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March 17, 2008

Diane Crory, Town Clerk
37 Shattuck Street
Littleton, MA 01460

RE: Littleton Annual Town Meeting of May 5, 2007 -- Case # 4610
Warrant Articles # 11, 12, and 17 (General)
Warrant Articles # 14, 15, and 16 (Zoning)

Dear Ms. Crory:

Articles 11, 12, 14, 15, and 16 - I return with the approval of this Office the amendments to the town by-laws adopted under these Articles on the warrant for the Littleton annual town meeting that convened on May 5, 2007.

Article 11 - The amendments adopted under Article 11 add to the town's general by-laws a new Chapter pertaining to the establishment of the town's Department of Finance and Budget ("Department"). The proposed by-law provides in pertinent part as follows:

Section 1. There is hereby established in the Town of Littleton a Department of Finance and Budget ("Department"). The Department shall be managed by an Assistant Town Administrator for Finance and Budget ("AAFB") who shall be appointed by, and may be removed by, the Town Administrator, subject to the approval of the Board of Selectmen.

Section 2. The AAFB will also serve in the capacity of and have all the powers and duties presently vested in one of the following positions: Town Accountant, Treasurer (if appointed), or Tax Collector (if appointed). The following positions, if appointed, and the respective staff shall become part of the Department and report to the AAFB: Town Accountant, Town Treasurer, Tax Collector, and Chief Assessor.

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Section 3B. The Assistant Town Administrator for Finance and Budget, subject to the approval of the Board of Assessors, shall have direct authority over, conduct performance reviews, appoint and remove the Chief Assessor.



* * *

Provided; however, that this vote shall not take effect until the voters of the Town accept the provisions of Chapter 43C, section 11 at a Town Election.

In approving the proposed by-law, we call the town's attention to G.L. c. 43C, § 11, which pertains to a consolidated Department of Municipal Finance. Section 11 provides in pertinent part as follows:

Any . . . by-law adopted pursuant to the provisions of this section shall provide for (i) a director of municipal finance who shall be appointed by and shall be responsible to the chief executive officer or to the chief administrative officer of the . . . town as the . . . by-law shall specify, (ii) the director of municipal finance to serve, ex-officio, as the accountant, auditor, comptroller, treasurer, collector or treasurer-collector of the . . . town; provided, however, that no director of municipal finance shall serve, ex-officio, as both accountant, auditor or comptroller and treasurer, collector or treasurer-collector and (iii), the term of the office of the director of municipal finance which shall not be less than three nor more than five years, subject to removal as may be otherwise provided in the charter of such . . . town (emphasis added).

Section 1 establishes the position of Assistant Town Administrator for Finance and Budget ("AAFB"), which we construe as the Director of Municipal Finance. However, the proposed by-law does not establish the length of the AAFB's term. As quoted above, G.L. c. 43C, § 11, requires that the municipality choose the length of the AAFB's term in the by-law. It is not obvious whether the town has delegated the decision on the length of AAFB's term of appointment nor is it clear whether the by-laws can delegate such decision. Whether this difference between the proposed by-law and the statute rise to the level of an inconsistency with state law is debatable, thus we approve the proposed by-la with a strong caution that the town discuss them further with DOR and address them at a future town meeting.

We next call the town's attention to Sections 2 and 3B. Sections 2 and 3B use the term "Chief Assessor," and Section 3B provides that the AAFB shall have direct authority over the "Chief Assessor," including the authority to appoint the Chief Assessor. It is unclear what the town means by "Chief Assessor" since the proposed by-law does not define the position or the Chief Assessor's duties. General Laws Chapter 41, Sections 25A and 28, refer to the position of assistant assessor and authorizes the assessors to appoint assistant assessors. The statutes also provide that the assistant assessor's duties include helping the assessors in the valuation of property, and such other duties as the board of assessor's may require. If "Chief Assessor" means "assistant assessor" then appointment by the AAFB even with the Board of Assessor's approval might take away the authority given to the Board of Assessor's under state law to appoint assistant assessors.

