

TOWN OF NEEDHAM

Office of the Town Clerk



BY-LAWS

Approved By the Attorney General

**Special Town Meeting
October 24, 2022**

February 16, 2023



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

CENTRAL MASSACHUSETTS DIVISION
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NEEDHAM, MA 02492
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February 16, 2023

Theodora K. Eaton, Town Clerk
Town of Needham
1471 Highland Avenue
Needham, MA 02492

**Re: Needham Special Town Meeting of October 24, 2022 – Case # 10805
Warrant Article # 8 (Zoning)**

Dear Ms. Eaton:

Article 8 – Under Article 8 the Town voted to amend its zoning by-laws to allow for brew pubs and microbreweries by special permit in the Town’s Business and Industrial Districts. We approve Article 8 because it does not present a clear conflict with state law, including the Alcohol Beverage Control Commission’s (ABCC) authority to regulate the licensing and sale of alcohol under G.L. c. 138. *Amherst v. Attorney General*, 398 Mass. 793, 795-96 (1986) (requiring inconsistency with state law or the constitution for the Attorney General to disapprove a by-law). However, the Town should consult with Town Counsel to ensure the by-law is applied in a manner that does not interfere with the ABCC’s authority to regulate the licensing and sale of alcohol under G.L. c. 138.

In this decision, we summarize the by-law amendments adopted under Article 8 and the Attorney General’s standard of review of town by-laws, and then explain why, based on our standard of review, we approve Article 8.

I. Summary of Article 8

Under Article 8 the Town amended Subsections 3.2.1 and 3.2.2 of its Schedule of Use Regulations to allow brew pubs and microbreweries by special permit in the Town’s Business and Industrial Districts. In addition, the Town amended Section 1.3, “Definitions,” to add definitions for “Brew Pub” and “Microbrewery.” Both definitions include provisions that these uses must be licensed according to federal and state statutes, including G.L. c. 138. The definitions for “Brew Pub” and “Microbrewery are as follows:

Brew Pub - Eat-in restaurant, licensed under relevant local, state and federal statutes to produce and sell malt beverages at the location, whose primary business is the preparation and sale of food to be consumed on the premises, and whose accessory

business is the production of malt beverages, including beer and ales, which may include packaging of such beverages and on-premises sale of such beverages for consumption on or off the premises. Malt beverages produced on the premises may be sold to other establishments in compliance with relevant state and federal statutes and regulations, but such sales shall not exceed 40 percent of the establishment's production capacity. Accessory outdoor dining and live indoor entertainment is allowed if otherwise permitted in the zoning district in which the brew pub is located, if and as permitted by its license.

Microbrewery - A facility, licensed under relevant local, state and federal statutes, for the production and packaging of malt beverages, including beer and ales, for retail sale and for consumption on or off the premises or wholesale distribution, with a capacity and production of not more than fifteen thousand (15,000) barrels per year (a barrel being equivalent to thirty-one (31) gallons), and which may include as an accessory use preparation and/or sale of food for on-premises consumption or for take-out. Any such facility may also provide samples limited in size, provided that such sampling is allowed under relevant local, state, and federal statutes, regulations and licenses issued thereunder. The facility may host marketing events, special events, and/or factory tours. The facility may include as an accessory use an eat-in or take-out restaurant that may include outdoor dining, which restaurant may occupy more than half of the area of the facility and may include live indoor entertainment if otherwise permitted in the zoning district in which the microbrewery is located, if and as permitted by its license.

