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December 15, 2010

Robert A. Lazzarini
Box 427
Monterey, MA 01245

RE: Zoning Review

Dear Bob:

As promised , I have reviewed Monterey's existing zoning by-law (ZBL) to point out internal inconsistencies, noncompliance with statute or case law, and omissions that should be addressed. These are the basic goals of a zoning recodification. It is not the intent of this memorandum to identify master plan objectives that represent a change in policy. I used the 2000 version of the ZBL in my work.

It was a pleasure meeting with you to go over my preliminary findings. Please feel free to share this Zoning Review with other boards and officials in Monterey.

General Comments:

One goal of a recodification is to create an expandable format for the new ZBL, with chapters that make sense. My usual suggestion is as follows:

Section 1. Purpose, Authority, Applicability

Section 2. Establishment of Districts

Section 3. Use Regulations

Section 4. Dimensional and Bulk Requirements

Section 5. Nonconformities

Section 6. General Regulations (Signs, Parking, Lighting, etc.)

Section 7. Special Nonresidential Regulations (Adult Uses, Wireless, etc.)

Section 8. Special Residential Regulations (congregate living, accessory apartments, etc.)

Section 9. Special Districts (Floodplain and other overlay districts).

Section 10. Administration and Enforcement.

Section 11. Definitions.

The existing ZBL seems adequate for a small town, but there are some topics that ought to be covered that are omitted. For example, while there are requirements for minimum parking spaces, there are no prescribed landscaping measures for parking lots. Similarly, there are no screening requirements for unsightly uses.

In order to administer such requirements, I usually recommend site plan review for nonresidential uses. Some small towns use site plan review to control development in important resource areas like view corridors and hillsides.

All references to dates would probably be rejected by the Attorney General's Office if the ordinance was subject to her review. The AG's Office is of the opinion that preferential treatment for established uses violates the uniformity requirement of G.L. c. 40A, s.4. This interpretation can undo the very delicate political compromises that lead to the initial enactment.

My overall impression is that the by-law is functional, not quite comprehensive, and could be better structured.

Specific Comments:

Section I: The purpose clause incorporates Chapter 40A, but it ought to also reference 1975 Mass. Acts 808, s. 2A:

This act is designed to provide standardized procedures for the administration and promulgation of municipal zoning laws. This section is designed to suggest objectives for which zoning might be established which include, but are not limited to, the following: -- to lessen congestion in the streets; to conserve health; to secure safety from fire, flood, panic and other dangers; to provide adequate light and air; to prevent overcrowding of land, to avoid undue concentration of population; to encourage housing for persons of all income levels; to facilitate the adequate provision of transportation,

water, water supply, drainage, sewerage, schools, parks, open space and other public requirements; to conserve the value of land and buildings, including the conservation of natural resources and the prevention of blight and pollution of the environment; to encourage the most appropriate use of land throughout the city or town, including consideration of the recommendations of the master plan, if any, adopted by the planning board and the comprehensive plan, if any, of the regional planning agency; and to preserve and increase amenities by the promulgation of regulations to fulfill said objectives. Said regulations may include but are not limited to restricting, prohibiting, permitting or regulating:

1. uses of land, including wetlands and lands deemed subject to seasonal or periodic flooding;
2. size, height, bulk, location and use of structures, including buildings and signs except that billboards, signs and other advertising devices are also subject to the provisions of sections twenty-nine through thirty-three, inclusive, of chapter ninety-three, and to chapter ninety-three D;
3. uses of bodies of water, including water courses;
4. noxious uses;
5. areas and dimensions of land and bodies of water to be occupied or unoccupied by uses and structures, courts, yards and open spaces;
6. density of population and intensity of use;
7. accessory facilities and uses, such as vehicle parking and loading, landscaping and open space; and
8. the development of the natural, scenic and aesthetic qualities of the community.

The purposes suggested in Section 2A have been cited as a guide to the legitimate exercise of the zoning power. See, e.g., *Sturges v. Town of Chilmark*, 380 Mass. 246, 253 (1980). These extensive powers "are not to be narrowly interpreted." *Collura v. Town of Arlington*, 367 Mass. 881, 885 (1975)(citing *Decoulos v. City of Peabody*, 360 Mass. 428, 429 (1971).

