COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, ss. CASE NO. 22 MISC 000290 (DRR)

ESTATE OF VIRGINIA L. ISOLA, by and through its Executor, David J. Crotta,

Plaintiff,

v.

TOWN OF STONEHAM,

Defendant.

DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Plaintiff, the Estate of Virginia L. Isola, by and through its Executor, David J. Crotta (the "Estate") hopes to subdivide a parcel of land in the Town of Stoneham without first obtaining a special permit and dedicating certain lots to affordable housing, even though the Zoning Bylaw of the Town of Stoneham (the "Bylaw" and the "Town") requires that applicants seeking approval of a residential subdivision of eight or more lots also obtain an affordable housing discretionary special permit. The Estate brings this action pursuant to G.L. c. 240, § 14, seeking a determination that two sections of the Bylaw are invalid as applied to the Estate's proposed residential subdivision of property located at 62 High Street under G. L. c. 41, § 81K et seq. (the "Subdivision Control Law"). For the reasons discussed below, I conclude the provisions of the Bylaw, as applied to the Estate's proposed subdivision, conflict with the Subdivision Control Law and are invalid.

PROCEDURAL HISTORY

On June 6, 2022, the Estate filed its Complaint with two counts: Count I seeks a declaration under G. L. c. 240, § 14A that Sections 4.24 and 6.12 of the Bylaw (the "8-Lot Subdivision Bylaw" and "Affordable Housing Bylaw," respectively, and collectively the "Subdivision Affordable Housing Bylaw Provisions") unlawfully require a special permit as a condition of subdivision approval because those sections conflict with the Subdivision Control Law and are invalid. Alternatively, Count II seeks a declaration also under G. L. c. 240, § 14A that the Affordable Housing Bylaw is invalid as applied to the Estate's proposed subdivision because it imposes an unconstitutional land-use condition in violation of the Fifth Amendment to the United States Constitution and Article 10 of the Massachusetts Declaration of Rights. The Estate also seeks an award of attorney's fees, costs, and interest. On June 28, 2022, the Town filed its Answer. At a status conference on November 15, 2022, counsel reported that settlement discussions had reached an impasse and discovery was complete. They proposed to resolve the dispute by filing cross motions for summary judgment.

On December 13, 2022, the Estate filed Plaintiff's Motion for Summary Judgment, Memorandum of Law of Plaintiff's Motion for Summary Judgment, Joint Statement of Undisputed Material Facts, Affidavit of David J. Crotta, Jr., and Affidavit of Counsel. On January 20, 2023, the Town filed Town of Stoneham's Cross-Motion for Summary Judgment, Town of Stoneham's Opposition to Plaintiff's Motion for Summary Judgment and Memorandum in Support of its Cross-Motion for Summary Judgment, and Affidavit of Robert W. Galvin. Thereafter on February 7, 2023, the Estate filed its Reply Brief in Further Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendants Cross-Motion for Summary

Judgment. On June 6, 2023, counsel appeared via videoconference for a hearing on the cross motions for summary judgment. After hearing, the court took the matter under advisement.

FACTS

The following material facts are derived from the record and are not in dispute:

The Property and Proposed Subdivision

1. David J. Crotta, Jr. ("Crotta") is a resident of Hamden, Connecticut and is the duly appointed executor and personal representative of the Estate. Joint Statement of Material Facts ("Jt. SOF"), ¶ 1.
2. The Estate is the owner of a freehold estate in possession of a rectangular parcel of land with approximately 3.9 acres in area, located at 62 High Street, Stoneham, and improved by a single-family house built around 1900 (the "Property"). Jt. SOF, ¶ 2.
3. The Property is in a Residence A district under the Bylaw. Jt. SOF, ¶ 3.
4. As applied to a contemplated subdivision of the Property into 12 or 13 dimensionally-compliant lots, the Bylaw requires an affordable housing restriction must apply to at least two (2) of those lots. Jt. SOF, ¶ 4.
5. The Estate has decided to sell the Property and has entered into a purchase and sale agreement, dated May 10, 2022. Plaintiff's Statement of Undisputed Material Facts ("P's SOF"), ¶¶ 6 and 7; Affidavit of David Crotta ("Crotta Aff."), ¶ 4, Exh. A.
6. As Executor and personal representative of the Estate, Crotta has a fiduciary duty to sell the Property at the highest price possible. P's SOF, ¶ 8; Crotta Aff., ¶ 5.
7. The highest and best use of the Property under the provisions of the Bylaw is for development as a residential subdivision. P's SOF, ¶ 9; Crotta Aff., ¶ 6

