INSTITUTE FOR JUSTICE

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RE: Yarmouth's Illegal and Unconstitutional Attempt to Shut Down Generations-old Home-based Business

Dear Members of the Zoning Board of Appeals:

This correspondence is regarding the Town of Yarmouth's potential shutdown of long-time resident Jon Tolley's home-based sale of lobster. As explained below, the town's stance is contrary to both state law and the town's own ordinances. It also likely violates the state and federal constitutional protections for substantive due process and equal protection.

For sixty years, Jon has legally harvested fish and lobster off the waters of Cape Cod. During that entire time, Jon has sold his catch from his home in West Yarmouth. And before that, his father did the same thing, from the same location. And still before *that*, beginning in 1930, his father's father did the same thing, at another residence in West Yarmouth. When this family business began, using one's home as both a residence and a place of business was

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common. It was also indisputably legal. And for the Tolley family, such use has remained undisrupted for decades—something that has more than just nostalgic significance. Indeed, because Jon (and before him, his father) has been doing the same thing, from the same location, since *before* the town adopted its ban on retail sales, Jon's lobster sales are a grandfathered use.

Before there was zoning on Cape Cod, no doubt, there were fishermen—hardworking residents like Jon, who fished the waters off the Cape and sold their fresh catch both at market and from their homes. So Jon selling lobster and seafood from one of his two double-driveways is not peculiar or disruptive. It is, rather, a reflection of Cape Cod's history and its economy—an act that residents have done from their homes for decades. That is why Jon's neighbors do not have a problem with Jon selling lobsters from his home. In fact, they *like* it. Along with neighbors, Jon sells to police, town officials, and over the years, countless other satisfied customers. He has a right to use his property to earn a living. But the town's illegal and unconstitutional impingement of that right, however, would put a stop to all of that.

About the Institute for Justice

The Institute for Justice is a national nonprofit law firm that fights against laws and government actions that irrationally burden people's right to economic liberty, including the right to run commercial businesses and home businesses without unreasonable government restrictions. One of our areas of expertise is zoning laws, including zoning laws for commercial businesses and home occupations. We recently concluded successful lawsuits against Pasadena, Texas for its unreasonable parking requirements on a mechanic shop and Lakeway, Texas for its irrational prohibition of home day-cares. And we are currently litigating against Winston-Salem, North Carolina and Nashville, Tennessee due to their unreasonable restrictions on home occupations.[1]

In addition, we frequently work with municipalities to help them reform or better understand their zoning codes. Our firm recently released a study on how zoning laws are impeding home businesses, called "~~Work~~ Entrepreneur from Home."[2] The survey shows that home-based businesses provide flexibility and opportunity for their owners and are an overall benefit to communities.

Barring Jon's Home Business Would be Illegal and Unconstitutional

This matter implicates IJ's historical interest in protecting property owners from abusive and arbitrary zoning regulations. Specifically, Yarmouth's prohibition of on-premises retail sales is legally problematic for at least three separate reasons. First, Jon's on-premises sale of lobsters is a grandfathered use under both Massachusetts law and Yarmouth's by-laws. Second, Yarmouth's probation on at-home sales violates Jon's right to substantive due process under both the Massachusetts and U.S. Constitutions. And third, Yarmouth's prohibition on at-home sales violates Jon's right to equal protection under both the Massachusetts and U.S. Constitutions. Each legal issue is addressed separately below.

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[1] You can read more about these cases on our website here: https://ij.org/case/texas-home-daycare/; https://ij.org/case/texas-mechanic/; https://ij.org/case/nashville-home-based-business/; https://ij.org/case/north-carolina-animal-sanctuary/.

[2] The link for this report is available here: https://ij.org/report/entrepreneur-from-home-how-home-based-businesses-provide-flexibility-and-opportunity-and-how-cities-can-get-out-of-their-way/.

Jon's At-home Sale of Lobsters Is a Grandfathered Use

The town's threatened shutdown of Jon Tolley's long-running and beloved home-based business is contrary to state law and the town's own ordinances.

Yarmouth's ordinances state, in relevant part, that "[t]he lawful use of any structure or land existing at the time of enactment or subsequent amendment . . . may be continued, although such structure or use does not conform." Yarmouth, Mass., Zoning Bylaw, ch. ZB, art. I, § 104-3. State law says much the same: "[e]xcept as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun," at the time of a zoning enactment. Mass. Gen. Laws ch. 40A, § 6 (2025).

