



THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

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MARTHA COAKLEY  
ATTORNEY GENERAL

August 19, 2010

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Rosemary B. Harvell, Town Clerk  
322 Concord Road  
Sudbury, MA 01776

**RE: Sudbury Annual Town Meeting of April 5, 2010 --- Case # 5525  
Warrant Articles # 6, 19, and 24 (General)  
Warrant Article # 20 (Zoning)**

Dear Ms. Harvell:

Articles 6, 20, and 24 - We return with the approval of this Office the amendments to the Town by-laws adopted under these Articles on the warrant for the Sudbury Annual Town Meeting that convened on April 5, 2010, and the maps pertaining to Article 20. Our comments on Article 20 are provided below.

Article 19 - We return with the approval of this Office the amendments adopted under this Article, except as provided below. [See page 3 for Disapproval # 1 of 2 and page 4 for Disapproval # 2 of 2].

The amendments adopted under Article 19 add to the Town's general by-laws a new Illicit Discharge and Connection by-law. Our comments on specific sections of the proposed by-law are provided below.

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). The Department has proposed further regulations for stormwater management, which may be found at 314 C.M.R. § 21.00. We remind the Town that 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 stormwater systems 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 ordinances 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). We understand the by-law proposed under Article 19 to be a part of Sudbury’s efforts to effectively manage stormwater.

Section 2 (“Definitions”) of the proposed by-law defines “Person” as follows (with emphasis added):

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.

Although we note that the above definition includes the qualifier “to the extent permitted by law,” we caution the Town that its 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 interferes 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). We recommend the Town consult with Town Counsel to ensure that its enforcement of the proposed by-law does not impermissibly interfere with the operation of state or federal entities.

Section 6 (“Regulations”) of the proposed by-law provides that the DPW Director “may promulgate rules and regulations to effectuate the purposes of this Bylaw.” We remind the Town that neither the DPW Director nor the Town has power to adopt rules or regulations that are inconsistent with state law. “A town may not promulgate a regulation that is inconsistent with State law.” American Lithuanian Naturalization Club v. Board of Health of Athol, 446 Mass. 310, 321 (2006). We suggest the Town discuss with Town Counsel any proposed rules or regulations to ensure that they comply with state law.

Section 8 (“Exemptions”) of the proposed by-law lists a number of non-stormwater discharges that “are exempt from the prohibition of non-stormwaters provided that the source is not a *significant contributor* of a pollutant to the municipal storm sewer system.” (Emphasis added.) The proposed by-law does not define what constitutes a “significant contributor” of a pollutant to the municipal storm sewer system. We remind the Town that a by-law – particularly

one that contains criminal penalties – must “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” Kolender v. Lawson, 461 U.S. 352, 357 (1983), *quoted in* Commonwealth v. Williams, 395 Mass. 302, 304 (1985). We recommend the Town consult with Town Counsel and consider amending the proposed by-law at a future Town Meeting to specify what will constitute a “significant contributor” of a pollutant to the municipal storm sewer system.

Section 10 (“Notification of Spills”) of the proposed by-law provides in part as follows (with emphasis added):

Notwithstanding other requirements of local, State, or Federal law, as soon as a person responsible for a facility or operation, or responsible for emergency response for a facility or operation, has information of or suspects a release of materials at that facility or operation resulting in or which may result in discharge of pollutants to the municipal drainage system or waters of the Commonwealth, the person shall take all necessary steps to ensure containment, and cleanup of the release.

Municipal enactments may not be inconsistent with the requirements of state or federal law. American Lithuanian Naturalization Club, 446 Mass. at 321; Bloom v. City of Worcester, 363 Mass. 136, 151-55 (1973). Accordingly, by-laws may not state that their provisions apply “[n]otwithstanding other requirements of . . . state, or federal law.” Therefore, we disapprove and delete the above underlined text (“State, or Federal”). **[Disapproval # 1 of 2]**

Section 11 (“Enforcement”) of the proposed by-law provides in pertinent part as follows (with emphasis added):

d. If the enforcing person determines that abatement or remediation of contamination is required, the order shall set forth a deadline by which such abatement or remediation must be completed. Said order shall further advise that, should the violator or property owner fail to abate or perform remediation within the specified deadline, the Town of Sudbury may, at its option, undertake such work, and expenses thereof shall be charged to the violator.

e. Within thirty (30) days after completing all measures necessary to abate the violation or to perform remediation, the violator and the property owner will be notified of the costs incurred by the Town of Sudbury, including administrative costs. The violator or property owner may file a written protest objecting to the amount or basis of costs with the DPW Director within thirty (30) days of receipt of the notification of the costs incurred. If the amount due is not received by the expiration of the time in which to file a protest or within thirty (30) days following a decision of the DPW Director affirming or reducing the costs, or from a final decision of a court of competent jurisdiction, the costs shall become a *special assessment against the property owner and shall constitute a lien on the owner’s property* for the amount of said costs. Interest shall begin to accrue on any unpaid costs at the statutory rate provided in G.L. Ch. 59, 57 after the thirty-first day at which the costs first become due.

Section 11 (d) imposes the duty of abating or remediating contamination, and provides that “the Town of Sudbury may, at its option, undertake such work, and expenses thereof shall be charged to the violator.” Section 11 (e) mandates that the cost of abating or remediating contamination shall become a special assessment against the property owner. We caution the Town that its enforcement of Section 11(e) must be consistent with applicable state law, including G.L. c. 40, § 58, which pertains to municipal charges liens. We urge the Town to consult with Town Counsel to ensure that its enforcement of this Section is consistent with state law.

