THE COMMONWEALTH OF MASSACHUSETTS
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August 11, 2005

Barbara A. Siira, Town Clerk
322 Concord Road
Sudbury, MA 01776

RE: Sudbury Annual Town Meeting of April 4, 2005 — Case # 3337
Warrant Articles # 19 and 37 (General)
Warrant Articles # 39 and 40 (Zoning)

Dear Ms. Siira:

Article 19 - I return with the approval of this Office the amendments to the town by-laws adopted under this Article on the warrant for the Sudbury annual town meeting that convened on April 4, 2005.

Article 37 - The amendments adopted under Article 37 delete Section VIII (B) from the town's general by-laws and insert a new Section VIII (B), "Scenic Roads." Section 1.2 pertains to the procedure to designate a road as a scenic road, and provides in pertinent part as follows:

> The Planning Board, the Conservation Commission, the Historical Commission, or the citizens of the Town of Sudbury by petition (consistent with petition requirements to place an article on the warrant) may propose "scenic road" status for any road in the Town of Sudbury, other than a numbered route or state highway.

In approving the above quoted text, we remind the Town of the requirements of G.L. c. 40, § 15C. General Laws Chapter 40, § 15C, pertains to the designation and improvement of scenic roads. Section 15C provides that a Town may designate any road in the town "other than a numbered route or state highway" as a scenic road "provided, however, that a numbered route may be designated by a . . . town as a scenic road if its entire length is contained within the boundaries of the town, and no part of said route is owned or maintained by the commonwealth."

The above-quoted text in Section 1.2 of the proposed by-law recognizes that numbered routes and state highways cannot be designated by the town as scenic roads; however, the by-law is silent on numbered routes in which their entire length are contained within the boundaries of the town and not part of said routes owned or maintained by the State. In those instances, it would be lawful to designate a numbered route as a scenic way. Although this omission does not make the proposed

by-law inconsistent with state law, we remind the town that designation of a numbered route as a scenic road is limited to instances expressly provided for in G.L. c. 40, §§ 15C.

We next call your attention to Section 3.4, which pertains to the tree warden and provides in as follows:

> Whenever feasible, Planning Board hearings shall be held in conjunction with those to be held by the Tree Warden acting under M.G.L. ch. 87. Consent to action by the Planning Board shall not be construed as inferring consent by the Tree Warden, or vice versa.

(Emphasis added.)

We disapprove and delete the above underlined text as inconsistent with the provisions of G.L. c. 40,.§ 15C, and c. 87, § 3. **[Disapproval # 1 of 4]** General Laws Chapter 40, Section 15C, provides in pertinent part as follows:

> After a road has been designated as a scenic road any repair, maintenance, reconstruction, or paving work done with respect thereto shall not involve or include the cutting or removal of trees, or the tearing down or destruction of stone walls, or portions thereof, except with the prior written consent of the planning board, . . . after a public hearing duly advertised twice in a newspaper of general circulation in the area, as to time, date, place and purpose, the last publication to occur at least seven days prior to such hearing; provided, however, that when a public hearing must be held under the provisions of this section and under section three of chapter eighty-seven prior to the cutting or removal of a tree, such hearings shall be consolidated into a single public hearing before the tree warden and the planning board, . . . and notice of such consolidated public hearing shall be given by the tree warden or his deputy as provided in said section three of chapter eighty-seven.

(Emphasis added.)

General Laws Chapter 87, Section 3 provides in pertinent part as follows:

> Except as provided by section five, public shade trees shall not be cut, trimmed or removed, in whole or in part, by any person other than the tree warden or his deputy, ... except upon a permit in writing from said tree warden, nor shall they be cut down or removed by the tree warden or his deputy or other person without a public hearing . . . provided, however, that when a public hearing must be held under the provisions of this section and under section fifteen C of chapter forty prior to the cutting or removal of a tree, such hearings shall be consolidated into a single public hearing before the tree warden and the planning board, . . . and notice of such consolidated public hearing shall be given by the tree warden or his deputy as provided herein.

(Emphasis added.)

