

PHASE I AUDIT REPORT

Somerset Zoning By-Law Recodification Project

Introduction

This Audit Report summarizes my findings and observations following a comprehensive review of the current Somerset Zoning By-law, as the first phase of the Town's Zoning By-law Recodification Project. The primary purpose of this Audit Report is to identify for Town officials certain issues I have identified relative to any inconsistencies with State law, as well as internal inconsistencies, outdated or unnecessary text, or ambiguous provisions in the current Bylaw that should be addressed as part of the recodification process. This Report will serve as the foundation for development of the Phase II Comprehensive Diagnostic Report, that will recommend specific housekeeping, organizational, and substantive changes to the Zoning By-law, and will identify options for new zoning regulations to support one or more of its long-range planning and policy objectives.

Audit Summary

1. Consistency with State Law

Purposes. The stated purposes listed in Section 1.1 are consistent with Chapter 40A. However, I recommend broadening the listed purposes to include all of the additional purposes for zoning recognized in the outside section of the Zoning Act. Additional purposes include the following: "encourage housing for persons of all income levels," conserve natural resources and prevent pollution of the environment," "encourage the most appropriate use of land in accordance with the objectives and recommendations of the master plan." Expanding the stated purposes will enhance enforceability, and lend support to the validity of any less traditional zoning regulations that the Town may adopt going forward.

Exempt Uses: The Bylaw does not specifically address the various exemptions provided under Chapter 40A, §3 for uses such as agriculture, education, day care, and solar energy, either in the use regulation section or in the dimensional regulations. To avoid having any of the regulations be interpreted as being inconsistent with the statutory exemptions, I recommend including provisions expressly excepting the statutorily exempt uses from certain of the standard use and dimensional regulations, and/or regulating such uses separately.

Unspecified Uses Allowed: The provisions in Section 4.1.4 that purport to authorize the ZBA to permit any use "which is substantially similar to one or more uses specifically authorized" is contrary to the uniformity requirements of Chapter 40A, §4. The Supreme Judicial Court invalidated a similar provision in *Gage v. Egremont*, 409 Mass. 345 (1991).

Nonconforming Structures, Uses and Lots: The By-law's regulations pertaining to nonconforming structures, uses and lots incorporate *some*, but not all, of the statutory language in §6 of Chapter 40A relative to the statutory protections for such structures, uses and lots.. Some

of the Bylaw provisions (such as Section 6.2.1) unnecessarily repeat the statutory language; other provisions are not entirely consistent with the zoning statute and case law interpreting the statute (portions of Section 6.3 and Section 7.6 relative to alterations and changes to nonconforming uses and structures, for example.).

The By-Law does not clearly define and regulate nonconforming uses that are *either* ‘abandoned’ *or* ‘not used for 2 years or more’ – these are two separate and distinct concepts, either of which can result in loss of nonconforming use protections.

The Section 6.3 procedures relative to alterations, extensions or reconstruction of nonconforming single and two-family residential structures are inconsistent with statutory and case law. In particular, neither the determination as to whether a proposed alteration or extension increases the nonconforming nature of the structure, nor the finding as to whether the change will be substantially more detrimental to the neighborhood, can be properly delegated to the Building Inspector. Pursuant to § 6 of Chapter 40A, only the “permit granting authority” (i.e., the Board of Appeals) is authorized to make such determination and finding. Consideration may, however, be given to providing for limited types of structural alterations to be made by right, without necessity for ZBA review.

Signs: A number of provisions in the Section 6.5 sign regulations are potentially vulnerable to challenge as unconstitutional limits on sign content. To forestall such a challenge, I recommend adding a general statement to the Section 6.5.1 Statement of Intent, indicating that the regulations are not intended to control sign content, and that any non-commercial message may be substituted for the message content used to describe the various permitted signs. This would mean, for example, that if a business is allowed to maintain a certain size wall sign to display the name of the business, the business could substitute a non-commercial message for its name.

Limited Business and Light Industrial Districts: Section 6.11.2 purports to prohibit the rezoning of non-governmentally owned land to Limited Business District or Light Industrial District except by unanimous vote of Town Meeting if the owner files a written protest. This provision conflicts with the procedural requirements for amendment of a zoning by-law, as prescribed in Chapter 40A, § 5. The statutory requirement for a two-thirds vote of a town meeting contains no exception if the landowner objects. The statutory exception providing for an increased quantum of vote in the case of a written protest by owners of the subject land area, applies only to cities and to towns with town council governments. It is not applicable to towns with town meeting governments.

Enforcement: The zoning enforcement provisions in Section 7.3 conflicts with the State Building Code, by requiring the Building Inspector to grant or deny a building permit based solely upon zoning compliance.

