February 20, 2009

Dawn E. Rickman, Town Clerk
300 Main Street
Wellfleet, MA 02667

**RE: Wellfleet Special Town Meeting of October 27, 2008 - Case # 4947**
**Warrant Articles # 4 and 5 (Zoning)**

Dear Ms. Rickman:

**Articles 4 and 5** - We return with the approval of this Office the amendments to the Town by-laws adopted under these Articles on the warrant for the Wellfleet Special Town Meeting that convened on October 27, 2008.

The amendments adopted under Article 4 add to the Town's zoning by-laws a new Section 5.4.3.1, "Maximum Site Coverage in the National Seashore Park." The amendments adopted under Article 4 impose a maximum site coverage requirement on lots within the National Seashore Park ("NSP"). Section 5.4.3.1 (b) provides that site coverage shall be calculated by adding the dwelling space area (as defined in the proposed by-law) to the gross horizontal area of the floors of any detached structures having a roof. The amendments adopted under Article 5 add a new Section 6.24, "National Seashore Park District Special Permit." The new Section 6.24 provides in pertinent part as follows:

> A National Seashore Park District Special Permit is required for any private property within the boundaries of the Cape Cod National Seashore whose owner proposes to tear down, build anew, make alterations to, or relocate existing buildings, or add new accessory buildings that would:
>
> a. exceed the Maximum Site Coverage in the National Seashore Park District listed in Section 5.4.3.1 of this By-law, or . . . .

In our review of the amendments adopted under Articles 4 and 5, we received an opposition letter suggesting that the proposed by-law amendments are inconsistent with G.L. c. 40A, § 3's, prohibition against regulating interior space. We also received copies of a number of materials from the Town, the Cape Cod Commission, and the Cape Cod National Seashore. These materials included opinions from various attorneys, including Town Counsel,

concluding that the proposed by-law amendments are not inconsistent with G.L. c. 40A, § 3, based in large part on the court's decision in 81 Spooner Road, LLC v. Town of Brookline, 425 Mass. 109 (2008), wherein the court determined that a very similar by-law was not inconsistent with G.L. c. 40A, § 3. The Attorney General is grateful for all of these materials and the attention that has been given to this matter.

Pursuant to G.L. c. 40, § 32, the Attorney General has a limited power of disapproval with every "presumption made in favor of the validity of municipal by-laws." Amherst v. Attorney General, 398 Mass. 793, 796 (1986). If a proposed by-law is capable of any interpretation or application that would make it a legal one, then it must be approved under G. L. c. 40, § 32. See Concord v. Attorney General, 336 Mass. 17, 24-25 (1957). Based upon our review of the proposed by-law amendments, the relevant case law, and all of the materials submitted to our Office, we conclude that the proposed by-law amendments adopted under Articles 4 and 5 are not clearly inconsistent with G.L. c. 40A, § 3 or any other state law. Therefore, we approve the proposed by-law amendments adopted under Articles 4 and 5. We offer the following comments regarding our analysis.

General Laws Chapter 40A, Section 3, provides in pertinent part as follows:

> No zoning . . . by-law shall regulate or restrict the interior area of a single family residential building . . . 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. . . .

General Laws Chapter 40A, Section 3, prohibits the regulation or restriction of the interior area of single-family residences; however, single-family residences may be subject to reasonable regulations pertaining to bulk and height of structures, yard size, lot area, setbacks, open space, parking, and building coverage requirements. Despite the prohibition against interior area regulation, the plain language of G.L. c. 40A, § 3, permits zoning by-laws that regulate single-family residences "through devices that operate against the exterior of such structures, and such regulations necessarily will affect its interior area." 81 Spooner Road, 425 Mass. at 113.

