



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

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November 22, 2005

Kristin M. Grant, Town Clerk
27 Sturbridge Road
Holland, MA 01521

**RE: Holland Special Town Meeting of July 28, 2005 — Case # 3549
Warrant Article # 1 (Zoning)**

Dear Ms. Grant:

Article 1 - I return with the approval of this Office the amendments to the town by-laws adopted under this Article on the warrant for the Holland special town meeting that convened on July 28, 2005, and the map pertaining to it.

The amendments adopted under Article 1 were voted on under seven different subsections. Specifically, the vote under Subsection 5 amends the town's Schedule of Principle Uses to provide for uses allowed in the new Commercial District. As amended, the Schedule of Principle Uses provides as follows [new text in **bold**]:

No.	Land Use Classification	Standards and Conditions	Zoning Districts						
	AGRICULTURAL		R	AR	GA	B	RB	SC	C
2.	Riding stables on parcels of less than 5 acres	See Section VIII for special permit standards	<u>N</u>	<u>SP</u>	<u>N</u>	<u>SP</u>	<u>SP</u>	<u>N</u>	<u>SP</u>
4.	Raising of swine and fur bearing animals on parcels of less than 5 acres	See Section VIII for special permit standards	<u>N</u>	<u>SP</u>	<u>N</u>	<u>N</u>	<u>SP</u>	<u>N</u>	<u>SP</u>
	INSTITUTIONAL								
17.	Hospital, sanitarium, convalescent home		<u>N</u>	<u>N</u>	<u>N</u>	<u>SP</u>	<u>SP</u>	<u>SP</u>	<u>SP</u>



20.	Assisted Living		<u>N</u>	<u>SP</u>	<u>N</u>	<u>N</u>	<u>N</u>	<u>SP</u>	<u>N</u>
	BUSINESS								
27.	Removal of Soil, Loam, Sand or Gravel	Provisions must be made to maintain the area in a safe and sanitary condition and to enable re-establishment of turf in excavated areas sufficient to stabilize soil and prevent erosion. Excavation shall be limited to a depth which leaves at least 10 feet of natural undisturbed soil cover above the highest water table elevation. See Section 7.5 for additional standards and conditions.	<u>N</u>	<u>SP</u>	<u>N</u>	<u>N</u>	<u>SP</u>	<u>N</u>	<u>SP</u>

(Emphasis added.)

- R Residential
- AR Agricultural-Residential
- GA Garden Apartment
- B Business
- RB Rural Business
- SC Special Conservancy District
- FP Flood Plain
- C Commercial

In the Schedule of Principle Uses, “Y” stands for a use allowed as of right; “N” stands for a prohibited use; and “SP” stands for a use allowed by special permit.

As amended, the Schedule of Principle Uses allows riding stables on parcels of less than 5 acres by special permit in the new C district. The existing text of the Schedule of Principle Uses allows such use by special permit in the AR, B, and RB districts and prohibits such use in the R, GA, and SC districts. As amended, the Schedule of Principle Uses also allows the raising of swine and fur bearing animals on parcels of less than five acres by special permit in the new C district. The existing text of the Schedule of Principle Uses allows such use by special permit in the AR and RB districts and prohibits such use in the R, GA, B, and SC districts.

In approving these portions of the Schedule of Principal Uses, we caution the town that the laws and Constitution of the Commonwealth have recognized the importance of agriculture and agricultural uses within the state. Article 97 of the Massachusetts Constitution declares that the protection of

people in their right to the utilization of agricultural resources is a public purpose in the Commonwealth. Moreover, there are numerous state laws and regulations that preclude agricultural uses from restriction by local legislation. See G.L. c. 40A, § 3, c. 11, § 125, and c. 131, § 40, ¶ 24. Specifically, G.L. c. 40A, § 3, provides protection to agriculture and provides in pertinent part:

No zoning . . . by-law shall . . . prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture, horticulture, floriculture, or viticulture; nor prohibit, or unreasonably regulate, or require a special permit for the use, expansion, or reconstruction of existing structures thereon for the primary purpose of agriculture, horticulture, floriculture, or viticulture, including those facilities for the sale of produce, and wine and dairy products, provided that during the months of June, July, August, and September of every year or during the harvest season of the primary crop raised on land of the owner or lessee, the majority of such products for sale, based on either gross sales dollars or volume, have been produced by the owner or lessee of the land on which the facility is located, except that all such activities may be limited to parcels of more than five acres in area not zoned for agriculture, horticulture, floriculture, or viticulture.

