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July 29, 2016

Diane Crory, Town Clerk
Town of Littleton
P.O. Box 1305
Littleton, MA 01460

**RE: Littleton Annual Town Meeting of May 2, 2016 - Case # 7930
Warrant Articles # 19, 20 and 21 (General)**

Dear Ms. Crory:

Articles 19, 20 and 21 - We approve Articles 19, 20 and 21 from the May 2, 2016 Littleton Annual Town Meeting. Our comments regarding Articles 20 and 21 are provided below.

Article 20 - Article 20 amends the Town's general by-laws, to add a new Chapter 38, Article I, "Illicit Connections and Discharges to Storm Drain System." The purpose of the by-law is to "provide for the health, safety and general welfare of the citizens of the Town of Littleton through the regulation of non-stormwater discharges to the municipal storm drain system." *See Section 38-1 (A).*

1. Section 38-2 - Definitions.

Section 38-2 (E), defines "Person" as:

An individual, partnership, association, firm, company, trust, corporation, agency, authority, department or political subdivision of the Commonwealth or the federal government (to the extent permitted by law) and any officer, employee or agent of such person.

We approve this definition. However, the Town's authority to regulate state and federal entities is limited. "The doctrine of essential governmental functions prohibits municipalities from regulating entities or agencies created by the Legislature in a manner that interferes with their legislatively mandated purpose, absent statutory provisions to the contrary." Greater Lawrence Sanitary Dist. v. Town of North Andover, 439 Mass. 16 (2003). *See also Teasdale v. Newell & Snowling Const. Co.*, 192 Mass. 440 (1906) (holding local board of health could not require state park commissioners to obtain license to maintain stable on park land). Similarly,

municipalities may not regulate federal governmental entities in a manner that impedes with their purpose. *Cf. First Nat'l Bank v. Missouri*, 263 U.S. 640, 656 (1926) (state laws may not regulate federal entities if “such laws interfere with the purposes of their creation [or] tend to impair or destroy their efficiency as federal agencies”); *Palfrey v. City of Boston*, 101 Mass. 329 (1869) (federal internal revenue stamps not subject to state or local property tax). The Town’s application and enforcement of Chapter 38, Article I, cannot impermissibly interfere with the operation of state or federal entities. The Town should discuss the proper application of this section with Town Counsel.

2. Section 38-6 - Enforcement.

Section 38-6 (D), “Recovery of Costs,” provides in relevant part that:

If the amount due is not received by the Town by the expiration of the time in which to file such a protest, or within sixty (60) [days] after the final decision of the Board of Health or (if appealed to court) a court of competent jurisdiction resolving that protest, the amount of the Town’s costs shall be a special assessment against the property and shall constitute a lien on the property pursuant to G.L. c. 40, § 58. Interest shall accrue on any unpaid costs at the statutory rate, as provided in G.L. c. 59, § 57.

The expenses incurred by the Town may be considered a charge for purposes of G.L. c. 40, § 58, the municipal charges lien statute. In order to avail itself of G.L. c. 40, § 58, the Town must take a separate vote authorizing the use of G.L. c. 40, § 58, for costs incurred by the Town for remediating violations of the by-law. The vote under Article 20 appears to be such a vote.

However, the costs incurred by the Town under the bylaw are not properly categorized as a “special assessment.” Betterments (or special assessments) are special property taxes assessed to recover costs of installing infrastructure or other public improvements that specially benefit properties in a defined area. *See G.L. c. 80 and 83*. According to the Department of Revenue, Division of Local Services, (“DOR/DLS”), any expense incurred by a Town to abate or remediate violations of a by-law is not a betterment or special assessment and cannot be added to the real estate tax for collection purposes as a betterment or special assessment. Therefore, the Town may wish to amend this section at a future Town Meeting to delete reference to the term “special assessment.” The Town should consult further with Town Counsel on this issue, and on the proper application of G.L. c. 40, § 58.

Article 21 - Article 21 amends the Town’s general by-laws, to add a new Chapter 38, Article II, “Stormwater.” The purpose of the by-law, as set forth in Section 38-11 (A), is to “provide for the health, safety and general welfare of the citizens of the Town of Littleton through the regulation of stormwater runoff from land disturbance and developed and redeveloped land uses” through the objectives set forth in Section 38-11 (B).

1. Applicable Law.

Both the federal government and the Commonwealth of Massachusetts have enacted certain regulations relative to stormwater management by municipalities. For instance, the federal Environmental Protection Agency has enacted requirements pertaining to operators of

municipal separate storm sewers. *See* 40 C.F.R. § 122.34. The Massachusetts Department of Environmental Protection (the Department) has promulgated regulations at 310 C.M.R. § 10.05 (6) (k) - (q) (“Stormwater Management Standards”), pursuant to G.L. c. 131, § 40. Furthermore, the Department has promulgated stormwater regulations at 314 C.M.R. §§ 3.04 and 5.04, pursuant to G.L. c. 21, §§ 26-53 (the Massachusetts Clean Waters Act). Any local regulation of stormwater management must be supplementary to and consistent with the regulation of such matters by the federal government and the Commonwealth of Massachusetts. The federal regulations suggest that municipalities adopt local laws or regulations as part of an effective stormwater management plan. *See, e.g.* 40 C.F.R. § 122.34 (b)(3)(ii)(B); 40 C.F.R. § 122.34 (b)(4)(ii)(A) and 40 C.F.R. § 122.34 (b)(5)(ii)(B). It appears the new Chapter 38, Article II, is part of the Town’s efforts to effectively manage stormwater.