General Laws Chapter 40, Section 15C, and c. 87, § 3, provide that when a public hearing is required under both G.L. c. 40, § 15C and c. 87, § 3, such hearing must be consolidated into a single

public hearing before the tree warden and the planning board. Thus, we disapprove and delete the words "Whenever feasible" from the provisions of Section 3.4.

We next call the town's attention to Section 4.3, which pertains to tree removal limitations and provides in pertinent part as follows:

> c) For each tree with a trunk exceeding six (6) inches in diameter, one (1) foot above ground level that is removed, a tree in a species, size and location with advice from the Tree Warden and suitable to the Planning Board, shall be planted, or an equivalent payment into the town-wide tree replacement fund shall be made. . . .

(Emphasis added.)

Section 4.3 (c) allows a person to make a cash payment to the town's tree replacement fund instead of replacing trees that have been removed. It is unclear whether the tree replacement fund is intended to be an account authorized under state law or whether it is intended to be a special account created by by-law.

General Laws Chapter 44, § 53, provides that "[a]ll moneys received by a city, town or district officer or department, except as otherwise provided by special acts and except fees provided for by statute, shall be paid by such officers or department upon their receipt into the city, town or district treasury." While we find no facial inconsistency between state laws and the mere imposition and collection of the fee prescribed in the proposed by-law, it is our opinion that the funds collected become part of the town's general fund unless placed in a fund established by the Legislature by general law or special act. In the packet of materials submitted to us for review, we were not given any information showing that the town has received a special act from the Legislature authorizing the creation of a "tree replacement fund."

In the absence of any general or special law to the contrary, fees of the sort contemplated here would, pursuant to G.L. c. 44, § 53, have to be deposited with the Town Treasurer and made part of the town's general fund, thus not available to the Town for the purpose for which they were assessed unless in accordance with an appropriation made by Town Meeting. Illustrative of such legislative authority is G.L. c. 44, § 53E 1/2, which authorizes revolving funds for the deposit of "departmental receipts received in connection with the programs supported by such revolving fund." It is not entirely clear whether the term "program" is malleable enough to be applicable to fees collected for tree replacement. Moreover, G.L. c. 44, § 53E 1/2, requires revolving funds to be established and renewed annually by Town Meeting and may not be set up in the body of a town by-law. Each town meeting has the power to decide whether or not to authorize a revolving fund for the upcoming fiscal year and, if so, what particular receipts will be credited to the fund and how the funds may be spent.

Another such law is G.L. c. 44, § 53F 1/2. Section 53F 1/2 allows towns, upon acceptance of that section, to establish enterprise funds for a utility, health care, recreational, or transportation facility and its operation, as the city or town may designate, referred to as the enterprise. However, absent such

general or special law to the contrary, the fines collected become part of the town's general fund and are not available to the Town other than as authorized by town meeting by proper appropriation.

Another such legislative authority is G.L. c. 44, § 53A. Section 53A pertains to the acceptance and expenditure of gifts and grants. Funds received by the town as true gifts or grants would qualify for treatment under G.L. c. 44, § 53A, under which funds given as a gift to a town department for a particular purpose may be segregated into a separate fund and may thereafter be spent without appropriation for the purpose of the gift. Interest would remain with the fund if the donor so provides. However, it strains credulity to construe the payments made under the proposed by-law as "gifts" or "grants" in the sense intended by Section 53A. Perhaps a liberal reading of Section 4.3 would be that the replanting is mandatory, but may be waived if a "gift" is made under Section 4.3, then the expenditure would be governed by the terms of the gift. We suggest that the town discuss this issue in more detail with town counsel.

Lastly, we call the town's attention to Section 7, "Enforcement," which provides in pertinent part as follows:

> Cutting or removal of trees or the tearing down or destruction of stone walls within the layout of the scenic road in violations of this Section may be subject to a fine of not more than three hundred dollars ($300.00), as set forth under the Scenic Road Act, MGL Ch. 40, Sec. 15C. Each day that a violation continues shall constitute a separate offense, until an application is made to the Planning Board, with continued progression toward a good faith effort for restoration. In addition, the Planning Board and Building Inspector may withhold or revoke any current or pending permit on the property associated with said violation.

