



THE COMMONWEALTH OF MASSACHUSETTS  
 OFFICE OF THE ATTORNEY GENERAL  
 CENTRAL MASSACHUSETTS DIVISION  
 10 MECHANIC STREET, SUITE 301  
 WORCESTER, MA 01608

MAURA HEALEY  
 ATTORNEY GENERAL

(508) 792-7600  
 (508) 795-1991 fax  
 www.mass.gov/ago

August 9, 2019

Carolyn Hurley, Town Clerk  
 Town of Fairhaven  
 40 Center Street  
 Fairhaven, MA 02719

RECEIVED  
 TOWN CLERK  
 2019 AUG 13 A 8:22  
 FAIRHAVEN,  
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Re: Fairhaven Special Town Meeting of May 4, 2019 -- Case # 9427  
 Warrant Article # 13 (Zoning)  
 Warrant Articles # 8, 10 and 12 (General)

Dear Ms. Hurley:

Articles 8, 12 and 13 - We approve Articles 8, 12 and 13 from the May 4, 2019 Fairhaven Special Town Meeting. Our comments regarding Articles 12 and 13 are provided below.

Article 10 - We take no action on Article 10 because it is a vote to accept the provisions of G.L. c. 32B, § 20, regarding "Other Post-Employment Benefits Liability Trust Fund." Votes to accept statutes are not by-law amendments and are not subject to review and approval of this Office. See G.L. c. 40, § 32. However, votes to accept statutes must be filed with the Secretary of State pursuant to G.L. c. 4, § 5. Also, the Department of Revenue, Division of Local Services, requests that such votes be filed with that Office. The Town should discuss any questions on this issue with Town Counsel.

Article 12 - Article 12 amends the Town's general by-laws to add a new by-law, Chapter 194, "Stormwater Management." The objectives of the new Section 194 include: (1) regulating pollutants from entering the Town's municipal separate storm sewer system (MS4); (2) prohibiting illicit connections and unauthorized discharges to the municipal separate storm sewer system; and (3) complying with state and federal statutes and regulations relating to stormwater discharges. Section 194-2 (C), "Purpose."

**I. Law Applicable to Article 12**

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. Operators of municipal separate storm sewers are required to develop and implement a stormwater management plan that meets certain minimum measures. *See* 40 C.F.R. § 122.34.

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); 40 C.F.R. § 122.34 (b) (5) (ii) (B). It appears Chapter 194 is part of Town's efforts to effectively manage stormwater.

## II. Comments on Chapter 194 - Stormwater Management

### 1. Section 194-3 - Definitions

Section 194-3 defines the term "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 of "Person." 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 enforcement of Section 194 cannot impermissibly interfere with the operation of state or federal entities. The Town should discuss any questions regarding the proper application of this definition with Town Counsel.

### 2. Section 194-12 - Surety

Section 194-2 requires the permittee, in the discretion of the Board of Public Works, to post a surety bond, or other acceptable security to ensure that the work will be completed in accordance with the permit. General Laws Chapter 44, Section 53 requires that performance security funds of the sort contemplated here must be deposited with the Town Treasurer and made part of the Town's general fund (and subject to future appropriation), unless the Legislature has expressly made other provisions that are applicable to such receipt. General

Law c. 44, Section 53G ½ does allow the deposit of surety proceeds into a special account under certain circumstances, as follows:

Notwithstanding section 53, in a...town that provides by by-law...rule, regulation or contract for the deposit of cash, bonds, negotiable securities, sureties or other financial guarantees to secure the performance of any obligation by an applicant as a condition of a license, permit or other approval or authorization, the monies or other security received may be deposited in a special account. Such by-law...rule or regulation shall specify: (1) the type of financial guarantees required; (2) the treatment of investment earnings, if any; (3) the performance required and standards for determining satisfactory completion or default; (4) the procedures the applicant must follow to obtain a return of the monies or other security; (5) the use of monies in the account upon default; and (6) any other conditions or rules as the...town determines are reasonable to ensure compliance with the obligations. Any such account shall be established by the municipal treasurer in the municipal treasury and shall be kept separate and apart from other monies. Monies in the special account may be expended by the authorized board, commission, department or officer, without further appropriation, to complete the work or perform the obligations, as provided in the by-law...rule or regulation. This section shall not apply to deposits or other financial surety received under section 81U of chapter 41 or other general or special law.

For the Town to deposit surety proceeds into a special account, the Town must comply with the requirements of G.L. c. 44, § 53G ½. Otherwise, surety proceeds must be deposited into the Town's general fund, pursuant to G.L. c. 44, § 53. The Town should consult with Town Counsel with any questions regarding the proper application of Section 194-12.

