



THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

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July 12, 2016

Doreen Tremblay, Town Clerk  
Town of Bedford  
10 Mudge Way  
Bedford, MA 01730

**Re: Bedford Annual Town Meeting of March 28, 2016 - Case # 7890  
Warrant Articles # 9, 10, 11, 12, 13, and 14 (Zoning)  
Warrant Articles # 6 and 7 (General)**

Dear Ms. Tremblay:

**Articles 6, 7, 9, 10, 11, 12, 13, and 14** - We approve Articles 6, 7, 9, 10, 11, 12, 13, and 14, and the map pertaining to Articles 10 and 13, from the March 28, 2016, Annual Town Meeting. Our comments on Article 7 are provided below.

**Article 7** - Article 7 deletes Article 54, "Wetlands Protection Bylaw" from the Town's general by-laws and inserts a new Article 54, "Wetlands Protection Bylaw." The new by-law's purpose is to:

"maintain the quality of surface water and the quality and level of the groundwater table and water recharge areas for existing or potential water supplies; protect the public health and safety; protect the community against unwanted costs that may be incurred when development occurs in or adjacent to wetland resource areas; and provide for the reasonable protection and conservation of certain irreplaceable natural resources, features and amenities for the benefit of the present and future inhabitants of the Town of Bedford."

*See* Section 54.2 "Purpose."

Our comments on the new Article 54 are provided below.

A. Section 54.12 "Security".

Section 54.12 of the by-law authorizes the Conservation Commission to require a form of security, including a performance bond, as part of an order of conditions. The security shall be used by the Town to complete work required under an order of condition issued as part of the wetlands permit. Any security proceeds received and used by the Town must be applied in a

manner consistent with state law. Security proceeds do not become Town funds unless and until the applicant defaults on the obligations imposed under the by-law and the permit. Moreover, if the Town must use the bond to pay for work required under a wetlands permit, an appropriation is required before expenditure is made to do the work. General Laws Chapter 44, Section 53, provides that “[a]ll moneys received by a city, town or district officer or department, except as otherwise provided by special acts and except fees provided for by statute, shall be paid by such officers or department upon their receipt into the city, town or district treasury.” Under Section 53 all moneys received by the Town become a part of the general fund, unless the Legislature has expressly made other provisions that are applicable to such receipt. In the absence of any general or special law to the contrary, performance security funds of the sort contemplated here must be deposited with the Town Treasurer and made part of the Town’s general fund, pursuant to G.L. c. 44, § 53. The Town must then appropriate the money for the specific purpose of completing work required under a wetlands permit.

#### B. Section 54.13 Regulations.

Section 54.13 authorizes the Conservation Commission to adopt rules and regulations to administer the Wetlands Protection By-law. Local boards and committees cannot adopt rules or regulations that are inconsistent with state law. *See, 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 rules or regulations adopted pursuant to the by-law to ensure that they comply with state law.

#### D. Section 54.14 Enforcement.

Section 54.14 (b) authorizes the Conservation Commission, its agents, officers, and employees, to enter onto the property in order to perform their duties under the by-law. Although Section 54.14 includes the qualifier, “subject to . . . the United States Constitution and Massachusetts Constitution and laws of the United States and the Commonwealth . . .”, “the Fourth Amendment requires warrants for non-emergency administrative inspections.” *Commonwealth v. Cote*, 15 Mass. App. Ct. 229, 233 (1983). 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 non-emergency 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). *See also Commonwealth v. John G. Grant & Sons Co.*, 403 Mass. 151 (1988) (holding that G.L. c. 131, § 40, does not authorize conservation commission members to conduct warrantless searches on private land). We suggest the Town consult with Town Counsel to ensure that Section 54.14 is applied in a manner that is consistent with state law and applicable constitutional requirements.

**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 that 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 voted by Town Meeting, unless a later effective date is prescribed in the by-law.**

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cc: Town Counsel Brandon H. Moss