

ARTICLE 22

BOARD OF SELECTMEN REVISED SUPPLEMENTAL RECOMMENDATION

The Selectmen were presented with revised language during the Selectmen's meeting on November 15, 2016. This language split Article 22 into two separate votes. The first vote would amend the Zoning By-Law to require special permit review for the construction of newly created space that exceeds the allowed Floor Area Ratio (FAR). The second vote would eliminate the By-Law provisions that allow buildings in T, F, and M districts to exceed the allowed FAR. The first vote includes changes to the Zoning By-Law proposed by the Moderator's Committee, but it does not include changes that would eliminate the application of exemptions in T, F and M districts. The second vote would eliminate those exemptions in T, F and M districts. The Selectmen agreed with the revised votes presented by Dick Benka, because it gives them and Town Meeting the opportunity to vote on the changes to the Zoning By-Law and to address the T, F and M districts separately. The Selectmen also noted that they do not want to prevent anyone from finishing attics or basements, but they would like to add a level of design review to new properties that are looking to pursue finishing attics or basements.

The Selectmen voted FAVORABLE ACTION on the motion offered by the Petitioner provided in supplement No. 3:

FIRST VOTE: 5-0 FAVORABLE ACTION

SECOND VOTE: 5-0 FAVORABLE ACTION

ADVISORY COMMITTEE'S REVISED SUPPLEMENTAL RECOMMENDATION

On November 15, 2016 the Advisory Committee voted 23-0-2 to reconsider its recommendation under Article 22.

The Advisory Committee reconsidered its recommendation, which had been for Favorable Action on its motion under Article 22, so that it could take separate votes on the two motions that it anticipates will be offered as a divided vote under Article 22.

In summary, the first vote would amend the Zoning By-Law to require special permit review for the construction of space that exceeds the allowed Floor Area Ratio (FAR). The second vote would eliminate the By-Law provisions that allow buildings in T, F, and M districts to exceed the allowed FAR.

The two votes are explained in detail in Article 22 – Supplement No. 3, “Petitioner’s Additional Explanation and Possible Divided Vote.” The overall motion remains the same as the Advisory Committee’s previous motion; the only difference is that there would be separate votes on each part of that motion.

The Advisory Committee voted 26–0–2 to conduct a divided vote on Article 22, with the question to be divided as specified in Article 22 – Supplement No. 3. Each of its votes on the divided question was for Favorable Action.

RECOMMENDATION:

FIRST VOTE: By a vote of 24–0–3, the Advisory Committee recommends FAVORABLE ACTION.

SECOND VOTE: By a vote of 22–1–4, the Advisory Committee recommends FAVORABLE ACTION.

ARTICLE 28

ADVISORY COMMITTEE'S REVISED SUPPLEMENTAL RECOMMENDATION

On November 15, 2016 the Advisory Committee voted 17–0–8 to reconsider its recommendation under Article 28.

The petitioner, Ernest Frey (TMM, Precinct 7), and Samuel Batchelder, vice chair of the Commission on Diversity, Inclusion and Community Relations, informed the Advisory Committee that they prefer the language of the Board of Selectmen's motion on the appointment and reappointment of members of the Commission. They pointed out that the Advisory Committee language might be problematic in the (probably) rare situation in which the Selectmen belatedly denied a Commissioner's application for reappointment.

Under the previous Advisory Committee motion, which is included in the Combined Reports (p. 28-44) a Commissioner's term might expire on August 31, and the Board of Selectmen might not act on that Commissioner's application for reappointment until weeks or months later. In the interim, the Commissioner would continue to serve and would most likely be regarded as part of a quorum and participate in votes. If the Selectmen then decided to deny the Commissioner's application for reappointment, would such a Commissioner's actions after his or term had expired on August 31 be regarded as valid, given that the Board of Selectmen had subsequently denied that Commissioner's renewal application? Commission Vice Chair Samuel Batchelder wondered if such Commissioners would be regarded as "ghost" Commissioners.

The language of the Selectmen's motion addresses these concerns in two ways. First, the terms of Commissioners who applied for renewal by the August 1 deadline would automatically be extended until a Commissioner received notification that his or her application for renewal had been acted upon. Second, if a Commissioner's application for reappointment is denied, that Commissioner's term would expire five days after receipt of the denial letter. The specific language used in the Selectmen's motion ensures that there would be no question that a Commissioner was still on the Commission while the Selectmen were considering his or her renewal application, even if the Selectmen subsequently denied that application.

The Advisory Committee's previous recommendation had been based on the implicit assumption that the Board of Selectmen would issue any denial letters prior to the expiration of a Commissioner's term.

The Advisory Committee noted that the Board of Selectmen and the Commission are the two bodies with the greatest direct interest in the operation of the by-law. The Selectman

and the Commission would be the primary participants in the appointment and reappointment process and therefore need to have language that addresses their concerns.

RECOMMENDATION:

By a vote of 22–0–4 the Advisory Committee recommends FAVORABLE ACTION on the motion offered by the Selectmen.

ARTICLE 31

ADVISORY COMMITTEE'S REVISED SUPPLEMENTAL RECOMMENDATION

SUMMARY:

This report is a supplement to the Advisory Committee Recommendation published in the Combined Reports, October 27, 2016.