II. Attorney General's Standard of Review of Zoning By-laws

Our review of Article 8 is governed by G.L. c. 40, § 32. Pursuant to G.L. c. 40, § 32 the Attorney General has a "limited power of disapproval," and "[i]t is fundamental that every presumption is to be made in favor of the validity of municipal by-laws." Amherst, 398 Mass. at 795-96. The Attorney General does not review the policy arguments for or against the enactment of a bylaw. Id. at 798-99. Rather, to disapprove a by-law (or any portion thereof), the Attorney General must cite an inconsistency between the by-law and the state Constitution or laws. Id. at 796. "As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid." Bloom v. Worcester, 363 Mass. 136, 154 (1973). "The legislative intent to preclude local action must be clear." Id. at 155. Massachusetts has the "strongest type of home rule and municipal action is presumed to be valid." Connors v. City of Boston, 430 Mass. 31, 35 (1999) (internal quotations and citations omitted).

Article 8, as an amendment to the Town's zoning by-laws, must be accorded deference. W.R. Grace & Co. v. Cambridge City Council, 56 Mass. App. Ct. 559, 566 (2002) ("With respect to the exercise of their powers under the Zoning Act, we accord municipalities deference as to their legislative choices and their exercise of discretion regarding zoning orders."). When reviewing zoning by-laws for consistency with the Constitution or laws of the Commonwealth, the Attorney General's standard of review is equivalent to that of a court. "[T]he proper focus of

review of a zoning enactment is whether it violates State law or constitutional provisions, is arbitrary or unreasonable, or is substantially unrelated to the public health, safety or general welfare.” Durand v. IDC Bellingham, LLC, 440 Mass. 45, 57 (2003). Because the adoption of a zoning by-law by the voters at Town Meeting is both the exercise of the Town’s police power and a legislative act, the vote carries a “strong presumption of validity.” Id. at 51. “Zoning has always been treated as a local matter and much weight must be accorded to the judgment of the local legislative body, since it is familiar with local conditions.” Concord v. Attorney General, 336 Mass. 17, 25 (1957) (quoting Burnham v. Board of Appeals of Gloucester, 333 Mass. 114, 117 (1955)). “If the reasonableness of a zoning bylaw is even ‘fairly debatable, the judgment of the local legislative body responsible for the enactment must be sustained.’” Durand, 440 Mass. at 51 (quoting Crall v. City of Leominster, 362 Mass. 95, 101 (1972)). In general, a municipality “is given broad authority to establish zoning districts regulating the use and improvement of the land within its borders.” Andrews v. Amherst, 68 Mass. App. Ct. 365, 367-368 (2007). However, a municipality has no power to adopt a zoning bylaw that is “inconsistent with the constitution or laws enacted by the [Legislature]...” Home Rule Amendment, Mass. Const. amend. art. 2, § 6.

III. Statutory Limitations on the Town’s Authority to Regulate Brew Pubs and Microbreweries

We approve the by-law amendments adopted under Article 8 because the Town has authority under its zoning powers to regulate the use of land within the Town. However, the Town must apply Article 8 consistent with G.L. c. 138, and the jurisdiction of the ABCC over the licensing and sale of alcohol. The “[r]egulation of the liquor industry in Massachusetts is comprehensive and pervasive.” Cellarmaster Wine o Mass., Inc. v. Alcoholic Bevs. Control Commn., 27 Mass. App. Ct. 25, 27, (1989). The Legislature set out a broad prohibition in the first sentence of G.L. c. 138, § 2, which provides, in pertinent part: “No person shall ... sell or expose or keep for sale, store, transport ... alcoholic beverages or alcohol, *except as authorized by this chapter* (with emphasis added.) Pursuant to G.L. c. 138, the local liquor licensing authority (LLA) issues retail licenses for both on-premises consumption and off-premises consumption of alcoholic beverages. See G.L. c. 138, §§ 12 and 15, respectively. Once the LLA grants a license, the ABCC approves the license, and then the LLA issues the license upon the payment of the required fees. See, e.g., G.L. c. 138, § 15.

The LLA is authorized to adopt reasonable rules and regulations with respect to the issuance of these licenses. See G.L. c. 138, § 23. However, the Town must ensure that it applies Article 8, including the definitions of a brew pub and a microbrewery consistent with G.L. c. 138, regarding the licensing and sale of alcohol, as further discussed below.