The Bylaw

8. The 8-Lot Subdivision Bylaw. Section 4.24 of the Bylaw is titled "Division of Land into Eight or More Lots or Construction of Eight of More Dwelling Units." It provides:

> 4.24.1. Applicability
>
> The division and/or subdivision of land held in single ownership as of January 1, 2021 into eight (8) or more dwelling lots or the construction of eight (8) or more dwelling units whether on one or more contiguous parcels held in single ownership as of January 1, 2021 *shall require a special permit from the Planning Board*. In cases where the proposed division of land is for eight (8) or more lots and said division is proposed as a divisions of land not requiring Planning Board approval (G.L. c. 41, s. 81-P), the Planning Board's special permit powers shall be limited to enforcing the provisions of Section 6.12 of the Zoning Bylaw.
>
> 4.24.2 Multiple Special Permits
>
> The special permit requirements of Section 4.24 may be subsumed by the special permit requirement of 6.12 such that only one special permit shall be required of an applicant dividing land into eight or more lots or constructing eight or more dwelling units.

(emphasis supplied)

9. The Affordable Housing Bylaw. Section 6.12 of the Bylaw is titled "Inclusionary Housing." It provides, in pertinent part:

> 6.12.1. Purpose and Intent
>
> The purpose of the bylaw is to outline and implement a coherent set of policies and objectives for the development of affordable housing in compliance with G.L. c.40B § 20-23 and ongoing programs within the Town of Stoneham to promote a reasonable percentage of housing that is affordable to moderate income buyers ("affordable housing unit"). It is intended that the affordable housing units that result from the Bylaw meet the programmatic requirements for the same as specified the Department of Housing and Community Development (DHCD) and, that said units count toward and are place on, the Town's Subsidized Housing Inventory as maintained by DHCD.
>
> . . . .
>
> 6.12.3 Applicability
>
> 1. Division of Land. This Bylaw shall apply to the division of land into eight (8) or more lots and *shall require a special permit from the Planning Board* under Section 7.4 et

seq. of the Zoning Bylaw. A special permit shall be required for division of land under G.L. c. 40A, § 9.

. . . .

6.12.4 Mandatory Provision of Affordable Units

1. The Planning Board shall, as a condition of approval of any development referred to in Sections 6.12.3 (1) and 6.12.3 (2), require that the applicant for special permit approval comply with the obligation to provide affordable housing pursuant to this Bylaw and more fully described in Section 6.12.5

6.12.5 Provision of Affordable Units

1. The Planning Board shall deny an application for a special permit for the development under Section 7.0 of the Zoning Bylaw if the applicant for a special permit approval does not comply, at a minimum, with the following requirements for affordable housing.

   (a) At least twelve (12) percent of the housing units in a division of land or multiple unit development subject to this Bylaw for development of up to thirty (30) dwelling units and at least fifteen (15) percent of the housing units in a division of land or multiple unit development subject to this Bylaw for developments greater that thirty (30) dwelling units, shall be established as affordable housing units either through new construction or rehabilitation or an existing structure(s) on the locus subject to the special permit.

   (b) If the percentages applied to the required number of affordable units results in a fraction, the required number of affordable units shall be rounded up to the next whole number. Example: A twenty dwelling unit development requires 2.4 affordable housing units (20 multiplied by 12%). Rounding up to the next whole number is 3. Three (3) affordable dwelling units are required.

