



THE COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL

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March 24, 2023

Laura J. Caruso, Town Clerk
Town of Sutton
4 Uxbridge Road
Sutton, MA 01590

**Re: Sutton Annual Town Meeting of October 17, 2022 -- Case # 10738
Warrant Article # 13 (General)**

Dear Ms. Caruso:

Article 13 – Under Article 13 the Town deleted its existing “Earth Removal” by-law and inserted a new By-law # 5, “Earth Disturbance & Removal.”¹ The purpose of the by-law is to provide a process for commercial and non-commercial earth removal regardless of whether the earth is taken off the subject property. See By-law # 5, “Purpose.” We approve the by-law because it does not present a clear conflict with state law or the constitution. 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). Our comments regarding Article 13 are provided below for the Town’s consideration.

1. Sections 5.3 and 5.5 - Filing Fee

Class 1 earth removal (as defined in Section 5.1) requires a “Full Permit” from the Planning Board (“Board”), including a “fee in an amount established by the Board.” Section 5.5. Class 2 earth removal (as defined in Section 5.1) requires an “Abbreviated Permit” from the Board, including submission of an application and a fee. Section 5.3. We approve Section 5.3 and 5.5’s fee provisions. However, in applying these Sections, the Town should be mindful that 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

¹ On January 4, 2023, by agreement with Town Counsel under G.L. c. 40, § 32, we extended the deadline for our review of Article 13 for 45 days until March 2, 2023. On, February 22, 2023, by agreement with Town Counsel, we extended the deadline for our review for an additional 45 days until April 16, 2023.

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 charged are valid fees rather than impermissible taxes.

2. Section 5.6 – Granting or Denying Abbreviated or Full Permits

Section 5.6 (b) (2) imposes conditions on a Class 1 earth removal permit including certain fencing and sloping requirements. This Section must be applied in a manner consistent with the requirements of G.L. c. 82A, “Excavation and Trench Safety,” and its implementing regulations at 520 CMR. §§ 14.00 *et. seq.* General Laws Chapter 82A and 520 CMR. §§ 14.00 require all excavators to obtain a permit prior to the creation of a trench made for a construction-related purpose on public land, including municipal property, private land, and rights-of-way under G.L. c. 82A. In addition to the permit, the trench safety regulations require that excavators take precautions to protect the general public and prevent unauthorized access to unattended trenches. The Town must apply Section 5.6 consistent with the requirements for trenches under G.L. c. 82A and 520 CMR. §§ 14.00. The Town should consult with Town Counsel with any questions on this issue.

3. Section 5.7 – Operating Standards

Section 5.7 (d) requires anyone with a Full Permit or an Abbreviated Permit to comply with the conditions stated in the Permit, including:

(d) If blasting is anticipated, the Board has a right to evaluations specific to potential effects of the blasting, and to require notifications, safeguards, and/or mitigation responsive to the specifics of the proposed operations.

We approve Section 5.7 (d) because G.L. c. 148, § 9 authorizes towns to enact by-laws regulating blasting operations, or the use, handling, transportation and storage of explosives and inflammable materials. However, the statute requires that such by-laws must be submitted to the Massachusetts Board of Fire Prevention Regulations (BFPR) within ten days after passage for the Board’s approval.² The Town should discuss with Town Counsel compliance with G.L. c. 148, § 9 before it enforces Section 5.7 (d)’s provisions relating to blasting.

4. Section 5.8 – Surety

Section 5.8 requires an applicant, prior to commencing earth removal operations, to post with the Town Treasurer a surety sufficient to guarantee compliance with the terms and conditions of the permit and to ensure compliance with the by-law and restoration of the site. 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

² The BFPR can be reached at:

The Executive Director of the BFPR
Department of Fire Services
P.O. Box 1025, 1 State Road
Stow, MA 01775

other provisions that are applicable to such receipt. General Law c. 44, Section 53G ½ allows surety deposits to be deposited 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 5.8.

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 Thomas W. McEnaney