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November 20, 2019

Carlene Hamlin, Town Clerk
Town of South Hadley
116 Main Street
South Hadley, MA 01075

Re: South Hadley Annual Town Meeting of May 8, 2019 -- Case # 9445
Warrant Articles # 23 and 26 (Zoning)
Warrant Articles # 7, 9, 12, 14, 15, 17, 18 and 22 (General)

Dear Ms. Hamlin:

Article 23 - We approve Article 23 from the May 8, 2019 South Hadley Annual Town Meeting.[1] This letter briefly describes the by-law; discusses the Attorney General's standard of review of town by-laws under G.L. c. 40, § 32; and then explains why, governed as we are by that standard, we approve the by-law amendments adopted under Article 23.

I. Summary of Article 23

Article 23 amends the Town's zoning by-laws, Section 255-35, "Water Supply Protection District," Sub-section 255-35D, "Permitted Uses" and Section 255-35E, "Prohibited Uses," pertaining to earth removal. Article 23 also makes related amendments to Attachment 1, "Use Regulations Schedule." Specifically, Article 23 amends Sub-section 255-35D (8) to delete the existing text and insert new text regarding a permitted use in the Water Supply Protection District (WSPD) as follows: (deletion in ~~strikethrough~~ and new text in underline):

> (8) ~~Excavation for earth removal, provided that the requirements of Subsection F of this section and § 255-84, are met, and an earth removal permit is granted by the Building Commissioner.~~ Other Earth Removal, Extraction, and/or Fill Activities and Earth Removal, Excavation, and/or Fill Activities as defined in § 255-84 for which a Permit from the Building Commissioner is not required due to the activity being part of an exempt development under Section 255-84A (2) and the associated excavation/earth removal shall not be nearer than 10 feet of the seasonal high groundwater.

[1] In a decision issued August 14, 2019, we: (1) approved Articles 7, 12, 14, 15, 17, 18, 22 and 26; (2) took no action on Article 9; and (3) extended our deadline for review of Article 23 for an additional 60 days until October 25, 2019.

Article 23 also amends Section 255-35E (10) to insert new text regarding a prohibited use in the WSPD as follows: (new text in underline):

> (10) Major Earth Removal, Excavation and/or Fill activities (as defined in Section 255-84 including "mining" of gravel, soil loam, sand and/or other materials.

The vote under Article 23 explains that "[i]f approved, this motion would prohibit Major Earth Removal, Extraction and/or Fill Activities within the Water Supply Protection District but leave 'Other Earth Removal, Extraction and/or Fill Activities' within the Water Supply Protection District unchanged."

During the course of our review, we received correspondence from an attorney on behalf of landowners in the WSPD urging our disapproval of Article 23 because the zoning amendments would "prevent [his] clients from conducting 'earth removal' operations on parcels of land where they and others before them, have legally conducted earth removal operations since the 1940s." The letter also asserts that the amendments adopted under Article 23 are: (1) "arbitrary and unreasonable;" (2) not "substantially related to public health, safety, morals or general welfare;" (3) "bear no reasonable relation to any permissible legislative objective;" (4) violate his client's "constitutional rights to equal protection of laws and due process;" and (5) "may be pre-empted by state and/or federal law." We have also received correspondence from Town Counsel urging us to approve Article 23 as a "valid exercise of [the Town's] zoning power." We appreciate these letters as they have aided us in our review.

As discussed herein, we determine that the by-law amendments are not in conflict with the state Constitution or laws and thus we approve Article 23.