Similarly, the Home Rule Amendment, Article 89 of the Constitution, acts in conjunction with Section 2A to establish the purposes and authority of the zoning power. It should be referenced in a separate section stating the "Authority" by which the zoning power may be implemented.

Section II: Some towns prefer to place all definitions in one location. Your definitions are randomly scattered throughout the by-law.

Most of the uses allowed in Section IV are not defined. There are a few --- summer camp, personal watercraft — but most are missing, for example:

Restaurant
Commercial ski area
Antique craft or gift shop
Facilities for generating power from wind, sun or water
Nonprofit recreation

In any recodification, each term should have a modern definition.

Chapter 40A, s. 3 identifies several “exempt” uses, including agriculture, schools, churches, and child care centers. These exempt uses need some attention, both as to definitions and to use. For example, child care centers are not mentioned at all. Family day care homes are defined by G.L. c. 15D, s. 1A. There are small homes (up to 6 children including resident participants) and large homes (up to 10 children). The ZBL refers to neither. The term “agricultural use” would permit a piggery or a fur farm on a small parcel. Exempt farm stands, also protected by G.L. c. 40A, s. 3, are not referenced but Section IV authorizes small local farm stands. Solar enjoys a similar exemption.

Section III.A: As an overlay district, the Wireless District ought to be moved to a special chapter. I assume that the Wireless District offers enough opportunity for siting to eliminate any gaps in coverage. This is required to avoid a “prohibition” under the federal law.

Section IV: Your use regulations should be reduced to a Table to make them easier to read. I’ve attached the Great Barrington Table to show you an example.

The uses - allowed, specially permitted, and prohibited - need work. As you’ve probably experienced, the western part of our state is vulnerable to proposals for biomass, wind, and other large-scale projects. The by-law needs to think these issues through. I am working with the Russell Planning Board in the review of a biomass facility that will burn 2,000 tons of wood per day, five days a week. Is that something Monterey wants?

Section IV.E: These rules pertaining to nonconformities should be deleted and a new, more modern set of rules for nonconforming uses and structures to conform with recent case law should be substituted. There were a half-dozen decisions in the 1990-2008 period that fundamentally changed practice here. Your existing section is also short of the standards imposed by *Blasco v. Board of Appeals of Winchendon*, 31 Mass. App. Ct. 32 (1991), in which the court required all available changes to nonconformities to be listed in the ordinance. Some

provisions run counter to the holding in *Bjorklund v. Norwell*, 450 Mass. 357 (2008). I've attached a file which lays out some basic options.

Section VII.C: These are completely legal, but I rarely see a Town that's taken the time to draft regulations for exempt uses. If a church or school cannot reasonably comply with these requirements, you do realize that the exemption trumps and the use is allowed?

Section VII.G: All of your overlay districts should be checked for conformance with the SCIT doctrine. In *SCIT, Inc. v. Planning Board of Braintree*, 19 Mass App. Ct. 101 (1984), the Appeals Court found it illegal to confer on local boards "a roving and virtually unlimited power to discriminate as to uses between landowners similarly situated." *Id.* at 108. In *Gage v. Town of Egremont*, 409 Mass. 345 (1991), the Supreme Judicial Court ruled that not *all* uses in a district could be placed on special permit. "[A] zoning by-law must permit at least one use in each zoning district as a matter of right." *Id.* at 348. In *Boch v. Planning Board of Tisbury*, 5 LCR 16 (1997), the Land Court ruled that the SCIT doctrine is applicable in overlay districts. The stream and pond overlay district may contemplate no use as of right in violation of the doctrine.

Section VIII.A: The penalty allowed by G.L. c. 40A, s. 7 has been raised to \$300.00.

Section VIII.B: The State Building Code causes building permit to lapse in six months, not one year.

Section IX.B.2: Your ZBL asks whether a use proposed in an application for a special permit will be "injurious, noxious, offensive, or detrimental." I think this is too vague as a standard for assessing a special permit application. I prefer the following language:

Special permits shall be granted by the Special Permit Granting Authority as specified herein only upon its written determination that the adverse effects of the proposed use will not outweigh its beneficial impacts to the town or the neighborhood, in view of the particular characteristics of the site, and of the proposal in relation to that site. In addition to any specific factors that may be set forth in this ordinance, the determination shall include consideration of each of the following:

1. Social, economic, or community needs which are served by the proposal;
2. Traffic flow and safety, including parking and loading;
3. Adequacy of utilities and other public services;
4. Neighborhood character and social structures;

5. Impacts on the natural environment; and
6. Potential economic impact, including fiscal impact on city services, tax base, and employment.