On November 3, 2016 the Advisory Committee heard a presentation and a request from the petitioner to reconsider the Committee's vote to recommend Favorable Action on an amended version of Article 31 as originally submitted. The petitioner is submitting a new motion under Article 31. The petitioner's new motion includes a revised version of the enforcement provision that would be included in the new by-law proposed in Article 31.

The motion that the Advisory Committee reconsider Article 31 was defeated by a vote of 4 in favor, 15 opposed and 4 abstentions. The Advisory Committee's recommendation to Town Meeting regarding Article 31 stands, as included in the Combined Reports (p. 31-7).

DISCUSSION:

During the course of a ten-minute presentation and ensuing questions and discussion, the petitioner presented information on several factual questions related to Article 31.

The petitioner originally reported that the Massachusetts Attorney General's office told her that compliance with the Open Meeting Law would not be required even if a committee of Town Meeting included outside members (a "hybrid" committee). In contrast, Town Counsel reported that she had been advised by the Attorney General's office that a "hybrid" committee was a public body, and that it would therefore be required to comply with the Open Meeting Law. The petitioner sought clarification from the Attorney General's office. She informed the Advisory Committee that the Attorney General's office had taken the stance that the Division of Open Government would not review complaints of non-compliance or enforce compliance, even if the offending body were a "hybrid" committee. Therefore, whenever Town Meeting has voted to create such a committee in order to carry out municipal duties it would be exempt from the Open Meeting Law, regardless of its composition. However, the Advisory Committee remained uncertain on the details of this point, as the petitioner declined to provide a copy of her email correspondence with the Attorney General's office.

At the Advisory Committee meeting of Nov. 3, the petitioner also addressed the relevance of Section 2.1.12, Para. 3 of the General By-Law (reproduced in its entirety as an appendix, below):

Neither the Board of Selectmen nor any other elected board shall utilize the

services of Town Counsel for the purposes of challenging an action taken by Town Meeting. Town Counsel shall use his or her best efforts to defend the action taken by the Town Meeting upon receipt of notice under this by-law.

The petitioner reported that she discussed the origin of this provision of Brookline's by-law with the person who drafted it some 20-plus years ago and learned that the purpose of the provision was not related to the circumstances Article 31 is meant to address. Nonetheless, the language of 2.1.12 is open to the interpretation that Town Counsel is restricted from challenging the actions of a Town Meeting committee. In addition, the previous reports on Article 31 from the Advisory Committee and the Selectmen raise questions about whether it would be appropriate or feasible for Town Counsel to play an enforcement role, regardless of how Section 2.1.12 of the General By-Law Article 31 is interpreted. (See p. 31-5 and p. 31-6 of the Combined Reports.)

Appendix

Text of Section 2.1.12 of the General By-Law:

SECTION 2.1.12 CHALLENGE TO THE VALIDITY OF AN ACTION TAKEN BY TOWN MEETING

Neither the Board of Selectmen, nor any department or agency which reports to the Board of Selectmen, shall file any petition or other document with the Attorney General or commence any legal proceeding contending that any action taken by Town Meeting is invalid, unless the following conditions have been complied with:

- (a) Such petition or other document or the commencement of such legal proceeding shall have been authorized by the Board of Selectmen; and
- (b) Subsequent to such authorization, the Town Moderator and Town Counsel shall have been notified in writing of such action, and provided with copies of such petition or document or the documents prepared for the purpose of such court action at least seven days before any such document is filed with the Attorney General or any court.

No other elected Town board, nor any department or agency which reports to any such other elected Town board, shall file any petition or other document with the Attorney General or commence any legal proceeding contending that

any action taken by Town Meeting is invalid, unless such Town board first authorizes such action and complies with the conditions described in sub-paragraphs (a) and (b), above.

Neither the Board of Selectmen nor any other elected board shall utilize the services of Town Counsel for the purposes of challenging an action taken by Town Meeting. Town Counsel shall use his or her best efforts to defend the action taken by the Town Meeting upon receipt of notice under this by-law. In the event that Town Counsel is unable for any reason to defend such action, including without limitation that Town Counsel has expressed the opinion that such action is illegal, the Moderator shall take such action as he or she deems necessary in order to present such defense, and Town Counsel may then represent the challenger on the Town Meeting action in controversy.

Nothing in this Article shall be construed to prohibit any employee or elected official of the Town, acting in his or her individual capacity, from communicating with the Attorney General, filing a petition or other document with the Attorney General, or commencing legal proceedings, contending that any action taken by Town Meeting is invalid.

ARTICLE 33

ADVISORY COMMITTEE’S REVISED SUPPLEMENTAL RECOMMENDATION

On November 15, 2016 the Advisory Committee voted 17–2–1 to reconsider its recommendation under Article 33.

The Advisory Committee and the Selectmen had offered almost identical motions under Article 33. The only difference was that in the first “Whereas” clause, the Selectmen used the phrase “who are visually impaired or have other disabilities” as opposed to “with blindness and other disabilities” in the Advisory Committee’s recommended motion.

The Advisory Committee approved of the language in the motion offered by the Selectmen and therefore voted to recommend Favorable Action.

RECOMMENDATION:

By a vote of 21–0–0 the Advisory Committee recommends FAVORABLE ACTION on the motion offered by the Selectmen.