We also point out that Section 2 provides that the AAFB will "also serve in the capacity of and have all the powers and duties presently vested in one of the following positions:" As quoted above, G.L. c. 43C, § 11, provides that any by-law adopted shall provide for the Director of Municipal Finance to serve, ex-officio, as the accountant, auditor, comptroller, treasurer, collector or treasurer-

collector of the city or town; provided, however, that no Director of Municipal Finance shall serve, ex-officio, as both accountant, auditor or comptroller and treasurer, collector or treasurer-collector. Section 2 does not require the AAFB to serve ex-officio in any position, in apparent disregard for the mandatory ex-officio provisions laid down in the statute. It would be inconsistent with state law to interpret the language of the by-law as denying these mandatory ex-officio functions to the Director. We therefore conclude that the Director does as a matter of law hold the ex-officio positions laid down in the statute, despite the legislative silence of the by-law itself. Moreover, it is unclear about who decides which positions the AAFB shall serve. However, since the AAFB along with the Town Administrator and subject to approval by the Board of Selectmen is the appointing authority for the Town Accountant, Town Treasurer, if appointed, and the Town Tax Collector, if appointed, it is arguable that the decision is the choice of the AAFB along with the Town Administrator, subject to approval by the Board of Selectmen. We suggest that the town amend Section 2 at a future town meeting in a manner consistent with this caution.

Lastly, the proposed by-law provides that it will not take effect until the voters accept the provisions of G.L. c. 43D, § 11, at a Town Election. While it is true that the proposed by-law does not take effect until the town has accepted the provisions of G.L. c. 43C, 11, at a town election, we remind the town that in addition to the acceptance of G.L. c. 43C, § 11, at the ballot box, the proposed by-law does not take effect until the requirements of G.L. c 40, § 32, have been satisfied.

General Laws Chapter 40, Section 32, provides that by-law takes effect once they are approved by our Office and posted published by the town clerk in accordance with Section 32. Town of Concord v. Attorney General, 336 Mass. 17, 20-1 (1957). The by-law amendments adopted under Article 11 will not take effect until all of the requirements under Section 32 have been satisfied.

Article 12 - The amendments adopted under Article 12 add to the town's general by-laws a new Chapter pertaining to the creation of the position of town administrator. The proposed by-law includes a comprehensive list of the functions, powers, and duties of the town administrator.

In approving the amendments adopted under Article 12, we are mindful that there are a number of titles that are given to the administrator position in towns; however, the title reveals little, if anything, about the powers and duties of such a position. Rather, we must look at how the position was created and to the substantive powers and duties given to such position and not draw inferences from the title given. Opinion of the Justices to the Senate, 365 Mass. 655, 658 (1974)

General Laws Chapter 41, Section 23A, pertains to executive secretaries and town administrators and provides as follows:

A town may by vote or by-law authorize and empower the selectmen to appoint an executive secretary or town administrator who may be appointed by them for a term of one or three years and to remove him at their discretion. An executive secretary or town administrator appointed under the provisions of this section shall be sworn to the faithful performance of his duties. During the time that he holds office he shall hold no elective

town office, but he may be appointed by the selectmen or, with their approval, by any other town officer, board, committee or commission, to any other town office or position consistent with his office. He shall receive such aggregate compensation, not exceeding the amount appropriated therefor, as the selectmen may determine. He shall act by and for the selectmen in any matter which they may assign to him relating to the administration of the affairs of the town or of any town office or department under their supervision and control, or, with the approval of the selectmen, may perform such other duties as may be requested of him by any other town officer, board, committee or commission. (emphasis added).

Section 23A authorizes a town by vote or by-law to appoint a town administrator. A town administrator carries out the will and mandates of the board of selectmen. The duties of the town administrator are those assigned to the town administrator by the board of selectmen and relating to the administration of town affairs or any town office or department under their jurisdiction or control. Douglas A. Randall & Douglas E. Franklin, Municipal Law and Practice § 144 (4th ed. 1993). A town administrator appointed under G.L. c. 41, § 23A, has no inherent power of his own and acts at all time as the agent of the board of selectmen. The position of a town administrator is distinct from a "town manager" in a town manager form of government, which must be created by a home rule charter or a special act charter.