(Emphasis added.)

The above underlined text in Section 7 authorizes the planning board or building inspector to revoke any and all types of permits related to property on which a violation occurred. We caution the town that some permits, for example, the building permit, may not lawfully be revoked in the manner contemplated by Section 7 of the proposed by-law. In applying Section 7, we suggest that the town discuss whether any current or pending permits have statutory permanence and are thus beyond the reach of the authority conferred upon the planning board and building inspector.

Article 39 - The amendments adopted under Article 39 make a number of changes to the town's zoning by-laws. One such change would amend Section 2325, "Pools in Residential District," by deleting the last five sentences and inserting new text. As amended, Section 2325 would have provided as follows [new text in **bold**]:

> In residential zoning districts, private or public swimming pools shall be permitted, provided that a building permit therefore be granted by the Building Inspector under the provision of the Commonwealth of Massachusetts State Building Code. Requirements for set back, side yard, front and rear yard clear distances shall be the same as for a principal building. Pools built for public or semi-public use (including private "clubs" or organizations) require Site Plan

approval per Section 6300 of this bylaw and a special permit for the Board of Appeals. **Enclosures for swimming pools shall meet the Massachusetts State Building Code requirements. In addition, the minimum fence barrier height shall be five (5) feet.**

(Emphasis added.)

We disapprove and delete the above underlined text as inconsistent with the State Building Code and G.L. c. 40A, § 3. **[Disapproval # 2 of 4]**

Beginning with Chapter 802 of the Acts of 1972, as amended by Chapter 541 of the Acts of 1974, the Legislature eliminated local building codes, the purpose of which was to create a state-wide "comprehensive" state building code which it intended should be applied uniformly throughout all the communities of the Commonwealth. Today, any town seeking to enforce regulations more restrictive than those currently imposed under the state building code must request that the State Board of Regulations and Standards adopt such regulation. G.L. c. 143, § 98. The Board will grant such a request only upon a finding, after conducting a public hearing, "that more restrictive standards are reasonably necessary because of special conditions prevailing within such city or town and that such standards conform with accepted national and local engineering and fire prevention practices, with public safety and with the general purposes of a statewide building code . . . ". *Id.*

General Laws, Chapter 40A, §3, likewise, begins with the admonition: "No zoning ordinance or by-law shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code . . . ." The State Building Code is a comprehensive statewide act and no local by-law that exceeds, competes or conflicts with any provisions of the State Building Code has legal effect.

State statutes and the State Building Code require fencing for swimming pools and impose construction requirements for such fences. G.L. c. 140, § 206, and 780 C.M.R. § 421.10. Section 421.10 of the State Building Code provides the criteria for fencing of outdoor private swimming pools. Section 421.10 of the State Building Code that sets forth the requirements to be used when constructing a fence around a private swimming pools and provides as follows:

> In lieu of any zoning laws or ordinances to the contrary, private swimming pools, spas and hot tubs shall be enclosed in accordance with 780 CMR 421.10.1 through 421.10.4 or by other approved barriers.

(Emphasis added.)

General Laws Chapter 140, Section 206, sets the criteria for outdoor public and semi-public pools. The State Building Code refers to G.L. c. 140, § 206, for the required enclosure of public or semi-public outdoor in-ground swimming pools. 780 C.M.R. § 421.2. As stated above, the State Building Code preempts the field of building construction, and towns are precluded from enacting by-laws and regulations that deal with subjects covered or reserved by the State Building Code. Because the State Building Code is a comprehensive statewide act and no local by-law that exceeds,

competes, or conflicts with any provisions of the State Building Code has legal effect, we disapprove and delete the above underlined text from Section 2325.

Article 40 - I return with the approval of this Office the amendments to the town by-laws adopted under this Article, except as provided below.