### 3. Section 194-15 Monitoring of Discharges

#### *a. Access to Facilities*

Several sections of the new Chapter 194 authorize the Town to enter onto the premises. Specifically, Section 194-15 (B (1)), "Access to Facilities," permits the Board of Public Works to "enter and inspect facilities subject to regulation under this by-law as often as may be necessary to determine compliance with this by-law. See also, Section 194-7 (F), "Entry" (providing that the filing of an application for a land disturbance permit grants the Board of Public Works or its agent, "permission to enter the site to verify the information in the application and to inspect for compliance with permit conditions, to the extent permitted by law"); and Section 194-10 (D), "Access Permission," (allowing the Board of Public Works, its agents, officers and employees, to the extent permitted by law, to enter "upon privately owned property for the purpose of performing their duties under this By-Law and may make or cause to be made such examinations, surveys or sampling as the Board of Public Works deems reasonably necessary to determine compliance with the permit").

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 nonemergency 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 these sections are applied in a manner that is consistent with state law and applicable constitutional requirements.

*b. Unreasonable Delays*

Section 194-15 (B) further provides that “[u]nreasonable delays in allowing the Board of Public Works access to a permitted facility is a violation of a storm water discharge permit and of this bylaw.” Section 194-15 (B) does not define “unreasonable delays” nor does the by-law provide any time frame, after notice, for the property owner to grant access to the property. To avoid a vagueness challenge, the Town may wish to consider defining the term “unreasonable delay” or otherwise establishing a time period for access after notice. The Town should consult further with Town Counsel with any questions on this issue.

4. Section 194-19 - Enforcement

Section 194-19 (B)(3) pertains to enforcement of the by-law. Specifically, it allows the Town to charge the property owner for costs incurred by the Town to abate or remediate violations of the by-law. If the costs are not paid by the property owner, then the costs shall become a “special assessment” and “constitute a lien” on the owner’s property.

Betterments or special assessments are special property taxes assessed to recover costs of installing infrastructure or other public improvements that specifically benefit properties in a defined area. *See* G.L. c. 80 and c. 83. According to the Department of Revenue, Division of Local Services (DOR/DLS), an 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. Absent express statutory authority, the Town cannot impose a “special assessment” for the costs incurred by the Town for remediating violations of the by-law.

Here, although Section 194-19 (B)(3) uses the term “special assessment,” it appears that the by-law contemplates a lien against the owner’s property, rather than adding such costs to a real estate tax bill. As such, the expenses incurred by the Town to abate or remediate violations of the by-law or permit may be considered a charge for purposes of G.L. c. 40, § 58, the municipal charges lien statute. However, in order for the Town to utilize the provisions of G.L. c. 40, § 58, the Town must either amend its by-law to specify that the costs will be liens for purposes of G.L. c. 40, § 58, or take a separate vote authorizing the use of G.L. c. 40, § 58, for charges the Town may incur abating or remediating by-law violations. Before it imposes a “lien” against a property owner, the Town should discuss any questions on this issue with Town Counsel.

Article 13 - Article 13 amends the Town’s zoning by-laws to add a new Chapter 198, “Historic Site Reuse Special Permit.” The purpose of the by-law is to “promote the adaptive

reuse of eligible municipally owned buildings...for residential use that protects the historic character...while protecting the health, welfare, aesthetics and character of the neighboring community.” Section 1, “Purpose.” We offer comments on the by-law for the Town’s consideration.

The new by-law requires a special permit for certain uses. Section 2, “Eligible Building and Lot.” The Planning Board is designated as the Special Permit Granting Authority. Section 3. Section 5 requires the Planning Board to submit a copy of the special permit application and plans to various Town boards and officials such as the Building Department, Board of Selectmen and the Historical Commission, and further provides as follows, with emphasis added:

Comments by any board should be submitted to the Planning Board for inclusion in the Special Permit application record. If no comment is made by one of these Boards to the Planning Board within 30 days of receipt, no objection by the recipient board shall be assumed.

General Laws Chapter 40A, Section 11, provides for the boards listed in the statute as follows: “Any such board or agency to which petitions are referred for review shall make such recommendations as they deem appropriate and shall send copies thereof to the special permit granting authority and to the applicant; provided, however, that failure of any such board or agency to make recommendations within thirty-five days of receipt by such board or agency of the petition shall be deemed lack of opposition thereto.” (emphasis added) The Town should ensure that Section 5 is applied consistent with G.L. c. 40A, § 11, and consult with Town Counsel with any questions on this issue.

**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,

MAURA HEALEY  
ATTORNEY GENERAL

*Nicole B. Caprioli*

By: Nicole B. Caprioli  
Assistant Attorney General  
Municipal Law Unit  
10 Mechanic Street, Suite 301  
Worcester, MA 01608  
(508) 792-7600 ext. 4418

cc: Town Counsel Thomas P. Crotty