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July 7, 2020

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TEMPLETON TOWN CLERK

Carol A. Harris, Town Clerk
Town of Templeton
P.O. Box 620
East Templeton, MA 01438

**Re: Templeton Special Town Meeting of January 15, 2020 -- Case # 9763
Warrant Article # 1 (General)**

Dear Ms. Harris:

Article 1 - Article 1 amends the Town's general by-laws to add a new Solid Waste Management by-law that regulates the use of the Town's Sanitary Landfill located on Route 202.¹

This decision briefly describes the by-law amendments adopted under Article 1; discusses the Attorney General's limited standard of review of town by-laws under G.L. c. 40, § 32; and why based on that standard, we approve Article 1.

We emphasize that our decision in no way implies any agreement or disagreement with the policy views that led to the passage of the by-law amendment. The Attorney General's limited standard of review requires her to approve or disapprove the by-law text based solely on its consistency with state law and not on any policy views she may have on the subject matter or wisdom of the by-law text. Amherst v. Attorney General, 398 Mass. 793, 795-96, 798-99 (1986). We also make no determination regarding how the by-law amendments at issue here might affect proposed or existing uses. The application of Town by-laws to such is beyond the scope of the Attorney General's by-law review under G.L. c. 40, § 32. Nor does our analysis extend to evaluating the town meeting action based upon the alleged motive of the town. See Andrews v. Amherst, 68 Mass. App. Ct. 365, 368 (2007); see also W.R. Grace & Co. v. Cambridge City Council, 56 Mass. App. Ct. 559, 568 (2002) (the validity of a zoning amendment does not turn on the motives of their supporters).

¹ In a decision dated July 31, 2003, we approved a similar by-law regulating the Landfill located at Route 202 adopted under Article 8 from the Town's June 18, 2002, Special Town Meeting. *See Case # 2492*. In a decision dated May 17, 2004, we approved another similar by-law regulating the Landfill located at Route 202 adopted under Article 2 at the February 19, 2004, Special Town Meeting. *See Case # 2832*.

During our review, we received correspondence from Town Counsel urging the Attorney General to disapprove portions of the by-law. We appreciate this input as it has assisted in our review.

I. Description of Article 1

Article 1 amends the Town's general by-laws to add a new "Solid Waste Management," by-law as follows:

Solid Waste Management

1. For the benefit of the community and in the best interest of the health and welfare of the people of Templeton, the Sanitary Landfill on Route 202, Templeton, shall be used only by residents, commercial business and industries located within the geographical limits of the Town of Templeton. Passed 5-10-1975, Approved by A/G 9-2-75.

2. Notwithstanding said limitations, individuals, and/or businesses, upon application and issuance of a waiver by the Templeton Board of Health, may use the Sanitary Landfill for garbage and/or refuse of residents, commercial businesses and industries located within the geographical limits of the Town of Templeton.

3. Excluded shall be the transportation of garbage and refuse from out of town areas to the Templeton Landfill and/or any other properties in the Town of Templeton".

Amended 9/28/82, Amended 6/18/02, Amended 2/19/04

4. The RCRA* states that "solid waste" means any garbage or refuse, sludge from a wastewater treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, resulting from industrial, commercial, mining, and agricultural operations, and from community activities. Nearly everything we do leaves behind some kind of waste. The terms "garbage" and "refuse" shall include but not be limited to: waste, wastewater sludge, medical waste, hazardous waste, nuclear waste, trash, biomix, polymers, industrial waste.

5. Furthermore, paper sludge in any form including but not limited to Bio Mixes with biosolids shall not be a means of reclamation for erosion control or any other purpose in any gravel pits or sites in Templeton in need of reclamation.

*RCRA- Resource Conservation and Recovery Act

Paragraph 1 of the by-law states that the Town's Sanitary Landfill located on Route 202 ("Landfill") shall be used only by Templeton residents and commercial businesses and industries located in the Town. Paragraph 2 provides that "[n]otwithstanding said limitations," individuals and businesses may seek a waiver from the Town's Board of Health to use the Landfill for "garbage and/or refuse of residents, commercial businesses and industries located" in the Town. Paragraph 3 prohibits the transportation of garbage and refuse from out of Town to the Landfill or other properties in the Town. Paragraph 4 purports to restate the definition of "solid waste" as provided in the Federal Resource Conservation and Recovery Act ("RCRA"). Paragraph 4 also

includes a list of those types of waste that are included in the terms “garage” and “refuse.” Lastly, Paragraph 5 prohibits “paper sludge” including “Bio Mixes” from being used for erosion control reclamation and at other reclamation sites in Town, and at gravel pits in Town for any purpose.

