



THE COMMONWEALTH OF MASSACHUSETTS  
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February 26, 2019

Laurence R. Pizer, Town Clerk  
Town of Plymouth  
26 Court Street  
Plymouth, MA 02360

**Re: Plymouth Fall Annual Town Meeting of October 20, 2018 – Case # 9238**  
**Warrant Articles # 22, 23, 24, and 25 (Zoning)**  
**Warrant Articles # 13, 16, and 18 (General)**

Dear Mr. Pizer:

**Articles 13, 16, 18, 22, 23, 24, and 25** - We approve Articles 13, 16, 18, 22, 23, 24, and 25, and the map amendments pertaining to Article 25, from the Plymouth October 20, 2018, Fall Annual Town Meeting. We will return the approve map to you by regular mail. Our comments on Articles 13, 23, and 25 are provided below.

**Article 13** - Article 13 was a vote to amend Chapter 143, “Departmental Revolving Funds,” by deleting the School Custodial Details fund from the table of authorized revolving funds. Article 13 was also a vote to “rescind the FY 19 spending cap request of \$150,000 voted under Article 3 of the 2018 Annual Town Meeting.” We take no action on the portion of Article 3 that rescinded the FY 19 spending cap request because it is not a by-law amendment and is not subject to review by the Attorney General pursuant to G.L. c. 40, § 32.

**Article 23** - Article 23 amends the Town’s zoning by-laws pertaining to commercial dog kennels. One change adds to Section 201.3, “Definitions,” a definition for “Commercial Dog Kennel” as follows:

A collection of dogs on a Lot, whether maintained for breeding, boarding sale and training, including more than three dogs, three months old or older, provided however, that a veterinary hospital shall not be considered a Dog Kennel.

Another change amends the Town’s Use Table to allow dog kennels by special permit in the Town’s Rural Residential District and as of right in the Light Industrial, Airport, Highway Commercial, and Mixed Commerce Districts.

While we approve the new portion of the Use Table pertaining to dog kennels, the Town must apply it consistent with the protections given to agriculture under G.L. c. 40A, § 3. 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 agriculture 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 may not 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.

Dog kennels that include the breeding and raising of dogs may be considered agricultural uses and subject to the protections provided under G.L. c. 40A, § 3. See Sturbridge v. McDowell, 35 Mass. App. Ct. 924, 926 (1993). As such, certain kennels may enjoy protections accorded to agriculture under G.L. c. 40A, § 3, and in such instances, it would be inconsistent with state law to prohibit, unreasonably regulate or require a special permit for such use. Therefore, the Town must apply the new portion of the Use Table pertaining to dog kennels in a manner consistent with G.L. c. 40A, § 3.

**Article 25** - Article 25 amends the Town’s zoning by-laws to create a new Cedarville Village Enterprise District (CVED). One change amends the Town’s Use Table to list the uses allowed or prohibited in the new CVED. As amended, the Use Table prohibits aviation related uses in the new CVED. “Aviation related uses” is not defined in the Town’s zoning by-laws. The Town must apply the prohibition on aviation related uses consistent with the authority given to MassDOT under G.L. c. 90, § 39B.

General Laws Chapter 90, Section 39B, requires MassDOT review and approval of local laws that regulate “the use and operation of aircraft.” However, local laws that regulate only the use of land and affect only private non-commercial restricted landing areas (PRLAs), do not require MassDOT approval. *See Roma v. Board of Appeals of Rockport*, 478 Mass. 580, 592 n.9 (2018) (“Nothing in this opinion is intended to disturb either the notice and safety requirements for noncommercial private restricted landing areas mandated under G. L. c. 90, § 39B, fourth par., or the continuing authority of the division under the aeronautics code over aircraft landing areas that do not fall within the narrow definition of a noncommercial private restricted landing area.”). Because the Town does not define “aviation related uses,” the Town may wish to discuss the application of the *Roma* decision to the bylaw’s prohibition on aviation related uses in the new CVED and whether the prohibition needs approval from MassDOT before it becomes effective.<sup>1</sup>

**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,

MAURA HEALEY  
ATTORNEY GENERAL

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cc: Town Counsel Mark Reich

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<sup>1</sup>MassDOT’s Aeronautics Division, General Counsel’s Office, MassDOT and MBTA, 10 Park Plaza, Room 7760, Boston, MA 02116.