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July 1, 2019

Laurence R. Pizer, Town Clerk  
Town of Plymouth  
26 Court Street  
Plymouth, MA 02360

**Re: Plymouth Special Town Meeting of April 6, 2019 -- Case # 9362  
Warrant Articles # 12 and 16 (General)**

Dear Mr. Pizer:

**Articles 12 and 16** - We approve Articles 12 and 16 from the April 6, 2019 Plymouth Special Town Meeting. Our comments regarding Article 16 are provided below.

**Article 16** - Article 16 amends the Town's general by-laws to add a new Chapter 159, "Stormwater Pollution Abatement." The purposes of the new Chapter 159 include: (1) preventing pollutants from entering the Town's municipal separate storm sewer system (MS4); (2) prohibiting illicit connections and unauthorized discharges to the MS4 and watercourses; and (3) complying with state and federal statutes and regulations relating to stormwater discharges. Section 159-1, "Purpose."

### **I. Law Applicable to Article 16**

Both the federal government and the Commonwealth of Massachusetts have enacted certain regulations relative to stormwater management by municipalities. For instance, the federal Environmental Protection Agency has enacted requirements pertaining to operators of municipal separate storm sewers. *See* 40 C.F.R. § 122.34. The Massachusetts Department of Environmental Protection (the Department) has promulgated regulations at 310 C.M.R. § 10.05 (6) (k)-(q) ("Stormwater Management Standards"), pursuant to G.L. c. 131, § 40. Furthermore, the Department has promulgated stormwater regulations at 314 C.M.R. §§ 3.04 and 5.04, pursuant to G.L. c. 21, §§ 26-53 (the Massachusetts Clean Waters Act). Any local regulation of stormwater management must be supplementary to and consistent with the regulation of such matters by the federal government and the Commonwealth of Massachusetts. Operators of municipal separate storm sewers are required to develop and implement a stormwater management plan that meets certain minimum measures. *See* 40 C.F.R. § 122.34.

The federal regulations suggest that municipalities adopt local laws or regulations as part of an effective stormwater management plan. *See, e.g.*, 40 C.F.R. § 122.34 (b) (3) (ii) (B); 40 C.F.R. § 122.34 (b) (4) (ii) (A); 40 C.F.R. § 122.34 (b) (5) (ii) (B). It appears Chapter 159 is part of Town's efforts to effectively manage stormwater.

## **II. Comments on Chapter 159 - Stormwater Pollution Abatement**

### **1. Section 159-2 - Definitions**

Section 159-2 defines the term “Person” as:

An individual, partnership, association, firm, company, trust, corporation, agency, authority, department or political subdivision of the commonwealth or the federal government, to the extent permitted by law, and any officer, employee, or agent of such person.

We approve this definition of “Person.” However, the Town’s authority to regulate state and federal 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). Similarly, municipalities may not regulate federal governmental entities in a manner that impedes with their purpose. *Cf. First Nat'l Bank v. Missouri*, 263 U.S. 640, 656 (1926) (state laws may not regulate federal entities if “such laws interfere with the purposes of their creation [or] tend to impair or destroy their efficiency as federal agencies”); Palfrey v. City of Boston, 101 Mass. 329 (1869) (federal internal revenue stamps not subject to state or local property tax). The Town’s enforcement of Chapter 159 cannot impermissibly interfere with the operation of state or federal entities. The Town should discuss any questions regarding the proper application of this definition with Town Counsel.

### **2. Section 159-7 - Enforcement**

Section 159-7 (B) (3) pertains to enforcement of the by-law. Specifically, it allows the Town to charge the property owner for costs incurred by the Town to abate or remediate violations of the by-law. If the costs are not paid by the property owner, then the costs shall become a “special assessment” and “constitute a lien” on the owner’s property.

Betterments or special assessments are special property taxes assessed to recover costs of installing infrastructure or other public improvements that specifically benefit properties in a defined area. *See G.L. c. 80 and c. 83*. According to the Department of Revenue, Division of Local Services (DOR/DLS), an expense incurred by a Town to abate or remediate violations of a by-law is not a betterment or special assessment and cannot be added to the real estate tax for collection purposes as a betterment or special assessment. Absent express statutory authority, the Town cannot impose a “special assessment” for the costs incurred by the Town for remediating violations of the by-law.

Here, although Section 159-7 (B)(3) uses the term “special assessment,” it appears that the by-law contemplates a lien against the owner’s property, rather than adding such costs to a real estate tax bill. As such, the expenses incurred by the Town to abate or remediate violations of the by-law or permit may be considered a charge for purposes of G.L. c. 40, § 58, the municipal charges lien statute. However, in order for the Town to utilize the provisions of G.L. c. 40, § 58, the Town must either amend its by-law to specify that the costs will be liens for purposes of G.L. c. 40, § 58, or take a separate vote authorizing the use of G.L. c. 40, § 58, for charges the Town may incur abating or remediating by-law violations. Before it imposes a “lien” against a property owner, the Town should discuss any questions on this issue 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,

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cc: Town Counsel Mark Reich