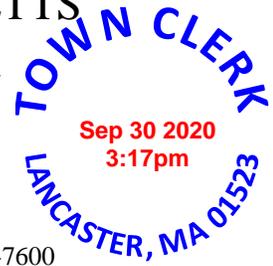


THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

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September 30, 2020

Dianne M. Reardon, Town Clerk
Town of Lancaster
701 Main Street, Suite 2
Lancaster, MA 01523

**Re: Lancaster Annual Town Meeting of June 22, 2020 -- Case # 9842
Warrant Articles # 12 and 13 (General)**

Dear Ms. Reardon:

Articles 12 and 13 - We approve Articles 12¹ and 13 from the June 22, 2020 Lancaster Annual Town Meeting. Our comments regarding Article 13 are provided below.

Article 13 - Article 13 amends the general by-laws to add a new Chapter 157, “Scenic Roads.” The new by-law establishes regulations pertaining to “any repair, maintenance, reconstruction, or paving work done” within a right-of-way on a designated scenic road. Section 157-1 (A), “Purpose.” The new by-law identifies the roads, streets and ways that have been previously designated as scenic roads at prior Town Meetings.² Section 157-4, “Designated Scenic Roads.”

1. Section 157-1 (D) – Rules and Regulations

Section 157-1 (D) authorizes the Planning Board, after notice and a public hearing, to “enact rules to accomplish the purposes of this bylaw.” Any rules or regulations adopted by the Planning Board must be consistent with state law. *See American Lithuanian Naturalization Club v. Board of Health of Athol*, 446 Mass. 310, 321 (2006) (“A town may not promulgate a

¹ In addition to amending the general by-laws to add a new Chapter 17, “Affordable Housing Trust Fund,” pertaining to the Town’s affordable housing trust and its Board of Trustees, the vote under Article 12 also (1) accepts the provisions of G.L. c. 44, § 55C; and (2) establishes a trust to be known as the Lancaster Affordable Housing Trust Fund. We take no action on those portions of the vote under Article 12 to accept the provisions of G.L. c. 44, § 55C and to establish the Trust. Those votes are not by-law amendments and are not subject to review and approval by the Attorney General. *See* G.L. c. 40, § 32. The Town should consult with Town Counsel regarding whether these votes should be filed with the Secretary of State and the Department of Revenue, Division of Local Services.

² Section 157-4 sets forth the scenic roads that were previously designated at the May 1, 1989 Annual Town Meeting under Article 29 and at the May 5, 1987 Annual Town Meeting under Article 58.

regulation that is inconsistent with State law.”) We suggest that the Town discuss with Town Counsel any proposed rules and regulations adopted pursuant to Section 157-1 (D) to ensure that they comply with state law.

2. Section 157-3 – Designation of Scenic Roads

Section 157-3 (E), “Town Meeting Approval,” provides as follows, with emphasis added:

For each road, a majority vote at the Town Meeting is required for Scenic Road designation. Designations shall be effective as of the date of Town Meeting Action. Any work on any portion of the right-of-way of a scenic road, which was not physically commenced at the time the road was designated, shall conform to these regulations.

Section 157-3 (E) requires a majority vote at Town Meeting to designate a road as a Scenic Road. It is unclear whether a vote to designate a scenic road at Town Meeting will be in the form of amending Section 157-4, “Designated Scenic Roads,” to add the new scenic road to the by-law, or if Town Meeting will vote to designate a scenic road independent of amending the by-law. To the extent that Town Meeting votes to amend Section 157-4 to designate an additional road as a scenic road, the by-law amendment does not take effect until the posting/publishing requirements of G.L. c. 40, § 32 are satisfied. Specifically, G.L. c. 40, § 32, provides in pertinent part:

Before a by-law or an amendment thereto takes effect it shall also be published in a town bulletin or pamphlet, copies of which shall be posted in at least five public places in the town; and if the town is divided into precincts, copies shall be posted in one or more public places in each precinct of the town; or instead of such publishing in a town bulletin or pamphlet and such posting, copies thereof may be published at least twice at least one week apart in a newspaper of general circulation in the town...The requirements of publishing in a town bulletin or pamphlet and posting, or publishing in one or more newspapers, as above, may be dispensed with if notice of the by-laws is given by delivering a copy thereof at every occupied dwelling or apartment in the town, and affidavits of the persons delivering the said copies, filed with the town clerk, shall be conclusive evidence of proper notice hereunder.

Thus, a scenic road designated by amending Section 157-4 of the by-law will not take effect until all of the requirements of G.L. c. 40, § 32, have been satisfied. The Town should consult with Town Counsel with any questions on this issue.

3. Section 157-4 – Designated Scenic Roads

Section 157-4 provides: “[t]he following Town of Lancaster roads, streets and ways have been designated as Scenic Roads...” and then identifies 31 scenic roads that were previously approved at Town Meetings in 1987 and 1989. Included in this list of scenic roads are:

- Route 70 (from the southerly boundary of Lancaster, through Lancaster, to the northerly boundary of Lancaster)

- Seven Bridge Road and a portion of Man Street designated as Route 117 (from the easterly boundary of Lancaster to the westerly boundary of Lancaster.

