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The Office has reviewed the first two Articles contained on the Warrant for the Southborough Special Town Meeting to be held on May 22, 2018. We are also in possession of a May 1, 2018, opinion submitted by the law firm Mead Talerman and Costa, LLC ("MTC opinion"), in which it calls into question the legality and "wisdom" and necessity of those two warrant articles. Below please find our opinion on the various matter set forth.

Article 1

Article 1, a Citizen's Petition, proposes to reinstate long standing provisions of the Town Code relative to proceedings before the Zoning Board of Appeals (ZBA) that were recently deleted.[1] Specifically, Article 1 seeks to:

- reinstate the four-member quorum requirement (Meetings; Hearings; Quorum, sections A and B);
- clearly set forth the order of proceedings (Meetings; Hearings; Quorum, sections C and D); and
- ensure that ZBA members who hear and decide matters are free from conflicts of interest (Meetings; Hearings; Quorum, section B; Disqualification of Members, Section A).

1. The Four Member Quorum Requirement.

Pursuant to the Home Rule Amendment of the Massachusetts Constitution, cities and towns have broad powers "to exercise any power or function . . . as long as the exercise of these powers is not inconsistent with the Constitution or" the General Laws. Rayco Inv. Corp. v. Board of Selectmen of Raynham, 368 Mass. 385, 392 (1984). With respect to the quorum requirement, contrary to the opinion provided by Mead Talerman and Costa, LLC ("MTC opinion"), which cites to no legal authority, there is no conflict with state law.[2] Simply stated, the MTC opinion appears to confuse and conflate the quorum requirement with the voting requirement, even though they are entirely distinct requirements.

The word "*quorum*" is the term for the minimum number of members of a deliberative body that must be present in order to hold a meeting. Sesnovich v. Board of Appeal of Boston, 313 Mass. 393, 397-398 (1943). In contrast, a *voting* requirement specifies the minimum number of votes required to approve an application, such as a majority or a super majority. See, e.g., G.L. c. 40A, § 9 ("A special permit issued by a special permit granting authority shall require a two-thirds vote of boards with more than five members, a vote of at least four members of a five

[1] These provisions were codified in the Southborough Town Code at § 249-3A and 3B.
[2] The MTC Opinion incorrectly denotes the quorum requirement as the "second proposed by law"; in actuality, it is Article 1.

member board, and a unanimous vote of a three member board."). Article l seeks only to set the quorum requirement and has no impact on the number of votes required to approve any given application.

The great majority of matters typically within the jurisdiction of Boards of Appeals require, by virtue of state laws, four affirmative votes for approval. For example, G.L. c. 40A, § 9 (special permits) and § 10 (variances) require the affirmative vote of four members of a five member board. Clearly the establishment of a four-member quorum requirement is not at all inconsistent with these laws. Likewise, for those much less common matters that require only majority approval (three out of five votes) under state law--including applications for comprehensive permits filed pursuant to G.L. c. 40B--a four-member quorum requirement has no impact on the *quantum* of votes required for approval; only three votes of the five-member board are required. In other words, in 40B proceedings, an application could be approved by a vote of 3-2. Thus, it is our opinion that a four-member quorum requirement does not in any way conflict with Chapter 40B or any other state law.

With respect to the assertion that a four-member quorum requirement is "a change from established and existing practice," our understanding is that is actually not the case. For many years, the Southborough ZBA has recognized the Code's four-member quorum requirement and has acted accordingly. Moreover, because the Code provides for two associate (or alternate) members, there are seven Board members capable of sitting on any particular application. Thus, it should not—and has not—proved difficult to assemble four of seven members even in the case of absence, illness, or conflict. Indeed, it is generally in an applicant's best interest to have as many members of the Board as possible in attendance in order to maximize odds of approval.

2. Conflict of Interest.

a. "Personal Interest" Provision

Part B of the proposed changes to the ZBA's meetings, hearings, and quorum requirements seeks to add the following language: "No [ZBA] member shall hear or decide an appeal in which he or she is directly or indirectly interested in a personal or financial sense." This proposed requirement is largely redundant of state law. Specifically, under G.L. c. 268A, § 19(a), a ZBA member--like all Board and Committee members--cannot participate in any matter in which "he, his immediate family or partner, . . . has a financial interest . . . ."

