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April 7, 2022

Diane Packer, Town Clerk
Town of Natick
13 East Central Street
Natick, MA 01760

Re: Natick Fall Annual of October 19, 2021 – Case # 10456
Warrant Articles # 26, 27, 28, 29, and 30 (Zoning)
Warrant Article # 10, 15, 38 and 39 (General)

Dear Ms. Packer:

Articles 15, 26, 27, 28, 29, 30, 38, and 39 - We approve Articles 15, 26, 27, 28, 28, 30, 38, and 39 from the Natick October 19, 2021 Fall Annual Town Meeting. Our comments on Article 26 are provided below

Article 10 - Under Article 10 the Town voted to amend the Town's general by-laws add a new Article 43A, "Tax Title Pay Agreements." The by-law proposes to authorize payment agreements between the town treasurer and persons entitled to redeem parcels in tax title. Because Article 10 is inconsistent with G.L. c. 60, 62A, in that it grants to the Treasurer complete discretion to set certain key terms of the payment agreement (the agreement's term of years and the percentage of interest waived), we disapprove the by-law. We explain this decision in more detail below.¹

I. Summary of By-Law.

Article 10 proposes to add a new general by-law, Article 43A, "Tax Title Pay Agreement," that authorizes the Town Treasurer ("Treasurer"), under G.L. c. 60, § 62A, to enter into payment agreements with property owners entitled to redeem parcels in tax title. Although the new by-law proposes to authorize the Treasurer to enter into payment agreements with persons entitled to redeem parcels in tax title, it does not specify the term applicable to such agreements, or the specific percentage of accrued interest that the Treasurer is authorized to waive. The new by-law provides as follows:

¹ We have disapproved similar by-laws in the following decisions: Town of Tisbury issued 01/11/22 (Case # 10334); Town of Duxbury issued 07/2/18 (Case # 8805); Town of Chatham issued 08/14/17 (Case # 8256); and Town of Rutland issued 02/16/17 (Case # 8182).

Section 1

In accordance with MGL c.60 section 62A, this bylaw authorizes payment agreements between the treasurer/collector and persons entitled to redeem parcels in tax title and the waiver of certain interest charges, as provided for in Section 2.

Section 2

The Treasurer/Collector of the Town may enter into an agreement with the person or persons entitled to redeem parcels in tax title for payment of taxes and interest, subject to the following conditions:

- a. Such agreements shall be for a term of up to 5 years and waive not more than 50 per cent of the interest that has accrued on the amount of the tax title account for all persons entitled to redeem parcels in tax title.
- b. No tax principal or collection costs/fees may be waived in any agreement.
- c. The Treasurer shall create a schedule of payments, including interest, for all agreements.
- d. Agreements and waivers under this section shall be uniformly applied for all classes of tax titles.
- e. All agreements shall require a minimum payment at the inception of the agreement of 25 per cent of the amount needed to redeem the parcel.

Section 3

During the term of the agreement the treasurer may not bring an action to foreclose the tax title unless payments are not made in accordance with the schedule set out in the agreement or timely payments are not made on other amounts due to the municipality that are a lien on the same parcel. In the event of any default in payment obligations stipulated in said agreement, the Treasurer may pursue any or all remedies prescribed by MGL c. 60 for the collection of unpaid taxes, including, but not limited to, tax title foreclosure.

Section 4

Nothing in this bylaw shall preempt or preclude the authority of the treasurer/collection to accept partial payments or to negotiate and enter into payment agreements authorized by any other statutory authority.

II. Article 10 Conflicts with G.L. c. 60, § 62A.

General Laws Chapter 60, Section 62A allows municipalities to adopt by-laws that authorize payment agreements between the Treasurer and persons entitled to redeem parcels in tax title. However, G.L. c. 60, § 62A requires specific provisions in the by-law, as follows (emphasis supplied):

Municipalities may by bylaw...authorize payment agreements between the treasurer and persons entitled to redeem parcels in tax title. Such agreements shall be for a maximum term of no more than 5 years or such lesser period as the...bylaw may specify and may waive not more than 50 per cent of the interest that has accrued on the amount of the tax title account, subject to such lower limit as the...bylaw may specify. An ordinance or bylaw under this section shall provide for such agreements and waivers uniformly for classes of tax titles defined in the ordinance or bylaw.

Any such agreement must require a minimum payment at the inception of the agreement of 25 per cent of the amount needed to redeem the parcel. During the term of the agreement the treasurer may not bring an action to foreclose the tax title unless payments are not made in accordance with the schedule set out in the agreement or timely payments are not made on other amounts due to the municipality that are a lien on the same parcel.

A by-law adopted pursuant to G.L. c. 60, § 62A must therefore: (1) specify the term applicable to all agreements that cannot exceed five years; (2) specify the percentage of accrued interest on the amount of the tax title account that is waived that cannot exceed more than 50 per cent of such accrued interest; and (3) treat each class of tax title in a uniform manner – to ensure that similarly situated taxpayers are treated the same.