Section IX.B.3: It looks like use variances are prohibited because they are not expressly authorized. See G.L. c. 40A, s. 10, which states that, for a use variance to be granted, it must be expressly authorized in the local ZBL. Why not state the prohibition (or allowance)?

I hope my comments will prove useful. Please let me know if you have any questions. I look forward to meeting with you and other officials in the spring.

Sincerely,

Mark Bobrowski

3.1.4 Table of Use Regulations

PERMITTED USE	ZONING DISTRICT ^{1,4}												ADDITIONAL APPLICABLE REGULATIONS
	R1A	R1B	R2	R3	R4	B	B1	B2	B2A	B3	I	I2	
A. Residential uses													
(1) Dwelling, Single family	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	SB	SB	
(2) Dwelling, Two-family	SB	SB	SB	SB	SB	Y ²	N	Y ²	Y ²	Y ²	SB ²	SB ²	See also 8.1, 8.7.
(3) Dwelling, multifamily	N	N	N	SB	N	SB	N	SB	SB	Y	SB ³	SB ³	See also 8.3
(4) Assisted living residence	PB	PB	PB	PB	PB	PB	PB	PB	PB	PB	PB	PB	See also 8.8
(5) Live/work units	N	N	N	N	N	N	N	N	N	Y	Y	Y	See also 9.4, 9.6.
(6) Lodging house or tourist home for transient guests	SB	SB	SB	SB	SB	SB	N	SB	SB	SB	SB	SB	See also 7.16
(7) Mixed use	N	N	N	N	N	SB	SB	SB	SB	SB	Y	Y	See also 8.4, 9.6.
(8) Open Space Residential Development	N	N	PB	N	PB	N	N	N	N	N	N	N	See also 8.7
(9) Planned unit residential development (PURD)	SB	SB	SB	SB	SB	SB	N	SB	SB	SB	N	N	See also 8.5
(10) Publicly Financed Nonprofit Age-Restricted Housing	N	N	N	SB	N	SB	N	SB	SB	SB	N	N	See also 8.9
(11) Trailer or mobile home	SB	SB	SB	SB	SB	SB	SB	SB	SB	N	SB	SB	See also 8.6
B. Community, educational, & recreational uses													
(1) Camping facilities	N	N	SB	N	SB	N	N	SB	N	N	N	N	See also 7.4
(2) Cemeteries	N	N	SB	N	SB	N	N	N	N	N	N	N	
(3) Child care center	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	
(4) Clubhouses or fraternal lodges not conducted for profit	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	
(5) Commercial amusements, fairgrounds	N	N	N	N	N	N	N	N	N	N	N	N	
(6) Community center operated by a	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	

PERMITTED USE	ZONING DISTRICT ^{1,4}												ADDITIONAL APPLICABLE REGULATIONS	
	R1A	R1B	R2	R3	R4	B	B1	B2	B2A	B3	I	I2		
municipal or private not-for-profit organization														
(7) Educational use, exempt	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	
(8) Educational use, nonexempt	N	N	SB	N	SB	SB	N	SB	SB	SB	SB	SB	SB	See also 7.6
(9) Golf or country clubs	N	N	SB	N	SB	N	N	N	SB	N	SB	SB	SB	
(10) Hospitals, sanitariums, nursing or convalescent homes or philanthropic institutions, provided that no principal building so used shall be within 50 feet of any lot line	N	N	SB	N	SB	SB	N	SB	SB	SB	SB	SB	SB	
(11) Municipal parks and playgrounds, including recreational buildings therein	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	
(12) Public libraries, public museums, municipal buildings and facilities	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	
(13) Riding stables on less than 5 acres, provided that any buildings or structures are set back not less than 50 feet from any lot line	N	N	SB	N	SB	SB	N	SB	SB	N	SB	SB	SB	
(14) Ski tows, provided that any buildings or structures are set back not less than 50 feet from any lot line	N	N	SB	N	SB	SB	N	SB	N	N	SB	SB	SB	
(15) Summer camps operated for children on sites not less than 10 acres in area	N	N	SB	N	SB	N	N	SB	SB	N	N	N	N	
(16) Use of land or structures for religious purposes	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	
C. Office, retail and consumer service establishments														
(1) Banks and other financial institutions	N	N	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y	
(2) Fast-food eating establishments	N	N	N	N	N	SB	N	SB	N	N	N	N	N	See also 7.7, 7.9
(3) Fuel storage and sales, excluding motor vehicle fuel stations	N	N	N	N	N	SB	N	SB	N	N	SB	SB	SB	
(4) Garages, public[CRI1]	N	N	N	N	N	SB	N	SB	N	SB	SB	SB	SB	See also
(5) Garden centers, including associated	N	N	N	N	N	Y	N	Y	Y	Y	Y	Y	Y	

