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March 9, 2021

Pearl M. Sears, Town Clerk
Town Plymouth
26 Court Street
Plymouth, MA 02360

**Re: Plymouth Annual Town Meeting of August 10, 2020 -- Case # 9903
Warrant Article # 20 (General)**

Dear Ms. Sears:

Article 20 - Under Article 20 the Town authorized the Select Board to review and approve demolition activities pertaining to certain large scale industrial buildings, including power generating facilities, in order to address possible negative effects on Town ways, abutting properties and the environment. As provided in more detail below, we approve Article 20 because we find no conflict with state law, but the Town must carefully apply the by-law to avoid interfering with the Town Building Inspector's authority under the State Building Code; and to avoid interfering with state and federal oversight of the Pilgrim nuclear power station decommissioning and site restoration.¹

In this decision, we summarize the by-law and the Attorney General's standard of review of town by-laws; and then explain why, based on our standard of review, we approve the by-law.

¹ Based on the Attorney General's limited standard of review of town by-laws pursuant to G.L. c. 40, § 32, we cannot determine whether the proposed by-law is pre-empted by certain federal laws, including the authority given to the Nuclear Regulatory Commission (NRC) to license and regulate nuclear power plants. The Town should consult with Town Counsel on this issue.

We emphasize that our approval in no way implies any agreement or disagreement with the policy views that led to the passage of the by-law. The Attorney General's limited standard of review requires her to approve or disapprove by-laws based solely on their consistency with state law, not on any policy views she may have on the subject matter or wisdom of the by-law. Amherst v. Attorney General, 398 Mass. 793, 795-96, 798-99 (1986).

I. Summary of the By-Law

Article 20 proposes to amend the Town's general by-laws by adding a new Chapter 121, "Industrial Building Demolition Permit," that requires the Town's Select Board to review and approve demolition activities associated with large scale industrial buildings with a total building footprint greater than 180,000 square feet.² The by-law's stated purpose is to establish a process for the Town to impose conditions on the demolition of industrial buildings in order to avoid "objectionable negative effects," including heavy equipment noise, vibration, dust, and traffic on Town ways, abutting properties, the environment, or the Town in general. Section 121-1, "Purpose."

The by-law defines Industrial Buildings as "buildings, outbuildings, and accessory structures on a site and used for Heavy Industry, Manufacturing, Warehousing or as a Power Generating Facility."³ Section 121-2, "Applicability." As part of the review process an applicant must provide on-site and off-site information to the Select Board, including information on: (1) site restoration; (2) measures proposed to minimize noise, vibration, and dust; (3) the number and types of vehicles that will be travelling on Town ways, and (4) plans showing heavy truck routes.

The by-law authorizes the Select Board to impose reasonable conditions on the demolition activities, including limiting truck traffic. It also authorizes the Select Board to "deny a Permit" if the demolition activities would create "unsafe off-site conditions" or "would be detrimental or a nuisance . . . by reason of traffic, noise, dust, vibration, or other objectionable conditions." Section 121-5, "Denial of a Demolition Permit."

Section 121-6 imposes specific requirements on demolition activities, including required access for the Building Commissioner to ensure compliance with the by-law's requirements. Section 121-6 also limits the use of heavy vehicles to twenty round trips per day and limits the

² The by-law also requires the Select Board to review associated roadways, parking lots, and other amenities located on the building's site. Section 121-2 "Applicability."

³ The by-law does not define "Power Generating Facility." However, the certified vote submitted to our Office included a comment section that states the purpose of the by-law is to give the Town limited oversight on the on-site activities and use of Town ways to transport demolition materials from the Pilgrim Nuclear Power Station and other large scale industrial buildings. The comments also state that the intent of the by-law "is not to prevent or impede demolition processes but to ensure that conditions are in place to minimize the negative effects of a large scale demolition project."

hours of truck and equipment operation and activities to Monday through Friday from 7:00 a.m. to 4:00 p.m. Finally, Section 121-6 requires that the Select Board receive “[c]opies of demolition permits issued [by] Plymouth’s Inspectional Services” “[p]rior to any demolition work.”