   (c) The applicant may offer, and the Planning Board may accept, up to a fifty (50) percent reduction in the total number of affordable dwelling units required . . . if, the applicant pays, upon receipt of the special permit issued pursuant to this Bylaw and the expiration of all appeal periods governing the same, fees in lieu of each affordable housing unit not construction in the amount of $200,000 per dwelling unit . . . .

   (d) The Planning Board may, as part of any Special Permit decision, modify the number of affordable units as required . . . upon finding that due to unique conditions effecting the property, project location, or other beneficial site designs, that the affordable unit requirements of this section would unreasonably restrict the use of the property or would be detrimental to the orderly development of the area or would create a better project. In granting such modifications, the Board

> may impose conditions it deems necessary to protect the purpose of this section. In no case shall the percentage of affordable units be reduced to less that twelve (12) percent.
>
> . . . .
>
> 6.12.10 Preservation of Affordability; Restrictions on Resale and Rental
>
> 1. Each affordable unit created in accordance with this bylaw and made available for sale, shall have limitations governing its resale. The purpose of these limitations is to preserve the long-term affordability of the unit and to ensure its continued availability for affordable income households. The resale controls shall be established through the execution of an affordable housing restriction pursuant to G.L. c. 184, ss. 31-32 and shall be in force in perpetuity or for the longest period permitted by law.
>
> . . . .
>
> (b) The Planning Board shall require, as a condition for the special permit under this Bylaw, that the applicant comply with the affordable housing unit requirements and accompanying restrictions on affordability, including the execution and recording or an affordable housing restriction pursuant to G.L. c. 184, ss. 31-32 The Building Commissioner shall not issue an occupancy permit for any affordable unit until an affordable housing restriction for each relevant dwelling until has been recorded at the Middlesex County Registry of Deeds.
>
> . . . .
>
> (emphasis supplied).

10. As applied to a contemplated subdivision of the Property into 12 or 13 lots, the Bylaw requires that affordable housing restrictions apply to two of those lots. Jt. SOF, ¶ 4.

DISCUSSION

A. Standard of Review on Motions for Summary Judgment

"Summary judgment is granted where there are no issues of genuine material fact, and the moving party is entitled to judgment as a matter of law." *Ng Bros. Constr., Inc.* v. *Cranney*, 436 Mass. 638, 643-644 (2002); Mass. R. Civ. P. 56(c). "The moving party bears the burden of affirmatively showing that there is no triable issue of fact." *Ng Bros. Constr., Inc.*, 436 Mass. at 644. In determining whether genuine issues of fact exist, the court must draw all inferences from

the underlying facts in the light most favorable to the party opposing the motion. See *Attorney Gen.* v. *Bailey*, 386 Mass. 367, 371, *cert. denied*, 459 U.S. 970 (1982). Whether a fact is material or not is determined by the substantive law. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Further, "an adverse party may not manufacture disputes by conclusory factual assertions." *Ng Bros. Constr., Inc.*, 436 Mass. at 648. "If the opposing party fails properly to present specific facts establishing a genuine, triable issue, summary judgment should be granted." *O'Rourke* v. *Hunter*, 446 Mass. 814, 821-822 (2006), quoting *Cullen Enters., Inc.* v. *Mass. Prop. Ins. Underwriting Ass'n*, 399 Mass. 886, 890 (1987).

There are no disputes of material fact relative to the questions now before the court and therefore summary judgment is appropriate to determine the rights of the parties.

B. Chapter 240, §14A & the Questions Before the Court

Chapter 240, § 14A vests jurisdiction in the Land Court over cases concerning the validity of zoning ordinances or bylaws, or the extent to which such ordinances or bylaws affect a proposed use of property. *Banquer Realty Co.* v. *Acting Bldg. Comm'r of Boston*, 389 Mass. 565, 570 (1983). The statute provides, in relevant part:

> The owner of a freehold estate in possession in land may bring a petition in the land court against a . . . town wherein such land is situated, which shall not be open to objection on the ground that a mere judgment . . . is sought, for determination as to the validity of a municipal . . . by-law . . . which purports to restrict or limit the present or future use . . . improvement or development of such land . . . or for determination of the extent to which any such . . . by-law . . . affects a proposed use, enjoyment, improvement or development of such land . . . . The court may make binding determinations of right interpreting such ordinances, by-laws or regulations whether any consequential judgment or relief is or could be claimed or not.

