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TO: Mark B. Lyons, Chairman (***By Electronic Mail Only)***

FROM: Amy Kwesell, Esq.

RE: 35 Main Street / Topsfield Village Shopping Center

DATE: September 19, 2018

You requested a summary of feasible options available to the Town of Topsfield with regard to long-standing physical conditions at the Topsfield Village Shopping Center (the "Shopping Center"). I understand that during the past few years there have been several complaints from residents relating to the Shopping Center including complaints of rodents, leaks, dumpster conditions, fire risks, and parking lots problems involving flooding, the storm drain, jersey barriers, and uneven surfaces of the parking areas. Please find below a summary of possible options available to the Town. ***Any determination of whether to proceed with an option should include an analysis of costs versus the likelihood of success***.

Building Code Enforcement

As you know, the Inspector of Buildings administers and enforces the Massachusetts State Building Code. The purpose of the State Building Code is "to establish the minimum requirements to safeguard the public health, safety and general welfare through structural strength, means of egress facilities, stability, sanitation, adequate light and ventilation, energy conservation, and safety to life and property from fire and other hazards attributed to the building environment, and to provide safety to fire fighters and emergency responders during emergency operations." See 780 CMR 101.3.

Notably, the State Building Code applies not only to the "construction" of buildings and structures but also to the "maintenance" of them. See 780 CMR 101.2.2. Pursuant to 780 CMR 102.8, all buildings and structures that are existing must be "maintained in a safe, operable and sanitary condition." If they are not, pursuant to the State Building Code the Inspector of Buildings may formally require the building be brought up to code and could, if warranted, revoke any certificate of occupancy.

If the Inspector of Buildings is of the opinion that the actual building comprising the Shopping Center is not being maintained in a "safe" or "sanitary condition", the Inspector of Building is authorized to require the owner to remedy the condition. However, it should be noted that only the condition deemed to be unsafe will need to be remedied.

Architectural Access Board Enforcement

The Inspector of Buildings is also authorized to enforce the Architectural Access Board regulations. See 780 CMR 1101.1. The Inspector of Buildings may evaluate whether the Shopping Center has a sufficient accessible spaces pursuant to 521 CMR 23. The Architectural Access Board accessible spaces are required whenever a parking lot is "relined." ***Therefore, it must be determined that the parking areas have been "relined" in order to seek this remedy***.

Board of Health

The Board of Health is authorized to address the reported conditions relating to the dumpsters the Shopping Center if it enacts rules and regulations to do so. Pursuant to G.L. c. 111, §31B, the Board of Health is authorized to enact rules and regulations "for the control of the removal, transportation or disposal of garbage." The Board of Health may consider whether the enactment of such rules and regulations would be a useful regulatory mechanism for the Board of Health to address the maintenance of dumpsters at the Shopping Center and elsewhere in Town. Additionally, the Board of Health generally regulates septic issues through the State Regulations (310 CMR 15.000) and local regulations.

More generally, the Board of Health possesses the authority to conduct inspections and address "nuisances." Pursuant to G.L. c. 111, §122, the Board can investigate "all nuisances, sources of filth and causes of sickness within" the Town and if it is the Board's opinion that such are "injurious to the public health", the Board may "destroy, remove or prevent" them. Pursuant to G.L. c. 111, §123, the Board of Health may order the owner of any private premises at his expense to remove any nuisance within twenty-four hours or within a time that the Board deems reasonable, after notice. If the owner violates the order, the owner may be liable up to $1,000 for every day he knowingly violates the order. Upon a review of case law, the majority of actions related to G.L. c. 111, §123 involve animals (particularly pigs and swine). ***Again, the Board of Health would only be seeking remediation for individual conditions and cannot order the entire property cleaned up due to one discreet violation.***

Accordingly, if the Board determines that any of the physical conditions at the Shopping Center are "nuisances" which are "injurious to the public health" the Board could issue a cease and desist order to the owner. If the conditions are not addressed, the Board could file suit to enjoin the condition and subject the owner to penalty pursuant to G.L. c. 111, §123. ***The statute requires a high level of proof and therefore, we recommend that prior to initiating a suit, the Town assess whether the enforcement of the actual violation outweighs the significant cost of litigation***.

Fire Department Enforcement

The Fire Chief may have the authority to enforce "fire lanes" within the Shopping Center. The State Board of Fire Regulations at 527 CMR 10.03(10) allows a municipal fire department to designate "fire lanes" with a minimum of 18 feet to be kept free of obstructions and vehicles. If the Town Fire Department has designated such a fire lane adjacent to the Shopping Center buildings, and if the condition of the parking lot is such that the Fire Department vehicles are unable to make practical use of the fire lane, in my opinion such a violation could be treated as a violation of the Fire Regulations and G.L. c. 148, § 28. After notice of the violation, if the violation is not cured, the owner can be fined not more than fifty dollars for each day during which such violation continues after actual notice. ***Additionally, pursuant to G.L. c 148, § 5, if access is blocked creating a dangerous situation, the Fire Department can serve notice and if, after 24 hours, the violation is not cured, in the interest of public safety, can go upon the property and remedy the situation.*** [1]

