ARTICLE 63
(Affordable Housing Requirements)

To see if the Town will vote to: To require the Town of Nantucket to create and enforce legislation and regulations to enact and enforce the attachment of the state mandated 10% affordable housing to our local building permit process. 10% of new residence permits issued annually (both year round and seasonal) shall be designated affordable. For each 10 residential permits issued 1 shall be affordable; or otherwise act thereon.

(Andrew G. Lowell, et al)

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BY ELECTRONIC MAIL (avorce@nantucket-ma.gov)

Mr. Andrew V. Vorce
Director of Planning
Nantucket Town Hall
16 Broad Street
Nantucket, MA 02554

RE: Review of Petitioned Warrant Articles, 2020 Annual Town Meeting

Dear Mr. Vorce:

You have requested our review of several warrant articles included in the 2020 Annual Town Meeting Warrant by citizen petition, specifically Articles 60, 61, 62, and 63. My comments relative to each of these Articles follow.

Article 60 – Rural Affordable Development

As an initial matter, it is my opinion that a Town Meeting vote to adopt the proposed amendment to the Zoning Bylaws under Article 60 may be disapproved by the Attorney General on the grounds that Town Meeting is barred from considering the amendment, where the Town Meeting acted unfavorably on a similar proposal presented at the 2019 Annual Town Meeting after the Planning Board had recommended unfavorable action. Pursuant to G.L. c. 40A, § 5, sixth par. "[n]o 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."

In a recent decision, the Massachusetts Appeals Court considered a challenge to the Barnstable City Council's adoption of a revised version of a proposed zoning amendment approximately four months after a vote to adopt the original version failed to carry by the necessary two-thirds majority. *Penn* v. *Town of Barnstable*, 88 Mass. App. Ct. 205 (2019). The original proposal had sought an amendment to authorize commercial parking lots on certain nonconforming lots. The revised version expanded upon the original by adding further restrictions, procedural requirements and site development standards.

In *Penn*, the Appeals Court cite an earlier decision by the Massachusetts Supreme Judicial Court, *Kitty* v. *Springfield*, 343 Mass. 321 (1961), in explaining that the purpose of the two-year bar is to give some measure of finality to unfavorable legislative action on a zoning 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." *Id.* at 210. The Appeals Court went on to note that, while the Court in *Kitty* had construed the two-year bar as applying to "any new action of the same character, there are no reported decisions addressing the question of what it means to be "of the same character." Therefore, the Appeals Court looked to cases construing analogous statutory time bars for repetitive actions, and concluded 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 differences."

In my opinion, while the zoning amendment proposed last year and the proposed amendment under current Article 60 are not identical, the two proposals share the same fundamental purpose – to create a new development option which would authorize the Planning Board to allow the division of larger lots into smaller, non-standard lots as long as 50% of the newly created lots are subject to a "Nantucket Housing Needs Covenant" for affordable ownership or rental, and the lots have adequate access and parking. Last year's article sought to amend the Zoning Bylaws by "expansion of the secondary residential lot option in Section 139-8, or an alternative development option thereto...." but offered no proposed text for such amendment.

Current Article 60 similarly proposes the creation of a new development option, with a requirement that 50% of the newly created (reduced size) lots must be subject to a "Nantucket Housing Needs Covenant." Article 60 is more detailed than the 2019 proposal. It seeks to amend the Zoning Bylaws to provide for a Rural Affordable Development option, under which the Planning Board would be authorized to allow, by special permit, the division of certain lots in the LUG-2 and LUG-3 Districts subject to an affordable housing requirement, "substantially as provided in attached Exhibit A." Exhibit A itself is in the form of a warrant article asking if the Town will vote to amend the Zoning Bylaws in order to provide for a Rural Affordable Development option. Exhibit A explains the purpose of the Rural Affordable Development Option, and then sets out a number of conditions and requirements in consecutively numbered and lettered paragraphs. Exhibit A to Article 60 does not indicate what portion, if any, of the text is intended to be added to be Zoning Bylaws, and does not specify which section of the Zoning By-laws is to be amended.

Such drafting deficiencies can be corrected in a motion under Article 60. However, based on the *Penn* decision, it is my opinion that current Article 60's expansion of the original, bare-bones proposal in last year's Warrant, by setting out detailed standards and limiting applicability of the development option, does not change the "fundamental and essential character" of the amendment rejected by Town Meeting last year. Therefore, it is my opinion that consideration of the proposed amendment presented under Article 60 less than two-years after unfavorable action on Article 60 would be barred by statute, and a vote to adopt such amendment may be disapproved by the Attorney General, or later invalidated by a court, on that ground.

Article 61 – Coastal Erosion Liability Waiver

Article 61 proposes to amend Section 139-26 of the Zoning Bylaws relative to issuance of building permits, by requiring that, in exchange for a building permits for construction on Shorefront Land, or within 300 feet of Shorefront Land, the owner must "execute a release, hold harmless and indemnification agreement ("Release") relative to said permitting and the potential for coastal erosion and impacts on or elimination of public access to the property at issue." As we have cautioned the Town in the past, it is not entirely clear that this type of requirement is a proper subject of zoning. If adopted, therefore, the amendment may be vulnerable to challenge as being outside the legitimate scope of local

zoning authority. But regardless of its ultimate enforceability, such a requirement is, in my opinion, unnecessary, in light of the municipal liability limits provided by Chapter 258 of the General Laws.