Section 11 (g) provides that non-criminal disposition may be used to enforce the proposed by-law. Section 11 (g) provides in pertinent part as follows (with emphasis added):

The penalty for the 1<sup>st</sup> violation shall be \$200.00. The penalty for the 2<sup>nd</sup> violation shall be \$500.00. The penalty for the 3<sup>rd</sup> and subsequent violations shall be \$1,000.00. . . .

We disapprove and delete the above underlined text from Section 11 (g) because it is inconsistent with G.L. c. 40, § 21D. **[Disapproval # 2 of 2]**

General Laws Chapter 40, Section 21D, is the non-criminal disposition method option for enforcement of local by-laws and provides in pertinent part as follows (with emphasis added):

Any city or town may by ordinance or by-law not inconsistent with this section provide for non-criminal disposition of violations of any ordinance or by-law or any rule or regulation of any municipal officer, board or department the violation of which is subject to a specific penalty.

Any person notified to appear before the clerk of a district court as hereinbefore provided may so appear and confess the offense charged, either personally or through a duly authorized agent or by mailing to the city or town clerk of the municipality within which the violation occurred together with the notice such specific sum of money not exceeding three hundred dollars as the town shall fix as penalty for violation of the ordinance, by-law, rule or regulation.

General Laws Chapter 40, Section 21D, limits the amount of the fine that may be imposed to \$300. Thus, a fine of \$500 and \$1,000 is inconsistent with G.L. c. 40, § 21D and must be disapproved and deleted.

Section 11 (h) (“Entry to Perform Duties under this Bylaw”) of the proposed by-law provides as follows:

To the extent permitted by State law, or if authorized by the owner or other party in control of the property, the DPW Director, its agents, officers, and employees may enter upon privately owned property for the purpose of performing their duties under this Bylaw and regulations and may make or cause to be made such examinations, surveys or sampling as the DPW Director deems reasonably necessary.

Although Section 11(h) includes the qualifier, “[t]o the extent permitted by State law,” we caution the Town that “the Fourth Amendment requires warrants for non-emergency administrative inspections.” Commonwealth v. Cote, 15 Mass. App. Ct. 229, 233 (1983). The U.S. Supreme Court has also 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). 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). See also Commonwealth v. John G. Grant & Sons Co., 403 Mass. 151 (1988) (holding that G.L. c. 131, § 40, does not authorize conservation commission members to conduct warrantless searches on private land); G.L. c. 111, § 131 (requiring warrant for board of health’s compulsory examination of premises). We urge the Town to consider including language in its permit application that will put applicants on notice that they are being asked to consent to inspections. We also urge the Town to consult with Town Counsel to ensure that Section 11(h) is applied in a manner that is consistent with state law and applicable constitutional requirements.

Section 13 (“Transitional Provisions”) of the proposed by-law provides that “[r]esidential property owners shall have 180 days from the *effective date of this By-law* to comply with its provisions.” (Emphasis added.) General Laws Chapter 40, Section 32, establishes the effective date of Town by-laws. A general by-law takes effect following the Attorney General’s approval and the Town’s compliance with the posting and publishing requirements specified in G.L. c. 40, § 32. We understand Section 13 to establish a 180-day “grace period” for persons and property owners, which begins to run once the by-law becomes effective in accordance with G.L. c. 40, § 32.

**Article 20** - The amendments adopted under Article 20 make a number of changes to the Town’s zoning by-laws. One change adds “assisted care facility” to Section 2230 (“Table of Principal Use Regulations”) Use # C.6. As amended, Use #C.6 allows nursing homes, convalescent homes, and assisted care facilities by right in the RD district and by special permit in the Town’s A-RES, C-RES, WI, LBD, and VBD districts provided that certain dimensional requirements set forth in footnote (ii) are satisfied. We approve this change to the Table of Principal Use Regulations, but caution the Town that G.L. c. 40A, § 3, prohibits discrimination against disabled persons and provides in pertinent part as follows:

Notwithstanding any general or special law to the contrary, local land use and health and safety laws, regulations, practices, ordinances, by-laws and decisions of a city or town shall not discriminate against a disabled person. Imposition of health and safety laws or land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size or other unrelated persons shall constitute discrimination. The provisions of this paragraph shall apply to

every city or town, including, but not limited to the city of Boston and the city of Cambridge.

To the extent that a certain nursing home, convalescent home, or assisted care facility satisfies the conditions for residential dwellings, the Town cannot apply or enforce its by-laws with respect to such homes with any less deference than that given to other similar residential dwellings. Such difference in treatment would violate the provisions of G.L. c. 40A, § 3. We suggest that the Town discuss this issue in more detail with Town Counsel.

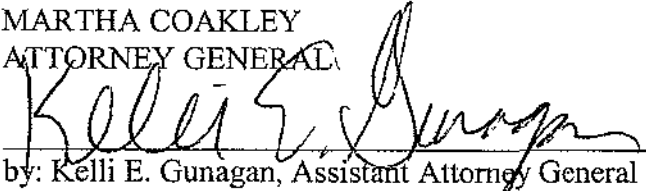
**Note:** Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date that these posting and publishing 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,

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ATTORNEY GENERAL

  
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enc.

cc: Town Counsel (via email)

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