PERMITTED USE	ZONING DISTRICT ^{1,4}												ADDITIONAL APPLICABLE REGULATIONS
	R1A	R1B	R2	R3	R4	B	B1	B2	B2A	B3	I	I2	
(6) Landscaping services General service establishment	N	N	N	N	N	SB	N	Y	N	SB	Y	Y	
(7) Greenhouses, commercial, on less than 5 acres, provided that no heating plant for a greenhouse shall be within 50 feet from any side or rear lot line	N	N	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	
(8) Hotels	N	N	N	N	N	SB	N	SB	SB	SB	SB	SB	See also 7.10
(9) Institutional administrative offices or planned professional office developments or research centers, provided that in R-2 and R-4 Districts such uses are subject to special requirements	N	N	SB	N	SB	SB	SB	SB	SB	SB	SB	SB	See also 7.13
(10) Large-scale commercial development	N	N	N	N	N	N	N	SB	N	SB	SB	SB	See also 7.9, 7.12, 9.6
(11) Lumberyards	N	N	N	N	N	SB	N	SB	N	SB	SB	SB	
(12) Motels or overnight cabins	N	N	N	N	N	SB	N	SB	N	SB	SB	SB	See also 7.10
(13) Motor vehicle fuel station	N	N	N	N	N	SB	N	SB	N	N	SB	SB	See also 7.8
(14) Motor vehicle general and body repair	N	N	N	N	N	SB	N	SB	N	N	SB	SB	
(15) Motor vehicle sales rooms, including used car lots	N	N	N	N	N	SB	N	SB	N	N	SB	SB	
(16) Offices	N	N	N	N	N	Y	Y	Y	Y	Y	Y	Y	
(17) Parking lots, commercial	N	N	N	N	N	SB	N	SB	N	SB	SB	SB	See also
(18) Personal service establishment	N	N	N	N	N	Y	Y	Y	N	Y	Y	Y	
(19) Professional offices	SB	SB	SB	SB	SB	Y	Y	Y	Y	Y	Y	Y	See also 7.14
(20) Restaurants and other places for serving food, other than fast-food eating establishments	N	N	N	N	N	Y	SB	SB	SB	SB	SB	SB	See also 7.3
(21) Retail stores or centers and/or wholesale sales and service with total	N	N	N	N	N	Y	Y	Y	SB	Y	Y	Y	See also 7.3

PERMITTED USE	ZONING DISTRICT ^{1,4}												ADDITIONAL APPLICABLE REGULATIONS	
	R1A	R1B	R2	R3	R4	B	B1	B2	B2A	B3	I	I2		
(22) aggregate floor area less than or equal to 20,000 square feet Retail stores and shops for custom work or making of articles sold on the premises														
D. Agricultural uses														
(1) Agriculture, as defined by MGL c. 40A, s. 3, on tracts larger than 5 acres, including sales of products raised on premises on stands or structures erected in accordance with front yard setback requirements, provided that soil fertilizer shall be stored not less than 100 feet from any lot line, unless kept in air-tight containers	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	
E. Utilities, communication and transportation														
(1) Aviation field, public or private	N	N	N	N	N	SB	N	N	N	N	N	N	N	See also 7.2
(2) Essential services	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	
(3) Freight terminals, truck or rail	N	N	N	N	N	SB	N	SB	N	N	SB	SB	SB	
(4) Low-power FM broadcast radio licensed by FCC														See also 7.15
(a) Studio	N	N	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y	
(b) Antenna	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	
(5) Passenger stations	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	
(6) Personal wireless tower or structure as a principal (or accessory) use in the Overlay District, and the initial and any subsequent personal wireless service facility located upon that tower or structure (see Section 9.3 of this Bylaw)														See also 9.3
F. Industrial, manufacturing and storage uses														