(Emphasis added.)

General Laws Chapter 40A, Section 3, provides that all agricultural uses must be allowed as of right on land zoned for agriculture and on land greater than five acres in size; therefore, a municipality may not restrict agricultural uses in those areas. However, a municipality is allowed to restrict agricultural uses on land less than five acres that is not zoned for agriculture.

General Laws Chapter 128, Section 1A, broadly defines agriculture to include greenhouses and provides as follows:

"Farming" or "agriculture" shall include farming in all of its branches and the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural, aquacultural, floricultural or horticultural commodities, the growing and harvesting of forest products upon forest land, the raising of livestock including horses, the keeping of horses as a commercial enterprise, the keeping and raising of poultry, swine, cattle and other domesticated animals used for food purposes, bees, fur-bearing animals, and any forestry or lumbering operations, performed by a farmer, who is hereby defined as one engaged in agriculture or farming as herein defined, or on a farm as an incident to or in conjunction with such farming operations, including preparations for market, delivery to storage or to market or to carriers for transportation to market.

(Emphasis added.)

As quoted above, G.L. c. 128, § 1A, defines agriculture to include riding stables, and the raising of swine and fur bearing animals. The definition of "agriculture" in G.L. c. 61A, § 1, and c. 128, § 1A, includes "the keeping of horses as a commercial enterprise." See Steege v. Board of Appeals of Stow, 26 Mass. App. Ct. 970 (1988). It would be inconsistent with state law for the by-law to be applied so as to prohibit or require a special permit for riding stables, piggeries or fur farms that enjoy the

protections accorded under G.L. c. 40A, § 3. Therefore, we caution the town to apply this by-law in a manner consistent with G.L. c. 40A, § 3.

As amended, the Schedule of Principle Uses allows convalescent homes by special permit in the new C district. The existing text also allows such use by special permit in the B, RB, and SC districts and prohibits such use in the R, AR, and GA districts.

As amended, the Schedule of Principle Uses prohibits assisted living facilities in the new C district. The existing text allows such use by special permit in the AR and SC districts and prohibits such use in all of the town's other zoning districts. In approving the Schedule of Principle Uses, as amended, we caution the town that G.L. c. 40A, § 3, prohibits discrimination against disabled persons and provides in pertinent part as follows:

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. The provisions of this paragraph shall apply to every city or town, including, but not limited to the city of Boston and the city of Cambridge.

We caution the town that it would be inconsistent with G.L. c. 40A, § 3, for the town to apply or enforce its by-laws in a way that treats housing for the disabled with any less deference given to other similar types of housing projects. Such difference in treatment would violate the provisions of G.L. c. 40A, § 3. The town may wish to discuss these issues in more detail with town counsel.

Lastly, as amended, the Schedule of Principal Uses allows the removal of soil, loam, sand, or gravel by special permit in the new C district. Such use is allowed by special permit in the AR and RB districts and prohibited in all of the town's other zoning districts. In approving the Schedule of Principal Uses, as amended, we again call your attention to the protections accorded to agriculture under state law. General Laws Chapter 40A, Section 3, states that all agricultural uses must be allowed as of right on land zoned for agriculture and on land that is greater than five acres in size; therefore, a municipality cannot restrict agricultural uses in those areas. A municipality is allowed to restrict agricultural uses on land less than five acres that is not zoned for agriculture. Thus, it would be inconsistent with state law to prohibit, require a special permit, or unreasonably regulate agricultural uses that enjoy the protections accorded under G.L. c. 40A, § 3.

Depending on the circumstances, earth removal activities may qualify as normal and customary maintenance and improvement of agricultural land. Earth removal may be necessary for a number of agricultural purposes, e.g., leveling of land for growing areas and preparing land for farm structures. In those instances, it would be inconsistent with G.L. c. 40A, § 3, to prohibit such earth removal activities. Thus, we remind the town to apply the Schedule of Principle Uses in a manner consistent with the protections accorded to agriculture under state law.

Note: Under G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the town has first satisfied the posting/publishing requirements of this section. 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,

THOMAS F. REILLY
ATTORNEY GENERAL



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