II. Attorney General’s Standard of Review

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. a 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 state Constitution or laws. 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). “The legislative intent to preclude local action must be clear.” Id. at 155. Massachusetts has the “strongest type of home rule and municipal action is presumed to be valid.” Connors v. City of Boston, 430 Mass. 31, 35 (1999) (internal quotations and citations omitted).

III. Laws Applicable to Hazardous Waste, Hazardous Waste Facilities, Solid Waste and Solid Waste Facilities

There are a number of federal and state laws that govern hazardous waste, hazardous waste facilities, solid waste and solid waste facilities. *See* G.L. c. 21C, 21D, 21E and c. 111, §§ 150A and 150A 1/2, and 310 CMR §§ 30.00 and 40.00. The Town must ensure that it applies the new by-law consistent with the state’s environmental laws, especially those highlighted below.

A. Solid Waste and Solid Waste Facilities

Pursuant to G.L. c. 40A, § 9, the state Department of Environmental Protection (“DEP”) has broad authority over solid waste facilities pursuant to G.L. c. 21A, § 8, G.L. c. 40A, § 9, and G.L. c. 111, § 150A, and the Solid Waste Management Facility regulations found at 310 C.M.R. § 19.000 *et seq.* *See, e.g.* Buckley v. Wilmington, 68 Mass. App. Ct. 1113 (2007) (unpub.) (invalidating a landfill height limitation by-law because it interferes with and frustrates DEP’s authority under G.L. c. 111, § 150A, to properly close and cap a landfill.).

General Laws Chapter 111, Section 150A, grants broad authority to the Department of Environmental Protection (“DEP”) to regulate solid waste facilities. Through its implementing regulations found at 310 C.M.R. § 19.000 *et seq.* DEP imposes operating conditions on solid waste facilities. Towns may impose reasonable requirements on solid waste facilities. *See, e.g.* G.L. c. 40A, § 9. However, Towns cannot apply such requirements in a manner that interferes with DEP’s authority over solid waste facilities pursuant to G.L. c. 111, § 150A, and 310 C.M.R. § 19.000 *et seq.* *See* Buckley, 68 Mass. App. Ct. 1113 (2007).

B. Hazardous Waste and Hazardous Waste Facilities

General Laws Chapter 40A, Section 9, pertains to hazardous waste facilities and provides in pertinent part as follows:

A hazardous waste facility as defined in section two of chapter twenty-one D shall be permitted to be constructed as of right on any locus presently zoned for industrial use pursuant to the . . . by-laws of any . . . town provided that all permits and licenses required by law have been issued to the developer and a siting agreement has been established pursuant to sections twelve and thirteen of chapter twenty-one D, provided however, that following the submission of a notice of intent, pursuant to section seven of chapter twenty-one D, a city or town may not adopt any zoning change which would exclude the facility from the locus specified in said notice of intent. This section shall not prevent any . . . town from adopting a zoning change relative to the proposed locus for the facility following the final disapproval and exhaustion of appeals for permits and licenses required by law and by chapter twenty-one D.

General Laws Chapter 40A, § 9, allows hazardous waste facilities to be constructed on land presently zoned for industrial uses, providing all permits and licenses required by law have been issued and a siting agreement has been established. Towns cannot prohibit such facilities on land presently zoned for industrial use other than as provided in G.L. c. 40A, § 9.

C. Radioactive Waste

The United States Supreme Court has held that state and local regulations related to nuclear health and safety concerns are preempted by the Atomic Energy Act, 42 U.S.C. §§ 2011-2284, in the absence of an agreement with the Nuclear Regulatory Commission authorizing state regulation. Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190 (1983). Also, the Massachusetts Low-Level Radioactive Waste Management Act, G.L. c. 111H, is a comprehensive state statute that prohibits by-laws regulating radioactive waste. Compare Town of Wendell v. Attorney General, 394 Mass. 518, 529 (1985), where the Legislature, in enacting another state-wide “comprehensive” act, was found to have preempted further regulation by municipalities within that area of concern, *i.e.*, the use and application of pesticides. General Laws Chapter 111H, among other things, establishes a low-level radioactive waste management board that is responsible for “planning and effecting the management of low-level radioactive waste in the commonwealth.” G.L. c. 111H, § 2. General Laws Chapter 111H also requires that the Department of Environmental Protection establish, through its regulations, criteria to be used in the site selection process for low-level radioactive waste facilities. G.L. c. 111H, § 14. More specifically, Section 16 (b) of Chapter 111H states that “no community may prohibit, or require any license, permit, approval or condition for the construction, operation, closure, post-closure observation and maintenance or institutional control of a facility.”

