



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

CENTRAL MASSACHUSETTS DIVISION
10 MECHANIC STREET, SUITE 301
WORCESTER, MA 01608

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

(508) 792-7600
(508) 795-1991 fax
www.mass.gov/ago

May 23, 2024

Grace Bannasch, Town Clerk
Town of Shutesbury
P.O. Box 264
Shutesbury, MA 01072

**Re: Shutesbury Special Town Meeting of January 16, 2024 -- Case # 11305
Warrant Article # 3 (General)**

Dear Ms. Bannasch:

Article 3 - Under Article 3 the Town amended its general by-laws by voting to repeal its existing Wetlands by-law (first adopted in 1987) and adopt a new by-law entitled, “Shutesbury General Wetlands Protection Bylaw” (Wetlands By-law). We approve Article 3 because it does not conflict with the Constitution or laws of the Commonwealth. See Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986) (requiring inconsistency with state law or the constitution for the Attorney General to disapprove a by-law); see also Lovequist v. Conservation Commission of Town of Dennis, 379 Mass. 7 (1979) (The Wetlands Protection Act “sets forth minimum standards only, leaving local communities free to adopt more stringent controls.”)

The purpose of the new by-law is to “protect the wetlands, water resources, flood prone areas and adjoining upland areas...by controlling activities deemed by the Conservation Commission...likely to have a significant or cumulative effect upon Resource Area Values...” Section 1, “Purpose.” The by-law is adopted under the Town’s Home Rule Authority to “impose in local Regulations and permits additional standards and procedures stricter than those of the WPA [Wetlands Protection Act] and Regulations thereunder (310 CMR 10.00).” Section 1.

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

A. Section 5 – Applications and Fees

Section 5 requires the applicant to file an application with the Conservation Commission to perform activities affecting the Resource Areas protected by the by-law. At the time of the application, the applicant must pay “a filing fee specified in the Regulations of the Commission” and this fee is in addition to any fee required under the WPA. While a municipality may impose fees, 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. Id. (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 charged under Section 5 constitutes a valid fee rather than an impermissible tax.

In addition, Section 5 provides that the Conservation Commission will establish regulations related to the implementation of the Wetlands Bylaw. Any regulations adopted by the Conservation Commission under the by-law 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 regulations adopted pursuant to Section 5 to ensure that they comply with state law.

B. Section 10 – Definitions

Section 10 defines terms used in the by-law including the term “Person” that is defined as follows:

The term “person” shall include any individual, group of individuals, association, partnership, corporation, company, business organization, trust, estate, the Commonwealth or political subdivision thereof to the extent subject to Town by-laws, administrative agency, public or quasi-public corporation or body, the Town of Shutesbury, and any other legal entity, its legal representatives, attorneys, agents, heirs, successors or assigns.

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 Wetlands 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.

C. Section 11 – Security

Section 11 requires, as part of a permit issued under the by-law, that the “performance and observance of the conditions imposed...be secured wholly or in part” by one of several methods, including a bond or other surety. 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 11.

D. Section 12 – Enforcement

1. *Entry onto Private Property*

Section 12 authorizes the Conservation Commission, its agents, officers and employees to “enter upon privately owned land for the purpose of performing their duties...and may make or cause to be made such examinations, surveys or sampling as the Commission deems necessary, subject to the constitution and laws of the United States and the Commonwealth.” In applying Section 12, 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 12 are applied in a manner that is consistent with state law and applicable constitutional requirements.

2. *Informing the Police Chief*

Section 12 of the by-law was amended at Town Meeting to add text to Section 12, Paragraph 5 as follows: “[t]he Conservation Commission shall inform the Police Chief prior to any involvement with outside law enforcement.” It is not clear what the Town intends by this text or the process for informing the Police Chief. In addition, the terms “involvement” and “outside law enforcement” are not defined. Further, it is not clear whether this text refers only to those situations where the Conservation Commission initiates contact with outside law enforcement or whether it refers to any contact, regardless of who initiates the contact. The Town may wish to discuss these issues with Town Counsel to determine if a future by-law amendment is needed to clarify this text.

E. Section 17 – Effective Date

Section 17, “Effective Date,” provides as follows (lines in the original):

This Bylaw shall not apply to those projects and activities for which a Notice of Intent has been filed on or before _____, for which a Final Order of Conditions is ultimately issued by the Commission or the Massachusetts Department of Environmental Protection (MassDEP), and to those projects for which an Order of Conditions is issued approving the project on or before _____. The Bylaw shall apply to all other projects and activities.

The by-law text adopted by Town Meeting includes blank lines in Section 17 rather than dates. The effective date of the new Wetlands By-law is governed by G.L. c. 40, § 32 that requires that a by-law must first be approved by the Attorney General, and then must be posted or published, before it goes into effect, as follows:

Before a by-law or an amendment thereto takes effect it shall also be published in a town bulletin or pamphlet, copies of which shall be posted in at least five public places in the town; and if the town is divided into precincts, copies shall be posted in one or more public places in each precinct of the town; or instead of such publishing in a town bulletin or pamphlet and such posting, copies thereof may be published at least twice at least one week apart in a newspaper of general circulation in the town.

The by-law amendments adopted under Article 3 will not take effect until all the requirements of G.L. c. 40, § 32 have been satisfied. The Town should consult with Town Counsel with any questions regarding the bylaw's effective date as it relates to the provisions of Section 17.

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.

Very truly yours,

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

Nicole B. Caprioli

By: Nicole B. Caprioli
Assistant Attorney General
Municipal Law Unit
10 Mechanic Street, Suite 301
Worcester, MA 01608
(508) 792-7600 ext. 4418

cc: Town Counsel Donna L. MacNicol