G.L. c. 240, § 14A.

G. L. c. 240, § 14A provides a mechanism separate from other administrative routes, including those set forth in G. L. c. 40A, such as appeals pursuant to G. L. c. 40A, § 17. The Land Court is vested with exclusive jurisdiction to determine the extent to which a zoning bylaw

affects a proposed use of property, or the validity of a particular zoning ordinance or bylaw that purports to limit the use of such property. See *Whitinsville Ret. Soc'y, Inc.* v. *Northbridge*, 394 Mass. 757, 762-763 (1985), citing *Addison-Wesley Publ. Co*. v. *Reading*, 354 Mass. 181, 184-185 (1968).

The Estate wants to build a subdivision of twelve to thirteen lots on the Property and posits that its proposed subdivision will comply fully with the Town's subdivision rules and regulations. To obtain approval for its proposed subdivision plan from the Planning Board, however, the Estate will need to comply with the Subdivision Affordable Housing Bylaw Provisions (Sections 4.24 and 6.12), which means applying for a special permit and setting aside two lots for affordable housing. The Estate does not want to do so. The Estate contends that those provisions are invalid as applied to the Estate's proposed subdivision because they conflict with the Subdivision Control Law and because application of the Affordable Housing Bylaw (Section 6.12) would result in an unconstitutional taking. The affordable housing restrictions remain in force in perpetuity and the Building Commissioner shall not issue an occupancy permit for an affordable housing unit until the perpetual restrictions have been recorded at the Registry of Deeds. See Section 6.12.10.

On the other hand, the Town contends that its efforts to advance affordable housing are consistent with the Subdivision Control Law and otherwise lawful. In sum, the parties concur that as applied to the Estate's proposed subdivision of its Property, the Bylaw would require that affordable houses be built on at the least of two of those lots.

C. The 8-Lot Subdivision Bylaw & the Affordable Housing Bylaw

I first examine the two inter-related Subdivision Affordable Housing Bylaw Provisions here at issue. The first is the 8-Lot Subdivision Bylaw, Section 4.24, which is entitled "Division

of Land into Eight of More Lots or Construction of Eight of More Dwelling Units." According to Section 4.24.1, "[t]he division and/or subdivision of land held in single ownership as of January 1, 2021 into eight (8) or more dwelling lots . . . shall require a special permit from the Planning Board." Further, "[i]n cases where the proposed division of land is for eight (8) or more lots and said division is proposed as a division of land not requiring Planning Board approval (G.L. c. 41, s. 81-P), the Planning Board's special permit powers shall be limited to enforcing the provisions of Section 6.12 of the Zoning Bylaw."[1]

In turn, Section 6.12.1 of the Bylaw (the Affordable Housing Bylaw is entitled "Inclusionary Housing") declares its stated purpose and intent are "to outline and implement a coherent set of policies and objectives for the development of affordable housing in compliance with G.L. c.40B § 20-23 and ongoing programs within the Town of Stoneham to promote a reasonable percentage of housing that is affordable to moderate income buyers . . . ." Section 6.12.3 states that "[t]his Bylaw shall apply to the division of land into eight (8) or more lots and shall require a special permit from the Planning Board." Section 6.12.4, entitled "Mandatory Provision of Affordable Units," thereafter states that "[t]he Planning Board shall, as a condition of approval of any development referred to in Sections 6.12.3 (1) and 6.12.3 (2), require that the applicant for special permit approval comply with the obligation to provide affordable housing pursuant to this Bylaw and more fully described in Section 6.12.5." The provisions of Section 6.12.5 then requires that subdivisions of eight lots or more include a certain percentage of affordable dwelling units or, alternatively, provide financial contributions towards that purpose,

[1] Further, Section 4.24.2 provides "The special permit requirements of Section 4.24 may be subsumed by the special permit requirement of 6.12 such that only one special permit shall be required of an applicant dividing land into eight or more lots or constructing eight or more dwelling units."

all as detailed therein.[2] In accordance with Section 6.12.10, the affordable housing restrictions are permanent and an occupancy permit will not issue until the affordability requirements are satisfied. The parties agree that the 8-Lot Subdivision Bylaw and the Affordable Housing Bylaw, as applied here, require two of the proposed twelve or thirteen lots be set aside for affordable housing.

