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OFFICE OF THE ATTORNEY GENERAL

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January 31, 2020

Michelle Bissonnette, Town Clerk
Town of Wareham
54 Marion Road
Wareham, MA 02571

**Re: Wareham Fall Annual Town Meeting of October 28, 2019 -- Case # 9659
Warrant Articles # 17, 18, 19 and 20 (Zoning)
Warrant Article # 22 (General)**

Dear Ms. Bissonnette:

Articles 17, 18 and 22 - We approve Articles 17, 18 and 22 from the October 28, 2019 Wareham Fall Annual Town Meeting.¹ Our comments regarding Article 22 are provided below.

Article 20 - As explained in more detail herein, we disapprove Article 20 because it was not adopted in compliance with the procedures established by G.L. c. 40A, § 5. Article 20 proposes to amend the Town's zoning by-laws, Article 2, "Zoning Districts," Section 212, "Overlay Districts, by adding the following text:

212.5 Tremont Nail Factory Redevelopment Overlay District

The Tremont Nail Factory Overlay District is intended to encourage a cultural, mixed use center within historic buildings and a distinctive and attractive site development program.

Because Article 20 was not adopted in compliance with the procedures established by G.L. c. 40A, § 5 for zoning by-law amendments, we must disapprove and delete the by-law adopted under Article 20 in its entirety. (**Disapproval # 1 of 1**).

General Law Chapter 40A, § Section 5 establishes specific procedure that the Town must follow when amending its zoning by-laws, as follows (with emphasis):

No zoning...by-law or amendment thereto shall be adopted until after the planning board in a...town has...held a public hearing thereon...at which interested persons shall be given an opportunity to be heard....*Notice of the time and place of such*

¹ In a decision issued January 28, 2020, we approved Article 19.

hearing, of the subject matter, sufficient for identification, and of the place where texts and maps thereof may be inspected shall be published in a newspaper of general circulation in the...town once in each of two successive weeks, the first publication to be not less than fourteen days before the day of said hearing, and by posting such notice in a conspicuous place in the...town hall for a period of not less than fourteen days before the day of said hearing. Notice of said hearing shall also be sent by mail, postage prepaid to the department of housing and community development, the regional planning agency, if any, and to the planning board of each abutting city and town.

The information filed with this Office reflects that a planning board hearing notice for Article 20 was not published or posted in compliance with G.L. c. 40A, § 5.² Moreover, the information filed with this Office reflects that a notice of a planning board hearing was not sent by mail to the Department of Housing and Community Development, the regional planning agency, and the planning boards of each abutting city and town. Although it appears that the Planning Board may have discussed Article 20 at a Planning Board hearing held on October 7, 2019, the failure to provide notice of this hearing by posting and publishing to the Town's residents, the Department of Housing and Community Development, the regional planning agency, and the planning boards of abutting cities and towns, renders the adoption of Article 20 fatally defective for failing to comply with G.L. c. 40A, § 5.

For this reason, we disapprove and delete the zoning by-law amendments proposed under Article 20. The Town should consult with Town Counsel with any questions regarding the procedural requirements of G.L. c. 40A, § 5.

Article 22 - Article 22 amends the Town's general by-laws to add a new by-law, "Stormwater Management and Illicit Discharge Bylaw." The by-law is comprised of two sections: Article I, "Stormwater Management;" and Article II, "Illicit Discharges to Storm Drain System." The objectives of the new by-law include: (1) preventing 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. Article I, Section 1 (B), "Purpose" and Article II, Section 2, "Objectives."

I. Law Applicable to Article 22

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,

² The Town Clerk certified that the Town posted a notice on October 5, 2019 for a planning board hearing to be held on October 7, 2019 and has provided this Office with a copy of a posting entitled "Wareham Planning Board Agenda - Revised." However, this posting does not comply with G.L. c. 40A, § 5, because: (1) it was not posted at least fourteen days before the Planning Board's hearing and (2) it did not include information where the text and map (if applicable) of the proposed zoning amendment could be inspected.

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 and Illicit Discharge by-law is part of Town's efforts to effectively manage stormwater.

II. Comments on Article I - Stormwater Management

A. Section 3 - Administration

1. Section 3 (B) - Rules and Regulations

Section 3 (B) authorizes the Planning Board to adopt or amend "rules and regulations relating to the terms, conditions, definitions, enforcement, fees...procedures, administration, and appeal process" of the Stormwater Management by-law. Any rules or regulations adopted by the Planning Board 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.") We suggest that the Town discuss with Town Counsel any proposed rules and regulations adopted pursuant to Section 3 (B) to ensure that they comply with state law.³

2. Section 3 (G) - Water Resources Mitigation Fund

Section 3 (G) authorizes the Board of Health (BOH), acting as the Stormwater Permitting Authority (SWPA) to allow an applicant to contribute to the Town's Water Resources Mitigation Fund in lieu of providing on-site stormwater measures. Section 3 (G) further provides that the "[f]unds may be used to design and construct stormwater projects that will improve the quality and quantity of surface waters" in the Town and that "[t]he fee for contribution to the fund shall be determined by the Board of Selectmen." While Section 3 (G) does not require any payment from the applicant, but rather contemplates the applicant voluntarily agreeing to provide a payment in lieu of providing on-site stormwater measures, the Town should be mindful of the case law pertaining to mitigation fees.