PERMITTED USE	ZONING DISTRICT ^{1,4}												ADDITIONAL APPLICABLE REGULATIONS
	R1A	R1B	R2	R3	R4	B	B1	B2	B2A	B3	I	I2	
(1) Contractor's and Landscaper's yards	N	N	N	N	N	N	N	N	N	N	Y	Y	
(2) Gravel, loam, sand and stone removal for commercial purposes	N	N	SB	N	SB	SB	N	SB	N	N	SB	SB	See also 7.5
(3) Light manufacturing	N	N	N	N	N	N	N	N	N	SB	Y	Y	See also 6.4
(4) Saw (log) mill and manufacture of forest products, provided that any saw (log) mill shall be located at least 200 feet from any lot line, and no piles of sawdust or other refuse shall be maintained within 100 feet of any lot line	N	N	N	N	N	N	N	N	N	N	SB	SB	
G. Accessory uses													
(1) Any structure or use customarily incidental and subordinate to the principal permitted use in the district	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	See also 3.2, 7.1
(2) Home occupation (low impact)	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	See also 3.3
(3) Adult day care	PB	PB	PB	PB	PB	PB	PB	PB	PB	PB	PB	PB	See also 8.8
(4) An accessory use to a by-right use, whether or not on the same parcel, which is necessary in conjunction with scientific research or development or related production, provided that the Board of Selectmen finds that the proposed accessory use does not substantially derogate from the public good	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	See also 3.2
(5) Drive-up or drive-through facilities	N	N	N	N	N	SB	SB	SB	SB	SB	SB	SB	See also 7.9, 9.6
(6) Family day care (small)	Y	Y	Y	Y	Y	SB	SB	SB	SB	SB	SB	SB	
(7) Family day care (large)	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	
(8) Home occupation (moderate impact)	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	See also 3.3

PERMITTED USE	ZONING DISTRICT ^{1,4}												ADDITIONAL APPLICABLE REGULATIONS
	R1A	R1B	R2	R3	R4	B	B1	B2	B2A	B3	I	I2	
(9) Incidental stripping of sod or removal of topsoil, gravel, loam, sand, stone or other earth materials	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	
(10) Keeping of horses, for whatever purpose, subject to Board of Health regulations and only on lots of 5 acres or more	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	
(11) Private garage or off-street parking for private automobiles registered at the premises	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	
(12) Swimming pools, inground or aboveground. Pool must be surrounded by a continuous fence having a minimum of 4 feet height and with a gate that can be locked; so designed and built to restrain entry by unauthorized persons.	Y	Y	Y	Y	Y	SB	SB	SB	SB	SB	SB	SB	
(13) Wind Energy Generator	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	SB	

