

Letter to Board of Selectmen

TO: Board of Selectmen of Southborough
CC: Town Administrator, Southborough
Town Clerk, Southborough
Margaret Hurley, Attorney General Bylaw Division
Kelli Gunagan, Attorney General Case # 9074 Lead Bylaw division
Ginny Kremer, Esq., Article #1 Petitioner's Counsel
DATE: November 11, 2018
RE: Intervention by Southborough Officials into Article 1 of the May 22, 2018 Special Town Meeting,

On November 7, 2018, I attended the Southborough Board of Selectmen meeting and, during public comment, provided a high-level overview of the sequence of scandalous events regarding Article #1 (Case #9074) that have transpired since the Special Town Meeting on May 22, 2018. This letter serves as a formal request for information.

The appointed Town Administrator, the appointed Town Counsel, and some members of the elected Board of Selectmen have acted in **direct opposition to the will of the citizens**. On May 22, 2018, Southborough held a special Town Meeting for consideration of several warrant articles that resulted from citizen petitions. Article 1 sought to reaffirm the 4-member quorum requirement for the Zoning Board of Appeals which had been part of the Code and observed by the ZBA for many years. Despite the fact that the requirement was routinely observed by the ZBA over three decades and caused no known problems, it was deleted from the Town Code in the first quarter of 2018 after it became a liability to the litigation involving the ZBA's approval of the Park Central 40B. Specifically, during many of the Park Central hearings, the ZBA acted with only 3 members present. Because Town Counsel is representing the ZBA in that case, and because he has claimed in that case that the quorum requirement was obsolete and/or unenforceable, Town Counsel has a clear conflict in opining on Article 1, which he explained to the Town Meeting voters. As a result, the Board of Selectmen hired the services of Attorney Jay Talerman, who was given time to provide his opinion on Article 1. His opinion was that reinstating the 4-member quorum requirement was "unwise" and potentially in conflict with 40B's voting requirement, which only requires a three affirmative votes for approval. Unfortunately, despite being the petitioner of Article 1, moderator Paul Cimino would not allow my attorney, Ginny Kremer, to speak. I was, however, able to furnish copies of her written opinion to the voters. Her opinion was that there is no conflict between a **quorum** requirement, which sets the number of ZBA members who must be present for the ZBA to act, and 40B's **voting** requirement, which still would only require three affirmative votes for approval. The distinction is quite simple. After an hour and 45 minutes of debate, Town Meeting voters overwhelmingly approved the amended Article #1 (parts of the original Article governing recusal of members for conflicts was removed by amendment). The citizens of this Town feel that "more is better" and makes the ZBA less vulnerable to corruption and influence of Board stacking.

After the Town Meeting, as is required by Massachusetts law, the Town Clerk submitted materials to the Attorney General's Office for its review of the bylaws that were passed, including Article 1. The Attorney General has the authority to disapprove a bylaw **only** if it is in conflict with a state law or provision of the Constitution. Unfortunately, one or several town officials have collaborated to attempt to influence the Attorney General's review of Article 1. Specifically, well after the Town Clerk submitted the required materials, the Town Administrator—under unknown or no authority from the Board of Selectmen—forwarded Attorney Talerman's opinion to the Attorney General's Office. Attorney Kremer's opinion was not included in that transmission. Later—again under unknown or no authority, Town Counsel himself—whose conflict remains real and present—submitted his opinion to the AG. Town Counsel has an obvious stake in the game on the AG's outcome and is attempting to thwart our

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rights under the Home Rule Amendment to the Massachusetts Constitution to govern our Town as we see fit, so long as there is no conflict with state law. Again, there is a clear and simple distinction between a requirement that 4 members be present in order for the ZBA to act, and 40B's requirement that three affirmative votes are needed to approve a 40B application. The ZBA has operated under those rules for years, and Article #1 simply reinstated that requirement.

As a Southborough citizen and a person who spent the time, energy, and resources to reinstate a longstanding rule that was deleted without the public's knowledge (in a non-public way per the Town Clerk that 'the Town would have no way of knowing'), it is outrageous to me that my own Town Officials (the Town Administrator and Town Counsel) are trying to convince the Attorney General that Article 1 is somehow in conflict with 40B. Has this been done without the approval or direction of the Board of Selectmen? If they are successful, this will set precedent for any future bylaw, and Town Officials will feel free to secretly work to manipulate the outcome. Does the concept of integrity, ethics, and a government for the people by the people have any meaning to the Officials involved? I have had to directly insert myself into the Attorney General's review process because of these off-the-record communications by Town Officials, but it is not clear what the Attorney General will now do.