A town manager form of government is created by either a home rule or special act charter. No town manager position may be created accept as a provision in a home rule charter proposed by an elected charter commission or pursuant to a special act of the state legislature enacted at the request of the town. Section 4 of the Home Rule Amendment provides as follows:

Section 4. Procedure for Amendment of a Charter by a City or Town. - Every city and town shall have the power to amend its charter in the following manner: The legislative body of a city or town may, by a two-thirds vote, propose amendments to the charter of the city or town; provided, that . . . any change in a charter relating in any way to the composition, mode of election or appointment, or terms of office of the legislative body, the mayor or city manager or the board of selectmen or town manager shall be made only by the procedure of charter revision set forth in section three. All proposed charter amendments shall be published and submitted for approval in the same manner as provided for adoption or revision of a charter.

Chapter 43B, Section 13, of the Home Rule Procedures Act provides in pertinent part as follows:

[5th Sentence] . . . [N]o change in the composition, mode of election or appointment, or terms of office of the . . . town manager, may be accomplished by by-law . . .

[6th Sentence] . . . [S]uch changes may be accomplished . . . only under procedures for the adoption, revision or amendment of a charter under this chapter.

Moreover, G.L. c. 43B, § 10—which authorizes amendments to charters previously adopted or revised under Chapter 43B without requiring the use of a charter commission—expressly excludes from the changes amenable to amendment or revision thereunder “*any change in a charter relating in any way to the composition, mode of election or appointment, or terms of office of the legislative body, the mayor or city manager, or the board of selectmen or town manager.*” The Section expressly declares that “*only a charter commission elected under this chapter may propose*” such changes. In other words, town meeting action, by either by-law or vote, to create a town manager position would be in conflict not only with G.L. c. §§ 10 and 13, but also with the Home Rule Amendment itself.

A town manager carries out the day to day business of the town as the town manager deems to be in the community’s best interest subject only to the provisions of the charter itself and to the general policy guidelines issued by the board of selectmen. The town manager exercises powers and duties of his or her own. The purpose of a town manager is to concentrate administrative authority and responsibility in a professional manager to the end of efficient and economic administration of a municipal affairs. Atkinson v. Town of Ipswich, 34 Mass. App. Ct. 663, 666 (1993). When the powers and duties of the town manager are at issue, the town’s charter must be examined. Douglas A. Randall & Douglas E. Franklin, Municipal Law and Practice § 144 (4th ed. 1993).

While it is perfectly consistent with state law for a town to establish a “town administrator” by by-law, and while Littleton has adopted under Article 12 a “town administrator” by-law, it is unclear whether the powers and duties listed in the proposed by-law are properly those of a “town administrator” or are rather those reserved to a “town manager” and thus require charter action. We are not bound by the descriptive name given by the town to such a position. “It is the substance of the thing done, and not the name given to it, which controls.” Opinion of the Justices to the Senate, 365 Mass. at 658. Regardless of what the town calls this position, if the powers and duties given under the proposed by-law are those properly reserved to a “town manager” adopted under a local charter, then the proposed by-law would be inconsistent with the Home Rule Amendment and the Home Rule Procedures Act. A town cannot circumvent the Constitution and laws of the Commonwealth by giving such position the title of town administrator. However, if the powers and duties are those properly given to a town administrator by vote or by-law, then the proposed by-law is consistent with state law.

The proposed by-law is replete with the phrases “at the direction of the” Board of Selectmen and “subject to the” Board of Selectmen. The text of the proposed by-law leads us to conclude that the town administrator is an agent of the Board of Selectmen and is at all times subject to the control of the Board of Selectmen. Another way to express the principle we discuss above is to say that the essential executive functions of the town remain vested at all times in the Board of Selectmen who, on any given occasion, may assert that power in substitution for the powers initially delegated under this by-law to the Town Administrator, and that the integrity of this executive supremacy requires that the Selectmen shall always be able to assert their full executive powers preemptively. Such interpretation is entirely consistent with

the role and function of a "town administrator" position. We caution the town that as the administrative position grows in its powers and duties, or if at any time the town administrator does not act as an agent for the Board of Selectmen, then the town may brush up against the constitutional requirements necessary for the creation of a town manager. We caution the town that great care must be given in applying the proposed by-law to ensure that the line between the authority of a town administrator and a town manager is not breached.