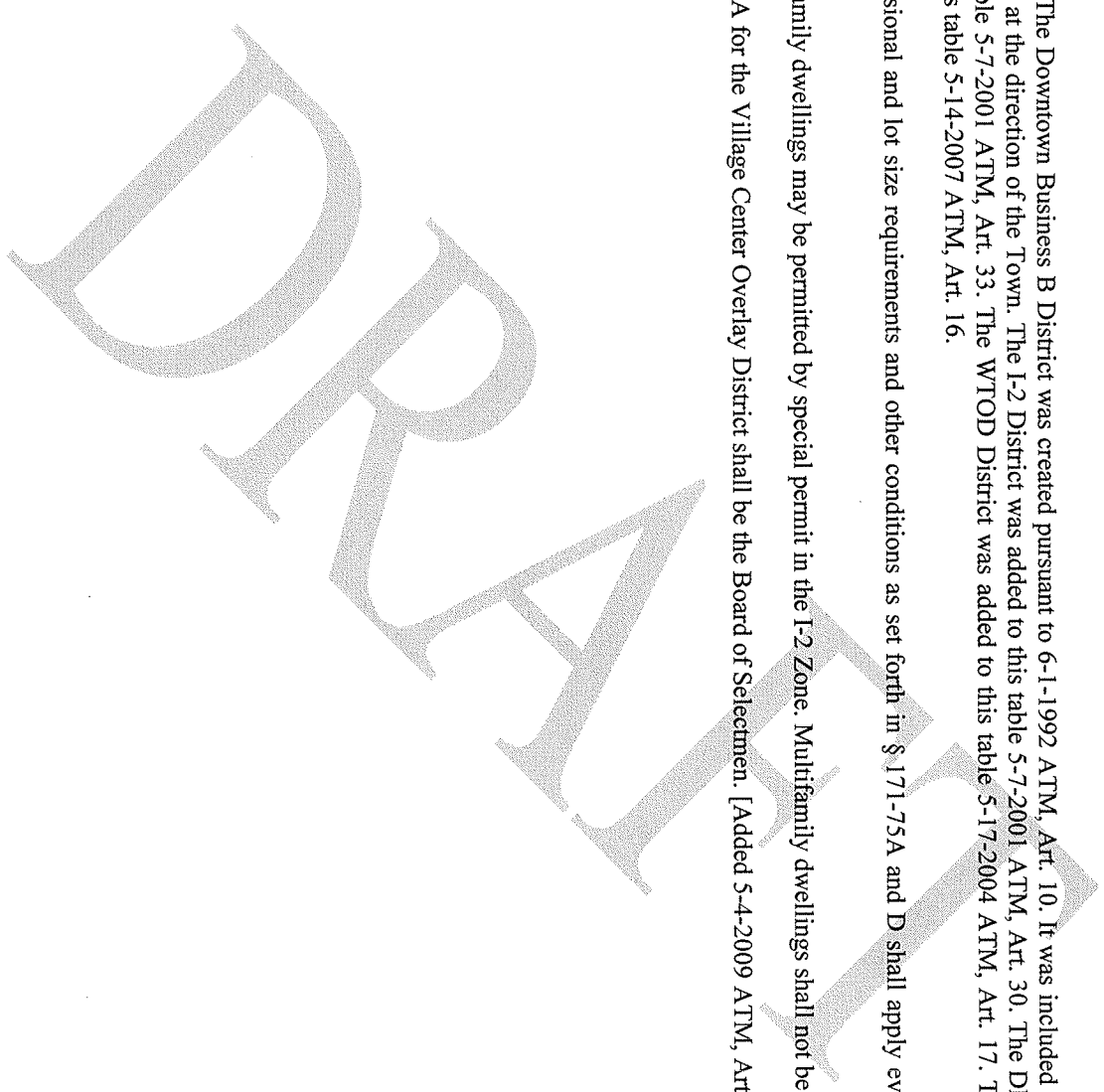
FOOTNOTES TO TABLE OF USE REGULATIONS:

¹ Editor's Note: The Downtown Business B District was created pursuant to 6-1-1992 ATM, Art. 10. It was included in this Table of Use Regulations at the direction of the Town. The I-2 District was added to this table 5-7-2001 ATM, Art. 30. The DBP District was added to this table 5-7-2001 ATM, Art. 33. The WTOD District was added to this table 5-17-2004 ATM, Art. 17. The B-3 District was added to this table 5-14-2007 ATM, Art. 16.

² NOTE: Dimensional and lot size requirements and other conditions as set forth in § 171-75A and D shall apply even where the use is permitted by right.

³ NOTE: Multifamily dwellings may be permitted by special permit in the I-2 Zone. Multifamily dwellings shall not be permitted in the I Zone.

⁴ Note: The SPGA for the Village Center Overlay District shall be the Board of Selectmen. [Added 5-4-2009 ATM, Art. 17]



NONCONFORMING USES AND STRUCTURES.

1. Applicability. This zoning by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing required by G.L. c. 40A, s. 5 at which this zoning by-law, or any relevant part thereof, was adopted. Such prior, lawfully existing nonconforming uses and structures may continue, provided that no modification of the use or structure is accomplished, unless authorized hereunder.

This is set forth in G.L. C.40A, s. 6, para. 1.