II. The Attorney General's Standard of Review

Pursuant to G.L. c. 40, § 32, the Attorney General has a "limited power of disapproval," and "[i]t is fundamental that every presumption is to be made in favor of the validity of municipal by-laws." Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986). The Attorney General does not review the policy arguments for or against the enactment. Id. at 798-99 ("Neither we nor the Attorney General may comment on the wisdom of the town's by-law.") Rather, in order to disapprove a by-law (or any portion thereof), the Attorney General must cite an inconsistency between the by-law and the state Constitution or laws. Id. at 796. "As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid." Bloom v. Worcester, 363 Mass. 136, 154 (1973). "The legislative intent to preclude local action must be clear." Id. at 155. Massachusetts has the "strongest type of home rule and municipal action is presumed to be valid." Connors v. City of Boston, 430 Mass. 31, 35 (1999) (internal quotations and citations omitted).

Article 23, as an amendment to the Town's zoning by-laws, must be accorded deference. W.R. Grace & Co. v. Cambridge City Council, 56 Mass. App. Ct. 559, 566 (2002) ("With

respect to the exercise of their powers under the Zoning Act, we accord municipalities deference as to their legislative choices and their exercise of discretion regarding zoning orders."). When reviewing zoning by-laws for consistency with the Constitution or laws of the Commonwealth, the Attorney General's standard of review is equivalent to that of a court. "[T]he proper focus of review of a zoning enactment is whether it violates State law or constitutional provisions, is arbitrary or unreasonable, or is substantially unrelated to the public health, safety or general welfare." Durand v. IDC Bellingham, LLC, 440 Mass. 45, 57 (2003). Because the adoption of a zoning by-law by the voters at Town Meeting is both the exercise of the Town's police power and a legislative act, the vote carries a "strong presumption of validity." Id. at 51. "Zoning has always been treated as a local matter and much weight must be accorded to the judgment of the local legislative body, since it is familiar with local conditions." Concord v. Attorney General, 336 Mass. 17, 25 (1957) (*quoting* Burnham v. Board of Appeals of Gloucester, 333 Mass. 114, 117 (1955)). "If the reasonableness of a zoning bylaw is even 'fairly debatable, the judgment of the local legislative body responsible for the enactment must be sustained.'" Durand, 440 Mass. at 51 (*quoting* Crall v. City of Leominster, 362 Mass. 95, 101 (1972)). In general, a municipality "is given broad authority to establish zoning districts regulating the use and improvement of the land within its borders." Andrews v. Amherst, 68 Mass. App. Ct. 365, 367-368 (2007). However, a municipality has no power to adopt a zoning by-law that is "inconsistent with the constitution or laws enacted by the [Legislature]." Home Rule Amendment, Mass. Const. amend. art. 2, § 6.

III. Authority for Earth Removal By-laws

Both the Home Rule Amendment and state law provide authority for towns to adopt local by-laws regulating earth removal. Specifically, G.L. c. 40, § 21 (17), authorizes towns to adopt by-laws "prohibiting or regulating the removal of soil, loam, sand or gravel from land not in public use in the whole or in specified districts of the town." Prior to the adoption of Section 21 (17), towns were limited to regulating earth removal through zoning by-laws. Byrne v. Middleborough, 364 Mass 331, 333-34 (1973). Section 21 (17), was adopted in order to allow towns to regulate the removal of soil, loam, sand, or gravel through non-zoning measures. Butler v. East Bridgewater, 330 Mass 33, 36 (1953). "The broad purpose of the statute is to give municipalities the freedom to devise local solutions to the deleterious effects brought about by unrestrained earth removal." Beard v. Salisbury, 378 Mass. 435, 439 (1979) *citing* Burlington v. Dunn, 318 Mass. 216, 221 (1945). It is clear that towns have the express statutory power to regulate earth removal through general by-laws, zoning by-laws, or both. *See* Byrne, 364 Mass at 331.[2]

IV. Article 23 is a Valid Exercise of the Town's Zoning Power

The state constitution's Home Rule Amendment, as ratified by the voters themselves in 1966, confers broad powers on individual cities and towns to legislate in areas that previously

