

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

CENTRAL MASSACHUSETTS DIVISION
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July 27, 2023

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

Re: Sutton Annual Town Meeting of May 8, 2023 – Case # 10922
Warrant Articles # 17, 18, and 19 (Zoning)

Dear Ms. Caruso:

Articles 17, 18, and 19 - We approve Articles 17, 18, and 19 from the Sutton May 8, 2023 Annual Town Meeting. Our comments regarding Articles 17 and 18 are provided below.

Article 17 - Under Article 17 the Town voted to amend the Town's zoning by-laws by deleting Section V.A, "Flood Plain District," in its entirety and inserting a new Section V.A, "Flood Plain District." The new Section V.A adopted under Article 17 is part of a federal requirement for communities that choose to participate in the National Flood Insurance Program (NFIP).

The new Section 17 appears to follow the "Massachusetts 2020 Model Floodplain Bylaw" provided by the Massachusetts Department of Conservation and Recreation Flood Hazard Management Program. (DCR Flood Hazard Management Program) See <https://www.mass.gov/guides/floodplain-management#-2020-massachusetts-mo>. The DCR Flood Hazard Management Program is the state coordinating office for the NFIP and, according to their website, they have provided the Model Floodplain Bylaw to Massachusetts communities "to assure that their local bylaws...contain the necessary and proper language for compliance with the" NFIP.¹ For this reason, we approve Article 17. The Town should consult with Town Counsel and the DCR Flood Hazard Management Program with any questions regarding the application of the new Section V.A.

¹ <https://www.mass.gov/doc/2020-model-floodplain-bylaw-slide-deck-with-notes/download>

Posted: TOWN OF SUTTON
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Article 18 - Under Article 18 the Town voted to amend Section IV.A.2.B of the Town's Sign Bylaw regarding exceptions from the Sign Bylaw's provisions for Town, State and non-profit signs as follows (deleted text in strikethrough and new text in underline):

3. No permit shall be required for any sign erected by the Town or by the Commonwealth of Massachusetts or any agency thereof, or non-profit agency, provided that ~~Although~~, placement, size and type must be reviewed by the Building Commissioner, and be in compliance with the General Guidelines for signs in Section 3. The Planning Board may grant a special permit allowing deviation from the General Guidelines for such signs upon a finding that such deviation serves a governmental or non-profit purpose and does not substantially derogate from the intent or purpose of this bylaw.

We approve the changes to the exemptions for Town, State and non-profit signs as voted under Article 18 as shown above. 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 provisions of Section IV.A.2.B (3) exempting State signs cannot impermissibly interfere with the operation of the state or any state agency. The Town should discuss the proper application of this provision with Town Counsel.

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,

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

Kelli E. Gunagan

By: Kelli E. Gunagan
Assistant Attorney General
Municipal Law Unit
10 Mechanic Street, Suite 301
Worcester, MA 01608
(508) 792-7600

cc: Town Counsel Thomas W. McEnaney

ARTICLE 17

Planning Board

Voted unanimously vote to amend Zoning Bylaw Section V. A. – Flood Plain District, by deleting it in its entirety and replacing it, as printed in the warrant.

As printed in the warrant:

A. Flood Plain District

1. Purpose

The purpose of the Floodplain Overlay District is to:

- 1) Ensure public safety through reducing the threats to life and personal injury
- 2) Eliminate new hazards to emergency response officials
- 3) Prevent the occurrence of public emergencies resulting from water quality, contamination, and pollution due to flooding
- 4) Avoid the loss of utility services which if damaged by flooding would disrupt or shut down the utility network and impact regions of the community beyond the site of flooding
- 5) Eliminate costs associated with the response and cleanup of flooding conditions
- 6) Reduce damage to public and private property resulting from flooding waters

2. Definitions

National Flood Insurance Program (NFIP) definitions are found in Title 44 of the Code of Federal Regulations, section 59.1. The definitions below refer to their source; if the definition is from the MA building code, it is from the 9th Edition, which meets the minimum standards of the NFIP.

DEVELOPMENT means any man-made change to improved or unimproved real estate, including but not limited to building or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations or storage of equipment or materials. [US Code of Federal Regulations, Title 44, Part 59]

FLOODWAY. The channel of the river, creek or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than a designated height. [Base Code, Chapter 2, Section 202]

FUNCTIONALLY DEPENDENT USE means a use which cannot perform its intended purpose unless it is located or carried out in close proximity to water. The term includes only docking facilities, port facilities that are necessary for the loading and unloading of cargo or passengers, and ship building and ship repair facilities, but does not include long-term storage or related manufacturing facilities. [US Code of Federal Regulations, Title 44, Part 59] Also [Referenced Standard ASCE 24-14]

HIGHEST ADJACENT GRADE means the highest natural elevation of the ground surface prior to construction next to the proposed walls of a structure. [US Code of Federal Regulations, Title 44, Part 59]