2. Nonconforming Uses. The Board of Appeals may award a special permit to change a nonconforming use in accordance with this section only if it determines that such change or extension shall not be substantially more detrimental than the existing nonconforming use to the neighborhood. The following types of changes to nonconforming uses may be considered by the Board of Appeals: [**“a” is from the statute - choose “b” or not**]

- a. Change or substantial extension of the use;
- b. Change from one nonconforming use to another, less detrimental, nonconforming use.

This is set forth in G.L. c. 40A, s. 6, para. 1. Subsection a is specifically mentioned therein. Subsection b is by local option. See Blasco v. Board of Appeals of Winchedon, 31 Mass. App. Ct. 32, 35-39 (1991).

3. Nonconforming Structures. The Board of Appeals may award a special permit to reconstruct, extend, alter, or change a nonconforming structure in accordance with this section only if it determines that such reconstruction, extension, alteration, or change shall not be substantially more detrimental than the existing nonconforming structure to the neighborhood. The following types of changes to nonconforming structures may be considered by the Board of Appeals: [**“a” and “b” in statute**]

- a. Reconstructed, extended or structurally changed;
- b. Altered to provide for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent.

This is set forth in G.L. c. 40A, s. 6, para. 1. Both subsections are verbatim from the statute.

4. Variance Required. Except as provided in subsection 5, below, the reconstruction, extension or structural change of a nonconforming structure in such a manner as to increase an existing nonconformity, or create a new nonconformity, shall require the issuance of a variance. The extension of an exterior wall at or along the same nonconforming distance within a required yard shall require a variance/special permit [**pick one**] from the Board of Appeals.

This is the holding in Rockwood v. Snow Inn Corp., 409 Mass. 361 (1991). The last sentence is

purely local option as there is no case law.

5. Nonconforming Single and Two Family Residential Structures. Nonconforming single and two family residential structures may be reconstructed, extended, altered, or structurally changed upon a determination by the Building Inspector that such proposed reconstruction, extension, alteration, or change does not increase the nonconforming nature of said structure. The following circumstances shall not be deemed to increase the nonconforming nature of said structure:

[pick one or all]

- a. alteration to a structure located on a lot with insufficient area which complies with all current setback, yard, building coverage, and building height requirements,
- b. alteration to a structure located on a lot with insufficient frontage which complies with all current setback, yard, building coverage, and building height requirements.
- c. alteration to a structure which encroaches upon one or more required yard or setback areas, where the alteration will comply with all current setback, yard, building coverage and building height requirements.

In the event that the Building Inspector determines that the nonconforming nature of such structure would be increased by the proposed reconstruction, extension, alteration, or change, the Board of Appeals may, by special permit, allow such reconstruction, extension, alteration, or change where it determines that the proposed modification will not be substantially more detrimental than the existing nonconforming structure to the neighborhood.

This is the holding in Goldhirsch v. McNear, 32 Mass. App. Ct. 455 (1992), as modified by the holding in Bransford v. Zoning Board of Appeals of Edgartown, 444 Mass. 852 (2005), and Bjorklund v. Board of Appeals of Norwell, 450 Mass. 357 (2008).

6. Abandonment or Non-Use. A nonconforming use or structure which has been abandoned, or not used for a period of two years, shall lose its protected status and be subject to all of the provisions of this zoning by-law **[but town can allow reestablishment by special permit]**.

See G.L. c. 40A, s. 6, para. 3.

7. Reconstruction after Catastrophe or Demolition. A nonconforming **[any structure or single family structure - pick one or both]** may be reconstructed after a catastrophe or after demolition in accordance with the following provisions:

- a. Reconstruction of said premises shall commence within two years after such catastrophe or demolition.
- b. Building(s) as reconstructed shall be located on the same footprint as the original nonconforming structure, shall be only as great in volume or area as the original nonconforming structure, **[and shall meet all applicable requirements for yards,**

setback, and height] - optional.

c. In the event that the proposed reconstruction would (a) cause the structure to exceed the volume or area of the original nonconforming structure or (b) exceed applicable requirements for yards, setback, and/or height or (c) cause the structure to be located other than on the original footprint, a special permit shall be required from the Board of Appeals prior to such demolition.

See Berliner v. Feldman, 363 Mass. 767, 770 (1973).

8. Reversion to Nonconformity. No nonconforming use shall, if changed to a conforming use, revert to a nonconforming use.