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July 1, 2014

Katherine A. Kelly-Regan, Town Clerk
Town of Granby
215 West State Street
Granby, MA 01033

**RE: Granby Special Town Meeting of March 10, 2014 - Case # 7078
Warrant Articles # 1-20 (Zoning)**

Dear Ms. Kelly-Regan:

Articles 1-16 and 18-20 - We approve Articles 1-16 and 18-20, and the related map amendments, from the March 10, 2014 Granby Special Town Meeting. We will return the approved maps to you by regular mail. Our comments regarding Articles 3, 16, and 19 are provided below.

Article 17 - The Attorney General's deadline for action on this Article is extended for 30 days under the authority conferred by G.L. c. 40, § 32 as amended by Chapter 299 of the Acts of 2000. The agreement with Town Counsel for an additional 30 day extension is attached hereto. The amendments adopted under this Article will be acted upon by the Attorney General on or before **August 1, 2014**.

Article 3 - Article 3 adds a new Section 4.4, "Mixed Use Development Overlay District."

1. **Section 4.45, Performance Standards for Mixed Use Developments.**

Section 4.45 establishes performance standards for mixed use developments. Section 4.45 (14) (e) and (f), provide in relevant part as follows:

(e) The town shall assess the owners, agents, renters, or lessees for the cost of trimming or removal plus an additional amount of up to 20% of the charges for administrative costs, to the owner and to the lessee, agent, occupant or other person in possession and control of the property.

(f) If any property owner fails or refuses to pay when due any charge imposed under this section, the Director of Public Works may, in addition to taking other

collection remedies, certify due and unpaid charges, including interest, to the Town Treasurer to be levied against the person's property for collection by the county in the same manner as delinquent general taxes upon such property are collected as provided by the Town of Granby.

Section 4.45 (14) (e) authorizes the town to assess a fee of "an additional amount of up to 20% of the charges for administrative costs" over the actual costs of trimming or removal. Although 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 may wish to consult with Town Counsel to ensure that the fees charged under the by-law constitute valid fees rather than impermissible taxes.

Section 4.45 (14) (f) authorizes the Town, in addition to other collection remedies, to collect the amounts due under the by-law, including interest, by "levi[ng] against the person's property for collection by the county in the same manner as delinquent general taxes upon such property are collected as provided by the Town of Granby." Section 4.45 (14) (f) authorizes only the county to collect the amounts due under the by-law but does not authorize the Town of Granby to collect such amounts due. Pursuant to G.L. c. 40, § 58, Towns "may impose a lien on real property located within the...town for any local charge or fee that has not been paid by the due date, said lien shall be known as the 'municipal charges lien'; provided, that a separate vote at a town meeting...is taken for each type of charge or fee." The bylaw text adopted by the Town is insufficient to authorize a municipal charges lien under G.L. c. 40, § 58. The Town should consult with Town Counsel regarding the application of this section of the by-law and also to determine if a future amendment is needed.

Article 16 - Article 16 adds a new section 5.11, "Age Restricted Housing Community."

1. **Section 5.11.5, Building Requirements.**

Section 5.11.5 (6) requires that the "[d]esign characteristics and façade elevations shall be provided in the development application which shall require *Town Council* approval." (emphasis added). It is unclear what the Town means by "Town Council" approval since the Town does not appear to have a town council form of government. The Town may wish to clarify this term at a future Town Meeting.

2. **Section 5.11.9, Community/Unit Owner's Association.**

Section 5.11.9 (2) provides in relevant part that "the Town may, after notice to the association and public hearing, enter upon such land and maintain it in order to preserve the

taxable value of the properties within the development and to prevent the common land from becoming a public nuisance.”

Municipal officials do not have the authority to conduct warrantless searches of private property without permission of the owner. Commonwealth v. John G. Grant & Sons Co., Inc., 403 Mass. 151, 159-60 (1988). We suggest the Town consult with Town Counsel to ensure that this Section of the by-law is enforced in a manner that is consistent with state law and applicable constitutional requirements.

Article 19 - Article 19 amends Section III, “Use Regulations,” Table 1, “Schedule of Use Regulations.”

1. Agricultural Uses.

The Schedule of Use Regulations does not indicate whether the following uses are allowed or prohibited in the Village Center (VC) District:

- Agriculture, horticulture, floriculture, viticulture;
- Commercial, livestock, dairy, poultry farm;
- Farm business, commercial greenhouse; and
- Forestry, wood harvesting, tree farm, nursery

It is unclear whether the Town intentionally left blanks in the Schedule regarding these uses in the VC District and if so, whether the absence of a designation renders the use permitted or prohibited. We suggest the Town consult with Town Counsel to determine if an amendment of Table 1 is necessary at a future Town Meeting.

