

TOWN OF SOUTHBOROUGH



OFFICE OF THE BOARD OF SELECTMEN

TOWN HOUSE · 17 COMMON STREET · SOUTHBOROUGH, MASSACHUSETTS 01772-1662
(508) 485-0710 · FAX (508) 480-0161 · selectmenoffice@southboroughma.com

November 2, 2018

Marnie Hoolahan
26 Clifford Road
Southborough, MA 01772

RE: Public Records Request #18-3

Mrs. Hoolahan:

Attached are the files in the Town's possession that are responsive to your request. Materials protected under attorney-client privilege are not subject to release.

Please let me know if you have any questions.

Thank you.

A handwritten signature in black ink, appearing to read "Mark J. Purple".

Mark J. Purple
Town Administrator

cc: Board of Selectmen

Mark Purple

From: Jay Talerman <jay@mtclawyers.com>
Sent: Thursday, October 11, 2018 2:17 PM
To: Gunagan, Kelli (AGO); 'aldoc.esq@comcast.net'
Cc: Hurley, Margaret (AGO); Mark Purple
Subject: RE: Materials in Support of Article 1
Attachments: Southboro.memo.articles.pdf

Thanks Kelli: I find Attorney Kremer's invective and bombastic opinions on the history and nature of certain parties' actions to be unhelpful. There are also a number of factual inaccuracies in her letter but this is not the forum to discuss them. All that said, I rely on my previous memo with respect to the town's objections to Section A and B of the proposed bylaw.

As to Section A and notwithstanding the strained legal analysis offered by Ms. Kremer, it would certainly be illegal to require four voting members to be present for a 40B hearing. While the application of such a requirement, however unwise, to other contexts would be legal, the Bylaw simply cannot be applied to the 40B context. Whether this dooms the Bylaw to rejection or simply warrants an admonition by your office, I leave to you.

As to Section B, the concerns raised in my original memo (which I attach again) remain. There can be no legal barrier to acting on a matter that a board member has a "personal" interest in. Here, the term "personal" cannot be interpreted as including "financial" interests because the bylaw uses both terms. Chapter 268A does not proscribe acting in the event of purely "personal" interests and indeed only suggests that a board member may file a discretionary disclosure in the event of an appearance of an interest that doesn't otherwise rise to a violative "financial" interest. A bylaw such as this cannot take away a right to participate that is otherwise enshrined in State law. Second, as I mention in my memo, the State Ethics law does not compel recusal – rather, it prescribes a penalty if there is unethical action. This distinction is important. Ethical dilemmas are personal and largely confidential and a bylaw cannot be used by others, via zoning enforcement, to compel a board member to recuse. Certainly, chaos could ensue if highly motivated and combative fellow board members or interested members of the public could hijack an otherwise proper ZBA proceeding because of an alleged "personal" (or even financial") issue. While we certainly counsel all of our clients to recuse themselves if a conflict is apparent, this Bylaw simply goes too far.

Please do not hesitate to contact me with any questions.

Jay



Jason R. Talerman
Mead, Talerman & Costa, LLC
730 Main Street · Suite 1F · Millis, Massachusetts · 02054
Phone 774.993.5000
jay@mtclawyers.com · www.mtclawyers.com

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 Think before you print.

From: Gunagan, Kelli (AGO) <kelli.gunagan@state.ma.us>
Sent: Thursday, October 11, 2018 1:30 PM
To: 'aldoc.esq@comcast.net' <aldoc.esq@comcast.net>; Jay Talerma <jay@mtclawyers.com>
Cc: Hurley, Margaret (AGO) <margaret.hurley@state.ma.us>
Subject: Materials in Support of Article 1

Good afternoon,

Attached are materials we received from Legal Counsel for the Petitioners of Article 1. Please feel free to contact me if you have any questions.

Thank you.

Kelli E. Gunagan
Assistant Attorney General
By-law Coordinator, Municipal Law Unit
Office of the Attorney General Maura Healey
Ten Mechanic Street, Suite 301
Worcester, MA 01608
(508) 792-7600
kelli.gunagan@state.ma.us

Mark Purple

From: Jay Talerman <jay@mtclawyers.com>
Sent: Thursday, July 26, 2018 4:16 PM
To: Hurley, Margaret (AGO); Mark Purple
Cc: Gunagan, Kelli (AGO)
Subject: RE: Review of bylaw changes from May 22, 2018 Southborough Special Town Meeting

Thanks Margaret!



Jason R. Talerman
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Think before you print.

From: Hurley, Margaret (AGO) <margaret.hurley@state.ma.us>
Sent: Thursday, July 26, 2018 4:16 PM
To: Mark Purple <mpurple@southboroughma.com>
Cc: Gunagan, Kelli (AGO) <kelli.gunagan@state.ma.us>; Jay Talerman <jay@mtclawyers.com>
Subject: RE: Review of bylaw changes from May 22, 2018 Southborough Special Town Meeting

Thank you Mark. This information is very helpful. Please note that this packet is Case # 9074 and our due date is September 22, 2018. It is assigned to Kelli Gunagan.