In 81 Spooner Road, LLC v. Town of Brookline, 425 Mass. 109 (2008), the court concluded that a Brookline by-law creating a maximum gross floor area to lot size ratio was not inconsistent with G.L. c. 40A, § 3. The court concluded that the language of G.L. c. 40A, § 3, prohibiting the regulation of interior space prohibits only "'direct' regulation of interior area, and not incidental effects of reasonable dimensional, bulk, and density requirements." 81 Spooner Road, 425 Mass. at 116. As the court explained,

> "Construing the prohibition in s. 3, second par., to mean direct regulation of interior area is sensible. It is based on a sound method of analysis used to resolve similar internal conflicts in other statutes, and it would make s. 3, second par., with its proviso a coherent and internally consistent piece of legislation. It permits municipalities to effectuate the legislative purpose of zoning, as set forth in St. 1975, c. 808, s. 2A, while simultaneously preserving the legislative policy against snob zoning and another stated purpose of zoning:

"to encourage housing for persons of all income levels."

Id. at 117.

While not identical to the by-law upheld in 81 Spooner Road, the maximum site coverage requirements in the proposed by-law amendments are similar enough for this Office to conclude that proposed by-law amendments are not inconsistent with G.L. c. 40A, § 3. We agree with the various legal opinions that the proposed by-law amendments' maximum site coverage requirements regulate the bulk of buildings and lot coverage and only incidentally affect the interior area of a single-family residence. For this reason, we approve the amendments adopted under Articles 4 and 5.

Finally, in approving the changes to the zoning by-laws adopted under Articles 4 and 5, we call the Town's attention to the provisions of G.L. c. 40A, § 5. General Laws Chapter 40A, Section 5, provides in pertinent part as follows:

> Notice of the time and place of such public hearing, of the subject matter, sufficient for identification, and of the place where texts and maps thereof may be inspected shall be published in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication to be not less than fourteen days before the day of said hearing, and by posting such notice in a conspicuous place in the city or town hall for a period of not less than fourteen days before the day of said hearing (emphasis added).

The planning board hearing notice for Articles 4 and 5 did not include a statement identifying where the text and map (if any) of the proposed by-law amendment was available for inspection. However, the planning board hearing notice contained the exact language of the proposals that were submitted to the planning board for consideration. Because the hearing notice served the purpose of G.L. c. 40A, § 5, in providing clear notice of matters to be considered at the planning board hearing, we determine that the hearing notice substantially complied with the notice requirements of the statute. See Hallenborg v. Town Clerk of Billerica, 360 Mass. 513, 517-18 (1971) ("[o]rdinarily in the enactment and amendment of . . . by-laws, fairly strict compliance by local legislative bodies with prescribed statutory procedures is treated as mandatory (citation omitted). The principal is not inflexible, however, and a court, in appraising the legal effect of insubstantial noncompliance with procedural details, must consider whether strict compliance is mandatory or only directory (citation omitted) and whether an asserted minor noncompliance in fact is significantly inconsistent with, or prejudicial to, the apparent legislative objectives of the prescribed procedures").

We remind the Town that in the future the posted and published planning board hearing notice should include a statement regarding where the text and map (if applicable) may be inspected, as required by G.L. c. 40A, § 5. The Office of the Attorney General has drafted a suggested form for use by the planning board that has, as part of its standard text, the statement required by G.L. c. 40A, § 5. A copy of that form is enclosed. We recommend that you provide a copy of the form to the planning board for its future use.

**Note: Under G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the town has first satisfied the posting/publishing requirements of this section. 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.**

**If the Attorney General has disapproved and deleted one or more portions of any by-law or by-law amendment submitted for approval, only those portions approved are to be posted and published pursuant to G.L. c. 40, § 32. We ask that you forward to us a copy of the final text of the by-law or by-law amendments reflecting any such deletion. It will be sufficient to send us a copy of the text posted and published by the Town Clerk pursuant to this statute.**

**Nothing in the Attorney General's approval authorizes an exemption from any applicable state law or regulation governing the subject of the by-law submitted for approval.**

Very truly yours,

MARTHA COAKLEY
ATTORNEY GENERAL

_____

by: Kelli E. Gunagan, Assistant Attorney General
By-law Coordinator, Municipal Law Unit
1350 Main Street, 4th Floor
Springfield, MA 01103-1629
(413) 784-1240, x 7717

enc.

cc: Town Counsel