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July 26, 2018

Susan E. Copeland, Town Clerk
Town of Ayer
1 Main Street
Ayer, MA 01432

RE: Ayer Special Town Meeting of March 19, 2018 - Case # 8798
Warrant Articles # 1 and 2 (Zoning)

Dear Ms. Copeland:

Article 1 - We approve Article 1 from the Ayer March 19, 2018, Special Town Meeting.[1] Our comments on Article 1 are provided below.

Article 1 recodifies the Town's zoning by-laws. Article 1 deleted the zoning by-laws in their entirety and inserted a revised zoning by-law. The explanatory note included in the Town Meeting Warrant states that the proposed zoning by-law is a comprehensive update and reorganization that includes specific changes identified as: inserting a new Mixed-Use Transition District; changing the name of the "Heavy Industrial District" to "Industrial District;" designating the Planning Board as the special permit granting authority for several uses; clarifying the permitting process for the Open Space Residential Developments, Multi-family Developments, and Affordable Housing; and changing the Town's Table of Use Regulations and Table of Dimensional Requirements.

Our comments on the zoning recodification are provided below.

I. Section 8.3 "Wireless Communications Services Overlay District".

Section 8.3 establishes a Wireless Communication Services District ("District") as an overlay district and requires a special permit for certain types of wireless communication facilities

[1] In a decision issued June 27, 2018, we approved Article 2.

in the District. Subsection 8.3.4 provides exemptions from Section 8.3's requirements and provides in pertinent part as follows:

> A. The following types of WCFs are exempt from the requirements of this Section 8.3 but must comply with all other applicable requirements of this by-law.
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> * * *
>
> 2. Amateur radio towers used in accordance with the terms of any amateur radio service license issued by the FCC provided that the tower is not used or licensed for any commercial purposes.

Subsection 8.3.4 (A) (2) exempts federally licensed amateur radio operators from Section 8.3 "provided that the tower is not used or licensed for any commercial purposes."[2] However, G.L. c. 40A, § 3 does not restrict the purpose for which such antenna structures may be used. Specifically, G.L. c 40A, § 3 provides in pertinent part as follows:

> No zoning . . . by-law shall prohibit the construction or use of an antenna structure by a federally licensed amateur radio operator.

To the extent that federally licensed amateur radio operators and their structures are subject to the by-law, the by-law cannot "prohibit the construction or use of an antenna structure" by federally licensed amateur radio operators. Subsection 8.3.4 (A) (2) must be applied consistent with G.L. c. 40A, § 3. The Town may wish to discuss this issue in more detail with Town Counsel.

II. Section 8.4 "Adult Entertainment Overlay District".

Section 8.4 establishes an Adult Entertainment Overlay District and requires a special permit for adult entertainment uses. Specifically, subsection 8.4.3 pertains to the special permit requirements and provides in pertinent part as follows:

> The Board of Appeals shall not grant a special permit for an adult bookstore, adult video store, adult paraphernalia store, adult motion picture or mini-motion picture theatre, or adult live entertainment establishment unless all of the following conditions are satisfied: . . .

Subsection 8.4.3 requires adult entertainment uses to obtain a special permit from the Board of Appeals and restricts such uses to the Overlay District.[3] Subsection 8.4.3 do not clearly specify when a special permit must, or should, be granted for such adult entertainment uses. As provided in more detail below, unbridled discretion in the granting of an adult entertainment special permit is, under First Circuit precedent, an impermissible prior restraint on speech.

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[2] Subsection 8.3.4 (A) (2) was not substantively changed under the recodification.

[3] Subsection 8.4.3 was also not substantively changed under the recodification.

In Showtime Entertainment, LLC v. Town of Mendon, 885 F.Supp.2d 479 (2012), the Court struck down the special permit language similar to subsection 8.4.3.[4] The Court noted that the Mendon by-law did not define what conditions were sufficient for a special permit to be granted and that the use of the word "may" allowed the Mendon Zoning Board of Appeals to deny a permit application based on undefined criteria, even if all of the enumerated prerequisites for a permit had been met. "[T]he bare text of the by-law provides no definite standard for when the Zoning Board should grant a special permit – it only defines when it must not." Id. at 487.

The Showtime court concluded that the Mendon by-law, as a prior restraint on speech, failed to overcome "a heavy presumption against its constitutional validity." Id., *quoting* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975). "To overcome this presumption, a governmental entity must prove that its ordinance contains 'narrow, objective, and definite standards' to guide the licensing authority in deciding whether to issue a permit." Id., *quoting* New England Reg'l Council of Carpenters v. Kinton , 284 F.3d 9, 21 (1st Cir. 2002). *See also* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 226 (1990) ("[A]n ordinance which...makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official -- as by requiring a permit or license which may be granted or withheld in the discretion of such official -- is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."). Because the Mendon by-law contained no narrow and objective standards and vested excessive discretion in the Zoning Board, it was an invalid prior restraint on speech. Showtime, 885 F.Supp.2d at 489-490.

Subsection 8.4.3 is similar to the Mendon by-law at issue in Showtime. Subsection 8.4.3 states only that the Board of Appeals "shall not grant a special permit" if it determines that the applicant does not meet certain criteria. Subsection 8.4.3 does not state when the special permit must or should be granted and gives the Board of Appeals discretion to deny the special permit even if the by-law's criteria are met. The Town may wish to review the Showtime decision with Town Counsel to determine how the Town might impose a special-permit requirement consistent with constitutional standards. *See* Showtime at 488.

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.**

[4] The Mendon by-law stated in relevant part: "Adult entertainment enterprises *may be allowed* in the Overlay District only by Special permit granted by the Board of Appeals." *See* Showtime, 885 F. Supp. 2d at 482 (emphasis supplied).

Very truly yours,
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cc: Town Counsel Mark Reich