



THE COMMONWEALTH OF MASSACHUSETTS  
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January 19, 2021

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

**Re: Southampton Special Town Meeting of October 17, 2020 -- Case # 9940  
Warrant Article # 8 (General)**

Dear Ms. Dalton:

**Article 8** - We approve Article 8 from the October 17, 2020 Southampton Special Town Meeting. Article 8 amends the Town's general by-laws, Article XXIX, "Conservation Commission Fees," to add a new Section 6, "Wetlands Protection By-law." We offer the following comments for the Town's consideration on the new by-law.

1. Section 5.1 – Commission Quorum

Section 5.1 provides that: "[m]ore than half of the members of the Commission in office must be present to conduct business and to hold a public meeting." (emphasis added). It is unclear what the Town means by "members of the Commission in office." In applying Section 5.1, the Town must be mindful that the quorum is calculated based upon the total number of members that constitute the Conservation Commission ("Commission"), regardless of how many of such members are "in office" at the time of the public meeting. The general rule is that in the absence of a statutory restriction, a majority of a council or board is a quorum, and a majority of the quorum can act. Merrill v. Lowell, 236 Mass. 463, 467 (1920); *see also* Clark v. City Council of Waltham, 328 Mass. 40, 41 (1951). The majority is calculated from the total membership regardless of whether a member is present at a particular meeting. *See* Gamache v. Town of Acushnet, 14 Mass. App. Ct. 215, 219 (1982) (the resignation of one member from a five-member board does not convert the board to a "not more than four" member board.) The Town should consult with Town Counsel regarding any questions about the proper application of Section 5.1 and the specific quorum requirements for the Conservation Commission.

2. Section 10 – Regulations

Section 10 authorizes the Commission to promulgate rules and regulations to effectuate the purposes of the by-laws. Any rules or regulations adopted by the Commission 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 10 to ensure that they comply with state law.

3. Section 12 – Enforcement Order

a. *Entry onto Private Land*

Section 12 authorizes the Commission “to enter upon privately owned land for the purpose of performing their duties under this Bylaw.” In applying this portion of 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 Section 12 is applied in a manner that is consistent with state law and applicable constitutional requirements.

b. *Use of G.L. c. 40, § 21D*

Section 12 authorizes several enforcement mechanisms, including the use of non-criminal disposition pursuant to G.L. c. 40, § 21D, as follows:

The Commission shall have the authority to enforce this Bylaw and Permits issued thereunder by violation notices, non-criminal citations under M.G.L. Chapter 40, Section 21D, administrative orders, and civil and criminal court actions. Any person who violates provisions of this By-law may be ordered to restore the property to its original condition and/or take other action deemed reasonable and necessary to remedy such violations, or may be fined, or both.

Although Section 12 authorizes the use of non-criminal disposition (G.L. c. 40, § 21D), the by-law itself does not provide for a specific penalty if the non-criminal disposition process is utilized. Instead, the by-law provides that “the violator shall be punished by a fine per offense (see Southampton Conservation Commission Fee Schedule for the fine amount).” General Laws Chapter 40, Section 21D, has several specific requirements, including the requirement that the violation be subject to a specific penalty. *See* G.L. c. 40, § 21D (“Any...town may by...by-law not inconsistent with this section provide for non-criminal disposition of violations of any...by-law or any rule or regulation of any municipal officer, board or department the violation of which is subject to a specific penalty.) Before the Town uses the non-criminal disposition

method to enforce any violation of the new Wetlands Protection By-law, the Town should consult with Town Counsel to determine if the by-law should be amended to include a specific fine amount in the by-law.

*c. Reimbursement to Town of Expenses*

Section 12 also provides as follows:

In addition to any fine, the Town shall be entitled to reimbursement for all expenses, including legal fees, incurred in prosecuting said violation, either civilly or criminally.

The by-law does not define the term “incurred in prosecuting said violation” or specify the nature or parameters of the expenses for which the Town seeks reimbursement. While the Town may be entitled to recover certain charges and expenses incurred by the Town in abating or in remediating violations of the by-law (*see e.g.*, G.L. c. 40, § 58), *the by-law* cannot provide a blanket authorization that the Town is entitled to reimbursement of “all expenses, including legal fees,” incurred in the civil or criminal prosecution of a by-law violation. Instead, the determination of whether the Town is entitled to reimbursement of expenses and legal fees incurred in prosecuting a violation of the by-law is a matter for a court of competent jurisdiction to decide upon the initiation of an appropriate court proceeding by the Town; but such determination cannot be *required* by by-law. In light of this, the Town should consult with Town Counsel regarding whether this text should be deleted from the by-law or further clarified at a future Town Meeting. In addition, the Town should consult with Town Counsel with any questions regarding the proper application of this portion of Section 12.

4. Section 13 – Security

Section 13 requires the applicant to post a bond or other surety to secure the performance and observance of the conditions imposed under the by-law. 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 13.

**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 E. Randazzo