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February 20, 2020

Carlene Hamlin, Town Clerk
 Town of South Hadley
 116 Main Street
 South Hadley, MA 01075

**Re: South Hadley Special Town Meeting of November 20, 2019 -- Case # 9699
 Warrant Article # 6 (General)**

Dear Ms. Hamlin:

Article 6 - We approve Article 6 from the November 20, 2019 South Hadley Special Town Meeting. Article 6 amends the Town's general by-laws to add a new Chapter 245, "Earth Removal Incidental to Construction Activities." We offer the following comments for the Town's consideration on the new Chapter 245.

I. Summary of Chapter 245 and Authority for Earth Removal By-laws

The purpose of the new Chapter 245 is to "regulate earth removal incidental to construction activities" in the Town. Section 245-1, "Purpose and Objectives." Section 245-3, "Definitions," defines "earth" and "removal" as follows:

Earth: all material normally and naturally composing part of the earth's surface and immediate subsurface, excluding water, including but not limited to, soil, clay, gravel, hard pan, loam, rock, peat and sand.

Removal: the severance of any Earth from its natural location, whether or not such Earth is moved from the lot to another location on the same lot or off the lot, by any means, including but not limited to, stripping, excavating, mining or blasting.

Section 245-6 prohibits earth removal in the Town without a permit, and provides as follows:

- A. No person, firm, corporation, or other entity shall excavate and/or remove any Earth from any lot in the Town of South Hadley, unless such activity is authorized by an Earth Removal Permit issued by the Board.
- B. Earth removal is prohibited unless it is: 1) necessary and incidental to a lawful end use for which all local and state permits required by law have been issued, or 2) exempt pursuant to Article 5 of this by-law. ^[1]

The new by-law provides that it is adopted under the authority granted by G.L. c. 40, § 21, clause 17. Section 245-2, "Authority." Both the Home Rule Amendment and state law provide authority for towns to adopt local by-laws regulating earth removal. Specifically, G.L. c. 40, § 21 (17), authorizes towns to adopt by-laws "prohibiting or regulating the removal of soil, loam, sand or gravel from land not in public use in the whole or in specified districts of the town." Prior to the adoption of Section 21 (17), towns were limited to regulating earth removal through zoning by-laws. Byrne v. Middleborough, 364 Mass 331, 333-34 (1973). Section 21 (17), was adopted in order to allow towns to regulate the removal of soil, loam, sand, or gravel through non-zoning measures. Butler v. East Bridgewater, 330 Mass 33, 36 (1953). "The broad purpose of the statute is to give municipalities the freedom to devise local solutions to the deleterious effects brought about by unrestrained earth removal." Beard v. Salisbury, 378 Mass. 435, 439 (1979) *citing* Burlington v. Dunn, 318 Mass. 216, 221 (1945). It is now clear that towns have the express statutory power to regulate earth removal through general by-laws, zoning by-laws, or both. *See* Byrne, 364 Mass at 331.²

Because the by-law amendments adopted under Article 6 are not in conflict with the state Constitution or laws, we approve Article 6.

II. Comments on Specific Provisions of the New Chapter 245

1. Section 245-7 - Conditional Exemptions

The by-law's objectives include "to permit reasonable removal of earth for agriculture..." and "to limit earth removal from any agricultural...development to a reasonable and essential amount which is incidental to the primary principal end use." Section 245-1 (A)(1) and (2). Moreover, Section 245-3 defines the term "agricultural excavation," as "[t]he process of removing earth or other materials that are necessary and incidental to prepare a site for specific agricultural use." However, Section 245-7 does not include an exemption for agricultural activities. Thus, it appears that earth removal for agricultural purposes is subject to an earth removal permit pursuant to Section 245-9.

¹ The citation to "Article 5 of this by-law" is unclear because there is no Article 5. Section 245-5 of the by-law pertains to "Grandfathering" and Section 245-7 pertains to "Conditional Exemptions." The Town may wish to clarify the reference to Article 5 at a future Town Meeting.

² The Home Rule Amendment, Art. 89, § 6, of the Amendments to the Massachusetts Constitution, provides additional authority for towns to regulate earth removal because the Amendment gives municipalities the power to take any action that is not "inconsistent" with State laws or the Constitution. Board of Appeals of Hanover, 363 Mass at 360. Thus, independent of G.L. c. 40, § 21 (17), and c. 40A, towns can adopt earth removal by-laws if they are not inconsistent with state law.

To the extent agricultural earth removal requires an earth removal permit, the Town must apply the by-law consistent with the protections given to agricultural uses under the constitution and laws of the Commonwealth. In certain circumstances, the earth removal may be related to a protected agricultural use. For example, earth removal activities may qualify as normal and customary maintenance and improvement of agricultural land. The removal of earth materials (or the importation of earth materials) may be necessary for a number of agricultural purposes, e.g., construction of dams, creation of farm ponds, leveling of land for growing areas, or preparing land for farm structures. The Town must apply the new Chapter 245 in a manner consistent with the protections accorded to agricultural uses under state law. 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. 111, § 125; and c. 131, § 40.

The Town must apply Chapter 245 consistent with the protections accorded to agriculture under state law. The Town may wish to discuss the application of the by-law's permit requirement to agricultural earth removal activities with Town Counsel to ensure it is applied consistent with the protections given to agriculture under the constitution and laws of the Commonwealth.

2. Section 245-12 - Surety

Section 245-12 requires the applicant to provide a bond or other security to cover "the estimated cost of reclamation." 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 245-12.

3. Section 245-14 - Revocation

Section 245-14 provides that the Planning Board, as the earth removal permit granting authority, may revoke a permit as follows (with emphasis added):

The Board may revoke any Earth Removal Permit which it has issued for good cause, provided that it shall in writing offer to the permit holder an opportunity for a hearing within seven days after the revocation.

To avoid any due process challenge, the Town may wish to amend the by-law at a future Town Meeting to establish a notice and hearing process prior to revocation, as well as identify any standards and criteria that will guide the Board's decision. The Town should consult with Town Counsel with any questions on these issues.

III. Additional Comments

The Town must ensure that the new Chapter 245 is applied consistent with the state's environmental laws that govern hazardous waste, hazardous waste facilities, solid waste and solid waste facilities. *See* G.L. c. 21C, 21D, 21E and c. 111, §§ 150A and 150A 1/2, and 310 CMR §§ 30.00 and 40.00. Further the Town must ensure that the new Chapter 245 does not interfere with the broad regulatory authority of the Massachusetts Department of Environmental Protection (DEP). For example, the DEP has authority over earth removal or the importation of soils as part of an environmental cleanup (including the remediation of contaminated sites under G.L. c. 21E) or as part of the operation or closing of a solid waste facility or hazardous waste facilities. In approving Article 6, we incorporate by reference our comments on these environmental laws in our decision to the Town of Middleborough, issued November 19, 2018 in Case # 8945.³ The Town should consult with the Town Counsel with any questions on these issues.

³ A copy of this decision can be found on the Attorney General's Municipal Law Unit website at: www.mass.gov/ago/munilaw

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,

MAURA HEALEY
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cc: Town Counsel Lisa Mead

