

**From:** [Jonathan D. Eichman](#)  
**To:** [Jennifer Hager](#)  
**Subject:** RE: Earth removal bylaw question  
**Date:** Thursday, August 18, 2022 6:05:04 PM

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Jen, do you have a specific blasting permit in mind that I could take a look at? The Town can't override or countermand a State permit.

In general, pursuant to G.L. c.148, s.9 (below), the State Board of Fire Prevention "make[s] rules and regulations for the keeping storage, use, manufacture, sale, handling, transportation or other disposition" of dynamite and other explosives. The State Board has adopted the National Fire Protection Association Fire Code, 2015 edition, as the regulations governing activities subject to the statute, including blasting. See 527 CMR 1.04, as modified by 527 CMR 1.05. Under these regulations, permits required for blasting activities are issued by a municipality's Fire Chief.

Section 9. The board shall make rules and regulations for the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of gunpowder, dynamite, crude petroleum or any of its products, or explosive or inflammable fluids or compounds, tablets, torpedoes or any explosives of a like nature, or any other explosives, fireworks, firecrackers, or any substance having such properties that it may spontaneously, or acting under the influence of any contiguous substance, or of any chemical or physical agency, ignite, or inflame or generate inflammable or explosive vapors or gases to a dangerous extent, and may prescribe the location, materials and construction of buildings to be used for any of the said purposes. Such rules and regulations shall require persons keeping, storing, using, selling, manufacturing, handling or transporting dynamite or other high explosives to make reports to the department in such particulars and in such detail that the quantity and location thereof will always be a matter of authentic record in the department. Cities and towns may also make and enforce ordinances and by-laws, not inconsistent with said rules and regulations, relative to the subject matter of this section. Each city or town shall submit a copy of each such ordinance or by-law to the board within ten days after the passage thereof. Any ordinance or by-law regulating blasting operations, or the use, handling, transportation or storage of dynamite or gunpowder, shall not take effect until such ordinance or by-law is approved by the board, except that any such ordinance or by-law that has not been approved or disapproved by the board within ninety days after the receipt thereof shall be deemed to have been approved.

From this and caselaw, I think it is correct to say that pursuant to G.L. c.148, s.9, the Town may not adopt blasting regulations (and impose permit conditions) that conflict with or are more stringent than the State's. I think that would apply as well to State permit limitations on blast force based on seismic measurements. However, the statute does leave room for local regulations "*not inconsistent with [State] rules and regulations*, relative to the subject matter of this section." (emphasis supplied). The statute requires such municipal regulations to be approved by the State Board prior to becoming effective, subject to constructive approval 90 days after submittal to the State Board. What scope of regulation is allowed to the Town is not clear, but ultimately you won't have to guess, given the approval process provided in the statute.

Further, the statute and State regulations do not appear to concern *where* or *when* blasting may take place other than as it impacts public safety. For instance, there may be a reasonable basis for local regulation prohibiting blasting based on water resource

protection or similar concerns that does not conflict with the primary area of concern of the State regulation, which the courts have identified as “safety”. There is caselaw to the effect that the Town may regulate some aspects of blasting through an earth removal permit. In Tebo v. Board of Appeals of Shrewsbury, 22 Mass.App.Ct. 618 (1986), the Zoning Board permissibly imposed conditions on an earth removal special permit issued for work including blasting. (In this case, earth removal bylaw was regulated under the Zoning Bylaw, as opposed to the General Bylaws). The conditions addressed matters including “site plan approval, duration of the removal operations, limitation of removal to phases not exceeding ten acres at a time, buffer strips, the pitch of excavated slopes, final grading and restoration.” Conditions imposed on earth removal included:

- “(1) limitation of the area in which initial removal would take place;
- (2) limiting the slope at the perimeter of the excavation;
- (3) construction of a retention area for water runoff;
- (4) enclosure of the removal area with a six-foot high metal “non-climbable” fence;
- (5) limitation of access to the site to one entrance at which a gate was to be installed;
- (6) limitation of blasting to one blast per week and one detonation per day of blasting;
- (7) the taking of seismograph readings at specified locations in conjunction with each blast;
- (8) specification of time during which blasting and drilling may be conducted;
- (9) and establishing final grades and criteria for restoration following completion of quarry activity in a particular area.”

I recommend review of the State regulations relative to blasting in considering earth removal regulation that may conflict. Where conflict is possible, I recommend seeking approval of the regulation as provided for by the statute. I can review specific questions as needed.

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**From:** Jennifer Hager <j.hager@town.sutton.ma.us>

**Sent:** Wednesday, August 17, 2022 9:43 AM  
**To:** Jonathan D. Eichman <JEichman@k-plaw.com>  
**Subject:** Earth removal bylaw question

Hi Jon! If the State grants a blasting permit can the towns bylaws allow the Board to override this permit and vice versa? Additionally, if the state imposes a limit on an operation like a blast can't produce more than a seismic measurement of 2, can the Town reduce that ? These are questions I know we'll be asked/have been asked already about potential bylaw changes . . . Thanks! Jen

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