[2] The Home Rule Amendment, Art. 89, § 6, of the Amendments to the Massachusetts Constitution, provides additional authority for towns to regulate earth removal because the Amendment gives municipalities the power to take any action that is not "inconsistent" with State laws or the Constitution. Board of Appeals of Hanover, 363 Mass at 360. Thus, independent of G.L. c. 40, § 21 (17), and c. 40A, towns can adopt earth removal by-laws if they are not inconsistent with state law.

were under the Legislature's exclusive control. Towns have used these home rule powers, and the powers conferred by the Massachusetts Zoning Act (G.L. c. 40A, §§ 1 et seq.) to adopt earth removal by-laws. *See* Toda v. Board of Appeals of Manchester, 18 Mass. App. Ct. 317, 319 (1984) ("Municipalities may regulate earth removal through their zoning ordinances or by-laws.") In addition, towns have authority to adopt zoning by-laws pertaining to permitted and prohibited uses in the Town's zoning districts, including a water protection district. *See* Andrews, 68 Mass. App. Ct. at 367-368 (a municipality "is given broad authority to establish zoning districts regulating the use and improvement of the land within its borders."); Leominster Materials Corp. v. Board of Appeals of Leominster, 42 Mass. App. Ct. 458, 461-462 (1997) (Validating city ordinance that prohibited uses of sand, loam and gravel removal in a water supply protection district except as incidental to a permitted use.)[3] Here, the Town has amended its zoning by-law regarding allowed and prohibited earth removal uses in its WSPD. The by-law as amended prohibits major earth removal, excavation and/or fill activities a defined in Section 255-84 and permits other earth removal, extraction and/or fill activities, as defined in Section 255-84, in the WSPD. Because the by-law amendments are not in conflict with the state Constitution or laws, we approve Article 23.

1. Alleged Improper Motive of Town Meeting

The landowners urge our disapproval of Article 23 asserting that the use of gravel or sand removal in the WSPD has been allowed for several years, subject to special permit requirements, and that the amendments adopted under Article 23 were in response to a specific project in the Town. The Attorney General, like a court "should not invalidate a legislative decision of a town based upon the alleged motive the town had in enacting the legislation." Andrews, 68 Mass. App. Ct. at 368; *see also* Durand, 440 Mass. at 51 (if the by-law is otherwise valid the judgment of the local legislative body must be sustained despite the various possible motives that may have inspired the legislative action); W.R.Grace & Co., 56 Mass. App. Ct. at 568 (the "validity of the zoning amendments does not turn on the motives of their supporters.") Further, the application of a town-wide zoning by-law to a particular project is beyond the scope of the Attorney General's by-law review under G.L. c. 40, § 32. On its face, Article 23 amends the Town's zoning by-law pertaining to permitted and prohibited uses in the WSPD. The vote under Article 23 reflects both the exercise of the Town's police power and a legislative act, and as such, the vote carries a "strong presumption of validity." Durand, 440 Mass. at 51. Therefore, the purported motivation or intent of the Town Meeting voters does not furnish a basis for our disapproval of Article 23.

2. Allegation that Article 23 is Arbitrary, Unreasonable and Unrelated to Public Health, Safety, Morals or General Welfare

The Article 23 opponents also assert that Article 23 is arbitrary, unreasonable and unrelated to the public health, safety, morals or general welfare. The opponents assert that "[t]here is nothing in the record which was before the Planning Board or town meeting which

[3] *Compare* Beard, 378 Mass. at 435, 442 (Invalidating Salisbury's by-law that prohibited the removal of sand, loam or gravel from the confines of the town, concluding that while the Town "has ample authority to regulate the location and extent of earth removal within its jurisdiction," it exceeds the Town's home rule authority to "prevent its transportation to points outside the town.")

would suggest that earth excavation within a water supply district had compromised, or would compromise, public health, safety, morals or welfare in any way."