The use of a “commercial boarding stable, riding academy” is designated as “N” (prohibited) in all districts, including the new VC District, except for the Residential - Single Family Units (RS) District where the use is allowed by special permit from the Planning Board with site plan approval (SP-PB-SPA). Additionally, the use of “removal of soil, loam, sand, gravel, rock, quarried stone or other earth products” is designated as “N” in the VC District and requires a special permit from the Board of Selectmen (SP-BS) in all other districts.

In certain circumstances, the following uses may be considered protected agricultural uses pursuant to G.L. c. 40A, § 3, and the Town must apply its zoning by-laws consistent with that statute: commercial boarding stable; riding academy; removal of soil, loam, sand, gravel, rock, quarried stone or other removal products; agriculture, horticulture, floriculture, viticulture; commercial, livestock, dairy, poultry farm; farm business, commercial greenhouse; and forestry, wood harvesting, tree farm, nursery. General Laws Chapter 40A, Section 3, provides in relevant part:

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 Town should consult with Town Counsel as to the proper application of its zoning by-law to these uses.

2. Congregate Housing.

Table 1, Schedule of Use Regulations, includes the following uses:

- “Congregate housing for the elderly or handicapped” is a prohibited use (“N”) in the Industrial (I) and Industrial Limited (I-2) Districts and is allowed by special permit from the Planning Board with site plan approval (SP-PB-SPA) in all other districts;
- “Age Restricted Housing Community” is allowed by special permit from the Planning Board with site plan approval (SP-PB-SPA) in the Residential - Single Family Units (RS) and General Business (GB) Districts and prohibited (“N”) in all other districts;
- “Community Center, facility for the elderly” is allowed by special permit from the Planning Board with site plan approval (SP-PB-SPA) in all districts; and
- “Rest home, convalescent or nursing home” is allowed by special permit

from the Planning Board with site plan approval (SP-PB-SPA) in the Residential (RS) and Village Center (VC) Districts and a prohibited use (“N”) in all other districts.

In certain circumstances, the above noted uses may be protected uses pursuant to G.L. c. 40A, § 3, and the Town must apply its zoning by-laws consistent with that statute. General Laws Chapter 40A, Section 3, provides in relevant part:

Notwithstanding any general or special law to the contrary, local land use and health and safety laws, regulations, practices, ordinances, by-laws and decisions of a city or town shall not discriminate against a disabled person. Imposition of health and safety laws or land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size or other unrelated persons shall constitute discrimination. The provisions of this paragraph shall apply to every city or town, including, but not limited to the city of Boston and the city of Cambridge.

The Town should consult with Town Counsel as to the proper application of its zoning by-laws to these uses.

3. Schools and Churches.

Table 1, Schedule of Use Regulations, includes the following uses:

- “Public or non-profit educational institution” is allowed in all districts with site plan approval (SPA);
- “Church, parish house or other place of worship” is allowed in all districts with site plan approval (SPA); and
- “Private schools” are allowed by special permit from the Planning Board with site plan approval (SP-PB-SPA) in the Residential Single Family Unit (RS) District; allowed with site plan approval (SPA) in the Village Center (VC) District and prohibited (“N”) in all other districts;

In certain circumstances, the above noted uses may be protected uses pursuant to G.L. c. 40A, § 3, and the Town must apply its zoning by-laws consistent with that statute. General Laws Chapter 40A, Section 3, provides in relevant part:

No zoning...by-law...shall...prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to

reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.

The Town should consult with Town Counsel as to the proper application of its zoning by-law to these uses.

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
ATTORNEY GENERAL

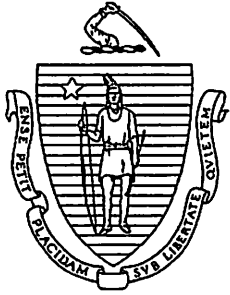
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July 1, 2014

Edward Ryan, Jr., Esq.
Ryan, Boudreau, Randall & Kirkpatrick
129 College Street
South Hadley, MA 01075

**Re: Extension of 90 day review period of Article 17
Granby Special Town Meeting of March 10, 2014 - Case # 7078**

Dear Attorney Ryan:

Pursuant to the requirements of G.L. c. 40, § 32, as amended by Chapter 299 of the Acts of 2000, the Attorney General and the Town Counsel are authorized to extend the 90-day period provided for the Attorney General's review of town by-laws for not more than an additional 90 days. This letter serves to satisfy the requirements of G.L. c. 40, § 32, as amended. In light of our need for time to further discuss the by-laws' consistency with state law, we hereby jointly agree to extend the Attorney General's 90-day review period of Article 17 for an additional 30 days. The decision on Article 17 will now be due on or before August 1, 2014.

In accordance with your assent and authorization, I have signed this letter on your behalf to reflect our agreement. We will file this letter with the Town Clerk via electronic mail, with a copy to you. Thank you.

Very truly yours,

MARTHA COAKLEY
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Edward Ryan Jr
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7/1/14
Date