 32 is limited to the text “of the proposed by-law . . . and adequate proof that all of the procedural requirements for the adoption of such by-law have been complied with.” We generally interpret the phrase “procedural requirements” in G.L. c. 40, § 32 to refer primarily if not exclusively to those established by statute as basic conditions essential to the validity of Town Meeting action, rather than all possible procedural requirements (such as rules of order) that might govern the conduct of Town Meeting itself.

General Laws Chapter 40, Section 32 does not confer upon the Attorney General the plenary power to determine all issues relevant to whether the legislative process by which the Amendment was adopted violated the laws and Constitution of the Commonwealth. The alleged deficiencies in how Town Meeting was conducted are issues beyond the scope of the Attorney General’s review of town by-laws under G.L. c. 40, § 32. Amherst, 398 Mass. at 795-96, 798-99.

Finally, as to the argument that the Town Meeting voters were not provided enough time to discuss the floor amendment to Article 24, we were not provided – and it is not required that the Town provide – a complete transcription of all that occurred at Town Meeting. The Attorney General’s review of a by-law is based primarily if not exclusively on the materials that G.L. c. 40, § 32, requires a town to submit: “a certified copy of such by-law with a request for its approval, a statement clearly explaining the proposed by-law, including maps and plans if necessary, and adequate proof that all of the procedural requirements for the adoption of such by-law have been complied with.” Any inquiry into whether voters has enough time to discuss a matter at Town Meeting would involve consideration of evidence and determination of factual issues going well outside the bounds envisioned by G.L. c. 40, § 32. See Durand v. IDC Bellingham, LLC, 440 Mass. 45, 51 (2003) (analysis of by-law’s validity “is not affected by consideration of the various possible motives that may have inspired legislative action.”)

#### IV. Conclusion

Based on our standard of review, we cannot conclude that Article 24 as voted by Town Meeting, is inconsistent with state law, including G.L. c. 39, § 10, c. 40A, § 5, or G.L. c. 64G. Therefore, we approve Article 24.

**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,

ANDREA JOY CAMPBELL  
ATTORNEY GENERAL

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