Article 17 - Pursuant to G.L. c. 41, §§ 108A and 108C, personnel by-laws and amendments thereto are not subject to the approval of the Attorney General.

In the materials submitted to us, you provided us with a copy of the amended Personnel By-Law, including Section 33-1, which provides that the by-law is adopted pursuant to the "authority contained in Section 108A and 108C of Chapter 41." On the basis of the foregoing, we conclude that the relevant sections of the Town's Code serve as a "personnel by-law" of the sort expressly exempted by G.L. c. 41, §§ 108A and 108C, and thus we take no action on the proposed by-law amendments adopted under Article 17.

Articles 11, 12, 14, 15, and 16 - In approving the amendments adopted under these Articles, we remind the town of the requirements of G.L. c. 40, § 32. Section 32 pertains to the by-law review process. Specifically, Section 32 provides in pertinent part as follows:

Except to the extent that a zoning by-law may take effect as provided in section five of chapter forty A, before a by-law takes effect it shall be approved by the attorney general or ninety days shall have elapsed without action by the attorney general after the clerk of the town in which a by-law has been adopted has submitted to the attorney general a certified copy of such by-law with a request for its approval, a statement clearly explaining the proposed by-law, including maps and plans if necessary, and adequate proof that all of the procedural requirements for the adoption of such by-law have been complied with. Such request and proof shall be submitted by the town clerk within thirty days after final adjournment of the town meeting at which such by-law was adopted. If the town clerk fails to so submit such request and proof within such thirty days, the selectmen, within fifteen days thereafter, may submit a certified copy of such by-law with a request for its approval, a statement explaining the proposed by-law, including maps and plans, if necessary, and adequate proof that all procedural requirements for the adoption of such by-law has been complied with. . . . Before a by-law or an amendment thereto takes effect it shall also be published in a town bulletin or pamphlet, copies of which shall be posted in at least five public places in the town; and if the town is divided into precincts, copies shall be posted in one or more public places in each precinct of the town; or instead of such publishing in a town bulletin or pamphlet and such posting, copies thereof may be published at least twice at least one week apart in a newspaper of general circulation in the town. (emphasis added).

General Laws Chapter 40, Section 32, requires the town clerk to submit proposed by-law amendments to the Attorney General for review and approval thirty days after the final adjournment of town meeting. The amendments voted under Articles 11, 12, 14, 15, and 16

were adopted at the May 5, 2007, Annual Town Meeting but not received by our Office until January 15, 2008. The failure to submit proposed by-law amendments to the Attorney General in accordance with G.L. c. 40, § 32, affects the effective date of the by-laws. Therefore, as you are aware, the by-law amendments adopted under Articles 11, 12, 14, 15, and 16 have not taken effect and will not take effect until the posting and publication requirements set out in Section 32 have been satisfied. We suggest that you discuss this issue in more detail with your town counsel.

Note: Under G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the town has first satisfied the posting/publishing requirements of this section. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date that these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were voted by Town Meeting, unless a later effective date is prescribed in the by-law.

If the Attorney General has disapproved and deleted one or more portions of any by-law or by-law amendment submitted for approval, only those portions approved are to be posted and published pursuant to G.L. c. 40, § 32. We ask that you forward to us a copy of the final text of the by-law or by-law amendments reflecting any such deletion. It will be sufficient to send us a copy of the text posted and published by the Town Clerk pursuant to this statute.

Nothing in the Attorney General's approval authorizes an exemption from any applicable state law or regulation governing the subject of the by-law submitted for approval.

Very truly yours,

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ATTORNEY GENERAL

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