Known as the Torts Claim Act, Chapter 258 provides the exclusive remedy for persons with claims against public employers (including municipalities) for injury or loss caused by negligent or wrongful acts or omissions by a public employee while acting within the scope of his or her employment. Among other things, the statute limits the amount of recovery against public employers to $100,000. But importantly, it also immunizes municipalities from any liability in some circumstances by expressly foreclosing certain tort claims against public employers, including any claims based upon the acts or omissions of a public employee when exercising due care in the execution of any municipal ordinance or by-law; and any claims based upon the issuance, denial, suspension or revocation or failure or refusal to issue, deny or revoke any permit, license, approval or similar authorization. In my opinion, absent highly unusual facts (e.g., if the permit included an express guarantee that there would be no damage to the structure or surrounding land from wind or erosion,) a building permit for construction in or near Shorefront Land falls within such categories, making waivers or releases of claims relative to such a building permit unnecessary.

Article 62 – Preservation of Historically Significant Buildings

Article 62 proposes that the Town adopt a new General Bylaw for the purpose of protecting and preserving older buildings in the Town with significant historic, cultural, or architectural value, by establishing a procedure for imposing a delay on any proposed demolition of such buildings which are "preferably preserved." The Article also seeks authorization for the Select Board to file any Home Rule legislation necessary to carry out the purposes of the Article. As will be discussed, it is my opinion that adoption of the Bylaw proposed under Article 64 would require special legislation, likely as an amendment to the Special Act that established the Town's Historic District Commission. Alternatively, the proposed Bylaw may not be necessary given the express authority provided to the Historic Districts Commission under the Special Act to prevent the razing of any structure in the Town-wide Historic District

The proposed Bylaw appears to be based upon a model that has been adopted in numerous Massachusetts cities and towns. The Bylaw proposed under Article 64 differs in one important respect from most of the building preservation bylaws in effect in other communities, however. While the majority of these bylaws are administered by the local historical commission, independently from the regulation of historic districts by the local historic district commissions, the Article 62 Bylaw proposed for Nantucket would be administered by the Historic District Commission. This distinction matters because, while the powers and duties of historic district commissions in most other communities are set forth in the general law under which those historic district commissions were established (G. L. c. 40C), Nantucket's Historic District Commission is governed by the Special Act which established it, Chapter 395 of the Acts of 1970, as amended (the "Special Act").

Both Chapter 40C historic district commissions and the Nantucket Historic District Commission have similar powers and duties with respect to regulating any new construction or alterations proposed within the boundaries of historic districts through the certificate of appropriateness process. Neither

legislation, however, specifically grants other powers and duties, or sets out procedures to be used for determining significant or preferably preserved buildings and delaying demolition of same. This is likely why these procedures are administered by the local historical commission in most communities. A local historical commission established pursuant to G.L. c. 40, § 8D is charged under that statute with the inventory, preservation and development of historical assets of the municipality and is given the power to acquire and manage such assets.

In those municipalities that do provide for a demolition bylaw to be administered by the historic district commission, it should be noted that Chapter 40C expressly allows a city council or town meeting to assign other powers and duties to an historic district commission established thereunder, and to permit such an historic district commission to also have the powers and duties of an historical commission per G.L.c.40, § 8D. The Special Act, however, does not contain a similar authorization. Therefore, if the Town wishes to enact the proposed Bylaw to be administered by the Historic District Commission, it is my opinion that additional special legislation is needed to expressly include this specific authority and process.

However, it is also my opinion, that without the proposed Bylaw, the Historic District Commission already has ample authority to control the demolition of any significant structure in the Town pursuant to Sections 6 and 9 of the Special Act. Section 6 provides that no building or structure within the Historic District shall be razed without approval by the Commission, and expressly empowers the Commission "to refuse such a permit for any building or structure of such architectural or historic interest, the removal of which in the opinion of said Commission would be detrimental to the public interest of the Town of Nantucket or the Village of Siasconset." Section 9 also expressly provides that, in addition to the function and duty to pass upon the appropriateness of exterior features to be erected, reconstructed, altered or restored, "[i]t shall also be the duty of the Commission to pass upon the removal of any building" as set forth in Section 6. In my opinion, although the Special act does not authorize the type of demolition delay process set out in the proposed Article 62 Bylaw, it does presently permit the Historic Districts Commission to refuse approval of demolition in cases where the Commission deems the building to be of significant architectural or historic interest.

Article 63 – Affordable Housing Requirements

Article 63 asks the Town to vote to require the Town to create and enforce legislation and regulations requiring that 10% of permits issued annually for new residences be designated "affordable," and that for each 10 residential permits issues, one shall be affordable. In my opinion, a vote under this Article would not be binding, as one Town meeting may not bind or commit a future Town Meeting to taking particular actions.

Moreover, it is doubtful that a bylaw imposing a mandatory affordability requirement on otherwise, by-right, residential building permits would be lawful. Such a requirement would be vulnerable to constitutional challenges, in my opinion. Even with a valid public purpose, absent a direct nexus between the requirement and the particular properties burdened, courts are reluctant to allow bylaws to allocate the burdens of achieving such purpose to some property owners, while permitting other property owners to avoid those same burdens,. This is why most inclusionary housing requirements are

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linked to special permit developments in which higher permissible density or protection of natural resources are allowed in exchange for low and moderate income housing units. They are not applicable to by-right development. Further, to the extent that such a requirement would have the result (intended or otherwise) of limiting the rate of housing production in the town, bylaws limiting the rate of development must be of limited duration, reasonably related to the time needed to achieve a planning objective. The proposal under Article 63 appears to be a permanent limit, however.

If you have any further questions regarding these Articles please do not hesitate to contact me.

Very truly yours,

Judith C. Cutler

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