The proposed new Article 43A does not meet the requirements of G.L. c. 60, § 62A, because it does not provide for a specific term applicable to all agreements and does not provide for a specific interest rate amount that the Treasurer is authorized to waive. As written, Section 2 (a) of the by-law gives the Treasurer the sole discretion to determine the length of term of such agreements (such agreement shall be for a term of up to 5 years) and the percentage of interest to be waived (waive not more than 50 per cent of the interest that has accrued). Therefore, the language of Section 2 (a) allows the Treasurer to potentially grant different waiver and term provisions to similarly situated taxpayers. By granting this complete discretion to the Treasurer, the by-law conflicts with the requirement in G.L. c. 60, § 62A that authorize the Town Meeting, through the specific by-law text it adopts, to establish the term of the agreements and the percentage of interest the Treasurer may waive.

The Department of Revenue, Division of Local Services (DOR/DLS) has published an Informational Guideline Release (“IGR”) explaining the requirements of G.L. c. 60, § 62A which can be found at: <https://www.mass.gov/files/documents/2017/09/26/igr05-208.pdf>. The IGR states at page 5, Section I (A): “Municipalities must adopt a payment by-law or ordinance before any tax agreements may be made with taxpayers. The by-law or ordinance *must specify* the scope of the program, the details of which may vary for different categories of tax titles. The by-law or ordinance may not delegate any of those decisions to the treasurer or other board or officer.” (emphasis supplied).

We have considered whether we could disapprove just the offending text in the new by-law (the term of the agreement and the interest waiver provisions), and approve the remaining text, but determine that we cannot. When a portion of a law or regulation is found to be invalid, “[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.” Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987). Although the offending text is only a single section of the by-law, it is crucial to the operation of the by-law because the term and interest waived are foundational elements of such tax title agreements. No part of the tax title agreement scheme contemplated by the by-law makes sense without a provision detailing the term of such agreements and the specific percentage of interest the Treasurer is authorized to waive. Therefore, we determine that the offending text is non-severable and we must disapprove the entire by-law.

Should the Town wish to re-adopt a similar by-law at a future Town Meeting, we are happy to work with the Town to ensure the proposed by-law text meets the statutory requirements.

Article 26 - Under Article 26 the Town voted to amend the Town's zoning by-laws to add a new section one to Section V-B.2, Accessory Uses" that allows for agri-tourism related activities by special permit on land where the primary use is agriculture. The new section one provides as follows:

Agri-tourism - A range of uses accessory to an agricultural use including, but not limited to, restaurants or similar food service establishments, outdoor dining, indoor or outdoor events, inns or similar specialty lodging, and retail stores with agricultural, food, craft, art or similar products.

- a. Standards.
 - i. The primary use must be an agricultural use.
 - ii. The property must be a minimum of 25 acres.
 - iii. Lodging related uses are limited to no more than 6 rooms
- b. Review. This accessory use requires a special permit from the Planning Board. In its discretion to approve or deny a special permit authorizing an Agri-tourism accessory use, the SPGA shall consider the following:
 - i. The review conditions for all Special Permits, as specified in section VI-DD.2.A.b.
 - ii. The compatibility of the proposed agri-tourism accessory use with the agricultural primary use.

General Laws Chapter 40A, Section 3 provides exemption from local zoning by-laws for certain agricultural uses and provides in relevant part as follows:

No zoning . . . by-law . . . shall . . . prohibit unreasonably regulate, or require a special permit for the use of land for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, nor prohibit, unreasonably regulate or require a special permit for the use, expansion, reconstruction or construction of structures thereon for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, including those facilities for the sale of produce, wine and dairy products.....

General Laws Chapter 128, Section 1A, defines agricultures and provides in pertinent part as follows:

"Farming" or "agriculture" shall include farming in all of its branches and the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural, aquacultural, floricultural or horticultural commodities, the growing and harvesting of forest products upon forest land, the raising of livestock including horses, the keeping of horses as a commercial enterprise, the keeping and raising of poultry, swine, cattle and other domesticated animals used for food purposes, bees, fur-bearing animals, and any forestry or lumbering operations, performed by a farmer, who is hereby defined as one engaged in agriculture or farming as herein defined, or on a farm as an incident to or in conjunction with such farming operations, including preparations for market, delivery to storage or to market or to carriers for transportation to market

These statutes together establish that, to the extent the use of land or structures constitutes commercial agriculture, the Town cannot require a special permit for, unreasonably regulate, or prohibit such activities: (1) on land zoned for agriculture; (2) on land that is greater than five acres in size; and (3) on land of 2 acres or more if the sale of products from the agricultural use generates \$1,000 per acre or more of gross sales.

The new section one allows agri-tourism as accessory use provided that the primary use of land is (1) agriculture; (2) on a parcel that has a minimum of twenty-five acres; and (3) lodging related uses are limited to no more than six rooms. While the by-law seeks to promote and help agriculture, there may be agri-tourism related activities, for example a farm stand, that are incidental to an agricultural parcel and qualify as commercial agriculture under G.L. c. 40A, § 3.² In such instances, the Town cannot prohibit, require a special permit for, or unreasonably regulate such agri-tourism related activities, including limiting such activity to parcels with a minimum of 25 acres or more. We suggest that the Town discuss with Town Counsel the proper application of G.L. c. 40A, § 3 to agri-tourism on agricultural property.

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 that 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 voted by Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,
MAURA HEALEY
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² The Massachusetts Department of Agricultural Resources (MDAR) offers the following guidance to towns and farmers in determining if a specific agri-tourism type activity enjoys agricultural protections under state law: <https://www.mass.gov/agritourism-program>