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September 6, 2022

Sarah B. Gmeiner, Town Clerk
Town of South Hadley
116 Main Street, Room M 11
South Hadley, MA 01075

**Re: South Hadley Annual Town Meeting of May 11, 2022 -- Case # 10635
Warrant Articles # 8, 14, 16, 17 and 18 (General)**

Dear Ms. Gmeiner:

Articles 8, 14, 16, 17 and 18 - We approve Articles 8, 14, 16, 17 and 18 from the May 11, 2022 South Hadley Annual Town Meeting. Our comments regarding Articles 16 and 17 are provided below.

Article 16 - Under Article 16 the Town voted to delete Chapter 200 in its entirety and add a new Chapter 200, "Stormwater Management." The purpose and objectives of the new Stormwater Management by-law include: (1) managing land development in order to protect public health, safety and general welfare by establishing minimum requirements for stormwater runoff; (2) regulating illicit connections and discharges into the Municipal Separate Storm System (MS4); and (3) reducing the adverse water quality impacts of stormwater discharges. Section 200-1, "Purpose." We offer the following comments to the Town on the new Stormwater Management by-law.

I. Law Applicable to the New Stormwater Management By-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. 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 the new Stormwater Management by-law is part of the Town’s efforts to effectively manage stormwater.

II. Comments on the New Stormwater Management By-law

1. Section 200-3 – Definitions

Section 200-3 defines the term “Person” as follows:

Person: Any individual, group of individuals, association, partnership, corporation, company, business, organization, trust, estate, administrative agency, public or quasi-public corporation or body, the commonwealth or political subdivision thereof.

We approve the definition of “Person.” However, the Town’s authority to regulate state 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). The Town’s enforcement of the Stormwater Management bylaw cannot impermissibly interfere with the operation of state entities. The Town should discuss any questions regarding the proper application of the by-law with Town Counsel.

2. Section 200-9 – Application Requirements

Section 200-9 (A) “Rules and Regulations,” authorizes the Planning Board to adopt rules and regulations related to application requirements and procedures. Any rules or regulations adopted by the Planning Board under the Stormwater Management bylaw must be consistent with state law. See American Lithuanian Naturalization Club v. Board of Health of Athol, 446 Mass. 310, 321 (2006) (“A town may not promulgate a regulation that is inconsistent with State law.”) The Town should discuss with Town Counsel any proposed rules and regulations adopted pursuant to Section 200-9 (A) to ensure that they comply with state law.

3. Sections 200-13 – Inspections and 200-14 – Right of Entry for Inspection

Section 200-13 (A)(4) authorizes the Town to “conduct random inspections to ensure effective control of erosion and sedimentation during all phases of construction.” Section 200-14 authorizes the right to enter property where there is “a reasonable basis to believe that violation of this bylaw is occurring or has occurred, and to enter when necessary for abatement of a public nuisance or correction of a violation” of the by-law.

In applying these Sections of the by-law, the Town should be mindful that 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 the provisions of Section 200-13 (A)(4) and 200-14 are applied in a manner that is consistent with state law and applicable constitutional requirements.

4. Section 200-15 – Fees

Section 200-15 authorizes the Planning Board to establish a schedule for application fees, inspection fees and review fees. The Town must ensure that these fee requirements are applied consistent with state law. A municipality may impose fees, but it “has no independent power of taxation.” Silva v. City of Attleboro, 454 Mass. 165, 169 (2009). In distinguishing valid fees from impermissible taxes, the Supreme Judicial Court has noted that fees tend to share the following common traits: (1) fees, unlike taxes, are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society; (2) user fees (although not necessarily regulatory fees) are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge; and (3) fees are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses. See Silva, 454 Mass. at 168 (citing Emerson College v. City of Boston, 391 Mass. 415, 424-25 3 (1984)). The Town should consult with Town Counsel to ensure that any fees assessed under the Stormwater management by-law constitute a valid fee rather than impermissible tax.

5. Section 200-24 – Performance Guarantees; Requirements

Section 200-24 authorizes the Planning Board to require an applicant to post a “financial guarantee” before the start of any site work for the construction of a development requiring a stormwater management facility to ensure compliance with the by-law. 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 200-24.

Article 17 - Under Article 17 the Town voted to amend the general by-laws to add a new, unnumbered by-law, "Human Rights Commission" (HRC). The HRC consists of 9 members, with members appointed by different Town boards or Committees, as provided in the by-law. Section 1 (B), "Appointment & Terms of Office of Commission Members." The purpose of the HRC is to: (1) improve the life of the Town by providing educational programs; (2) work with various Town boards and others to increase diversity as well as awareness to human and civil rights issues; (3) respond to complaints; and (4) provide referrals and information to persons with complaints about unlawful discrimination. Section 1 (A), "Purpose."

We offer comments on the new by-law for the Town's consideration.

Section 1 (D) (3), "Officers, Quorum and Adoption of Rules and Regulations" authorizes the HRC to adopt rules and regulations related to the administration of the by-law as follows:

The Commission shall adopt rules and regulations consistent with this Bylaw and the laws of the Commonwealth of Massachusetts to carry out the policy and provisions of this Bylaw and the duties of the Commission in connection therewith. The regulations and rules shall ensure the due process rights of all persons involved in investigations and hearings and shall set forth a process for investigations and related hearings as authorized hereunder consistent with the Purpose of the bylaw.

Although Section 1 (D)(3) authorizes the HRC to adopt rules and regulations related to "investigations and hearings" the by-law does not authorize the HRC to conduct investigations, hold hearings or adjudicate complaints. To the contrary, Section 4 (D) states that the HRC "shall not adjudicate or facilitate resolution of disputes between individuals." The Town should consult with Town Counsel regarding the authority of the HRC to undertake investigations and hearings. In addition, should the HRC adopt any rules or regulations, they must be consistent with state

law, as discussed in more detail above. See American Lithuanian Naturalization Club, 446 Mass. at 321. The Town should discuss these issues with Town Counsel.

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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