Nonetheless, again citing no authority, the MTC opinion states that the term "personal interest" "is too vague and undefined as to be enforceable." To the contrary, "personal interest" is and has been an easily understood term used frequently in the context of conflicts of interest decisions. See, e.g., Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, 473 Mass. 336 (2015) (Discussing Rule 1.7 of the Massachusetts Rules of Professional Conduct, which applies to conflicts of interests between clients, as providing limits on representation where there is a conflict with the "*personal interest*" of the attorney); Corcoran v. Thomas, 6 Mass. App. Ct. 190 (1978) (discussing a situation in which trustees of a land development business employed one of their number as a broker to handle sales of the parcels. Said the Court: "It was held (correctly, we think) that it was a conflict of interest for the trustees thus to benefit one of their number and for one serving as trustee to have a *personal interest* in the sale of lands comprising the trust property."); see also Barry v. Historic District Commission of the Borough

of Litchfield, 950 A. 2d 1 (Ct. App. Ct. 2008) ("Public policy requires that a member of a public board or commission refrain from placing himself or herself in a position in which *personal interest* may conflict with public duty. A *personal interest* has been defined as an interest in either the subject matter or a relationship with the parties before the zoning authority impairing the impartiality expected to characterize each member of the zoning authority. A *personal interest* can take the form of favoritism toward one party or hostility toward the opposing party; it is a personal bias or prejudice which imperils the open-mindedness and sense of fairness which a zoning official in our state is required to possess.").

At bottom, this is a matter of local control. Town Meeting voters can be trusted to understand the uncomplicated term "persona interest." Should they wish to make clear that ZBA members who have personal interests in a matter before them are disqualified from acting on that matter, they can vote in the affirmative. If not, they can vote in the negative.

b. Disqualification Provisions

The second part of Article 1, entitled "disqualification of members," proposes the following:

- where a ZBA member has a potential conflict of interest regarding the subject of a particular matter before the Board, the member must contact the State Ethics Commission and request an opinion regarding the potential conflict. Where the Commission determines that there is a conflict, the member is disqualified from participating in that matter.
- Members are required to file Conflict of Interest forms with the Town Clerk and the ZBA before the matter is heard.

As the MTC opinion acknowledges, G.L. c. 268A, the Commonwealth's Law regulating the Conduct of Public Officials, already precludes members of all local Boards and Committees from participating in matters in which they have a conflict of interest. Viewed in that light, the first part of this proposal seems to be a restatement of existing requirements.

Contrary to the MTC opinion, however, the proposal does not require a ZBA member to "refrain from acting if there is a mere appearance of conflict." Although perhaps inartful, the language of the proposal merely requires that the member request an opinion from the Commission where the member "has any conflict of interest or appearance of conflict of interest pertaining to the subject matter of the particular case." Should the Commission opine that there is no conflict, there is nothing in the proposal that requires disqualification of the member. Indeed, if there is an appearance of conflict, any member of a Board or Committee should protect themselves by requesting the Commission's opinion, whether that is included in local rules or not. If the Commission finds a conflict, the member should and must recuse him/herself; if it does not, s/he is protected from later claims that there was a conflict, and the Commission will direct the member with respect to any disclosures that can or should be filed.

With respect to the second part of this proposal, the Town Clerk has for many years utilized a conflict form. Thus, this also appears to be existing and established local practice, as it is in many towns. The MTC opinion states that requiring a member to fill out a conflict form and file it with the Town Clerk is "illegal," but again cites no authority in support of that

proclamation. Again, should voters wish to maintain this practice, they can vote in the affirmative. If not, they can vote in the negative.

Article 2

Article 2 proposes that the Town Meeting vote to add the words "subject to the approval of Town Meeting" to the Code (Ch. 174-25A) and/or the Zoning By Law for all proposed changes to the ZBA's rules and regulations (hereafter referred to as "ZBA Rules").

Under G.L. c. 40A Section 12, "[t]he board of appeals shall adopt rules, not inconsistent with the provisions of the zoning . . . by-law for the conduct of its business and for purposes of this chapter and shall file a copy of said rules with the . . . town clerk." Nothing in the language of the statute would make Town Meeting approval of changes to the ZBA Rules illegal or even inappropriate.

With respect to whether Town Meeting approval of changes is "wise " or "practical," that decision is to be made locally, by Town Meeting voters. Although the MTC opinion fears that such a requirement "would be very cumbersome", would "slow the function of the ZBA", and would "adversely affect the lion's share of applicants", there is absolutely no explanation for why this would be the case. To the contrary, until such time as changes to the ZBA Rules are made and approved, the ZBA would operate under its existing Rules, and thus there is no reason such a requirement would "slow the function of the ZBA." Additionally, our understanding of the history of amendments to the ZBA Rules is that there has been one major update, and three very minor updates, in the past four plus *decades*. Thus, if history proves a reliable guide, requiring Town Meeting approval of ZBA Rules changes would arise about once every ten years. Moreover, our understanding of the 2007 update is that the ZBA's own amendment process spanned four or five months. There was apparently nothing in that update—or any later update—that was time critical or could not wait for Town Meeting approval.

Essentially, this is again a matter of local control. Should the voters decide that amendments to the ZBA Rules should be reviewed and approved by Town Meeting, they can vote in favor of this Article. If not, they can vote against it.