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August 20, 2013

Margaret Barile, Town Clerk
Town of Nahant
334 Nahant Road
Nahant, MA 01908

**RE: Nahant Annual Town Meeting of April 27, 2013 - Case # 6731
Warrant Article # 30 (General)**

Dear Ms. Barile:

Article 30 - We approve the amendments to the Town's by-laws adopted under Article 30 at the April 27, 2013 Nahant Annual Town Meeting, except as noted below (See **Disapproval # 1 of 1** on pages 3-4).

The amendments adopted under Article 30 add a new Article XIII, Non-Criminal Disposition of Violations, to the Town's Police Regulations By-law. The new Article XIII is comprised of three sub-Articles, as follows: Article I, General Provisions; Article II, Noncriminal Disposition of Violations and Article III, Offenses Generally.

1. Article I, "General Provisions".

Article I (1) (G) defines "Rules and Regulations" as:

[T]he duly promulgated standards, regulations or requirements, adopted in accordance with this chapter, of any municipal officer, board, commission or department of the Town of Nahant.

The Town, including its officers, boards, commissions and departments, has no power to adopt rules and regulations which are inconsistent with state law. "A town may not promulgate a regulation that is inconsistent with State law." American Lithuanian Naturalization Club v. Board of Health of Athol, 446 Mass. 310, 321 (2006). We suggest that the Town discuss with Town Counsel any proposed standard, regulations or requirements to ensure they comply with state law.

2. Article II, “Noncriminal Disposition of Violations”.

a. *Article II (3), Payment of a Fine*

Article II (3), pertaining to the payment of a fine, provides, with emphasis added:

Any person notified to appear before the Clerk of the Lynn Division District Court Department as provided in this article, may so appear and confess the offense charged, either personally or through a duly authorized agent or by mailing to the Town clerk with the notice described in this article, with the specific sum of money not exceeding the penalty set forth in Article II, section 6 of this revision, for each offense *or as the Town, any municipal officer, board, commission or department shall fix as penalty for violation of the ordinance or rule or regulation.* Such payment shall, if mailed, be made only by postal note, money order or check. The payment to the Town clerk of such sum shall operate as a final disposition of the case....

Pursuant to G.L. c. 40, § 21D, “[a]ny town may by ordinance or by-law not inconsistent with this section provide for non-criminal disposition of violations of any ordinance or by-lawthe violation of which is subject to a specific penalty.” The statute describes certain requirements for the content of such by-laws, including the requirement that the by-law identify the specific penalty (not exceeding three hundred dollars) for violation of the by-law. G.L. c. 40, § 21D, ¶ 5.

The phrase in Article II (3) (“*or as the Town, any municipal officer, board, commission or department shall fix as penalty for violation of the ordinance or rule or regulation*”) does not comply with the statutory requirement of a specific penalty. Before the Town uses G.L. c. 40, § 21D to enforce the by-law, it should amend the by-law to insert a specific dollar amount (e.g. \$300). The Town should consult with Town Counsel on this issue.

b. *Article II (6), Late Fees and Additional Penalties*

Article II (6) (B) and (C), pertaining to late fees and additional penalties for failure to timely pay a penalty, provide:

B. Any person or entity who both fails to provide payment to the Town clerk as provided by Section 4 and fails to make written request for a hearing within twenty-one days to the Town clerk and the clerk magistrate of the Lynn District Court shall be assessed a late fee of fifty dollars. Written notice of this late fee shall be forwarded to such person or entity by regular mail by either the Town clerk or the enforcing officer. The original penalty plus the late fee shall be due and payable to the Town clerk within thirty days of the date of the written notice.

C. If the original penalty and the late fee are not paid in full within thirty days from the written notice described in Subsection B above, then the amount due to the city shall be three hundred dollars.

Although 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 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 may wish to consult with Town Counsel to ensure that the fees charged under the by-law constitute valid fees rather than impermissible taxes.

c. *Article II (6), Lien*

Article II (6) (D) provides:

In the event that the initial violation resulting in a penalty under this Section is a violation of the State Sanitary Code or the Health Code set forth in the ordinances of the Town of Nahant, then the balance due to the Town from any penalties, fines or late fees imposed under this Section shall constitute a lien on the property of the person or entity owing such charges in accordance with Chapter 497 of the Acts of 1991.

Chapter 497 of the Acts of 1991 is an act entitled “An Act Authorizing the Placing of Certain Liens of Properties in the City of Revere.” The Town may wish to amend this text at a future Town Meeting to refer to G.L. c. 40, § 58 which authorizes a town to impose a lien on real property for a local charge or fee that has not been paid by the due date. We suggest the Town consult with Town Counsel on this issue.

3. Article III, “Offenses Generally”.

a. *Article III (5), State Fire Code and State Building Code Violations*

Article III (5), State Fire Code and State Building Code violations, provides:

5. State Fire Code and State Building Code violations.

The provisions of the State Fire Code and State Building Code are incorporated and adopted by reference in this health code. Therefore, any person or entity who violates a provision of the State Fire Code or State Building Code shall be in violation of this health code and subject to the penalties set forth in SECTION II, section 6.

We disapprove and delete the text in underline and bold above because it is inconsistent with G.L. c. 40, § 21, as well as pre-empted by the Massachusetts State Building Code.

(Disapproval # 1 of 1). General Laws Chapter 40, Section 21D, allows municipalities to use non-criminal disposition as a method to enforce town by-laws, rules, and regulations, but not State laws or regulations as follows (with emphasis added):

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.

The Town may only use the enforcement mechanism of G.L. c. 40, §21D, for violations of local enactments (by-laws, rules, or regulations), not state law such as the State Building Code.

In addition, the text must be disapproved and deleted because it is inconsistent with the State Building Code. The State Building Code preempts the field of building construction, and towns are precluded from enacting by-laws and regulations that deal with subjects covered or reserved to the State Building Code. St. George Greek Orthodox Cathedral of Western Massachusetts, Inc. v. Fire Dept. Of Springfield, 462 Mass. 120, 128 (2012) (State Building Code preempts local regulation on topics covered by the Code). Enforcement of the State Building Code is proscribed by G.L. c. 143, § 94 (a) (i) and 780 C.M.R. § 118.4.

b. *Article III (10), Trailers*

Article III (10), Trailers, provides:

No trailer shall be used for human habitation in the Town, whether for temporary or permanent use, and whether or not placed on a foundation.

This section of the by-law must be applied in a manner consistent with G.L. c. 40A, § 3 which provides:

No zoning...by-law shall prohibit the owner and occupier of a residence which has been destroyed by fire or other natural holocaust from placing a manufactured home on the site of such residence and residing in such home for a period not to exceed twelve months while the residence is being rebuilt. Any such manufactured home shall be subject to the provisions of the state sanitary code.

The Town should consult with Town counsel to ensure that this section of the by-law is applied in accordance with the protections afforded by G.L. c. 40A, § 3.

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 Charles Riley