IV. **The DEP’s Broad Regulatory Authority**

The DEP has broad authority to regulate the importation of waste, including contaminated soil. For example, the DEP, pursuant to state law, may authorize or require the importation of

contaminated soils as part of an environmental cleanup or as part of the operation or closing of a solid waste facility. The DEP may also authorize or require the importation of hazardous waste as part of the operation of a hazardous waste facility. The Town may not apply the by-law in a way that would interfere with the DEP's authority over solid waste facilities or hazardous waste facilities pursuant to G.L. c. 40A, § 9, and G.L. c. 111, § 150A, and 310 CMR § 19.000 *et seq.* See, e.g., Buckley v. Wilmington, 68 Mass. App. Ct. 1113 (2007) (invalidating a landfill height limitation by-law that interfered with and frustrated DEP's authority under G.L. c. 111, § 150A, to close and cap a landfill.)

Moreover, on August 28, 2015, the DEP issued an "Interim Policy on the Re-Use of Soil for Large Reclamation Projects" (Policy COMM-15-01).² Under this policy, the DEP expresses an intent to issue site-specific approvals, in the form of Administrative Consent Orders, to ensure that the reuse of large volumes of soil for the reclamation of sand pits, gravel pits and quarries pose no significant risk of harm to health, safety, public welfare or the environment, and would not create new releases or threats of releases of oil or hazardous material. Although Policy COMM-15-01 provides that nothing in the Interim Policy "eliminates, supersedes or otherwise modifies any local, state or federal requirements that apply to the management of soil, including any local, state or federal permits or approvals necessary before placing the soil at the receiving location," the Town should consult with Town Counsel and DEP counsel regarding the proper application of the by-law to any project that has received a DEP site-specific approval in the form of an Administrative Consent Order.

V. Comments on Specific Provisions of Article 1

A. Paragraph 2's Board of Health Waiver Provision

Paragraph 1 limits the use of the Town's Landfill to residents, commercial businesses and industries located in the Town. However, Paragraph 2 provides that "[n]otwithstanding said limitations," individuals and businesses may seek a waiver from the Town's Board of Health to use the Landfill for "garbage and/or refuse of residents, commercial businesses and industries located" in the Town. By using the phrase "[n]otwithstanding said limitations" it is unclear what activity Paragraph 2 allows by a Board of Health waiver.³ The Town may wish to amend Paragraph 2 to make it clear what activity the Board of Health is authorized to allow by waiver. However, and more importantly, regardless of how Paragraph 2 is interpreted, it must be applied consistent with the limitations placed on a Town's ability to regulate certain types of wastes.

As provided in more detail above, the Town may not apply Paragraph 2 in a way that would interfere with the DEP's broad authority over hazardous waste or solid waste. In addition, federal and state laws preempt local regulations pertaining to high-level and low-level radioactive waste. Thus, the Board of Health cannot allow the Landfill to be used for waste that is prohibited under federal and state law. Therefore, we suggest that the Town discuss the application of Paragraph 2 with Town Counsel.

² The policy may be found at: <http://www.mass.gov/eea/docs/dep/cleanup/laws/massdep-policy-comm-15-01-2015-08-28.pdf>

³ In our decision to the Town approving Article 2 adopted at the February 19, 2004, Special Town Meeting, we gave similar comments on the vagueness of this text and its application. See Case # 2832.

B. Paragraphs 3 and 5's Prohibitions

Paragraph 3 prohibits the transportation of garbage and refuse from out of Town to the Town's Landfill and other properties within the Town. Paragraph 5 prohibits paper sludge, including Bio Mixes, for use in reclamation projects and in gravel pits. The Town must apply Paragraph 3 and 5's prohibitions consistent with state environmental laws as described in more detail above. More specifically, the Town cannot apply Paragraphs 3 and 5 in a manner that interferes with DEP's authority over solid waste and hazardous waste facilities pursuant to G.L. c. 111, § 150A, and its implementing regulations found at 310 C.M.R. § 19.000 *et seq.* See, e.g. Buckley v. Wilmington, 68 Mass. App. Ct. 1113 (2007) (unpub.) (invalidating a landfill height limitation by-law because it interferes with and frustrates DEP's authority under G.L. c. 111, § 150A, to properly close and cap a landfill.). The Town must apply Paragraph 3 and 5's prohibitions consistent with state environmental laws that authorize or require the importation of certain waste as part of an environmental cleanup or as part of the operation or closing of a solid waste facility.

VI. **Conclusion**

Although we approve the by-law adopted under Article 1, we strongly encourage the Town to consult closely with Town Counsel to ensure that the by-law is properly applied, as detailed in this decision.

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,

MAURA HEALEY
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cc: Town Counsels Thomas Harrington and Donna Brewer