Older versions of Yarmouth's by-laws confirm that retail sales of fish and lobster were historically permissible when Jon's father started the business at their home in 1958. Under our understanding of this historical record, Yarmouth did not even have zoning until 1946. And even then, until at least the 1980s, the code allowed "the handling of fish on the same premises where brought in from the sea, including sale" in residential areas. Thus, a fisherman can sell fish on residential premises as long as they were the "same premises" where he had been processing and "handling" the fish. In other words, this provision would let a fisherman sell fish from his home if that is where he had handled and processed the fish, but wouldn't allow the fisherman to sell the fish at his home if he had first handled and processed them at another location (say, a commercial location). This interpretation thus protects small-scale fishermen, like Jon, who operated using a traditional business model.

That means that Jon's use of his property to sell lobsters—an ongoing use that has remained uninterrupted for decades—was legal not just before the town changed its codes to prohibit it but also before the town had zoning codes at all. And as a grandfathered use, it is lawful today.

We understand that the town has taken the position that this provision only applies if a person sells fish in the exact place it was *literally* "brought in," like a port or marina. But this interpretation makes little sense. It would have been odd, cumbersome, and unsanitary for most fishermen to gut, clean, and sell their fish at the precise place and time they arrived to shore. It would even be dangerous, for the discarded fish parts would attract sharks to inland areas. As Jon himself attests from his over 50 years of experience, fishermen simply did not prepare and sell their fish at the sea. Instead, they brought them to their home to do so.

If town officials had intended to restrict fish sales to ports and marinas, it would have more clearly said so. That they did not strongly suggests that a more permissive interpretation would be more accurate. And even if the ordinance was ambiguous, such ambiguity should be construed to favor resident's property rights and to avoid constitutional violations. As discussed below, now barring Jon's business would violate the state and federal constitutions.

The Massachusetts and Federal Constitutions Protect Jon's Right to Earn a Living

The state and federal constitutions protect a person's right to earn an honest living. As a result, the town cannot infringe on that right with arbitrary and unreasonable laws.[3] This applies to zoning laws as well. As the Supreme Judicial Court has stated, *Zuckerman v. Town of Hadley*, 813 N.E.2d 843, 848 (Mass. 2004) (striking down a zoning law that was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare").

Here, banning retail sales in residential parts of the town is arbitrary and unreasonable. As discussed above, Yarmouth residents, like Jon and his family, have been selling for almost 100 years, with no evidence of any negative effects on their neighborhood. In fact, Jon's neighbors do not just fully support his business; they patronize it. Likewise, retail sale from home businesses is both traditional and commonplace, both in Yarmouth specifically, and America generally. That is true whether the sales involve birthday cakes, a neighbor selling sourdough bread, or a fisherman selling his catch. The town cannot arbitrarily ban such a common use of private property, without actual evidence of harm. And here, despite nearly a century of at-home lobster sales, the town has none.

Even if the town could identify negative consequences from retail sales (and it cannot), there are still other limitations, short of a total ban, that the town can impose. For instance, some cities regulate home occupations' daily customer visits, parking, and operating hours—and such limitations are constitutional, as long as they are reasonable and not excessive. But a total ban is not reasonable.

The Massachusetts and Federal Constitutions Protect Jon's Right to Equal Protection

In addition to Jon's substantive due process rights, Jon's ability to use his property peacefully and productively are protected by the state and federal constitutions' equal protection

[3] Both federal and state courts across the country have likewise struck down zoning laws as unconstitutional when the evidence shows they lack a substantial—or even rational—relationship to a legitimate government interest. *See, e.g.*, *Wheeler v. City of Pleasant Grove*, 664 F.2d 99, 100 (5th Cir. Unit B Dec. 1981) (finding application of ordinance invalidating permit unconstitutional because "[a] developer has its right to be free of arbitrary or irrational zoning standards"); *Doctor John's, Inc. v. City of Sioux City*, 438 F. Supp. 2d 1005, 1052–53 (Iowa 2006) (holding moratorium on new adult entertainment businesses was unconstitutional because it was not rationally related to legitimate government interest); *Burstyn v. City of Miami Beach*, 663 F. Supp. 528, 537 (S.D. Fla. 1987) (holding zoning ordinances regulating "adult congregate living facilities" unconstitutional because they were not rationally related to stated goals); *Bailey Inv. Co. v. Augusta-Richmond Cnty. Bd. of Zoning Appeals*, 345 S.E.2d 596, 597 (Ga. 1986) (finding classification in zoning ordinance to be unconstitutionally "arbitrary"); *Metro. Bd. of Zoning Appeals v. Gateway Corp.*, 268 N.E.2d 736, 742 (Ind. 1971) (upholding lower court's conclusion that zoning ordinance that prevented owner from using his land for any reasonable purpose was unconstitutional); *Hale v. City & Cnty. of Denver*, 411 P.2d 332, 346 (Colo. 1966) (striking down zoning ordinance that required every use to be operated within an enclosed structure, but exempting some specified businesses, as denying equal protection to operators of other businesses that displayed merchandise outside); *see also Andrews v. City of Mentor*, 11 F.4th 462, 478 (6th Cir. 2021) (finding plaintiffs stated an equal protection claim based on irrational disparate treatment: "While it is true that . . . the City need not 'produce evidence to sustain the rationality' of its decision, . . . it does not follow that the City can obtain judgment in its favor without so much as identifying a single rational explanation for its disparate treatment of similarly situated properties.").