As part of the by-law submission, the Town Clerk has provided us with a copy of the Planning Board report to Town Meeting (Form 7, Attachment 5). The Planning Board report to Town Meeting explained the objective of Article 23 as follows:

> The proposed amendments seek to better protect the public water supply by prohibiting Major or Other Earth Removal, Extraction and Fill Activities in the WSPD and requiring at least 10 feet of separation from the lowest point of any Earth Removal or Extraction and the seasonal high ground water.

In addition, the Planning Board's report to Town Meeting explained that many people and boards, including the Town's Board of Health, Conservation Commission and District 2 Water Commissioners raised concerns regarding the impact of earth removal activities on the public water supply. Moreover, the Planning Board report provided information that the Town undertook a review of its WSPD, including a request to the District 2 Board of Water Commissioners to review the WSPD provisions and provide the Planning Board with their suggestions on how to improve the zoning by-law protections. Finally, the Planning Board, after public hearing, unanimously recommended the adoption of Article 23 to Town Meeting.

Protection of the Town's public water supply is a valid zoning purpose. *See* Chapter 808 of the Acts of 1975, Section 2A (Objectives for which zoning might be established include "to facilitate the adequate provision of transportation, water, water supply, drainage, sewerage, schools, parks, open space and other public requirements...") As noted above in more detail, because the adoption of a zoning by-law by the voters at Town Meeting is both the exercise of the Town's police power and a legislative act, the vote carries a "strong presumption of validity." Durand, 440 Mass. at 51. "If the reasonableness of a zoning bylaw is even 'fairly debatable, the judgment of the local legislative body responsible for the enactment must be sustained.'" Id. *quoting* Crall, 362 Mass. at 101. Based upon the documents submitted to us by the Town Clerk, pursuant to G.L. c. 40, 32, and our standard of review, we cannot conclude that the Town's vote under Article 23 prohibiting certain earth removal activities in the WSPD lacks a legitimate planning purpose, or is "arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals, or general welfare." Johnson v. Town of Edgartown, 425 Mass. 117, 121 (1997). Thus, we approve Article 23.

3. Allegation that Article 23 Violates Equal Protection and Substantive Due Process Rights

The opponents further urge disapproval of Article 23, alleging that it violates equal protection principles. Specifically, the opposition alleges that Article 23 is:

> ...invalid, because [the amendments] are not "rationally related to the furtherance of a legitimate state interest." Massachusetts Federation of Teachers v. Board of Education, 436 Mass. 763, 777 (2002).

See Letter from Attorney Markey to AAG Caprioli, pg. 7.

In addition, the landowners allege that Article 23 violates substantive due process because:

> It bears no "reasonable relation to a permissible legislative objective" and no "real and substantial relation to the public health, safety, morals, or [some] other phase of the general welfare." Massachusetts Federation of Teachers v. Board of Education, 436 Mass. at 779.

See Id.

The opponents base these assertions on the argument that the Planning Board did not present Town Meeting with any evidence that earth removal operations could compromise the water supply.

To show that a law lacks a rational basis is a "heavy burden." Leibovich v. Antonellis, 410 Mass. 568, 576 (1991). "A legislative enactment carries with it a presumption of constitutionality, and the challenging party must demonstrate beyond a reasonable doubt that there are no conceivable grounds which could support its validity." Id. (citation and internal quotations omitted). "A classification will be considered rationally related to a legitimate purpose if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Massachusetts Federation of Teachers, 436 Mass. at 777 (citations and internal quotations omitted). Here, for equal protection purposes, the most obvious classification made by Article 23 is between properties located within the WSPD and those located outside the WSPD. To this end, the opponent asserts that the by-law "bars [his] clients from removing soil and gravel from land they own but does not bar one from removing sand or gravel from property just outside the boundaries of the water district."