D. The Subdivision Control Law

According to the Estate, as alleged in Count I of the Complaint, the Subdivision Affordable Housing Bylaw Provisions unlawfully conflict with the Subdivision Control Law and exceed the scope of the Planning Board's powers under the Subdivision Control Law. The Subdivision Control Law is a comprehensive statutory scheme regulating the "subdivision" of land into two or more lots. See G. L. c. 41, § 81L. Its purpose is to protect "the safety, convenience and welfare of the inhabitants" of municipalities which adopt the Subdivision Control Law, by regulating the laying out and construction of ways in those subdivisions which are not public ways, providing access to the lots therein, and ensuring "sanitary conditions in subdivisions and in proper cases parks and open areas." See G. L. c. 41, § 81M. When new lots in a proposed subdivision require construction of an access road, the local planning board must review and approve a subdivision plan, with that review to be in accordance with reasonable rules and regulations adopted by the planning board. See G. L. c. 41, § 81Q.

Section 81Q prescribes what can, must, and must not be contained in those subdivision rules and regulations. Specifically, those rules and regulations "shall set forth the requirements of

[2] In lieu of providing lots dedicated to affordable housing, an applicant may offer and the Planning Board may accept up to a fifty (50) percent reduction in the total number of affordable dwelling units required "if, the applicant pays, upon receipt of the special permit issued pursuant to this Bylaw and the expiration of all appeal periods governing the same, fees in lieu of each affordable housing unit not constructed in the amount of $200,000 per dwelling unit . . . ." See Section 6.12.5(c).

the board with respect to the location, construction, width, and grades of the proposed ways shown on a plan and the installation of municipal services therein, which requirements shall be established in such manner as to carry out the purposes of the subdivision control law as set forth in section eighty-one M." *Id*. However, "no rule or regulation shall relate to the size, shape, width, frontage, or use of lots within a subdivision, or to the buildings which may be constructed thereon, or shall be inconsistent with the regulations and requirements of any other municipal board acting within its jurisdiction," except that rules and regulations may require compliance with the requirements of existing zoning ordinances or by-laws. *Id*. Further Section 81Q prohibits rules or regulations and planning boards from imposing, "as a condition for the approval of a plan of a subdivision, that any of the land within said subdivision be dedicated to the public use, or conveyed or released to the . . . town in which the subdivision is located, for use as a public way, public park or playground, or for any other public purpose, without just compensation to the owner thereof."[3]

E. Limited Scope of Review by Planning Boards Under the Subdivision Control Law

Planning boards must approve proposed subdivision plans that conform to local subdivision rules and regulations and to the recommendations to the local board of health. See *Musto* v. *Planning Bd. of Medfield*, 54 Mass. App. Ct. 831, 836 (2002); G. L. c. 41, § 81M ("It is the intent of the subdivision control law that any subdivision plan filed with the planning board shall receive the approval of such board if such plan conforms to the recommendation of the board of health and to the reasonable rules and regulations of the planning board pertaining to subdivisions.") While a planning board may also review a proposed subdivision's compliance

[3] "No rule or regulation shall require, and no planning board shall impose, as a condition for the approval of a plan of a subdivision, that any of the land within said subdivision be dedicated to public use, or conveyed or released to the commonwealth or to the county, city or town in which the subdivision is located, for use as a public way, public park or playground, or for any other public purpose, without just compensation to the owner thereof."