HISTORIC STRUCTURE means any structure that is:

- (a) Listed individually in the National Register of Historic Places (a listing maintained by the Department of Interior) or preliminarily determined by the Secretary of the Interior as meeting the requirements for individual listing on the National Register;
- (b) Certified or preliminarily determined by the Secretary of the Interior as contributing to the historical significance of a registered historic district or a district preliminarily determined by the Secretary to qualify as a registered historic district;
- (c) Individually listed on a state inventory of historic places in states with historic preservation programs which have been approved by the Secretary of the Interior; or
- (d) Individually listed on a local inventory of historic places in communities with historic preservation programs that have been certified either:
 - (1) By an approved state program as determined by the Secretary of the Interior or
 - (2) Directly by the Secretary of the Interior in states without approved programs.

[US Code of Federal Regulations, Title 44, Part 59]

NEW CONSTRUCTION. Structures for which the start of construction commenced on or after the effective date of the first floodplain management code, regulation, ordinance, or standard adopted by the authority having jurisdiction, including any subsequent improvements to such structures. *New construction includes work determined to be substantial improvement.* [Referenced Standard ASCE 24-14]

RECREATIONAL VEHICLE means a vehicle which is:

- (a) Built on a single chassis;
- (b) 400 square feet or less when measured at the largest horizontal projection;
- (c) Designed to be self-propelled or permanently towable by a light duty truck; and
- (d) Designed primarily not for use as a permanent dwelling but as temporary living quarters for recreational, camping, travel, or seasonal use.

[US Code of Federal Regulations, Title 44, Part 59]

REGULATORY FLOODWAY - see FLOODWAY.

SPECIAL FLOOD HAZARD AREA. The land area subject to flood hazards and shown on a Flood Insurance Rate Map or other flood hazard map as Zone A, AE, A1-30, A99, AR, AO, or AH. [Base Code, Chapter 2, Section 202]

START OF CONSTRUCTION. The date of issuance for new construction and substantial improvements to existing structures, provided the actual start of construction, repair, reconstruction, rehabilitation, addition, placement or other improvement is within 180 days after the date of issuance. The actual start of construction means the first placement of permanent construction of a building (including a manufactured home) on a site, such as the pouring of a slab or footings, installation of pilings or construction of columns. Permanent construction does not include land preparation (such as clearing, excavation, grading or

filling), the installation of streets or walkways, excavation for a basement, footings, piers or foundations, the erection of temporary forms or the installation of accessory buildings such as garages or sheds not occupied as dwelling units or not part of the main building. For a substantial improvement, the actual "start of construction" means the first alteration of any wall, ceiling, floor or other structural part of a building, whether or not that alteration affects the external dimensions of the building. [Base Code, Chapter 2, Section 202]

STRUCTURE means, for floodplain management purposes, a walled and roofed building, including a gas or liquid storage tank, that is principally above ground, as well as a manufactured home. [US Code of Federal Regulations, Title 44, Part 59]

SUBSTANTIAL REPAIR OF A FOUNDATION. When work to repair or replace a foundation results in the repair or replacement of a portion of the foundation with a perimeter along the base of the foundation that equals or exceeds 50% of the perimeter of the base of the foundation measured in linear feet, or repair or replacement of 50% of the piles, columns or piers of a pile, column or pier supported foundation, the building official shall determine it to be substantial repair of a foundation. Applications determined by the building official to constitute substantial repair of a foundation shall require all existing portions of the entire building or structure to meet the requirements of 780 CMR. [As amended by MA in 9th Edition BC]

VARIANCE means a grant of relief by a community from the terms of a flood plain management regulation. [US Code of Federal Regulations, Title 44, Part 59]

VIOLATION means the failure of a structure or other development to be fully compliant with the community's flood plain management regulations. A structure or other development without the elevation certificate, other certifications, or other evidence of compliance required in §60.3 is presumed to be in violation until such time as that documentation is provided. [US Code of Federal Regulations, Title 44, Part 59]

ZONE A means an area of special flood hazard without water surface elevations determined

ZONE A1-30 and ZONE AE means area of special flood hazard with water surface elevations determined

ZONE AH means areas of special flood hazards having shallow water depths and/or unpredictable flow paths between (1) and (3) feet, and with water surface elevations determined

ZONE AO means area of special flood hazards having shallow water depths and/or unpredictable flow paths between (1) and (3) ft. (*Velocity flow may be evident; such flooding is characterized by ponding or sheet flow.*)

ZONE A99 means area of special flood hazard where enough progress has been made on a protective system, such as dikes, dams, and levees, to consider it complete for insurance rating purposes. (Flood elevations may not be determined.)