Board of Appeals: Section 7.4 does not accurately state the powers and duties of permit granting authorities, as prescribed in Chapter 40A, § 12. Section 7.4 also contains outdated provision relative to Board of Appeals members appointed under the previous zoning by-law. This seems to be a holdover from the Bylaw adopted immediately following enactment of Zoning Act in the late 1970’s.

Appeals: The provisions in Section 7.4, Section 7.5 and Section 7.7 stating that any persons aggrieved by a decision of the ZBA or Planning Board may appeal to Superior Court is inconsistent with Chapter 40A, §17, which also allows for appeals to the Land Court, the Housing Court, and the District Court.

Variances: The Section 7.7 criteria for the grant of a variance should re-state the mandatory criteria provided in Chapter 40A, § 10. In particular, the statutory criterion for a finding that “desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of [the] ...bylaw” should replace the re-worded criterion that appears in the current By-Law.

2. Internal Consistency

Numerous Bylaw amendments have been adopted over the years, including additions of complete, new topic-specific, sections addressing special uses and overlay districts. However, these amendments were not always fully integrated into the already existing By-laws. The lack of integration makes the By-laws unnecessarily cumbersome, and difficult to navigate and interpret. Among the problems are:

- Inconsistent definitions and terminology used in different sections of the By-Law
- Scattered and duplicative definitions
- Certain of the new districts and the associated maps are not included in the Section 2 description of Districts and zoning maps.
- Scattered use and dimensional regulations– some regulations appear only in the Definition section; others appear in the special permit requirements, and still others appear in the use and/or dimensional sections; some are independently addressed in the special overlay or special district regulations, There are few cross-references.
- Scattered accessory use and accessory structure regulations.
- Inconsistent site plan review requirements.
- Inconsistent terms employed to refer to certain uses. This problem is particularly evident in the Tables of Uses, Table of Dimensional Regulations, and Parking Schedule. For example, the Section 6.10 Planned Development regulations refers to “industrial use” and “commercial use.” Neither of these terms is defined in the By-law, however, and the Table of Uses does not include an “industrial” or “commercial.” use category. Instead, the Table of Uses employs other categories such as “Business Uses,” “Business Open Air or Drive-In Uses,” and “Industry, Wholesale Business and Storage Uses” (none of which are defined or described in the By-law). The Parking Schedule includes the “Industry, Wholesale Business and Storage” category, but neither of the “Business” use categories listed in the Table of Uses.

3. Clarity

Definitions: A number of the definitions in the By-law require revision in order to clarify their meanings and/or to eliminate regulatory language. Many terms used in the By-law are not defined at all.

The By-law also lacks any general instructions for interpreting the Bylaws in situations where a term is not defined anywhere in the Bylaw. Such an instruction might refer the user to a publication such as the most recent edition of the Webster's Dictionary, and/or the State Building Code, for example.

Dimensional Regulations: The dimensional requirements appear in several different sections of the Bylaw, including the Section 5.2 table. To aid in the uniform interpretation of the dimensional requirements, consideration should be given to consolidating all of the standard dimensional requirements into Section 5, as written regulations that explain the requirements displayed in the dimensional table. Consideration should also be given to including illustrations diagramming lot frontage, front, side and rear yards, how height is measured, and how frontage and yards are determined for a corner lot.

Planned Development: Section 6.10 contain a number of ambiguities with respect to the applicability of its provisions. For example, according to Section 6.10.1, "planned development shall mean the *following* commercial and industrial uses other than in a Light Industrial or Limited Business District:" [emphasis added]. However, no *specific* list of commercial or industrial uses follow. Instead, subsections a., b. and c. of Section 6.10.1 merely repeat the generic references to "industrial" and "commercial" uses, differentiated only by the size of the lot or the number of enterprises. As noted above, there is no definition of these two terms, and they are not listed in the Table of Uses.

In addition to ambiguities concerning the applicability of Section 6.10, the review and approval procedures are vague. After discussions with the Building Inspector and the Town Planner, it is my understanding that the Planned Development provisions do not work well, in any event. My Phase II recommendations will therefore include a proposed new administrative site plan procedure applicable to several non-residential developments, including the multiple business developments now governed by Section 6.10.1.

General: I have identified a number of other provisions that could benefit from re-drafting. Many of these provisions are highlighted in the annotated By-law text previously forwarded to the Committee.

4. Organization

Closely related to clarity and internal consistency is organization. Ideally, the individual provisions of a by-law are interpreted in the context of the by-law as a whole. Currently, however, the By-Law lacks a uniform and predictable structure, making it cumbersome to use and difficult to interpret. Notably problematic in this regard are Sections 4, 6 and 7. The Phase II Diagnostic Report will include a proposed reorganization, as well as recommendations for

appending user-friendly tools to the By-Law, such as a subject index, and a list of By-Law amendments with their effective dates.