The Town has asserted that the purpose of Article 23 is to "better protect the Town's public water supply." *See* Planning Board report. The classification between uses allowed or prohibited on properties located in the WSPD versus those outside of the WSPD appears rationally related to a legitimate governmental interest. *See e.g.,* FIC Homes of Blackstone, Inc. v. Conservation Commission of Blackstone, 41 Mass. App. Ct. 681, 690 (1996) (water pollution prevention purpose of Town's wetlands by-law was a legitimate state interest); *see also* Zanghi v. Board of Appeals of Bedford, 61 Mass. App. Ct. 82, 87-88 (2004) (maintenance of water quality as one purpose of by-law was a meritorious goal). The fact that the Town chose to prohibit certain uses in the WSPD does not amount to an equal protection violation. "If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality...[A legislative body] is permitted to deal with problems one step at a time..." Massachusetts Federation of Teachers, 436 Mass. at 778 (citations and internal quotations omitted). Therefore, this argument does not furnish a basis for our disapproval of Article 23.

4. Allegation that Article 23 is Preempted by Federal and State Law

Lastly, the WSPD landowners claim that Article 23 is preempted by the federal Clean Water Act and various state laws pertaining to the acquisition of land and water (G.L. c. 40, § 39B) and examination of water supplies, groundwater aquifers and recharge areas (G.L. c. 111, §

160). As a general proposition, the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid." Bloom, 363 Mass. at 154. "The legislative intent to preclude local action must be clear." Id. at 155. We are unaware of any provision in the Clean Water Act that would prevent a town from prohibiting a particular use in its Water Supply Protection District.[4] In addition, as noted above in more detail, both the Home Rule Amendment and state law provide authority for towns to adopt local by-laws regulating earth removal. *See* G.L. c. 40, § 21 (17) (authorizing towns to adopt by-laws "prohibiting or regulating the removal of soil, loam, sand or gravel from land not in public use in the whole or in specified districts of the town."); Toda, 18 Mass. App. Ct. at 319 ("Municipalities may regulate earth removal through their zoning ordinances or by-laws.") For these reasons, we cannot conclude, based on our standard of review, that the Town's by-law prohibiting and regulating earth removal in the WSPD is pre-empted by federal or state law.

V. Additional Comments

The Town must apply the amendments under Article 23 consistent with state environmental laws that authorize or require earth removal and importation activities as part of an environmental cleanup or as part of the operation or closing of a solid waste facility and hazardous waste facilities. Specifically, the Town cannot apply Sections 255-35D or 255-35E in a manner that interferes with the Department of Environmental Protection's (DEP) authority over solid waste facilities pursuant to G.L. c. 111, § 150A, and its implementing regulations found at 310 C.M.R. § 19.000 et seq. *See e.g.* Buckley v. Wilmington, 68 Mass. App. Ct. 1113 (2007) (unpub.) (invalidating a landfill height limitation by-law because it interferes with and frustrates DEP's authority under G.L. c. 111, § 150A, to properly close and cap a landfill.) General Laws Chapter 111, Section 150A authorizes the DEP to issue site assignments for solid waste facilities and provides a uniform process for siting these facilities. The by-law amendments may not be applied in a manner that would frustrate the DEP's ability to effectively oversee the siting of a solid waste facility or manage waste disposal options in Massachusetts. *See* Wheelabrator Land Resources, Inc. v. Town of Saugus, 13 LCR 498, 499 (Mass. Land Ct., 2005) (local by-law limiting landfill height unreasonable because it prohibited construction beyond a certain point.) *See also* Town of Warren v. Hazardous Waste Facility Site Safety Council, 392 Mass. 107 (1984) (invalidating local by-law that sought to prohibit hazardous waste from outside the town limits.) The Town should consult with Town Counsel to ensure that Sections 255-35D and 255-35E are properly applied, as detailed above.

[4] *See* 33 USC § 1370 of the Clean Water Act which provides in relevant part as follows: "[e]xcept as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants (B) any requirement respecting control or abatement of pollution...or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

VI. Conclusion

For the reasons set forth herein, we approve the zoning by-law amendments adopted under Articles 23.

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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