2. Section 38-12 - Definitions.

Section 38-12 (O) defines “Person” as:

An individual, partnership, association, firm, company, trust, corporation, agency, authority, department or political subdivision of the Commonwealth or the federal government (to the extent permitted by law) and any officer, employee or agent of such person.

As set forth above in more detail, the Town’s authority to regulate state and federal entities is limited. *See Greater Lawrence Sanitary Dist.*, 439 Mass. 16. The Town’s application and enforcement of Chapter 38, Article II, cannot impermissibly interfere with the operation of state or federal entities. The Town should consult with Town Counsel on this issue.

3. Section 38-15, Permits and Procedure.

Section 38-15 (B) provides that: “[f]iling an application for a permit grants the Board or its agent permission to enter the site to verify the information in the application and to inspect for compliance with permit conditions.” Municipal officials do not have the authority to conduct non-emergency warrantless searches of private property without permission of the owner. Commonwealth v. John G. Grant & Sons Co., Inc., 403 Mass. 151, 159-60 (1988). The U.S. Supreme Court has held that warrants are required for non-emergency administrative inspections. Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1966) (requiring warrant for health inspector non-emergency entry); See v. City of Seattle, 387 U.S. 541 (1966) (requiring warrant for non-emergency inspection by fire chief). “[A]dministrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure.” See, 387 U.S. at 545. Massachusetts courts have similarly recognized that “statutes can no longer convey blanket powers of warrantless entries.” Commonwealth v. Hurd, 51 Mass. App. Ct. 12, 17 (2001) (holding that G.L. c. 129, § 7, does not authorize warrantless searches for animal inspection). The Town should consult with Town Counsel to ensure that it applies Section 38-15 (B) in a manner consistent with state law and applicable constitutional requirements.

Section 38-15 (F) authorizes the Planning Board to employ outside consultants, at the applicant’s expense, “as authorized by G.L. c. 44, § 53G.” When conducting a review of a

stormwater permit application, the Planning Board must apply Section 38-15 (F) in a manner consistent with G.L. c. 44, § 53, which requires all money to be deposited into the Town's general fund. Although G.L. c. 44, § 53G authorizes the collection of professional consultant fees and deposit into a special account, the provisions of Section 53G are only applicable to zoning boards, planning boards, boards of health, and conservation commissions *acting under authority conferred by G.L. c. 40A, §§ 9 and 12, c. 41, § 81Q, c. 40B, § 21, c. 111; and c. 40, § 8C*. The Legislature did not include planning boards acting under the authority conferred solely by a local by-law (for instance, a stormwater by-law) within the small class of local boards that enjoy the benefits of G.L. c. 44, 53G. Therefore, the Town must manage any collected professional and technical consultant fees in a manner consistent with G.L. c. 44, § 53. The Town should consult with Town Counsel regarding any questions on this issue.

4. Section 38-20 - Surety.

Section 38-20 authorizes the Board to require the permittee to post "a surety bond, irrevocable letter of credit, cash, or other acceptable security." Any bond proceeds must be applied in a manner consistent with state law. In the absence of any general or special law to the contrary, performance security funds of the sort contemplated here must be deposited with the Town Treasurer and made part of the Town's general fund, pursuant to G.L. c. 44, § 53. General Laws Chapter 44, Section 53, provides that "[a]ll moneys received by a city, town or district officer or department, except as otherwise provided by special acts and expect fees provided for by statute, shall be paid by such officers or department upon their receipt into the city, town or district treasury." Under Section 53, all moneys received by the Town become part of the general fund, unless the Legislature has expressly made other provisions that are applicable to such receipt. Therefore, bond proceeds do not become Town funds unless and until the Permittee defaults on the obligations imposed under the by-law. Moreover, if the Town must use the bond to pay for any work to be done in accordance with the stormwater permit, an appropriation is required before an expenditure is made to do the work. The Town should consult with Town Counsel regarding any questions on this issue.

5. Section 38-21 - Enforcement.

Section 38-21 (M) provides that if an amount due is not paid, "the amount of the Town's costs shall be a special assessment against the property and shall constitute a lien on the property pursuant to G.L. c. 40, § 58." The expenses incurred by the Town may be considered a charge for purposes of G.L. c. 40, § 58, the municipal charges lien statute, provided that the Town has taken a separate vote authorizing the use of G.L. c. 40, § 58, for costs incurred by the Town for remediating violations of the by-law. The vote under Article 21 appears to be such a vote. However, as set forth above in more detail, such costs are not properly characterized as a "special assessment." The Town may wish to amend this section at a future Town Meeting to delete reference to the term "special assessment." In addition, the Town should consult with Town Counsel regarding any questions on the proper application of G.L. c. 40, § 58.

Note: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the Town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date 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 approved by the Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,

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cc: Town Counsel Thomas Harrington and Rebekha Lacey