I would expect that, as the elected members of the Board of Selectmen, and decision you make to oppose the voice of your own citizens would have to be discussed at public meetings, subject to on-the-record votes taken to authorize the communications from Attorneys Talerman and Cipriano. Further, given Attorney Cipriano's on the record declaration that he had a conflict of interest in this very matter, I am shocked and dismayed that he produced a 45-page document with numerous exhibits "opining" that Article 1 is in conflict with state law. Again, Attorney Talerman delivered that same opinion on the floor of Town Meeting, and the citizens resoundingly rejected it and approved the proposed bylaw. As our elected Board of Selectmen, please understand that aggressively battling against what the people of this town have voted in favor of is very problematic. Thus, the people of Southborough are entitled to know the extent to which each one of you has been involved in directing or approving these communications.

Therefore, I am formally requesting answers to the following three questions:

- 1) When and how did the Board--or any member of the Board—authorize the Town Administrator's communication of Attorney Talerman's opinion to AG on July 26th?**
- 2) When and how did the Board--or any member of the Board—authorize the Jay Talerman to further communicate his opinion to the AG on October 11th?**
- 3) When and how did the Board--or any member of the Board—authorize Attorney Cipriano respond, even after having recused himself at the Town Meeting, to Ginny Kremer's submission to the AG October 18th?**

In closing, I look forward to a prompt explanation, in writing, from each member individually of the Board regarding your involvement, approval, and/or authorization of the Town Administrator, and the Town Counsel to vigorously oppose and argue against Article 1. To be clear, as the petitioner, I believe any such action undermines our democratic rights and the process of the AG's review. If any of you were involved, please understand that you have deeply disappointed me and the hundreds of individuals who voted in favor of Article #1 on May 22, 2018.

Sincerely,
Marnie L. Hoolahan
26 Clifford Road

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Attachments/MLH

Correspondence Timeline for STM #1: ZBA Rules and Regulations:

Date	Topic
5-22-18	Article 1 passed (Exhibit #1)
6-24-18	Article 1 submitted to Attorney General by the Town Clerk with all required materials; pursuant to normal procedure, this package did not include any legal opinions.
9-19-18	Email received from Jim Hegarty informing me that Town Counsel approved the AG's request for an extension of time to review Article 1.
10-2-18	I submitted a public records request to Town Clerk Jim Hegarty asking for ALL correspondence between Town Officials and the Attorney General. He provided only the materials he submitted on June 24, which again did not include any legal opinions. I only later learned that the Town Clerk is NOT the Town's appointed "Records Access Officer, and that he did not provide the communication the Town Administrator's email and attached Talerman opinion to the AG.
10-2-18	I received the following documents from my public records request to the Town Clerk 1) Submission of Article #1 to AG on June 24, 2018 2) Email from AG requesting extension on Article #1 3) Email from Town Clerk to Cipriano requesting Article #3 being expedited 4) Email from AG Confirming 90-day extension on Article #1
10-5-18	I requested from the AG all correspondence on Article #1 received from any Town Official
10-9-18	I received from the AG: 1) Email dated July 26 from Mark Purple in which he provided Talerman's opinion as an attachment; 2) Talerman's opinion presented at Town Meeting; 3) An email from Ginny Kremer providing her legal opinion that I provided at the Special Town Meeting
10-9-18	I provided to the AG: 1) Ginny Kremer's legal opinion that I shared at Special Town Meeting; and 2) The STM Video link
10-10-18	I had a telephone call with Margaret Hurley, the AG's Municipal Law Chief and expressed my concern about the manipulation of the democratic process that I am entitled to under Home Rule. She agreed that her team would provide me and Ginny Kremer with all future correspondence received regarding Article 1.
10-11-18	I received from the AG prior AG decisions on quorum articles 1) Blackstone 2) Millville 3) Marion
10-25-18	I received from Ginny Kremer a copy of letter sent to AG from Cipriano dated 10-18-18 (Exhibit 3).
10-26-18	I submitted a Public Record Request through Southborough's automated system requesting ALL correspondence from anyone acting in any capacity on Article #1, to include all internal and external correspondence.
10-29-18	I received from the Town Clerk, Mark Purple's email to the AG (Exhibit 2).