ZONES B, C, AND X means areas of minimal or moderate flood hazards or areas of future-conditions flood hazard. (*Zone X replaces Zones B and C on new and revised maps.*)

3. Use of FEMA maps and supporting studies

The Floodplain District is herein established as an overlay district. The District includes all special flood hazard areas within Sutton designated as Zone A, AE, AH, AO, or A99 on the Worcester County Flood Insurance Rate Map (FIRM) with an effective date of June 21, 2023 issued by the Federal Emergency Management Agency (FEMA) for the administration of the National Flood Insurance Program. The exact boundaries of the District shall be defined by the 1%-chance base flood elevations shown on the FIRM and further defined by the Worcester County Flood Insurance Study (FIS) report with an effective date of June 21, 2023. The FIRM and FIS report are incorporated herein by reference and are on file with the Town Clerk, Planning Department, Building Department, and Conservation Commission.

4. Designation of community Floodplain Administrator

The Town hereby designates the position of Planning Director to be the official floodplain administrator.

Duties of an FPA include but are not limited to:

- a) Understanding the regulations for development in the floodplain overlay district
- b) Ensuring that permits are applied for when development of any kind is proposed in the floodplain overlay district
- c) Involvement with the permit process and/or permit application review for development in the floodplain overlay district
- d) Coordinating with other local departments such as public works, stormwater/engineering, planning & zoning, conservation commission, or housing
- e) Notifying adjacent communities prior to alteration of a watercourse
- f) Dealing with compliance issues and enforcement actions such as correcting violations, or working with the appropriate local staff to correct violations
- g) Maintaining records of floodplain development, and keeping FEMA current and historic maps available for public inspection

5. Permits are required for all proposed development in the Floodplain Overlay District

A Special Permit from the Planning Board is required for all proposed construction or other development in the floodplain overlay district, including new construction or changes to existing buildings, placement of manufactured homes, placement of agricultural facilities, fences, sheds, storage facilities or drilling, mining, paving and any other development that might increase flooding or adversely impact flood risks to other properties.

6. Assure that all necessary permits are obtained

The town's permit review process includes the requirement that the proponent obtain all local, state and federal permits that will be necessary in order to carry out the proposed development in the floodplain overlay district. The proponent must acquire all necessary permits, and must demonstrate that all necessary permits have been acquired.

7. Floodway encroachment

In Zones A, A1-30, and AE, along watercourses that have not had a regulatory floodway designated, the best available Federal, State, local, or other floodway data shall be used to prohibit encroachments in floodways which would result in any increase in flood levels within the community during the occurrence of the base flood discharge.

In Zones A1-30 and AE, along watercourses that have a regulatory floodway designated on the Town's FIRM encroachments are prohibited, including fill, new construction, substantial improvements, and other development within the adopted regulatory floodway unless it has been demonstrated through hydrologic and hydraulic analyses performed in accordance with standard engineering practice that the proposed encroachment would not result in any increase in flood levels within the community during the occurrence of the base flood discharge.

8. Unnumbered A Zones

In A Zones, in the absence of FEMA BFE data and floodway data, the building department will obtain, review and reasonably utilize base flood elevation and floodway data available from a Federal, State, or other source as criteria for requiring new construction, substantial improvements, or other development in Zone A and as the basis for elevating residential structures to or above base flood level, for flood proofing or elevating nonresidential structures to or above base flood level, and for prohibiting encroachments in floodways.

9. AO and AH zones drainage requirements

Within Zones AO and AH on the FIRM, adequate drainage paths must be provided around structures on slopes, to guide floodwaters around and away from proposed structures.

10. Development proposals

All development proposals, including subdivisions in the floodplain overlay district shall be reviewed to assure that:

- (a) Such proposals minimize flood damage.
- (b) Public utilities and facilities are located & constructed so as to minimize flood damage.
- (c) Adequate drainage is provided.

11. Base flood elevation data for subdivision proposals

When proposing subdivisions or other developments greater than 50 lots or 5 acres (whichever is less), the proponent must provide technical data to determine base flood elevations for each developable parcel shown on the design plans.

12. Recreational vehicles

In A1-30, AH, AE Zones, all recreational vehicles to be placed on a site must be elevated and anchored in accordance with the zone's regulations for foundation and elevation requirements or be on the site for less than 180 consecutive days or be fully licensed and highway ready.

13. Watercourse alterations or relocations in riverine areas

In a riverine situation, the Floodplain Administrator shall notify the following of any alteration or relocation of a watercourse:

- Adjacent Communities, especially upstream and downstream
 - Bordering States, if affected
 - NFIP State Coordinator
- Massachusetts Department of Conservation and Recreation

- NFIP Program Specialist
Federal Emergency Management Agency, Region I

14. Requirement to submit new technical data

If the Town acquires data that changes the base flood elevation in the FEMA mapped Special Flood Hazard Areas, the Town will, within 6 months, notify FEMA of these changes by submitting the technical or scientific data that supports the change(s.) Notification shall be submitted to:

- NFIP State Coordinator
Massachusetts Department of Conservation and Recreation
- NFIP Program Specialist
Federal Emergency Management Agency, Region

15. Variances to building code floodplain standards

The Town will request from the State Building Code Appeals Board a written and/or audible copy of the portion of the hearing related to the variance, and will maintain this record in the community's files.