clauses. As both the state and federal equal protection clauses require, the government must treat similarly situated individuals the same, absent a rational basis to treat them differently. Thus, state and federal courts routinely recognize that disparate treatment of businesses and professionals can result in an equal protection violation.[4] And state and federal courts have also repeatedly struck down zoning laws for this reason.[5]

Yarmouth's ordinance violates equal protection because it draws an irrational distinction. Specifically, Yarmouth prohibits home occupations from having customers on premises or engaging in retail sales, but it allows other similarly situated businesses and organizations in the same zoning district to do essentially the same things. For example, Yarmouth residents can run a child care center or family-home day care, operate an educational or religious use, or, perhaps most similarly, own and operate farmers' markets—where harvesters sell directly to consumers on property, just like Jon does. Moreover, these businesses have many more customers coming per day—and for more hours—than Jon does. It is irrational to ban Jon from having customers come to his home business, while other businesses in residential areas can have a significant amount of daily customers and clients.

Conclusion

Jon Tolley's lobster sales have long been a permissible and welcomed activity in his West Yarmouth community. And shutting down nearly this almost-century-old lawful business, on the basis of a single supposed complaint, is not just morally wrong; it is illegal and likely unconstitutional. Accordingly, the Zoning Board of Appeals should vote to allow Mr. Tolley's use to continue and affirmatively acknowledge his preexisting right to sell lobster and fish from his residence in West Yarmouth.

If you have any evidence that Jon's home-based lobster sales were problematic or disruptive, or that his property has any connection to any harm to public health or safety, please provide us with any documentation you have in support. Assuming no such evidence exists, the

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[4] *See, e.g.*, *Merrifield v. Lockyer*, 547 F.3d 978, 990–92 (9th Cir. 2008) (holding that requiring license for some pest controllers but not others was irrational and violated equal protection); *Jackson v. Raffensperger*, 843 S.E.2d 576, 581 (Ga. 2020) (holding plaintiffs stated a plausible equal protection claim based on disparate treatment of some health professionals); *cf. Ladd v. Real Est. Comm'n*, 230 A.3d 1096, 1115 (Pa. 2020) (holding plaintiff "asserts a colorable argument that it is unreasonable, unduly oppressive and patently beyond the necessities of the case . . . to exempt professions so closely analogous to her own while mandating her compliance with [the law]'s onerous broker license requirements").

[5] Both federal and state courts across the country held that zoning laws violate equal protection when they arbitrarily treat similarly situated businesses differently. *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (holding zoning ordinance that prevented adult care facility in residential area violated equal protection as applied); *Gas 'N Shop, Inc. v. City of Kearney*, 539 N.W.2d 423 (Neb. 1995) (holding that zoning ordinance distinguishing on and off-sale liquor businesses and requiring separate and distinct premises for off-sale liquor was violative of the Equal Protection clause); *Bailey Inv. Co. v. Augusta-Richmond Cnty. Bd. of Zoning Appeals*, 345 S.E.2d 596 (Ga. 1986) (holding that a retroactivity provision that unfairly discriminated against certain properties and their ability to take advantage of a reduced setback requirement violated equal protection.); *Hale v. City & Cnty. of Denver*, 411 P.2d 332 (Colo. 1966) (striking down zoning ordinance requiring every use to be operated within an enclosed structure, but exempting some specified businesses, as denying equal protection to operators of other businesses that displayed merchandise outside).

law requires that his lawful nonconforming use be allowed to persist and, relatedly, the Massachusetts Constitution demands that he be able to exercise his right to earn an honest living.

We are open to discussing this matter with town officials further. Please contact either one of us at 703-682-9320 or via email at esmith@ij.org or abargil@ij.org.

Sincerely,

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