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VIA EMAIL ONLY

Town of Milton Select Board
Attn: Michael Zullas, Chair
525 Canton Avenue
Milton, MA 02186

RE: Application of Two-Year Ban Under G.L. c. 40A, § 5 With Respect to Ballot Vote to be Held on February 13, 2024 Pursuant to Section 7 of the Milton Charter

Dear Mr. Zullas:

As you know, after Milton Town Meeting voted on December 11, 2023 (the "December 11th Vote") to approve an amended version of Article 1 (hereinafter "Article 1" or the "MBTA Bylaw") of the Warrant for the Special Town Meeting commenced on December 4, 2023, the Select Board received a petition under Section 7 of the Milton Town Charter "asking that the question or questions involved in such vote be submitted to the voters of the town at large." See Milton Town Charter, Section 7. Following the Town Clerk's certification of the requisite number of supporting signatures, at its meeting on December 28, 2023 the Select Board voted pursuant to Section 7 to call a Special Town Meeting "for the sole purpose of presenting to the voters at large the question or questions" presented in Article 1 (the "Ballot Vote"). Id. In addition, at such December 28th meeting the Select Board asked that I provide an opinion addressing whether a negative Ballot Vote would constitute "unfavorable" action under G.L. c. 40A, §5, so as to preclude Town Meeting from considering the MBTA Bylaw in its present form for two years absent Planning Board approval. For the reasons explained below, in my opinion it *would*.

G.L. c. 40A, § 5 provides, in pertinent part, that:

> No proposed zoning ordinance or by-law which has been unfavorably acted upon by a city council or town meeting shall be considered by the city council or town meeting within two years after the date of such unfavorable action unless the adoption of such proposed ordinance or by-law is recommended in the final report of the planning board.

Id. The Supreme Judicial Court has observed that "[t]he purpose of the two-year bar is to give some measure of finality to unfavorable action taken by a municipal legislative body so that 'members of the public shall be able to ascertain the legislative status of a proposed change at all times, and to rely on unfavorable action ... as a complete defeat of the proposal.'" Penn vs. Town of Barnstable, 96 Mass. App. Ct. 205, 210 (2019), quoting Kitty v. Springfield, 343 Mass. 321, 326 (1961). While I have located no reported decision that addresses explicitly whether a negative ballot vote constitutes unfavorable action under G.L. c. 40A, § 5, in my opinion a court is more likely to determine that it *does* than reach a contrary conclusion. For example, as goes without saying, because it would defeat the MBTA Bylaw and prevent it from becoming effective, a negative Ballot Vote would effectuate a final "unfavorable" outcome for Article 1. Nor in my view is a court likely to interpret Section 5 to apply the two-year bar exclusively in instances in which the final unfavorable action on the underlying zoning article results from a town meeting vote, as opposed to a subsequent vote of registered voters pursuant to a local charter referendum process, especially as no meaningful or logical policy basis exists to support such a construction, and conversely the concept of according disparate treatment in this context to ballot and town meeting votes, respectively, seemingly would belie the precedence that the Ballot Vote will enjoy over the December 11th Vote. Moreover, even assuming for purposes of argument that the Legislature intended to limit the application of Section 5 exclusively to "town meeting" action, in my opinion such a condition is satisfied in the instant matter insofar as pursuant to Section 7, the Ballot Vote is conducted as part of a "Special Town Meeting." See Milton Charter, Section 7. Accordingly, in my opinion, a negative Ballot Vote would render the MBTA Bylaw subject to Section 5's two-year bar.

While in my view a negative Ballot Vote would invoke the application of Section 5's two-year bar on reconsideration, because the Planning Board's report on Article 1 recommended its rejection, it remains possible that the MBTA Bylaw would be construed to be per se ineligible for reconsideration within two years, even if it is recommended for approval by the Planning Board in a future Planning Board report. In particular, in Penn the SJC posed without resolving the question whether, when as in this matter a planning board has recommended disapproval of a zoning amendment upon its first presentation, such planning board subsequently may approve the amendment so as to render it eligible for renewed consideration within two years. See Penn, supra, 96 Mass. App. Ct. at 210, fn. 9 ("[A]s applied to this case, the judge concluded that, because the planning board voted against recommending adoption of item no. 2016-54, the two-year bar applied even though the planning board later voted in favor of item no. 2016-166. In its reply brief, the town suggests that the judge erred and that the relevant final report is the favorable vote that the planning board recorded on item no. 2016-166. The plaintiffs, for their part, appear to agree with the town's reading of the "unless" clause, but argue that the town council "considered" item no. 2016-166 before the planning board's vote on that item. We do not reach these issues, neither of which has been adequately briefed."). Accordingly, while in my opinion such a ruling would contravene Section 5's terms, spirit and intent, it is conceivable that a court could determine that the MBTA Bylaw would be barred from reconsideration for two

years even assuming that the Planning Board were willing to recommend its approval within such a window.

Further, if by virtue of a negative Ballot Vote the MBTA Bylaw becomes subject to Section 5's two-year bar, and the Planning Board lacks authority or willingness to approve its reconsideration within such timeframe, no further zoning amendment attempting to comply with the MBTA Communities Act would be eligible for consideration unless it differs sufficiently from the MBTA Bylaw to satisfy the test set forth in Penn. Id. at 211 ("[W]e conclude that proposed ordinances or bylaws are the same for purposes of G. L. c. 40A, § 5, sixth par., if they share the same fundamental or essential character, with little substantive difference."). Relatively scant case law exists to precisely define this standard. See, e.g., Id. at 211-212 ("While no reported decision has addressed what it means for proposals to be 'of the same character' for purposes of G. L. c. 40A, § 5, sixth par. . . applying this standard to the facts, we have little trouble concluding that item no. 2016-166 was the same as item no. 2016-54. As discussed, the only differences between the two items were that item no. 2016-166 clarified that the HPOD does not include fully or partially enclosed parking structures, clarified that lot owners could not create more parking spaces by discontinuing other uses on their parcels, and required that lot owners file parking plans with the town. These were amendments that merely facilitated enforcement of item no. 2016-54. They did not change the fundamental and essential character of the item -- to allow for as-of-right operation of commercial parking lots through creation of the HPOD.")[1]. Accordingly, in my opinion, any new proposed amendment would require careful vetting to ensure that it sufficiently differs from Article 1.

I hope that you have found this information helpful. As always, please do not hesitate to contact me with any questions regarding this matter.

Very truly yours,

Peter L. Mello (CKS)

Peter L. Mello

cc: Nick Milano, Town Administrator

[1] See also Id. at 211, fn. 12 ("See Johnson, 354 Mass. at 752 (proposed zoning bylaw authorizing golf clubs and tennis courts not fundamentally changed by provisions omitting tennis courts and prescribing minimum size for golf clubs); Sullivan, 346 Mass. at 784, 196 N.E.2d 185 (extending length of proposed zoning district was not 'fundamental' change); Doliner, 343 Mass. at 13, 175 N.E.2d 925 (changing zoning for some small areas on map 'did not change the substantial character of the [proposed bylaw]'); Dunn, 318 Mass. at 218-219, 61 N.E.2d 243 (similar). Cf. Fish, 322 Mass. at 223, 77 N.E.2d 231 ('identity of the original propos[al]' to repeal zoning bylaw was 'utterly changed' by adoption of amendments 'reducing the area requirements in two kinds of districts and transferring certain land from one district to another'").