The Town shall also issue a letter to the property owner regarding potential impacts to the annual premiums for the flood insurance policy covering that property, in writing over the signature of a community official that (a) the issuance of a variance to construct a structure below the base flood level will result in increased premium rates for flood insurance up to amounts as high as \$25 for \$100 of insurance coverage and (b) such construction below the base flood level increases risks to life and property.

Such notification shall be maintained with the record of all variance actions for the referenced development in the floodplain overlay district.

16. Variances to local Zoning Bylaws related to community compliance with the National Flood Insurance Program (NFIP)

A variance from these floodplain bylaws must meet the requirements set out by State law, and may only be granted in accordance with the following:

1. Variances shall not be issued by a community within any designated regulatory floodway if any increase in flood levels during the base flood discharge would result;
2. Variances shall only be issued by a community upon (a) a showing of good and sufficient cause, (b) a determination that failure to grant the variance would result in exceptional non-financial hardship to the applicant, and (c) a determination that the granting of a variance will not result in increased flood heights, additional threats to public safety, extraordinary public expense, create nuisances, cause fraud on or victimization of the public, or conflict with existing local laws or ordinances;
3. Variances shall only be issued upon a determination that the variance is the minimum necessary, considering the flood hazard, to afford relief;
4. A community shall notify the applicant in writing over the signature of a community official that (a) the issuance of a variance to construct a structure below the base flood level will result in increased premium rates for flood insurance up to amounts as high as \$25 for \$100 of insurance coverage and (b) such construction below the base flood level increases risks to life and property. Such notification shall be maintained with a record of all variance actions as required in paragraph 5. of this section; and

5. A community shall (a) maintain a record of all variance actions, including justification for their issuance, and (b) report such variances issued in its annual or biennial report submitted to the Federal Insurance Administrator.

17. Abrogation and greater restriction section

The floodplain management regulations found in this Floodplain Overlay District section shall take precedence over any less restrictive conflicting local laws, ordinances or codes.

18. Disclaimer of liability

The degree of flood protection required by this bylaw is considered reasonable but does not imply total flood protection.


19. Severability section

If any section, provision or portion of this bylaw is deemed to be unconstitutional or invalid by a court, the remainder of the ordinance shall be effective.

The Finance and Warrant Advisory Committee voted 5-0 to recommend passage of this article, the Committee concurs with the Planning Board. These changes are necessary to make the Town by-laws consistent with State and Federal laws.

*Planning Board voted to recommend that Town Meeting vote to approve this article, 5-0-0.
Commentary: Local bylaws must be consistent with State/Federal standards when updated Flood Maps become effective in June or any residents with National Flood Insurance Program (NFIP) coverage (13 properties) will lose their coverage and the Town will lose access to certain types of disaster assistance funding. The model is largely consistent with current bylaws with the addition of a Flood Plain Administrator (FPA), missing definitions, and standards for variances from the local bylaw.*

A True Copy Attest:



Laura J Caruso
Town Clerk

ARTICLE 18

Planning Board

Voted by a 2/3rds vote to amend the Zoning Bylaw Section IV. A. – Common Regulations – Signs, by deleting the text shown in strike-through and adding the underlined text, as printed in the warrant.

As printed in the warrant:

b. Exceptions

3. No permit shall be required for any sign erected by the Town or by the Commonwealth of Massachusetts or any agency thereof, or non-profit agency, provided, that ~~Although,~~ placement, size and type must be reviewed by the Building Commissioner, and be in compliance with the General Guidelines for signs in Section 3. The Planning Board may grant a special permit allowing deviation from the General Guidelines for such signs upon a finding that such deviation serves a governmental or non-profit purpose and does not substantially derogate from the intent or purpose of this bylaw.

A True Copy Attest:



Laura J Caruso
Town Clerk

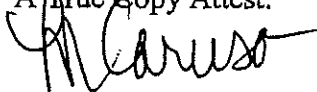
Town Meeting Action May 8, 2023 Article 19 Town of Sutton

ARTICLE 19

James Marran

Voted by a 2/3rds vote to amend the Zoning Bylaw III B.3. Table 3 – Table of Height and Bulk Regulations by deleting the OLI Max bldg. height (ft.) of 35/70** and replacing it with 35/55**.

A True Copy Attest:

A handwritten signature in black ink, appearing to read "L. Caruso", written over the printed name.

Laura J Caruso
Town Clerk