



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](http://www.mass.gov/ago)

December 17, 2014

Michael P. Seery, Town Clerk  
Town of Brookfield  
6 Central Street  
Brookfield, MA 01506

**RE: Brookfield Special Town Meeting of November 10, 2008 - Case # 7354  
Warrant Article # 8 (General)**

Dear Mr. Seery:

**Article 8** - We approve Article 8 from the November 10, 2008 Brookfield Special Town Meeting.<sup>1</sup>

Article 8 repeals the existing text of Chapter X, Section 16 of the general bylaws and inserts new text as follows:

A permit from the Highway Superintendent is required to construct a curb cut or a driveway (Curb cuts onto state highways require a written permit from Mass Highways). As part of the application for the permit, the applicant must pay an application fee in an amount set forth in a fee schedule established by the Highway Superintendent. As a condition for issuance of a permit, the applicant shall place funds in an escrow account held by an escrow agent approved by the Highway Superintendent as being reasonable to cover the cost of constructing and completing the curb cut or driveway. Upon written notice by the Highway Superintendent to the escrow agent and the applicant that the construction is completed in accordance with the permit, the escrow agent shall release to the applicant any funds being held. If the

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<sup>1</sup> General Laws Chapter 40, Section 32, requires the Town Clerk to submit proposed by-law amendments to the Attorney General for review and approval thirty days after the final adjournment of Town Meeting. The amendments voted under Article 8 were adopted at the November 10, 2008 Special Town Meeting but not received by our Office until September 25, 2014. The failure to submit proposed by-law amendments to the Attorney General in accordance with G.L. c. 40, § 32, affects the effective date of the by-laws. Therefore, as you are aware, the by-law adopted under Article 8 has not taken effect and will not take effect until the posting and publication requirements set out in Section 32 have been satisfied. We suggest that you discuss this issue in more detail with Town Counsel.

construction of the curb cut or driveway is not completed by the applicant in accordance with the permit, the escrow agent, upon written notice from the Highway Superintendent and written notice to the applicant, shall deposit with the Town Treasurer the funds or the portion of the funds determined by the Highway Superintendent to be necessary to complete construction. The funds would then be available for appropriation to complete the construction in order to protect the public health and safety.

1. Curb Cuts onto State Highways.

The by-law provides that “Curb cuts onto state highways require a written permit from Mass Highways.” The Massachusetts Division of Highways has authority over curb cuts and driveway openings onto state highways. *See* G.L. c. 81, § 21. Therefore, the Town, through its by-law, cannot dictate the manner of approval needed from the Division of Highways nor can the Town give such approval. The by-law must be applied in a manner consistent with G.L. c. 81, § 21 and the authority of the Division of Highways. We suggest the Town consult further with Town Counsel on the proper application of this portion of the by-law.

2. Application Fee.

The by-law provides that an applicant “must pay an application fee in an amount set forth in a fee schedule established by the Highway Superintendent.” 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 application fees charged under the by-law constitute valid fees rather than impermissible taxes.

3. Escrow Account.

The requirement that an applicant must place funds in an escrow account must be applied in a manner consistent with G.L. c. 44, § 53. General Laws Chapter 44, Section 53, provides that “[a]ll moneys received by a city, town or district officer or department, except as otherwise provided by special acts and except fees provided for by statute, shall be paid by such officers or department upon their receipt into the city, town or district treasury.” Under Section 53, all moneys received by the Town become part of the general fund, unless the Legislature has expressly made other provisions that are applicable to such receipt. Escrow funds do not become Town funds unless and until the applicant defaults on the obligations under the by-law. Moreover, if the Town must use the escrow to pay for compliance with the construction of the curb cut or driveway, the Town must first appropriate the money for this purpose by Town Meeting vote. In the absence of any general or special law to the contrary, escrow security funds of the sort contemplated here must be deposited with the Town Treasurer and made part of

the Town's general fund, pursuant to G.L. c. 44, § 53. The Town must then appropriate the money for the specific purpose of constructing the curb cut or driveway. We suggest that the Town consult with Town Counsel on the application of the by-law's provisions pertaining to the escrow account and escrow agent to ensure that the by-law is applied in a manner consistent with state law.

**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

*Nicole B. Caprioli*

By: Nicole B. Caprioli  
Assistant Attorney General  
Municipal Law Unit  
10 Mechanic Street, Suite 301  
Worcester, MA 01608  
(508) 792-7600 ext. 4418  
nicole.caprioli@state.ma.us

cc: Town Counsel Patricia A. Cantor