We call the town's attention to Sections 4230 and 4231. Section 4230 of the proposed by-law establishes the boundaries of the Water Resource Protection Overlay District and Section 4231 pertains to district boundary disputes. Section 4231 provides as follows:

> If the location of the District boundary in relation to a particular parcel(s) is in doubt, resolution of boundary disputes shall be through a Special Permit application to the Special Permit Granting Authority. Any application for a Special Permit for this purpose shall be accompanied by adequate documentation.
> The burden of proof shall be upon the owner(s) of the land to demonstrate that the location of the district boundary with respect to their parcel(s) of land is uncertain. The Town may hire a qualified professional to review any technical analyses or documentation provided by the applicant at the applicant's expense. The Planning Board shall provide the owner with a statement of the work performed and the cost thereof when charging an owner hereunder.
> For disputes which may arise related to a Zone II boundary, the determination of the location and extent of Zone II shall be in conformance with the criteria set forth in 310 CMR 22.00 and in the DEP's *Guidelines and Policies for Public Water Systems*. In the case of disputing a Zone II boundary, the Special Permit Granting Authority shall not issue approval until DEP issues an official approval of the revised delineation.

Section 4231 recognizes that lines on a map can only with limited precision be correlated with points on the surface of the land, and that such "line ambiguity" will occasionally need resolution. Section 5 therefore, provides a means by which to resolve doubt as to the location of a district boundary in relation to a particular parcel. That is, a district boundary – established by town meeting and shown on the map – may be verified on the ground, as distinct from established as part of the by-law. We conclude that Section 4231 is limited to the ministerial task of locating with precision on the ground the boundaries of the district as shown on the map, but is not a means of altering the district boundaries themselves without the accompanying action of town meeting. We caution the town that Section 4230 is in all instances controlling on the location of the district boundaries.

We next call the town's attention to Subsection 4242 (j) and Subsection 4252 (o). Subsection 4242 (j) pertains to uses prohibited in the Water Resources Protection Overlay Districts -Zone II, and provides in pertinent part as follows:

> The following uses are specifically prohibited within Water Resource Districts - Zone II:
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> * * *
>
> j. Permanent removal, or regrading of the existing soil cover, except for excavations for: 1) building foundations; 2) roads or utility works; 3) the installation of Stormwater BMPs subject

to approval by any Town board or committee having jurisdiction, which result in a finished grade at a level less than five (5) feet above the historical high groundwater.

Subsection 4252 (o) pertains to uses prohibited in the Water Resource Protection Overlay Districts - Zone III and provides as follows:

> The following uses are specifically prohibited within Water Resource Protection Overlay Districts - Zone III:
>
> * * *
>
> (o) Permanent removal, or regrading of the existing soil cover, except for excavations for: 1) building foundations; 2) roads or utility works; 3) the installation of Stormwater BMPs subject to approval by any Town board or committee having jurisdiction, which result in a finished grade at a level less than five (5) feet above the historical high groundwater.

In approving Subsections 4242 (j) and 4252 (o), we caution the town that the laws and Constitution of the Commonwealth have recognized the importance of agriculture and agricultural uses within the state. Article 97 of the Massachusetts Constitution declares that the protection of people in their right to the utilization of agricultural resources is a public purpose in the Commonwealth. Moreover, there are numerous state laws and regulations that preclude agricultural uses from restriction by local legislation. See G.L. c. 40A, § 3, c. 11, § 125, and c. 131, § 40, ¶ 24. Specifically, G.L. c. 40A, § 3, provides protection to agriculture and provides in pertinent part:

> No zoning . . . by-law shall . . . prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture, horticulture, floriculture, or viticulture; . . . except that all such activities may be limited to parcels of more than five acres in area not zoned for agriculture, horticulture, floriculture, or viticulture.

General Laws Chapter 40A, Section 3, states that all agricultural uses must be allowed as of right on land zoned for agriculture and on land that is greater than five acres in size; therefore, a municipality cannot restrict agricultural uses in those areas. A municipality is allowed to restrict agricultural uses on land less than five acres that is not zoned for agriculture. Thus, it would be inconsistent with state law to prohibit, require a special permit, or unreasonably regulate agricultural uses that enjoy the protections accorded under G.L. c. 40A, § 3.