Section 157-4 further provides that sections of Seven Bridge Road (Route 117) and Main Street (Route 70) were designated scenic roads at the Annual Town Meeting of May 1, 1989 under Article 29.

General Laws Chapter 40, Section 15C provides in relevant part as follows, with emphasis added:

Upon recommendation or request of the planning board, conservation commission or historical commission of any city or town, such city or town may designate any road in said city or town, other than a numbered route or state highway as a scenic road; provided, however, that a numbered route may be designated by a city or town as a scenic road if its entire length is contained within the boundaries of said city or town, and no part of said route is owned or maintained by the commonwealth.

In order for a Town to designate a numbered route or a state highway as a scenic road, the entire length of the numbered route must be “contained within the boundaries of” Lancaster and further, must not be “owned or maintained by the Commonwealth.” It is unclear whether the designation of Route 117 or Route 70 meet these requirements. The Town should consult with Town Counsel on this issue to ensure that the designation of “Route 70 (from the southerly boundary of Lancaster, through Lancaster, to the northerly boundary of Lancaster)” and “Seven Bridge Road and a portion of Main Street designated as Route 117 (from the easterly boundary of Lancaster to the westerly boundary of Lancaster)” meet the requirements of G.L. c. 40, § 15C and are appropriately designated as scenic roads.

4. Section 157-7 – Applications and Fees

a. *Section 157-7 (B) – Filing Fee*

Section 157-7 (B) requires an applicant to “pay a filing fee as specified on the Scenic Road Consent Application” at the time of making such application. Any fee established must be consistent with state law. A municipality may impose fees, but 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 any fees established constitute valid fees rather than impermissible taxes.

b. *Section 157-7 (C) – Applications by a Government Agency*

Section 157-7 (C) provides that the “Planning Board may waive the filing fee and costs and expenses for an application filed by a government agency, Town departments, a not-for profit conservation organization, or a non-governmental organization working with the interest of the Town” (emphasis added). We approve Section 157-7 (C). However, the Town does not define the term “government agency.” To the extent Section 157-7 (C) seeks to regulate state or federal entities, we note that the Town’s authority to do so 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 Town’s enforcement of its new by-law cannot impermissibly interfere with the operation of state or federal entities. The Town should discuss any questions regarding the proper application of the by-law with Town Counsel.

5. Section 157-8 – Procedures

Section 157-8 (D) authorizes a joint hearing to be held between the Planning Board and the Tree Warden. Section 157-8 (B)(1), “Notification,” appears to provide for notice of the hearing to be given by the Planning Board, with a copy of the notice given to the Tree Warden. The Town must ensure that notice of a joint meeting between the Planning Board and the Tree Warden complies with the notice requirements of G.L. c. 40, § 15 and c. 87, § 3. Specifically, these statutes both require that notice of a joint hearing be given by the Tree Warden (not the Planning Board). General Laws Chapter 87, Section 3, provides as follows with emphasis added:

...when a public hearing must be held under the provisions of this section and under section fifteen C of chapter forty prior to the cutting or removal of a tree, such hearings shall be consolidated into a single public hearing before the tree warden and the planning board...and notice of such consolidated public hearing shall be given by the tree warden or his deputy as provided herein.

And G.L. c. 40, §15C provides as follows, with emphasis added:

...when a public hearing must be held under the provisions of this section and under section three of chapter eighty-seven prior to the cutting or removal of a tree, such hearings shall be consolidated into a single public hearing before the tree warden and the planning board...and notice of such consolidated public hearing shall be given by the tree warden or his deputy as provided in said section three of chapter eighty-seven.

The Town should consult with Town Counsel about the proper notification process when a joint hearing is held between the Planning Board and the Tree Warden.

6. Section 157-10 – Enforcement; Violations and penalties

Section 157-10 (B) provides: “[w]ith regard to public shade trees, Violators may be fined up to \$500 per violation per MGL Chapter 87, Section 6.” General Laws Chapter 87, Section 6 provides: “[v]iolations of any provision of the three preceding sections shall be punished by forfeiture of not more than five hundred dollars to the use of the...town.”

General Laws Chapter 87, Section 6, provides for penalties in excess of \$300 for violations of G.L. c. 87, §§ 3-5. However, the imposition of a fine “up to \$500” is available only to enforce a violation of G.L. c 87, and not as a penalty for violation of the Scenic Roads by-law. General Laws Chapter 40, Section 21, provides that Towns may “affix penalties for breaches [of by-laws] not exceeding three hundred dollars for each offense.” Towns are limited to imposing fines of up to \$300 for *by-law* violations. We approve Section 157-10 (B) to the extent that it restates the provisions of G.L. c 87, § 6. However, the Town should consult with Town Counsel to ensure the proper application of Section 157-10 (C).

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 Mark R. Reich