



MARTHA COAKLEY
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL

CENTRAL MASSACHUSETTS DIVISION
10 MECHANIC STREET, SUITE 301
WORCESTER, MA 01608

(508) 792-7600
(508) 795-1991 fax
www.mass.gov/ago

September 9, 2012

Ronald A. Fucile, Town Clerk
Town of Walpole
135 School Street
Walpole, MA 02081

RE: Walpole Annual Town Meeting of May 7, 2012 – Case # 6399
Warrant Article # 33 (Zoning)
Warrant Articles # 27 and 29 (General)

Dear Mr. Fucile:

Articles 27, 29 and 33 – We approve the amendments to the Walpole by-laws adopted under these Articles on the warrant for the Annual Town Meeting which first convened on May 7, 2012. Our comments on Article 29 are detailed below.

Article 29 – The amendments adopted under Article 29 add a new chapter to the Town's general by-laws, Part III Regulatory Bylaws, "Registration and Maintenance of Abandoned or Foreclosed Buildings, Structures, and Properties." In general, the by-law imposes maintenance obligations on owners of foreclosing properties, and requires such owners to register with the Town and pay an initial and annual registration fee in the amount of \$100.00.

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 any fees established under the by-law constitute valid fees rather than impermissible taxes.

The court in Easthampton Savings Bank v. City of Springfield, 2012 WL 2577582 (D.Mass.) recently upheld a similar foreclosing properties ordinance adopted by the City of

Springfield. The court rejected the argument that the ordinance's \$10,000.00 cash bond requirement constituted an unlawful tax because "[t]he City's retention of a portion of the bond under the Foreclosure Ordinance is directly tied to defraying its costs of regulating foreclosures in the City." *Id.* at *6. The Town may wish to monitor the development of the Springfield case as it is currently on appeal (see Docket # 12-1917, U.S. Court of Appeals, First Circuit).

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.

cc: Town Counsel Joyce Frank (via electronic mail)

Very truly yours,

MARTHA COAKLEY
ATTORNEY GENERAL

Margaret J. Hurley

by: Margaret J. Hurley, Assistant Attorney General
Chief, Central Massachusetts Division
Director, Municipal Law Unit
Ten Mechanic Street, Suite 301
Worcester, MA 01608
(508) 792-7600 x 4402