TOWN CLERK

TOWN OF ACTON
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August 5, 2013

MIDDLESEX, SS:

ON THE ABOVE DATE, I POSTED ATTESTED COPIES OF THE AMENDMENT TO THE TOWN BYLAW ARTICLE 6, AS WELL AS ZONING BYLAW, ARTICLES 10, 11, 12, WHICH PASSED AT THE SPECIAL TOWN MEETING THAT CONVENED ON JUNE 3, 2013. THE ARTICLES MENTIONED FOR THE TOWN BYLAW AND ZONING BYLAW, WERE APPROVED BY THE ATTORNEY GENERAL, MARTHA COAKLEY ON AUGUST 5, 2013 AND IS POSTED AT THE FOLLOWING PLACES IN THE TOWN OF ACTON:

NAGOG WOODS POST OFFICE, TOWN HALL, WEST ACTON POST OFFICE, CENTER POST OFFICE, PUBLIC SAFETY FACILITY, CENTER LIBRARY AND TOWN WEB PAGE.

CONSTABLE

CLAIMS OF INVALIDITY BY REASON OF ANY DEFECT IN THE PROCEDURE OF ADOPTION OR AMENDMENTS OF THESE BYLAWS MAY ONLY BE MADE WITHIN NINETY DAYS (90) PER CHAPTER 40, SECTION 32, OF THE GENERAL LAWS OF THE COMMONWEALTH.

EVA K. SZKARADEK
TOWN CLERK

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

CENTRAL MASSACHUSETTS DIVISION
10 MECHANIC STREET, SUITE 301
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ATTORNEY GENERAL

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August 5, 2103

Ms. Eva K. Szkaradek, Town Clerk
Town of Acton
472 Main Street
Acton, MA 01720

RE: Acton Special Town Meeting of June 3, 2013 - Case # 6835
Warrant Articles # 10, 11, and 12 (Zoning)
Warrant Article # 6 (General)

Dear Ms. Szkaradek:

Articles 6, 10, 11, and 12 - We approve the amendments to the Town's by-laws adopted under these Articles on the warrant for the Acton Special Town Meeting that convened on June 3, 2013. Our comments on Article 6 are provided below.

Article 6 - The amendments adopted under Article 6 add a new Section D15, "Fee for Permitting of Ice Cream Truck Vendors." The new Section D15 provides as follows:

> Pursuant to M.G.L. c. 6, § 172B ½ and 520 CMR 15.00, the application fee for the issuance or renewal of a permit to engage in Ice Cream Truck Vending as defined in 520 CMR 15.02 shall be $100, or such larger amount as from time-to-time the Permitting Authority may determine and the Board of Selectmen may approve, to cover the Permitting Authority's costs for conducting the requisite criminal background check pursuant to 520 CMR 15.05(1)(b) and (2)(b), conducting the investigation into the criminal history of the permit application to determine eligibility pursuant to M.G.L. c. 6, §172B ½ and 520 CMR 15.05(3)(b), and otherwise administering the ice cream truck vendor permit application review.

The new Section D15 imposes a $100 application fee or "such larger amount as from time-to-time the Permitting Authority may determine and the Board of Selectmen may approve to cover the cost of conducting requisite criminal background check for ice cream truck vendors." The new Section D15 is based upon the recently issued Code of Massachusetts Regulations (CMR) pertaining to permitting of ice cream truck vendors (520 CMR 15.00 et seq). We approve the new Section D15, but offer the following comments for the Town's consideration.

In order for a municipality to conduct state and national criminal history record checks pursuant to G.L. c. 6, § 172B 1/2 , the municipality must comply not only with the requirements of G.L. c. 6, § 172B 1/2, but also with the procedures required by the Federal Bureau of Investigation ("FBI"). The Executive Office of Public Safety and Security ("EOPSS") has issued an Informational Bulletin which explains the requirements for town by-laws and the procedures for obtaining criminal histories. The Informational Bulletin can be found here:

http://www.mass.gov/eopss/docs/chsb/civil-fingerprint-june-2011.pdf

According to the EOPSS Bulletin, the FBI will not allow a municipality to access the national criminal history records database unless the municipality has a by-law in place which satisfies several requirements, as outlined in the EOPSS Bulletin. *See* EOPSS Informational Bulletin, p.2. The new Section D15 does not comply the FBI's requirements, including the requirements that the by-law authorize the use of FBI records to conduct state and national criminal history records checks, and the requirement that the by-law clearly state that the FBI criminal history will not be disseminated to unauthorized entities. It is unclear whether the Town has an existing by-law that satisfies the requirements of G.L. c. 6, § 172B 1/2. We urge the Town to consult with Town Counsel regarding these requirements if the Town wishes to gain access to the national criminal history records information.

The EOPSS Bulletin also contains detailed information about other requirements the Town must comply with in order to implement the criminal history check system. These include the requirement that the by-law must be forwarded to the State Identification Section of the Massachusetts State Police (SIS) and copied to the Massachusetts Department of Criminal Justice Information Services Office of the General Counsel (DCJIS OGC) to coordinate approval by the FBI Access Integrity Unit (AIU). We urge the Town to review and comply with these requirements.

We specifically offer the following comments on the fee established under Section D15. Pursuant to G.L. c. 6, § 172B ½, $30 of the fee imposed by "shall be deposited into the Firearms Fingerprint Identity Verification Trust Fund and the remainder of the fee may be retained by the licensing authority for costs associated with the administration of the system." We suggest that the Town discuss with Town Counsel whether $30 of the fee imposed under the new Section D15 must be deposited into the Firearms Fingerprint Identity Verification Trust Fund.

Finally, while a municipality may impose fees, it "has no independent power of taxation." Silva v. City of Attleboro, 454 Mass. 165, 169 (2009). In distinguishing valid fees from impermissible taxes, the Supreme Judicial Court has noted that fees tend to share the following common traits: (1) fees, unlike taxes, are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society; (2) user fees (although not necessarily regulatory fees) are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge; and (3) fees are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses. *See* Silva, 454 Mass. at 168 (citing Emerson College v. City of Boston, 391 Mass. 415, 424-25 (1984)). The Town should consult with Town Counsel to ensure that any fee amount established pursuant Section D15 constitutes a valid fee rather than an impermissible tax.

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,

MARTHA COAKLEY
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cc: Town Counsel Stephen D. Anderson