II. Attorney General’s Standard of Review of General By-laws

Pursuant to G.L. c. 40, § 32, the Attorney General has a “limited power of disapproval,” and “[i]t is fundamental that every presumption is to be made in favor of the validity of municipal by-laws.” Amherst, 398 Mass. at 795-96. The Attorney General does not review the policy arguments for or against the enactment. Id. at 798-99 (“Neither we nor the Attorney General may comment on the wisdom of the town’s by-law.”). Rather, in order to disapprove a by-law (or any portion thereof), the Attorney General must cite an inconsistency between the by-law and the Constitution or laws of the Commonwealth. Id. at 796. “As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid.” Bloom v. Worcester, 363 Mass. 136, 154 (1973) (emphasis added). “The legislative intent to preclude local action must be clear.” Id. at 155.

III. State and Town Authority to Regulate Demolition Activities

There are several statutes and regulations that govern the demolition of buildings and the requirement and issuance of a demolition permit, including G.L. c. 143, and the Massachusetts State Building Code, 780 C.M.R. § 100.00 *et seq* (“State Building Code”). The State Building Code requires a permit for the demolition of building and structures⁴ and provides in pertinent part as follows:

104.2 Applications and Permits. The building official shall receive applications, review construction documents and issue permits for the erection, and alteration, demolition and moving of buildings and structures, inspect the premises for which such permits have been issued and enforce compliance with the provisions of 780 CMR.

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105.1 Required. It shall be unlawful to construct, reconstruct, alter, repair, remove or demolish a building or structure; or to change the use or occupancy of a building or structure; or to install or alter any equipment for which provision is made or the installation

⁴ General Laws Chapter 143, Section 1 defines “Building” as “a combination of any materials, whether portable or fixed, having a roof, to form a structure for the shelter of persons, animals or property” and defines “Structure” as “a combination of materials assembled at a fixed location to give support or shelter, such as a building, framework, retaining wall, tent, reviewing stand, platform, bin, fence, sign, flagpole, recreational tramway, mast for radio antenna or the like.” See also 780 C.M.R. § 202.00.

of which is regulated by 780 CMR without first filing an application with the building official and obtaining the required permit.

These sections of the Building Code require a permit from the Town's Building Inspector, as the local official charged with enforcing the provisions of the State Building Code, for the demolition of buildings and structures. See G.L. c. 143, § 3 ("The building commissioner or inspector of buildings shall be the administrative chief in a city or town responsible for administering and enforcing the state building code."). In addition, G.L. c. 143, §§ 6-10, establishes a process that the Building Inspector must follow to demolish or make safe a dangerous or abandoned building. General Laws Chapter 143's statutory provisions and the State Building Code clearly grant the Town's Building Inspector authority over the issuance of a demolition permit for buildings and structures.

In addition, municipalities have broad home rule and statutory authority to regulate demolition activities. For example, courts have upheld local by-laws that impose temporary delays on the demolition of historical structures on the ground that the by-laws are reasonable, necessary, and not in conflict with the State Building Code. City of Cambridge v. Celucci, No. 87-1522 (Middlesex Super. Ct. Mar. 21, 1988) (city ordinance imposing a six-month delay on the issuance of a demolition permit for historically significant buildings posed no conflict with the State Building Code.)⁵ Moreover, municipalities have authority to adopt by-laws and other regulations that impose "anti-nuisance" requirements related to noise, odor, dust, and traffic. Greater Lawrence Sanitary District v. Town of North Andover, 439 Mass. 16, 22 (2003) (upholding town's authority to regulate dust control, blasting, odor, noise, and traffic conditions so long as regulations do not interfere with District's ability to fulfill its legislatively mandated function). Thus, municipalities retain the power to regulate demolition activities so long as their exercise of that power does not conflict with the Building Inspector's authority over demolition permits governed by the State Building Code and G.L. c. 143. See City of Cambridge v. Celucci, No. 87-1522 (Middlesex Super. Ct. Mar. 21, 1988).