³ In addition, Article II, Section 7, authorizes the "Department" (including the Board of Health, Wareham Department of Municipal Maintenance (MMD), Wareham Water Pollution Control Facility (WPCF) and Conservation Commission, to promulgate rules and regulations to effectuate the purpose of the Illicit Discharge to Storm Drain System By-law. The Town should consult with Town Counsel regarding any rules or regulations promulgated under Article II, Section 7 to ensure that they comply with state law. *See American Lithuanian Naturalization Club*, 446 Mass. at 321.

In order for a Town to *require* a mitigation fee there must be a demonstrated nexus and a “rough proportionality” between a required mitigation payment and the adverse impact to the community from the applicant’s proposal. Koontz v. St. John’s River Water Management District, 133 S.Ct. 2586 (2013) (monetary exaction as condition of land use permit must have essential nexus and rough proportionality to the impacts of proposed development).

In Koontz, the Supreme Court confirmed that a government’s demand for a mitigation payment from a land-use applicant must satisfy the requirements of Nollan v. California Coastal Comm’n, 483 U.S. 825 (1987), and Dolan v. City of Tigard, 512 U.S. 374 (1994). Under Nollan and Dolan, the government may condition the approval of a permit on the dedication of property to the public so long as there is a demonstrated “nexus” and “rough proportionality” between the property that the government demands and the adverse impact of the applicant’s development proposal. Dolan, 512 U.S. at 391; Nollan, 483 U.S. at 837. Koontz extended the “nexus” and “rough proportionality” requirements to situations where the government requires money - not property - as a condition of approval. Koontz, 133 S.Ct. at 2603. “Under Nollan and Dolan the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interests in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.” Koontz, *supra*, at 2595.

Section 3 (G) allows an applicant to contribute a fee (in an amount to be determined by the Board of Selectmen) in certain situations as set forth in the by-law, in lieu of providing on-site stormwater measures. Thus, the Town is equipped to satisfy the Nollan/Dolan test. *See Nollan*, 483 U.S. at 837 (there must be a demonstrated “essential nexus” between the legitimate state interest and the permit condition exacted by the city) and Dolan, 512 U.S. at 391 (in adopting the “rough proportionality” test, there must be an individualized determination of the costs of the proposed development that requires some sort of individualized determination that the dedication is related both in nature and extent to the impact of the proposed development). However, the Town should discuss any mitigation fund payment agreement with Town Counsel to ensure that the payment amount is lawful.

In addition, if an applicant agrees to provide payments to the Town’s Water Resources Mitigation Fund in lieu of providing on-site stormwater measures, the Town should consult with Town Counsel and the Department of Revenue/Division of Local Services (DOR/DLS) regarding the proper accounting of any mitigation payments. 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.” In the absence of any general or special law to the contrary, mitigation payments of the sort contemplated here would have to be deposited with the Town Treasurer and made part of the town’s general fund. An example of such legislative authority is G.L. c. 44, § 53E 1/2, which authorizes towns to create revolving funds by by-law. Revolving funds may be used for the deposit of “any fees, charges or other receipts from the departmental programs or activities supported by the revolving fund.” However, it is not entirely clear whether “departmental programs or activities” is applicable to mitigation payments made in lieu of providing onsite stormwater measures. The Town must ensure that the creation and application of the Water Resources Mitigation Fund is

consistent with G.L. c. 44, § 53. The Town should consult with Town Counsel and DOR/DLS with any questions on these issues.

III. Comments on Article II - Illicit Discharges to Storm Drain System

A. Section 3 - Definitions

Section 3 defines the term “Person” as follows:

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 the 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 its new by-law cannot impermissibly interfere with the operation of state or federal entities. The Town should discuss any questions regarding the proper application of the by-law with Town Counsel.

B. Section 11 - Monitoring of Discharges

1. *Section 11 (A) - Access to Facilities*

Section 11 (A) authorizes the BOH, Wareham Department of Municipal Maintenance (MMD), Wareham Water Pollution Control Facility (WPCF), Conservation Commission, or “other enforcement agency/delegated enforcement partner” to “enter and inspect facilities subject to regulation under this bylaw as often as may be necessary to determine compliance with this bylaw.” In applying the provisions of Section 11 (A), 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 Section 11 (A) is applied in a manner that is consistent with state law and applicable constitutional requirements.

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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