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11-2-18	Received from AG: 1) Letter from Ginny Kremer to AG
11-2-18	Received the following in response to my Public Record Request from the Town Administrator: 1) October 11, 2018 email sharing Ginny Kremer’s opinion to Cipriano and Talerman (Exhibit 4); 2) October 11, 2018 email from Talerman to AG with cc: to Purple (Exhibit 4); 3) Email chain between originating from me in May to the BOS and Purple, requesting that Talerman’s opinion be released (Exhibit 5); 4) Minutes from May 15 BOS meeting (Exhibit 6); 5) Purple’s statement that he could not share any correspondence from counsel as that was protected by attorney client privilege. However, according to the Attorney General, as soon as any person corresponds with the AG—whether they are an attorney or not--that information becomes public and is not protected by the attorney client privilege. Thus, Purple, as the Records Access Officer, has failed to supply all requested documents in violation of the Public Records Law.
11-7-18	I attended the BOS meeting and read my timeline, and asked for three specific answers, now I have 4 events that I want to know in which public meeting was a vote taken, who voted in favor and who authorized subsequent correspondence.
11-12-18	Public Records request for all legal invoices submitted to the Town for legal services rendered pertaining to Article #1 from April – November 2018

Exhibit #1: Article #1

ARTICLE 1: To see if the Town will vote to affirm and/or reaffirm, and/or reinstate, and/or clarify and/or amend the Town Code (Ch.174-25B) and/or the Zoning Bylaw as necessary to require a quorum of four (4) members of the Zoning Board of Appeals or their alternates to hold public hearings on any and all matters before them, and to further require that the following provisions be made a permanent part of the Town Code, effective upon being filed with the Town Clerk:

Zoning Board of Appeals: Meetings; Hearings; Quorum

- A. Five members of the Board shall be present at every hearing. Four members may hold a hearing and act on the matter before the Board, provided that the interested parties assent thereto before the hearing opens. Any hearing may be adjourned for any reason by the Board, or by any member in case of the absence of a quorum, to a later date by a statement to that effect at the hearing, and the hearing as so adjourned from time to time may be held without any further notice, unless the Board shall vote that such notice shall be given.
- B. The Board will hold public hearings on all applications submitted to it. A quorum shall consist of four members or their alternates. No member shall appear or represent any person in any matter pending before the Board. No member shall hear or decide an appeal in which he or she is directly or indirectly interested in a personal or financial sense.
- C. The hearings will proceed as follows:
 - 1. The Chairman will call the meeting to order and read the notice of hearing as it appeared in the paper.
 - 2. The applicant or his representative shall present the case to the Board.
 - 3. The abutters to the property present at the hearing shall be heard and duly recorded.
 - 4. Any other interested parties present at the hearing shall be heard.
 - 5. Town representatives shall be heard (Planning Board, Selectmen, other boards, etc.).
 - 6. The Chairman shall inform those present at the hearing as to the time requirements, under MGL c. 40A, § 21, [1] for appealing the decision of the Board. [1] Editor's Note: See MGL c. 40A, § 17, Judicial Review
- D. Hearings before the Board:
 - 1. All hearings of the Board shall be open to the public.
 - 2. The transcript of each hearing shall state the members of the Board present and other persons who speak at the hearing and shall contain a summary of the evidence given.
 - 3. The transcript shall be signed by the Secretary or Acting Secretary.

Zoning Board of Appeals: Disqualification of Members

- A. Members and alternates shall be responsible for contacting the State Ethics Commission for a conflict of interest opinion and disqualifying themselves from participation in the deciding of any case coming before the Board where the member or alternate has any conflict of Interest or appearance of conflict of interest pertaining

to the subject matter of the particular case. Members and alternates are required to file Conflict of Interest (COI) Forms with the Town Clerk and BOS before the case is heard.

; Or do or act anything in relation thereto.