with use and lot dimension restrictions in the local zoning bylaw, "that is *all* that a planning board may do in the subdivision review process." *Montrose Sch. Park LLC* v. *Dinkin*, 23 LCR 34, 35-36 (Misc. Case No. 11 Misc. 452175) (2015) (Long, J.), citing *Beale* v. *Planning Bd. of Rockland*, 423 Mass. 690 (1996). The "legislative history of subdivision control law 'gives no indication that planning boards were to have freedom to disapprove plans which comply with applicable standards merely because the board feels general public considerations make such action desirable.'" *Wall St. Dev. Corp.* v. *Planning Bd. of Westwood*, 72 Mass. App. Ct. 844, 854 (2008), quoting *Pieper* v. *Planning Bd. of Southborough*, 340 Mass. 157, 163-164 (1959) A planning board does not have "a roving commission" to address issues beyond providing suitable ways for public access, appropriate municipal utilities, and sanitary conditions. *Collings* v. *Planning Bd. of Stow*, 79 Mass. App. Ct. 447, 454 (2011).

In this context, the Estate contends that it need not comply with the Subdivision Affordable Housing Bylaw Provisions because its proposed subdivision plan conforms with the Town's subdivision rules and regulations. This position is supported by those cases which have considered local efforts to expand the scope of review of subdivision plans. For instance, in *Wall St. Dev. Corp.*, the Appeals Court considered a challenge to a zoning bylaw by a developer proposing a "Major Residential Development" ("MRD") in the town of Westwood (defined as a subdivision of four or more house lots), that was required to apply for a special permit together with two alternative subdivision plans as a condition for of submitting a subdivision of an MRD—one alternative fully compliant with all zoning and subdivision rules and regulations and the other including certain suggested features, such as fewer lots, greater open space, and a differing road pattern. *Wall St. Dev. Corp.*, 72 Mass. App. at 852-854. The planning board then had discretion to approve a special permit for a MRD, with or without conditions, whichever

plan best promoted the objectives of the bylaw. *Id*. Those objectives were "to allow greater flexibility and creativity in residential development and to assure a public voice and public authority" regarding the preservation of open space for conservation and recreation purposes, scenic vistas, and the like. *Id*. at 853-854. The Appeals Court invalidated the bylaw because it conflicted with the Subdivision Control Law by giving the planning board the authority to reject compliant plans: "[A] use allowed as of right cannot be made subject to the grant of a special permit inasmuch as the concepts of use as of right and use dependent on discretion are *mutually exclusive." Id*. at 854, quoting *Prudential Ins. Co. of Am.* v. *Board of Appeals of Westwood*, 23 Mass. App. Ct. 278, 281 (1986) (emphasis supplied). The Westwood planning board lacked the power to impose the preservation standards "merely because the board feels general public considerations make such action desirable." *Id*., quoting *Beale*, 423 Mass. at 695-697.

In *Symes Dev. & Permitting, LLC* v. *Ferguson*, 29 LCR 273, 273 (Misc. Case No. 21 Misc. 000021) (2012) (Speicher, J.), Judge Speicher considered a condition imposed by the Concord Planning Board when approving an 18-lot residential subdivision plan. That condition required the developer to reserve three lots for affordable housing purposes for an indeterminate period of time while the town considered whether to purchase the lots for just compensation.[4] *Id.* at 274. During this three-year period, no improvements could be constructed on the lots and no compensation was to be paid to the developer for what was essentially an option to purchase those lots. *Id*. at 274, 276. For authority to impose the affordable housing condition, the planning board relied on affordable housing provisions within the Concord subdivision rules and

[4] The Concord Planning Board also conditioned approval of the subdivision plan by requiring the developer reserve two lots for public park purposes and provide the town with an option to purchase the lots for just compensation. While noting that Sections 81Q and U of the Subdivision Control Law expressly permit such reservation of land for park purposes for a period of three year and also permit the planning board to prohibit the erection of buildings on the reserved lots during that period, Judge Speicher nonetheless concluded the Concord Planning Board's condition exceeded its statutory authority by also prohibiting the construction of streets, utilities, and other like improvements during the three year period.