In light of the Town's broad home rule power and the state statutory and regulatory provisions detailed herein, we conclude that the by-law's authorization to the Select Board to review and approve demolition activities pertaining to large scale industrial buildings, including power generating facilities, is not in conflict with state law. However, as explained herein, the Town must carefully apply the by-law to avoid interference with the state and federal oversight of the decommissioning and site restoration of the Pilgrim nuclear power station, or with the Building Inspector's authority under the State Building Codes.

⁵ The Attorney General has also approved various by-laws imposing temporary delays on the demolition of historic buildings and structures. See, e.g. decisions issued to the Town of Lenox on November 7, 2019 (Case # 9690); the Town of Acton issued July 18, 2019; and the Town of Hopkinton issued June 24, 2019.

IV. Comments on Specific Provisions in the By-law

A. The Select Board's Authority to Condition or Deny a Permit for Demolition Activities Must be Applied Consistent with the State Laws Applicable to Demolition Permits.

Although we approve the by-law, we caution the Town that the Select Board may not exercise its authority in a way that interferes with the Building Inspector's authority under the State Building Code.

Chapter 121 authorizes the Select Board to impose conditions on an unidentified "permit" for demolition activities, including limiting truck traffic to specific routes and limiting truck traffic during sensitive times. Chapter 121 also authorizes the Select Board to deny the "permit" if the demolition activities would create "unsafe off-site conditions" or "would be detrimental or a nuisance . . . by reason of traffic, noise, dust, vibration, or other objectionable conditions." Section 121-5, "Denial of a Demolition Permit." In addition, Section 121-6, requires "copies of demolition permits, issued [by] Plymouth's Inspectional Services" department to be submitted to the Select Board prior to the start of any demolition work.⁶ Chapter 121 does not define "Demolition Permit." The reference to a demolition permit issued by the Town's Inspectional Services department appears to acknowledge the Building Inspector's authority over demolition permits. Because the by-law does not define what "permit" the Select board is authorized to condition or deny, it is unclear how this permit relates to the demolition permit issued by the Building Inspector under the State Building Code. The Town should consult closely with Town Counsel on this issue before it applies the by-law to any demolition activities to avoid interference with the Building Inspector's authority over demolition permits or state and federal oversight of the decommissioning and site restoration of the Pilgrim nuclear power station.

B. The By-law's Use of Undefined Terms

The term "permit" used in reference to the Select board's review is not the only undefined term in the by-law. The by-law does not include a definition for the terms "Heavy Industry" or "Power Generating Facility." In addition, the terms "nearby neighborhoods" and "sensitive times" are not defined. The Town may wish to amend the by-law at a future Town Meeting to insert

⁶ The Town's Inspectional Services department includes the Town's Building Department that is responsible for ensuring that buildings are constructed and repaired safely, and buildings, structures and land are used properly. The Department issues zoning, building, electrical, gas and plumbing permits that allow the construction, reconstruction, repair, alteration and *demolition of buildings and structures* as well as the installation of equipment (with emphasis added). The Building Department enforces the Commonwealth of Massachusetts Building Code and the Plymouth By-Laws. See the Town's website at: <https://www.plymouth-ma.gov/inspectional-services> (emphasis added).

definitions for these phrases to add clarity. The Town should consult with Town Counsel with any questions on this issue.

V. Conclusion

We approve the new Chapter 121 that requires the Select Board's review of demolition activities at large scale industrial buildings because we find no clear conflict with the laws or Constitution of the Commonwealth. Amherst, 398 Mass. at 796. However, the Town should consult closely with Town Counsel when applying the by-law to avoid interference with the state or federal authority over the decommissioning and site restoration of the Pilgrim nuclear power station, or with the authority granted by the State Building Code to the Town's Building Inspector.

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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