We will contact you Jay with any questions. You should both feel free to contact me or Kelli if you need anything else!

Best,

Margaret

From: Mark Purple <mpurple@southboroughma.com>
Sent: Thursday, July 26, 2018 4:10 PM
To: Hurley, Margaret (AGO) <Margaret.Hurley@MassMail.State.MA.US>; Gunagan, Kelli (AGO) <Kelli.Gunagan@MassMail.State.MA.US>; Caprioli, Nicole (AGO) <Nicole.Caprioli@MassMail.State.MA.US>
Cc: Jay Talerman <jay@mtclawyers.com>; Board of Selectmen <bos@southboroughma.com>
Subject: Review of bylaw changes from May 22, 2018 Southborough Special Town Meeting

Dear Ms. Hurley:

Good afternoon.

On May 22, 2018, the Town of Southborough held a Special Town Meeting to consider five articles, four of which considered changes to the Town Code and/or zoning bylaws. Those articles that were approved have since been sent to your office for approval. Article 1 of that warrant was submitted by citizen petition, and sought to make changes to the zoning bylaw as it pertains to the Zoning Board of Appeals and quorum. While the article as amended and approved by Town Meeting addressed many of the concerns expressed by Special Counsel Jay Talerman on behalf of the Board of Selectmen, it did not address all of them. To that end, for your consideration in your review, I have included a copy of the opinion letter that was issued by Attorney Talerman in regards to this article. This opinion was requested by the Board of Selectmen, and was distributed to all parties, including the petitioner, prior to the Special Town Meeting.

If you have questions, or need further clarification on the attached opinion, please contact Attorney Talerman. Here is his contact information:

Jason R. Talerman
Mead, Talerman & Costa, LLC
730 Main Street · Suite 1F · Millis, Massachusetts · 02054
Phone 774.993.5000
jay@mtclawyers.com

Thank you for your consideration.

Mark
Mark J. Purple
Town Administrator
Town of Southborough
P: 508-485-0710
F: 508-480-1061

Mark Purple

From: Hurley, Margaret (AGO) <margaret.hurley@state.ma.us>
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Cc: Gunagan, Kelli (AGO); Jay Talerman
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Margaret

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Sent: Thursday, July 26, 2018 4:10 PM
To: Hurley, Margaret (AGO) <Margaret.Hurley@MassMail.State.MA.US>; Gunagan, Kelli (AGO) <Kelli.Gunagan@MassMail.State.MA.US>; Caprioli, Nicole (AGO) <Nicole.Caprioli@MassMail.State.MA.US>
Cc: Jay Talerman <jay@mtclawyers.com>; Board of Selectmen <bos@southboroughma.com>
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Jason R. Talerman
Mead, Talerman & Costa, LLC
730 Main Street · Suite 1F · Millis, Massachusetts · 02054
Phone 774.993.5000
jay@mtclawyers.com

Thank you for your consideration.

Mark
Mark J. Purple

Town Administrator
Town of Southborough
P: 508-485-0710
F: 508-480-1061

Mark Purple

From: Mark Purple
Sent: Thursday, July 26, 2018 4:10 PM
To: 'Hurley, Margaret (AGO)'; 'Gunagan, Kelli (AGO)'; 'Caprioli, Nicole (AGO)'
Cc: 'Jay Talerman'; Board of Selectmen
Subject: Review of bylaw changes from May 22, 2018 Southborough Special Town Meeting
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If you have questions, or need further clarification on the attached opinion, please contact Attorney Talerman. Here is his contact information:

Jason R. Talerman
Mead, Talerman & Costa, LLC
730 Main Street · Suite 1F · Millis, Massachusetts · 02054
Phone 774.993.5000
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Thank you for your consideration.

Mark
Mark J. Purple
Town Administrator
Town of Southborough
P: 508-485-0710
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Attorneys at Law

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MEMORANDUM

TO: MARK PURPLE, TOWN ADMINISTRATOR
CC: ALDO CIPRIANO, TOWN COUNSEL
FROM: JASON TALERMAN, SPECIAL COUNSEL
RE: PETITIONED ARTICLES FOR SPECIAL TOWN MEETING
DATE: May 1, 2018

Mark: you have asked me to review and provide my opinion with respect to three petitioned articles that are on the Special Town Meeting Warrant for May 22, 2018. All three articles, two of which are identical (or nearly so), propose amendments to the Town's Zoning Bylaws. Particularly, the proposed bylaws seek changes to the bylaws that govern the administrative aspects of the Zoning Board of Appeals. In my opinion, as discussed more fully below, the proposed bylaws are, at the very least, concerning, and, in some vital respects, illegal.