regulations.[5] *Id*. at 274. Judge Speicher concluded that those affordable housing rules and regulations exceeded the authority granted to planning boards by the Subdivision Control Law. *Id.* at 276. He reasoned that affordable housing was not "any other public purpose" within G.L. c. 41, § 81Q because affordable housing was unrelated to the provision of subdivision improvements.[6] *Id.* In addition, the reservation of three lots for an indeterminate period of time without just compensation was unconstitutional because "[l]ocal enactments that prohibit the use of private property for an indefinite period of time 'do not serve a permissible public purpose, and are therefore unconstitutional.'" *Id*. at 276, quoting *Zuckerman* v. *Town of Hadley*, 442 Mass. 522, 520-521 (2004) (invalidating a zoning bylaw controlling the rate of development); see *Collings*, 79 Mass. App. Ct at 455-456 (planning board's waiver of some subdivision rules and regulations in exchange for requiring dedication of open space for public use to be transferred to the town in exchange for certain waivers violated G.L. c. 41, § 81Q); see also *Montrose Sch. Park LLC*, 23 LCR at 41-49 (invalidating a condition of a subdivision plan approval requiring compliance with a separate Open Space Residential Design Ordinance for subdivisions of four lots or more because the requirement exceeded the allowable scope of subdivision control and required sizable contributions to open space without compensation).

The Subdivision Affordable Housing Bylaw Provisions here at issue also run afoul of the Subdivision Control Law, its legislative history, and the principles articulated in the cases discussed above. The Subdivision Affordable Housing Bylaw Provisions authorize the Planning Board to disapprove plans that fully comply with Subdivision Rules and Regulations and do so in order to generate affordable housing in Stoneham. This objective, though worthy, is unrelated

[5] The affordable housing requirements had been adopted as general bylaws of the town, unlike the zoning bylaw provisions now before the court.

[6] G.L. c. 41, § 81Q authorizes planning boards to require the reservation of land in a subdivision "for use as a public way, public park or playground, or for any other public purpose."

to the purposes of the Subdivision Control Law. While the Legislature has enacted G.L. c. 40B and other legislation to spur the development of affordable housing in the Commonwealth, there is no indication that the Subdivision Control Law was intended to expand the limited scope of subdivision plan approvals to encompass affordable housing requirements. In fact, the legislative history is to the contrary, as reviewed in *Collings*:

> [T]he legislative history of the current subdivision control, G.L. c. 41, §§ 81K-81GG, enacted in 1953, makes clear that revisions to the prior law were necessary in part to ensure that "the application of law is limited to regulating the design and construction of ways in subdivisions," and to address the problem of "some well-intentioned but overzealous planning boards" using "their power of approving or disapproving plans of proposed subdivisions to enforce conditions doubtless intended for the good of the public, but not relating to the design and construction of ways within subdivisions."

Collings, 79 Mass. App. Ct. at 454, quoting MARK BOBROWSKI, MASSACHUSETTS LAND USE AND PLANNING LAW, § 14.01, at 470 (2d ed. 2002).

I note that Section 81Q does permit a planning board to require that a portion of subdivision land be dedicated to public use "as a public way, public park or playground, or for any other public purpose." However, even if the term "any other public purpose" was read to encompass affordable housing as one of the permitted conditions (in light of the policy objectives of G.L. c. 40B), the Subdivision Affordable Housing Bylaw Provisions would nonetheless fail because they do not provide for "just compensation to the owner" of the property as required by Section 81Q. See *Collings*, 79 Mass. App. Ct. at 455, quoting *Aronson* v. *Sharon*, 346 Mass. 598, 604 (1964) ("'[W]e cannot resist the conclusion that, however worthy the objectives,' the conditions imposed attempt 'to achieve a result which properly should be the subject of eminent domain.'"). Here, the Subdivision Affordable Housing Bylaw Provisions neither contemplate nor require such compensation.

The Town attempts to distinguish the Subdivision Affordable Housing Bylaw Provisions from the cases discussed above. The Town points out that among the powers granted to planning boards is "insuring compliance with applicable zoning ordinances or bylaws." Chapter 41, § 81M. Thus, according to the Town, the planning board has authority to determine the use and intensity of land generally and, in this instance, compliance with the affordable housing requirements. While this may be true as far as it goes, the Subdivision Affordable Housing Bylaw Provisions nevertheless fail because an applicant would be required to provide lots dedicated to affordable housing without commensurate compensation by precluding the applicant from selling the dedicated lots for fair market value, in violation of Section 81Q.

