



THE COMMONWEALTH OF MASSACHUSETTS  
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September 21, 2021

Lucille A. Dalton, Town Clerk  
Town of Southampton  
210 College Highway Suite 2  
Southampton, MA 01073

**Re: Southampton Annual Town Meeting of June 13, 2021 -- Case # 10224  
Warrant Article # 12 (Zoning)  
Warrant Articles # 2, 3, 5, 6, 7, 8, 9, 10 and 12 (General)**

Dear Ms. Dalton:

**Articles 2, 3, 5, 6, 7, 8, 9, 10 and 12** - We approve Articles 2, 3, 5, 6, 7, 8, 9, 10 and 12 from the June 13, 2021 Southampton Annual Town Meeting. Our comments regarding Articles 6 and 12 are provided below.

**Article 6** – Article 6 amends the general by-laws, Article XVII, “Fire Lands and Fire Hydrants” to make specific identified changes. One change adds a new Section 4, that provides:

It shall be unlawful for any person(s) to willfully open or tamper with any fire hydrant to cause damage and/or to allow water to flow on any public or private property in the Town of Southampton unless previously authorized to do so by the Water Department or Fire Chief. Each unauthorized opening/tampering of a hydrant shall constitute a separate offense; penalty shall not exceed \$200 per offense.

In certain circumstances, tampering with a fire hydrant could be a criminal offense under G.L. c. 268, § 32A which provides:

Whoever willfully obstructs, interferes with or hinders a fire fighter in the lawful performance of his duty, or whoever willfully obstructs, interferes with or hinders a fire fighting force in the lawful performance of its duty, shall be punished by a fine of not less than one hundred nor more than one thousand dollars or by imprisonment in a jail or house of correction for not less than thirty days nor more than two and one half years or by imprisonment in the state prison for not more than five years, or by both such fine and imprisonment in a jail or house of correction.

Before imposing any penalties for violations of Article XVII, Section 4, the Town should discuss with Town Counsel the principles of double jeopardy established under federal and state

law, to ensure that enforcement of a by-law violation (a lesser offense), doesn't foreclose prosecution of a potential criminal act, for example, under G.L. c. 268, 32A.

**Article 12** – Article 12 amends both the Town's zoning and general by-laws regarding Stormwater by: (1) deleting from the zoning by-laws Section XIV, "Erosion and Sediment Control for Stormwater Management," in its entirety; and (2) inserting into the general by-laws a new Section XIV, "Stormwater Management & Erosion and Sediment Control" (Stormwater Management By-law").

The purpose and objectives of the new by-law include: (1) protecting, maintaining and enhancing the public health, safety and general welfare by establishing minimum requirements and procedures to control the adverse impacts associated with stormwater runoff; (2) reducing the adverse water quality impacts of stormwater discharges; (3) preventing the discharge of pollutants into stormwater runoff; (4) minimizing damage to public and private property from flooding; and (5) bringing the Town into compliance with requirements of the NPDES general permit for stormwater discharges. Section A, "Purpose and Authority." We offer the following comments to the Town on the new Stormwater Management By-law.

**A. Law Applicable to the New Stormwater Management Bylaw**

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 Bylaw is part of the Town's efforts to effectively manage stormwater.

**B. Comments on the New Stormwater Management Bylaw**

1. Section B – Definitions

Section B defines the term "Person" as follows:

Person is any individual, group of individuals, entity, including an 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 by-law 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 C – Applicability

Section C provides that prior to the issuance of a special permit, site plan approval or other development permit for certain proposed new developments or redevelopments, a stormwater management permit (or waiver of the need for a permit) must be approved by the Southampton Planning Board. This section of the by-law must be applied consistent with G.L. c. 40A, § 9 pertaining to special permits. General Laws Chapter 40A, Section 9 establishes the process for special permits applications and provides in pertinent part as follows:

Each application for a special permit shall be filed by the petitioner with the...town clerk and a copy of said application, including the date and time of filing certified by the...town clerk, shall be filed forthwith by the petitioner with the special permit granting authority. The special permit granting authority shall hold a public hearing, for which notice has been given as provided in section eleven, on any application for a special permit within sixty-five days from the date of filing of such application;...The decision of the special permit granting authority shall be made within ninety days following the date of such public hearing.

The Town should be mindful that notwithstanding the requirements of Section C that a project must obtain a stormwater permit prior to the issuance of a special permit, the filing of a special permit application begins the administrative clock in which the Special Permit Granting Authority must render a decision. Mark Bobrowski, *Handbook of Massachusetts Land Use and Planning Law*, § 10.03 (2003). If the Town fails to hold a public hearing on a special permit application within the time set forth under G.L. c. 40A, § 9, a special permit may be constructively approved. The Town may wish to discuss this issue in more detail with Town Counsel.

## 3. Section E – Administration

The by-law designates the Planning Board as the Stormwater Authority. See Section A (2). Section E (5) authorizes the Planning Board, as the Stormwater Authority, to establish a permit review fee schedule “based on the type and complexity of projects” in order to “cover the costs of permit administration for Stormwater Management Permits.” Any fee established must

be 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 (1984)). The Town should consult with Town Counsel to ensure that any fees established constitute valid fees rather than impermissible taxes.

#### 4. Section F – Enforcement and Penalties

Section F (2)(f), “Notice of Violation” pertains to enforcement of the by-law. Specifically, it allows the Town to charge the property owner and violator for costs incurred by the Town to abate or remediate violations of the by-law. If the costs are not paid by the property owner and/or violator, then the costs “shall become a special assessment against the property owner and shall constitute a lien” on the property.

Betterments or special assessments are special property taxes assessed to recover costs of installing infrastructure or other public improvements that specifically benefit properties in a defined area. See G.L. c. 80 and c. 83. According to the Department of Revenue, Division of Local Services (DOR/DLS), an expense incurred by a Town to abate or remediate violations of a by-law is not a betterment or special assessment and cannot be added to the real estate tax for collection purposes as a betterment or special assessment. Absent express statutory authority, the Town cannot impose a “special assessment” for the costs incurred by the Town for remediating violations of the by-law.

Here, although Section F (2)(f) uses the term “special assessment,” it appears that the by-law contemplates a lien against the owner’s property, rather than adding such costs to a real estate tax bill. As such, the expenses incurred by the Town to abate or remediate violations of the by-law or permit may be considered a charge for purposes of G.L. c. 40, § 58, the municipal charges lien statute. However, in order for the Town to utilize the provisions of G.L. c. 40, § 58, the Town must either amend its by-law to specify that the costs will be a lien for purposes of G.L. c. 40, § 58, or take a separate vote authorizing the use of G.L. c. 40, § 58, for charges the Town may incur abating or remediating by-law violations. Before the Town charges any expenses or costs to the property owner, the Town should discuss these issues with Town Counsel.

#### 5. Section G - Surety

Section G provides that the Stormwater Authority can require the applicant to post a surety before the start of land disturbance or construction activity to “ensure that the work will be completed in accordance with the permit.” 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 G.

**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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cc: Town Counsel Michele Randazzo