FIRST MOTION MADE: I move to strike Article 1 in its entirety and replace it with the following language:

To require a quorum of four (4) members of the Zoning Board of Appeals or their alternates to hold public hearings on any and all matters before them, and to further require that the following provisions be made a permanent part of the Town Code, effective upon being filed with the Town Clerk:

Zoning Board of Appeals: Meetings; Hearings; Quorum

- A. Five members of the Board shall be present at every hearing. Four members may hold a hearing and act on the matter before the Board, provided that the interested parties assent thereto before the hearing opens. Any hearing may be adjourned for any reason by the Board, or by any member in case of the absence of a quorum, to a later date by a statement to that effect at the hearing, and the hearing as so adjourned from time to time may be held without any further notice, unless the Board shall vote that such notice shall be given.
- B. The Board will hold public hearings on all applications submitted to it. A quorum shall consist of four members or their alternates. No member shall appear or represent any person in any matter pending before the Board. No member shall hear or decide an appeal in which he or she is directly or indirectly interested in a personal or financial sense.
- C. The hearings will proceed as follows:
 - (1) The Chairman will call the meeting to order and read the notice of hearing as it appeared in the paper.
 - (2) The applicant or his representative shall present the case to the Board.
 - (3) The abutters to the property present at the hearing shall be heard and duly recorded.
 - (4) Any other interested parties present at the hearing shall be heard.
 - (5) Town representatives shall be heard (Planning Board, Selectmen, other boards, etc.).
 - (6) The Chairman shall inform those present at the hearing as to the time requirements, under MGL c. 40A, § 21, [1] for appealing the decision of the Board.
[1] Editor's Note: See MGL c. 40A, § 17, Judicial Review

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D. Hearings before the Board:

- (1) All hearings of the Board shall be open to the public
- (2) The minutes of each hearing shall state the members of the Board present and other persons who speak at the hearing and shall contain a summary of the evidence given.
- (3) The minutes shall be signed by the Secretary or Acting Secretary.

Zoning Board of Appeals: Conduct

A. Zoning Board of Appeals (ZBA) members are municipal employees covered by the conflict of interest law (Chapter 268A of the General Laws).

B. In addition to complying with the requirements of Mass General Law Chapter 268A, members and alternates are required to file any necessary Conflict of Interest (COI) Forms with the Town Clerk and Board of Selectmen before a case related to such a conflict is heard.

FIRST MOTION PASSED.

SECOND MOTION MADE: I move to strike the last sentence of Section B: "No member shall hear or decide an appeal in which he or she is directly or indirectly interested in a personal or financial sense."

**SECOND MOTION FAILED BY TELLER COUNT
94 YES, 127 NO: 42.5%.**

MOTION AS AMMENDED PASSED BY MODERATOR DECLARED 2/3 MAJORITY.

True Copy
Attest:

James F. Hegarty, Town Clerk

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EXHIBIT #2:
Email from Mark Purple to Attorney General
Date: July 26, 2018
Day 32 from submission of Article #1 to AG

----- Forwarded message -----

From: Mark Purple <mpurple@southboroughma.com>

To: "Hurley, Margaret (AGO)" <Margaret.Hurley@massmail.state.ma.us>, "Gunagan, Kelli (AGO)" <Kelli.Gunagan@massmail.state.ma.us>, "Caprioli, Nicole (AGO)" <Nicole.Caprioli@massmail.state.ma.us>

Cc: Jay Talerman <jay@mtclawyers.com>, Board of Selectmen <bos@southboroughma.com>

Bcc:

Date: Thu, 26 Jul 2018 20:09:39 +0000

Subject: Review of bylaw changes from May 22, 2018 Southborough Special Town Meeting

Dear Ms. Hurley:

Good afternoon.

On May 22, 2018, the Town of Southborough held a Special Town Meeting to consider five articles, four of which considered changes to the Town Code and/or zoning bylaws. Those articles that were approved have since been sent to your office for approval. Article 1 of that warrant was submitted by citizen petition, and sought to make changes to the zoning bylaw as it pertains to the Zoning Board of Appeals and quorum. While the article as amended and approved by Town Meeting addressed many of the concerns expressed by Special Counsel Jay Talerman on behalf of the Board of Selectmen, it did not address all of them. To that end, for your consideration in your review, I have included a copy of the opinion letter that was issued by Attorney Talerman in regards to this article. This opinion was requested by the Board of Selectmen, and was distributed to all parties, including the petitioner, prior to the Special Town Meeting.

If you have questions, or need further clarification on the attached opinion, please contact Attorney Talerman. Here is his contact information:

Jason R. Talerman
Mead, Talerman & Costa, LLC
730 Main Street · Suite 1F · Millis, Massachusetts · 02054
Phone 774.993.5000
jay@mtclawyers.com

Thank you for your consideration.

Mark
Mark J. Purple
Town Administrator
Town of Southborough
P: 508-485-0710
F: 508-480-1061