

January 27, 2023

To: Emily Wentworth
Michael Silveira

Cc: John Coughlin, Town Counsel

From: Susan Murphy, Real Estate Counsel

Re: Minimum Occupancy Period By-law and ADU By-law

The purpose of this memo is to respond to a request from Acting Chair Kevin Ellis for clarification regarding various aspects of the proposed ADU amendment and the proposed new minimum occupancy period bylaw.

1. *Whether the Town would be limited to only a 30-day minimum occupancy period.*

The short answer to that question is no. Communities in Massachusetts that impose minimum occupancy periods have imposed requirements anywhere from 30 days to 12 months. Looking at the context for those requirements may be helpful for the Town's determination of what restriction works best for Hingham. For example, the communities that impose longer periods of 6 or 12 months are typically communities that have a high number of seasonal residents. Communities that do not are more likely to have a shorter period of 30 or 60 days.

There was also a question about having minimum occupancy periods for ADUs vs. all dwelling units. As there are two proposed zoning amendments for ATM 2023, one for ADUs and one for general minimum occupancy periods, I provided the following guidance:

- If the Town were to adopt a general minimum occupancy period that would apply to all dwelling units in the Town, the recommendation is that the By-law would not need to repeat the minimum occupancy period in the ADU section of the bylaw. The restriction would apply universally to all types of dwelling units and redundancy is typically not recommended. That being said, there is no reason why it could not be repeated in both sections.
- In the interest of uniformity throughout the By-law, the recommendation is that the minimum occupancy period be the same for all types of dwelling units.
 - Section 4 of Chapter 40A provides, in part: "Any zoning ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted."



As different types of dwelling units (e.g. single-family, two-family, multi-family, ADUs) are different uses, the requirement for uniformity may not strictly apply, but there should be an articulated basis for the different standards. If the Board elects to apply different minimum occupancy periods to different types of dwelling units, I recommend that the Board articulate during its deliberations the zoning basis (i.e. “public health, safety & welfare”) rationale for the differentiation.

There was also a question as to the practicalities of allowing occupancy periods of shorter or longer periods that is not a factor in zoning law, but rather an issue for property owners. The Town should determine a minimum occupancy period that can be justified on a zoning basis.

[While not applicable to the zoning amendment discussion, as there was some discussion at the hearing on this issue, Acting Chairman Ellis requested some clarification. As I noted at the meeting, Massachusetts law provides different levels of obligations on property owners depending on the type of occupancy. For example, if someone has the benefit of a longer term lease it is very difficult for a landlord to terminate the lease and evict the tenant except for non-payment of rent or other serious violation. However, for a tenant-at-will, Massachusetts law allows the owner to give a 14-day notice to quit for non-payment of rent and 30-day notice to vacate for any reason or no reason. The eviction process for failure to vacate may be the same but a tenant at will is less likely to prevail in an eviction case. Short-term rentals are not “leases” in the traditional sense. Therefore, there are no statutory protections requiring notice to vacate or the like and while a property owner may need a court order to remove the person(s), an unauthorized occupant who overstays their welcome has little to no defense in such a case.]

2. Enforcement options.

A number of questions have been raised regarding enforcement. Enforcement of all provisions of the zoning bylaw is governed by MGL Chapter 40A, Section 7, and Section I-C.3 of the Hingham Zoning By-law. These provisions provide for:

- The ability of any person to request zoning enforcement by the Building Commissioner
- Civil fines imposed by the Building Commissioner – [the failure to pay fines can convert to a criminal complaint]
- Injunctive relief in the Superior or Land Court

The ADU Study Committee recommendations included references to recently adopted provisions of the Norwell Zoning By-law. The Norwell bylaw amendment includes the following provision for both attached (“interior”) ADUs and detached ADUs:

The interior[or detached] ADU shall not be used as a short-term rental, and a restrictive covenant shall be recorded against the property to that effect before



any occupancy permit issues for the ADU, and the covenant shall run to the Town and be enforceable by the Town through injunctive relief and with the property owner required to pay the Town's reasonable legal fees and costs for successful enforcement of any violation of the restrictive covenant.

There are some important distinctions, however, between the ADU provisions adopted by Norwell and those existing and proposed in Hingham.

- Most significantly, both interior and detached ADUs are permitted in Norwell “as of right” with no special permit requirement. Detached ADUs require administrative site plan review only.
- Since no special permit is required, there is no approval with conditions that is recorded at the registry of deeds. Therefore, the covenant takes the place of the recorded permit.
- In Hingham, special permits are required for ADUs (and would be required for detached ADUs as currently proposed). Under Massachusetts law, the property owner is required to record the special permit and all conditions imposed by the special permit will be binding on subsequent property owners (unless modified by the special permit granting authority).
- Under Massachusetts law, special permit conditions do not expire. However, a covenant is a restriction on land and may not be enforceable in perpetuity. It is unclear from the Norwell provision if the town intends to impose the covenant for a particular period of time. But in either case, the Town is better protected by a special permit with conditions for the long term.
- There is no benefit from recording both a covenant and a special permit that will impose the same conditions.
- The Norwell provision allows enforcement of the covenant by injunctive relief. As noted above, Massachusetts law already provides that zoning may be enforced with injunctive relief. While it may provide some comfort to see it stated in the ADU bylaw, it does not add anything to the available enforcement remedies. There is no practical reason for incorporating enforcement provisions in specific sections of the bylaw when the general provisions of state law and the existing By-law already apply.
- Finally, Norwell allows for the reimbursement of legal fees for enforcement of the covenant. While this provision was not stricken during the Attorney General’s review of the bylaw, AG approval is not conclusive evidence that a certain bylaw provision will be upheld if challenged. With respect to legal fees, Massachusetts courts follow the



“American Rule” which was summarized in Preferred Mutual Insurance Company v. Gamache, 426 Mass. 93,95, 686 N.E.2d 989 (1997):

“The usual rule in Massachusetts is to prohibit successful litigants from recovering their attorney's fees and expenses except in a very limited class of cases. This rule is known as the "American Rule." See Waldman v. American Honda Motor Co., 413 Mass. 320, 321-323, 597 N.E.2d 404 (1992). Our traditional approach has been to prohibit recovery of attorney's fees and expenses in a civil case in the absence of either an agreement between the parties, or a statute or rule to the contrary, and this principle has been applied to deny recovery of attorney's fees and expenses in declaratory judgment actions. See Fuss v. Fuss (No. 1), 372 Mass. 64, 70-72, 368 N.E.2d 271 (1977); Wachusett Regional Sch. Dist. Comm. v. Erickson, 354 Mass. 768, 238 N.E.2d 369 (1968).”

In Massachusetts, there are statutes such as Chapter 93A (a consumer protection law) which expressly allows award of attorneys' fees. Under Chapter 40A, a recent change allows the court to require a bond in the event of bad faith appeals that would entitle the other party to recoup costs, but the SJC recently limited the extent of that recovery. We are not aware of any case which allowed a local zoning bylaw to impose reimbursement of legal fees and so we hesitate to recommend including such a provision in Hingham's bylaw.

Please let me know if the Board has any questions regarding the above information.