



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

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June 10, 2011

Mary Ann Silva, Town Clerk
54 Marion Road
Wareham, MA 02571

**RE: Wareham Fall Annual Town Meeting of October 25, 2010 --- Case # 5814
Warrant Article 80 (General)**

Dear Ms. Silva:

Article 80 - The Attorney General's deadline for action on Article 80 ("Nitrogen Net Zero For New Construction") from the Fall Annual Town Meeting which convened on October 25, 2010, was extended for an additional 90-days (to June 11, 2011) under the authority conferred by Chapter 299 of the Acts of 2000. In the interim, at the Annual Town Meeting which convened on April 25, 2011, the Town voted under Article 42 to delete in its entirety "Division VI, Article II, A. NITROGEN NET ZERO FOR NEW CONSTRUCTION including all related subsections thereto." ¹ In light of that vote under Article 42, the original vote under Article 80 of the Fall Annual Town Meeting is moot, and we disapprove it on that ground.

The amendments adopted under Article 80 would have added a new Division VI, Article II to the Town's general by-laws, "Nitrogen Net Zero For New Construction." The stated purpose of the new section was to establish "a standard for new construction, as defined below as "Nitrogen Net Zero." (Article 80, Section A, 1.0). However, the bylaw fails to define the standard of "Nitrogen Net Zero" and is therefore unconstitutionally vague. Due process of law requires that individuals have adequate notice of what conduct may subject them to legal sanction. "A 'statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *Commonwealth v. Carpenter*, 325 Mass. 519, 521 (1950) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). "In addition to its failure to give fair warning, a vague statute offends [due process] by its lack of reasonably clear guidelines for law enforcement and its consequent encouragement of arbitrary and erratic arrests and prosecutions." *Commonwealth v. Sefranka*, 382 Mass. 108, 110 (1980). Absent the vote to delete the amendments adopted under Article 80, we would have disapproved

¹ In conjunction with this decision on Article 80, we also issued an approval of Article 42 of the Wareham Annual Town Meeting which convened on April 25, 2011. See decision on Case # 5984 issued on June 10, 2011.

the amendments adopted under Article 80 on grounds of vagueness.

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,

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cc: Town Counsel (via email)