The first bylaw proposes a simple addition to §175-25A of the General Bylaws. Such addition would require that all rules and regulations of the ZBA must be approved by Town Meeting. In my opinion, this amendment is legal but unwise and impractical. As you are aware, the Town's Zoning Bylaws set forth substantial regulations for the use of land. Due to the fact that such bylaws establish the Town's basic policies underlying the use of land, they are subject to legislative (i.e. Town meeting) approval. Such requirement ensures that all such matters will be the subject of careful consideration and debate and may not be changed without further legislative debate and approval. In addition to the major precepts of zoning – such as dimensional requirements and uses that are allowed in each districts – there are administrative matters that are governed by regulations and subject to periodic change. Such matters include, among other items: application/plan requirements, forms, design guidelines and other similar matters. These administrative regulations cannot conflict with the Zoning Bylaws and rather, are merely intended to help implement them. In my experience, subjecting such regulations to the debate and approval of Town Meeting would be very cumbersome and would slow the function of the ZBA. In turn, this would adversely affect the lion's share of applicants, who are typical homeowners who may wish to make modest changes to their property. While I could envision requiring a public hearing prior to adopting regulations, it is, in my opinion, unwise and unnecessary to require Town Meeting approval for ZBA regulations.

The second proposed bylaw is more problematic. It adds a litany of requirements for ZBA proceedings. The requirements that cause the most concern are as follows:

1. Super-majority requirement for a quorum. The proposed bylaw requires that five members of the ZBA must be present to hear and act on applications (or four if there is a waiver from the applicant). This is a change from

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30 Green Street
Newburyport, MA 01950
Phone 978.463.7700
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established and existing practice, under which a quorum is only three members of a five-member board. While requiring such a super-majority may be allowable in many contexts, and while some applications (variances and special permits, etc) already require four votes for approval, this amendment would be illegal in the context of an application for a comprehensive permit under c. 40B. Under c. 40B, only three members of a five-member board are necessary to hear and approve an application. While home rule allows for the adoption of local requirements through zoning bylaws, such requirements may not conflict with State Law. Accordingly, as drafted and applied, this provision of the proposed bylaw would be illegal. It is also my opinion that imposing such a requirement on a volunteer board would be unwise and overly cumbersome to Southborough residents. Because of inevitable absences among board members, this super-majority requirements would almost certainly result in delays in the process that affect typical applicants. It is also worth noting that significant delays could increase the risk of constructive approvals should applicants become frustrated with the ZBA's inability to comply with the super-majority requirements of the proposed bylaw.

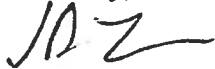
2. Personal Interest of a ZBA Member. Subsection B of the proposed bylaw prohibits any ZBA member from acting on a matter in which he/she has a "personal" interest. While there is no dispute that ethics laws preclude action where financial interests of a board member are invoked, the term "personal interest" is too vague and undefined to be enforceable, in my opinion. Furthermore, for the reasons stated below, it is inappropriate for a Zoning Bylaw to attempt to legislate the ethical responsibilities of a ZBA member, in my opinion.
3. Proposed "Disqualification of Members". The last section of the Bylaw requires all ZBA members: (a) to obtain a conflict of interest opinion from the State Ethics Commission before acting in a potentially conflictual way; (b) refrain from acting if there is a mere appearance of conflict; and (c) file conflict of interest forms with the Town Clerk and Board of Selectmen. Each of these requirements is illegal, in my opinion. First, a member that has a conflict may simply choose not to participate and cannot be compelled to disclose the reasons why or obtain an opinion with respect to such a conflict. Second, in all circumstances, a member's decision to obtain an ethics opinion is entirely discretionary. While we always recommend that potentially conflicted members obtain ethics opinions, there is no requirement under State law that they do so. Third, a member may obtain an opinion from Town Counsel as an alternative to an opinion from the State Ethics Commission. Fourth, there is no requirement under State law for a Board member to recuse him/herself from participating where there is a mere "appearance" of a conflict. In such circumstances, a board member may simply file a disclosure and continue to participate, if he/she so desires. Fifth, I am aware of no formal Conflict of Interest forms that are to be filled out in the event of a conflict. Sixth, as mentioned above, it is my opinion that it is improper for the Town to attempt to regulate the ethical requirements of a ZBA member through Zoning Bylaws. The State's ethics laws contain comprehensive requirements and procedures relative to ethical requirements of all board members.
4. Requirement for a Transcript. Subsection D of the proposed bylaw references transcripts of public hearings. However, while State agencies are required to maintain transcripts of

hearings, there is no such requirement for municipal boards such as the ZBA. This is ostensibly because of the cost of compliance with such a requirement. Accordingly, this provision makes reference to an obligation that is not legally required or enforceable.

Based upon the foregoing, it is my opinion that the second bylaw referenced in this memorandum is illegal in many respects. There are a variety of options on how to confront a petitioned article that presents an illegal proposition. I am happy to work with you, the Moderator and the Board of Selectmen to develop the proper approach.

I look forward to working with you on this matter. As always, please do not hesitate to contact me with any questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "JA Z" with a long horizontal stroke extending to the right.

Jay Talerman