Although G.L. c. 138, § 1 defines several terms for purposes of the State’s liquor licensing statutes, it does not define the terms “Brew Pub” or “Microbrewery.” According to the ABCC a “Brew Pub” is what the ABCC calls a “Pub Brewery” and is defined in G.L. c. 138, § 1, and licensed under G.L. c. 138, § 19D. A “Pub Brewery” is defined in Section 1 as follows:

a plant or premise licensed under sections 12 and 19D where malt beverages are authorized to be produced and sold and where alcoholic beverages or wine or malt beverages only are authorized to be sold for consumption on the premises according

to commission regulations.

In addition, the ABCC issues farmer-series licenses that include farmer-breweries. A farmer-brewery is defined in G.L. c. 138 § 1 as:

“Farmer-brewery”, any plant or premise where malt beverages are produced from the fermentation of malt with or without cereal grains or fermentable sugars, or of hops, provided that said hops or cereal grains are grown by the farmer-brewer.

Unlike the by-law amendments adopted under Article 8, the statute does not limit the number of barrels that are produced by a Pub Brewery or a Farm-Brewery. Moreover, according to the ABCC, a town is not authorized to limit the amount of production by a Farm-Brewery or a Pub Brewery because doing so would amount to a change of the license granted under G.L. c. 138. See Hub Nautical Supply Co., Inc. v. Alcoholic Beverage Control Commission, et. al., 11 Mass. App. Ct. 770, 774 (1981) (local liquor licensing commission’s requirement restricting the sale of alcoholic beverages to ships conflicted with c. 138 because it created a new type of license that the Legislature alone has the power to create.) It appears from the by-law’s text that the Town is using the production limits as a defining term to establish the size of a Brew Pub or Microbrewery and to determine where and how such uses are allowed in the Town (rather than establishing a limit on alcohol production, which only the ABCC may do). For this reason, we cannot conclude that the definitions of “Brew Pub” and “Microbrewery” clearly conflict with G.L. c. 138 and with the ABCC’s authority to regulate the licensing and sale of alcohol. However, the Town should consult closely with Town Counsel when applying Article 8 to ensure that the Town does not run afoul of G.L. c. 138 and the ABCC’s licensing authority.

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.

Very truly yours,

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

Kelli E. Gunagan

By: Kelli E. Gunagan
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cc: Town Counsel Christopher H. Heep

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TOWN CLERK
February 16, 2023

NEEDHAM
4:47 P.M.



Theodora K. Eaton, MMC
Town Clerk

TOWN OF NEEDHAM

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AT THE SPECIAL TOWN MEETING

HELD ON MONDAY, OCTOBER 24, 2022

UNDER ARTICLE 8

It was

VOTED: That the Town vote to amend the Zoning By-Law as follows:

In Section 1.3 Definitions, by adding the following after the existing definition of "Basement" and before the existing definition of "Building (or part or parts thereof)":

"**Brew Pub** – Eat-in restaurant, licensed under relevant local, state and federal statutes to produce and sell malt beverages at the location, whose primary business is the preparation and sale of food to be consumed on the premises, and whose accessory business is the production of malt beverages, including beer and ales, which may include packaging of such beverages and on-premises sale of such beverages for consumption on or off the premises. Malt beverages produced on the premises may be sold to other establishments in compliance with relevant state and federal statutes and regulations, but such sales shall not exceed 40 percent of the establishment's production capacity. Accessory outdoor dining and live indoor entertainment is allowed if otherwise permitted in the zoning district in which the brew pub is located, if and as permitted by its license."