The Town also points out that the Subdivision Affordable Housing Bylaw Provisions were adopted as a local zoning bylaw pursuant to G.L. c. 40A (and not as subdivision rules and regulations), so that there is no improper delegation of authority. Thus, according to the Town, the Planning Board is not usurping the authority of the local zoning board because the Planning Board serves as both the arbiter of subdivision applications under the local rules and regulations and also as special permit granting authority with respect to a proposed subdivisions of eight lots or more. This distinction is unsuccessful, however, because the Subdivision Affordable Housing Bylaw Provisions nevertheless violate the just compensation requirement of Section 81Q. Notably, the "Major Residential Development" invalidated in *Wall St. Dev. Corp*., had been adopted as a zoning bylaw with the Westwood planning board serving as the special permit granting authority. *Wall St. Dev. Corp*., 72 Mass. App. Ct. 844.[7]

[7] Although not briefed by the parties, I note that the Subdivision Affordable Housing Bylaw Provisions also appear to be independently invalid because they exceed the statutory limits of the Town's zoning authority by attempting to place limitations on the ownership of land, rather than on use of the land. *CHR General, Inc.* v. *Newton*, 387 Mass. 351, 353 (1982) (ordinance regulating condominium conversion was invalid because it limited who owned land, rather than use of the land); see also *Zuckerman*, 442 Mass. at 518-519 (Rate of development bylaw such as the

Lastly, the Town contends that the powers conferred by the Subdivision Affordable Housing Bylaw Provisions are lawful because they are comparable to the powers conferred upon planning boards pursuant to G.L. c. 40A, § 9 regarding open space residential developments and planned unit developments. For those development types, the special permit granting authority determines whether the proposed project conforms with the zoning bylaw and also applies the rules governing subdivision control. This argument is flawed, however, because the Legislature did not include affordable housing projects within the special development types identified in G.L. c. 40A, § 9, for which expanded planning board review is authorized.

For all of these reasons, I conclude the Subdivision Affordable Housing Bylaw Provisions, as applied to the proposed subdivision of the Property, violate the Subdivision Control Law by authorizing the Planning Board to act beyond its statutory authority and are invalid.

F. The Constitutional Challenge

In Count II of its Complaint, the Estate contends in the alternative that the Affordable Housing Bylaw is invalid as applied to its proposed subdivision of the Property by imposing an unconstitutional land-use condition in violation of the Fifth Amendment to the United States Constitution and Article 10 of the Massachusetts Declaration of Rights. Having concluded above that the Subdivision Affordable Housing Bylaw Provisions violate the Subdivision Control Law, there is no need to address Count II. This is consistent with the general rule that courts "assume that the Legislature intends its statutes to pass constitutional muster, and therefore . . . 'construe

---

one there at issue amounted to restrictions "not on how land ultimately may be used, but on when certain classes of property owners may use their land.").

statutes to avoid constitutional problems where possible.'" *Adoption of Arlene*, 101 Mass. App. Ct. 326, 332-333 (2022), quoting *Chapman, petitioner*, 482 Mass. 293, 305-306 (2019); *Commonwealth* v. *Jones*, 471 Mass. 138, 143 (2015); see *Commonwealth* v. *Lammi*, 386 Mass. 299, 301, 435 N.E.2d 360 (1982) (court must presume every enactment of Legislature intended to comply with constitutional constraints).

CONCLUSION

For the reasons stated above, the court hereby ALLOWS the Estate's Motion for Summary Judgment on Count I of its Complaint and DENIES the Town's cross motion for summary judgment. Judgment to issue accordingly.

SO ORDERED

By the Court (Rubin, J.)

/s/ Diane R. Rubin

Attest:

/s/ Deborah J. Patterson
Deborah J. Patterson
Recorder

Dated: January 4, 2024