

**RE: Warrant Article 13, Please see below, Responses of Petitioner Susan M. Roberts 9-19-22**

To: Advisory Committee, Land Use Subcommittee  
From: Associate Town Counsel Jonathan Simpson  
Re: 2022 Special Town Meeting Articles addressing demolition (11-13)  
Date: September 16, 2022  
Cc: Kara Brewton, Planning Director

The warrant for the 2022 Special Town Meeting contains 3 articles attempting to address demolitions, currently numbered as Articles 11, 12, and 13. I have been asked to provide a short legal opinion addressing the legality of, and any accompanying potential legal exposure that could be occasioned by, these articles.

ARTICLE 11

Article 11 attempts to extend the so-called “demolition delay” in Section 5.3.9 of the General By-Laws: the length of time the Building Commissioner can withhold a demolition permit if the building in question is found significant. The delay is currently set at twelve months (eighteen months for buildings either on the National or State Register of Historic Places, or eligible for listing on them). The article, if passed, would lengthen the applicable period of delay to **twenty-four** months in all circumstances. However, the article would only be effective for a twelve-month period following its approval by the Attorney General’s Office.

The length of the demolition stay proposed by Article 11 would be among the longest in the Commonwealth. As of 2020, preservation staff believe that only the Town of Milton imposed 24-month stays of demolition. I am not aware of any legal challenges to such demolition delays, and they are widely used. I believe the length of the stay would be legally defensible, particularly because it is only going to be used for a short period of time.

I am concerned about certain ambiguities in the language proposed for Section 5.3.9. The clause “subsequent to the date of approval of by the Attorney General” does not contain any reference to a particular approval. In the paragraph above I assume it is the date of approval of *this warrant article* but I had to read that language into what is being proposed.

ARTICLES 12 and 13

At this early stage, I have substantial concerns about the legality of both Articles 12 and 13. Our office is continuing to research the issues involved, but I am concerned that passage of either article will open the Town up to substantial legal exposure if they are used to deny the issuance of otherwise legitimate demolition permits. **[SR: Responding to this assertion, WA13 is not intended to deny the issuance of a demolition permit by the Building Commissioner. WA 13 is intended only that the demolition permit be issued following design review of a replacement of a structure found to be significant. Imposing this design review requirement is intended to encourage developers to work with the Preservation Commission and neighbors/community members regarding the replacement structure, which is an acknowledged goal of the Demolition Delay By-law, and which, data shows, is not being realized and hasn’t been realized for a number of years, resulting in the large number of demolitions of significant structures in the Town. We do not see a basis whereby the requirement of design review of the replacement of a significant structure prior to the issuance of a demolition permit would make WA 13 illegal.]** It is an open question whether zoning requirements can be applied to demolitions at all. Zoning is fundamentally the regulation of uses of property in order to achieve municipal goals.

Demolition, by contrast, is the process by which property transitions from one use to another. **[SR: Again, WA 13 does not prohibit demolition, and certainly doesn't interfere with property transitions from one use to another.]** I have not yet seen any examples where other communities have attempted to use their zoning by-laws to restrict building demolitions. I believe this may be because such a by-law would, if challenged, be found arbitrary, irrational, unreasonable or unrelated to a valid objective of the Zoning By-Law. **[SR: Given that design review is required in all instances stated in 5.09(2)(a) through (n) and is a legitimate "regulation of uses of property to achieve municipal goals," we don't see a basis for WA 13's being arbitrary, irrational, unreasonable or unrelated to a valid objective of the Zoning By-law just because, before the issuance of a demolition permit, the Town would like to approve the design of the replacement of a significant structure. Let us not forget that in imposing a demolition delay under the Demolition Delay By-law, the Preservation Commission does not consider the design of the significant structure's replacement, so design review in such instances may be the Town's only opportunity to do so.]**