Earth removal can be a use incidental to agricultural uses that are protected under G.L. c. 40A, § 3. Where earth removal is an incidental agricultural use, any unreasonable regulation or special permit requirement would be inconsistent with state law. Where earth removal is an incidental agricultural use, any prohibition, unreasonable regulation or special permit requirement would be inconsistent with state law. Thus, we caution the town to apply the text of the proposed by-law in a manner consistent with the protections accorded to agriculture under state law.

We next call the town's attention to Subsections 4243 (c) and Subsection 4253 (b). Subsection 4243 (c) pertains to uses allowed by special permit in the Water Resource Protection Overlay Districts - Zone II and provides in pertinent part as follows:

The following uses and activities may be allowed by Special Permit within the Water Resource Protection Overlay Districts - Zone II, subject to the approval of the Special Permit Granting Authority under such conditions as they may require and also subject to Section 4242:

* * *

c. The application of pesticides, including herbicides, insecticides, fungicides, and rodenticides, for non-domestic or non-agricultural uses in accordance with state and federal standards, provided the applicant demonstrates to the satisfaction of the Special Permit Granting Authority that other non-chemical means have been proven ineffective. If applicable, the applicant shall provide documentation of compliance with a Yearly Operating Plan (YOP) for vegetation management operations under 333 CMR 11.00 or a Department of Food and Agriculture approved Pesticide Management Plan or Integrated Pest Management (IPM) program under 333 CMR 12.00;

Subsection 4253 (b) pertains to uses permitted by special permit in the Water Resources Protection Overlay Districts - Zone III and provides in pertinent part as follows:

The following uses are permitted by Special Permit within Water Resource Protection Overlay Districts - Zone III, subject to the approval of the Special Permit Granting Authority under such conditions as they may require and also subject to Section 4252:

*

b. The application of pesticides, including herbicides, insecticides, fungicides, and rodenticides, for non-domestic or non-agricultural uses in accordance with state and federal standards, provided the applicant demonstrates to the satisfaction of the Special Permit Granting Authority that other non-chemical means have been proven ineffective. If applicable, the applicant shall provide documentation of compliance with a Yearly Operating Plan (YOP) for vegetation management operations under 333 CMR 11.00 or a Department of Food and Agriculture approved Pesticide Management Plan or Integrated Pest Management (IPM) program under 333 CMR 12.00;

We disapprove and delete Subsections 4243 (c) and 4253 (b) as inconsistent with the provisions of G. L. c. 132B, captioned, the "Massachusetts Pesticide Control Act." **[Disapprovals # 3 and # 4 of 4]** General Laws Chapter 132B, Section 1 provides in pertinent part as follows:

The purpose of this chapter is to conform the laws of the commonwealth to the Federal Insecticide, Fungicide, and Rodenticide Act, Public Law 92-516, as amended, and the regulations promulgated thereunder and to establish a regulatory process in the commonwealth. The exclusive authority in regulating the labeling, distribution, sale, storage, transportation, use and application, and disposal of pesticides in the commonwealth shall be determined by this chapter.

(Emphasis added.)

The intent of G.L. c. 132B is to have a uniform set of regulations throughout the Commonwealth administered by the Department of Food and Agriculture. In the case of Town of Wendell v. Attorney General, 394 Mass. 518, 529 (1985), the Court found that G.L. c. 132B was a state-wide "comprehensive" act that preempted further regulation by municipalities within that area of concern, i.e., the use and application of pesticides. We find that by requiring a special permit for application of pesticides, including insecticides, fungicides, and rodenticides, Subsections 4243 (c) and 4253 (b) frustrate the achievement of centralized regulation of pesticide use, and are thus inconsistent with the laws of the Commonwealth and must be disapproved and deleted.

We understand that some of the text we are disapproving was part of the town's existing Water Resources Protection Overlay Districts by-law. While we strive to maintain consistency in our disapproval, we cannot under our statutory role, allow a by-law that is inconsistent with state law to pass our review solely because it was previously submitted and approved. For these reasons, we disapprove and delete the above underlined text.

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,

THOMAS F. REILLY
ATTORNEY GENERAL

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