2. In Section 1.3 Definitions, by adding the following after the existing definition of "Medical Services Building," and before the existing definition of "Mixed-Use Building":

"**Microbrewery** - A facility, licensed under relevant local, state and federal statutes, for the production and packaging of malt beverages, including beer and ales, for retail sale and for consumption on or off the premises or wholesale distribution, with a capacity and production of not more than fifteen thousand (15,000) barrels per year (a barrel being equivalent to thirty-one (31) gallons), and which may include as an accessory use preparation and/or sale of food for on-premises consumption or for take-out. Any such facility may also provide samples limited in size, provided that such sampling is allowed under relevant local, state, and federal statutes, regulations and licenses issued thereunder. The facility may host marketing events, special events, and/or factory tours. The facility may include as an accessory use an eat-in or take-out restaurant that may include outdoor dining, which restaurant may occupy more than half of the area of the facility and may include live indoor entertainment if otherwise permitted in the zoning district in which the microbrewery is located, if and as permitted by its license."

use an eat-in or take-out restaurant that may include outdoor dining, which restaurant may occupy more than half of the area of the facility and may include live indoor entertainment if otherwise permitted in the zoning district in which the microbrewery is located, if and as permitted by its license.”

3. In Section 3.2, Schedule of Use Regulations, Subsection 3.2.2, Uses in Business, Chestnut Street Business, Center Business, Avery Square Business and Hillside Avenue Business Districts, by inserting immediately below the row that reads “medical clinic” a new entry, which shall read as follows:

<u>“USE</u>	<u>B</u>	<u>CSB</u>	<u>CB</u>	<u>ASB</u>	<u>HAB</u>
Brew Pub	SP	SP*	SP	SP	N

*Applies only to the portion of the Chestnut Street Business District that is west of Chestnut Street and south of Keith Place, otherwise N.”

4. In Section 3.2, Schedule of Use Regulations, Subsection 3.2.1, Uses in the Rural Residence-Conservation, Single Residence A, Single Residence B, General Residence, Apartment A-1, Apartment A-2, Apartment A-3, Institutional, Industrial, and Industrial-I Districts, by inserting immediately below the row that reads “medical clinic” a new entry, which shall read as follows:

<u>“USE</u>	<u>RRC</u>	<u>SRB</u>	<u>GR</u>	<u>A-1,2</u>	<u>I</u>	<u>IND</u>	<u>IND-1</u>
	<u>SRA</u>			<u>&3</u>			
Brew Pub	N	N	N	N	N	SP*	N
Microbrewery	N	N	N	N	N	SP**	SP

*Applies only to the Industrial District any portion of which is located within 150 feet of the Arbor Street boundary and the Industrial District that is located east of Rte. 95/128, otherwise N.

**Applies only to the Industrial District that is located east of Rte. 95/128, otherwise N.”

5. In Section 3.2.4 Uses in the New England Business Center District, Subsection 3.2.4.2 Uses Permitted by Special Permit, by adding a new paragraph (k) that states “Microbrewery, allowable only in the portion of the New England Business Center District located west and south of Second Avenue.” and new paragraph (l) that states “Brew Pub, allowable only in the portion of the New England Business Center District located west and south of Second Avenue.”
6. In Section 3.2.5, Uses in the Highland Commercial-128 District, Subsection 3.2.5.2, Uses Permitted by Special Permit, by adding a new paragraph (q) that states “Microbrewery, allowable only in the portion of the Highland Commercial-128 District located a) north of Highland Avenue and b) south of Highland Avenue and west of Second Avenue.” and a new paragraph (r) that states “Brew Pub, allowable only in the portion of the Highland Commercial-128 District located a) north of Highland Avenue and b) south of Highland Avenue and west of Second Avenue.” and by renumbering former paragraphs (q), (r) and (s) as paragraphs (s), (t) and (u) respectively.
7. In Section 3.2.6, Uses in the Mixed Use-128 District, Subsection 3.2.6.2, Uses Permitted by Special Permit, by adding a new paragraph (k) that states “Microbrewery” and a new paragraph (l) that states “Brew Pub” and by renumbering former paragraphs (k), (l) as paragraphs (m) and (n) respectively.

UNANIMOUS VOTE

A true copy

ATTEST:



Theodora K. Eaton, MMC, Town Clerk