The petitioner of Article 13 has pointed out that the Town already does utilize Section 5.09 of its Zoning By-Law to require design review special permits prior to the demolition of structures. While this is true, the Town is already having to defend itself in a lawsuit challenging that section's validity: 370 Wash LLC v. Town of Brookline, et al., Land Court Case No: 20-MISC-000437. The Town was able to defeat a Motion for Preliminary Injunction in that case, but the judge has never directly addressed the merits of Plaintiff's claim that the Town exceeded its authority under the Zoning Act when it required a design review special permit prior to the demolition of the 370 Washington Street property. And the 370 Washington case pertains to a Zoning By-Law section, 5.09.2.a, which only applies to buildings on or near major thoroughfares. **[SR: The response here is that 370 Wash LLC v. Town of Brookline is one case brought to attack 5.09(2)(a) (which requires design review for any structure within 100 ft. of Washington Street and says nothing about demolition). The basis of the complaint is that the Town acted arbitrarily because of its past practice of not requiring design review in connection with a demolition only permit. The complaint does not similarly allege any problem with a special permit for design review in connection with demolition followed by construction of a new structure, which is what 5.09(2)(m) does and WA 13 would do. Were WA 13 to pass and be certified by the AG, there would be no grounds to assert the Town's arbitrariness because the By-law would give full notice to developers of the Town's processes, which was not the case in 370 Wash LLC.]** Defending a challenge to Article 13 would be significantly more difficult, because its scope (the entire Town) is no longer linked to a discrete and easily-cited objective like preventing gaps in the Town's most prominent streetscapes. **[SR: This argument is misplaced. Unlike 5.09(2)(a), the subset for design review under WA 13 likely would result in fewer cases because only those cases involving demolition delays of significant structures where there is no agreement on the design of the replacement structure would be involved, not, as is the case with (a), all structures or outdoor uses with 100 ft. of the Town's prominent streetscapes].**

Article 13 also includes a requirement that a landowner wait until the stay of demolition has expired to apply for the necessary design review special permit. Any zoning by-law can be challenged on the grounds it is unreasonable, arbitrary, or unrelated to the substantial objects of zoning. It would be difficult to defend the sequencing laid out in Article 13 as it seems to require an arbitrary period of delay unrelated to any of the objectives of zoning. **[SR: WA 13 would not affect developers' ability to pursue the special permit during the demolition delay period, as some developers do now. With the adoption of WA 13, the developer would know, going into the demolition delay process, whether it wants to work with Preservation and neighbors, and if it decides not to, it could still obtain the special permit during the delay period in order to be ready to obtain the demolition and building permits once the**

**delay expires].**

Even if Article 12 and 13 were found to be legal exercises of the Town's power under the Zoning Act, they would likely lead to significant issues, potentially even legal challenges, due to their significant ambiguity as to what they are intended to apply *to*. Article 12 would impose a moratorium on the issuance of any "permits for demolition of a building in Brookline that is a residential dwelling where the dwelling is to be replaced with any residential structure that will change the building's footprint..." and goes on to state "demolition" is defined in the same manner as Section 5.3.2 of the Town's General By-Laws. But the definition of "demolition" in Section 5.3.2, the Demolition Delay By-Law, goes far beyond completely demolishing a building: it includes tearing down or covering any side or 25% of any exterior wall, removing any historically significant exterior architectural elements, or even – in certain circumstances – gutting an interior space. I do not believe Article 12 is intended to be a moratorium on all such "demolitions", but that leaves the question of what is meant by its phrase "where the dwelling is to be replaced". Can a landowner avoid the moratorium by retaining a portion of the existing structure? If so, how much is required?

Article 13 is similarly ambiguous as to its scope. Its special permit requirement would be triggered by the imposition of a stay of demolition under the Town's Demolition Delay By-Law, meaning it would theoretically require a design review special permit for any demolition where a determination of significance was made including, as noted above, projects involving only of 25% of a single exterior wall or even just the removal of significant exterior elements. But the petitioner's intent appears to be to address only complete demolitions, and the Warrant Article uses the undefined phrase "demolition of a principal structure".

**[SR: To clarify here, petitioners' intent is to follow the decision of the Preservation Commission in imposing the stay, so that the nature of the demolition subject to the Commission's stay would be covered by WA 13, except that non-principal structures subject to a stay, such as sheds, fences, or retaining walls, or the like would be exempt from coverage. To the extent it would be helpful to enumerate examples of non-principal structures, we are amenable to making such a change.]**

Finally, the ultimate effect of Article 13 will likely be significantly diminished due to the requirements of M.G.L. c. 40A, s. 6 and special allowances it makes for prior non-conforming one- or two-family residential structures. Pursuant to M.G.L. c. 40A, s. 6, such structures may be modified or even reconstructed with only a finding that the new structure is not “substantially more detrimental” to the neighborhood than the preexisting use as long as no new nonconformities with zoning are being created. **[SR: Perhaps I’m missing something here, but I’m not sure how a new By-law that requires design review would render an existing structure non-conforming. I do understand that if, for example, the Town were to change dimensional requirements, an existing structure might be non-conforming]**. It is doubtful that nonconformance with a design review special permit requirement would be considered a “new” nonconformity, meaning the additional requirements of Article 13 would not apply in many, many situations across Town. **[SR: Subject to the previous response, query whether, in the course of design review, adding one or more units to a single or two-family residence would be a “new” non-conformity].**