Public Nuisance Claims

Pursuant to G.L. 139, §1, the Board of Selectmen may address nuisance conditions. However, this type of independent enforcement by the Board of Selectmen is not common as matters such as these are usually addressed by the Board of Health. The statute provides that after written notice to the owner "of a burnt, dilapidated or dangerous building or other structure" and after a hearing, order that it is "a nuisance to the neighborhood" and prescribe its "disposition, alteration or regulation." This statutory power is usually used when a building is being used for an illegal purpose or is severely damaged such as a building after a significant fire. See, Morais v. City of Lowell, 50 Mass. App. Ct. 540 (2000) (City ordered tenants to vacate and shut off utilities due to the building being used for an illegal use) and Worcester v. Eisenbeiser, 7 Mass. App. Ct. 345 (1979) (City required the removal of a fire-damaged building). A wrong-doer aggrieved by such order may appeal to the Superior Court if within three days he commences a civil action. If the order is affirmed, the plaintiff shall pay the costs. If it is

[1] G.L. c. 148, § 28 states in pertinent part: "They shall, in writing, order such conditions to be remedied, and whenever such officers or persons find in any building or upon any premises any accumulation of combustible rubbish … that is or may become dangerous as a fire menace or as an obstacle to easy ingress into or egress from such buildings or premises, they shall, in writing, order the same to be removed or such conditions to be remedied. Notice of such order shall be served upon the owner, occupant or his authorized agent by a member of the fire or police department. If said order is not complied with within twenty-four hours, the person making such order, or any person designated by him, may enter into such building or upon such premises and remove such refuse or any useable materials or abate such conditions at the expense of such owner or occupant. Any expense so incurred by or on behalf of the commonwealth or of any city or town, shall be a debt due the commonwealth or the city or town, as the case may be, upon completion of such removal or abatement and the rendering of an account therefor to the owner."

annulled, the plaintiff shall recover his costs and damages. ***Again, this is only for structures, not the parking areas***.

Massachusetts law recognizes a cause of action for "public nuisance." A public nuisance is an "unreasonable interference with a right common to the general public." See Restatement (Second) of Torts §821B (1979). Circumstances that may give rise to a public nuisance include (1) conduct that involves a significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience, (2) conduct prescribed by statute, ordinance or administrative regulation, and (3) conduct that is of a continuing nature or has produced a permanent or long-lasting effect and, the actor knows or has reason to know, has a significant effect upon the public right. See, Sullivan v. Chief Justice for Administration and Management of the Trial Court, 448 Mass. 15, 34 (2006). (Massachusetts Supreme Judicial Court rejected a claim of public nuisance regarding a public building containing asbestos). A claim for public nuisance should be brought by the Attorney General and only in egregious cases directly impacting the Town can be brought by the Town, See, Dartmouth v. Silva, 325 Mass. 401, 404 (1950) (Flooding due to the illegal filling of a stream which diverted water to the public right of way. The Court stated "[w]here the interference with a public right of way is of such a nature that a town may be put to expense in repairing the way, or may be liable for damage sustained from its obstruction, it has been held that such a suit may be maintained by the town.").

If the Town is of the opinion that the conditions at the Shopping Center are causing an "unreasonable interference" with the rights of the general public, the Town may issue a cease and desist letter to the owner. If the owner does not resolve those conditions, the Town could file suit asserting a claim for public nuisance, but again, it is a relatively high bar to prove public nuisance.

Eminent Domain

General Laws c. 79 sets out the process to be used for most takings, and imposes the following requirements in order to meet the constitutional and statutory standards: (1) survey, (2) appraisal, (3) Town Meeting authorization and appropriation, (4) adopt Order of Taking, (5) record Order of Taking in Registry of Deeds, (6) provide written notice of Order of Taking to all owners and mortgagees, (7) payment of damages.

A Town cannot take a property without paying damages to the owner. Damages for property taken by eminent domain are fixed at the value of the property before the taking. The usual test is the fair market value of the property at the time of the taking. "Fair market value" means "the highest price which a hypothetical willing buyer would pay to a hypothetical willing seller in an assumed free and open market." I further note that most eminent domain cases end up in litigation as the Town and owner often do not agree upon the value of the property.

The Town has the authority to acquire real property by eminent domain for a valid public purpose as set forth in G.L. c. 79 and c. 40, §14. The authorization to acquire property by

eminent domain (including the appropriation of funds therefore) would require the affirmative vote of Town Meeting. As held by the Appeals Court in Muir v. Leominster, 2 Mass. App. Ct. 587, 595-596 (1974), "[a] taking by eminent domain is a drastic exercise of the power of government. It should be invoked only after there has been a considered determination that particular land is needed for a specific public purpose." ***While the acquisition of the property and the subsequent demolition of the building may satisfy many Town residents, it is doubtful, in my opinion, that aesthetics alone constitutes a valid public purpose***.[2]

Zoning Code Enforcement

I have been informed that the shopping center was built before there was Site Plan Review and it was designed as retail space with a parking lot to serve that space. In its original configuration, therefore, it would be grandfathered relative to use and parking capacity. In my opinion, the Zoning Bylaw does not provide a basis to require the owner of the Shopping Center to improve conditions unless there is a "change of use" i.e. a change of tenants at the Shopping Center. Pursuant to Section 9.03 of the Zoning Bylaw, for commercial uses, a "change in use of any building", as well as any expansion of floor area of any existing use, requires Site Plan Review as a precondition for the issuance of a building permit or certificate of occupancy. Under Section 9.07, "Standards of Review", when reviewing a site plan, the Planning Board may consider the convenience and safety of vehicular and pedestrian movement and provisions for parking. If presented with a change of use, the application should be referred to the Planning Board for Site Plan Review. ***With an application for Site Plan Review, in my opinion, the Planning Board could impose reasonable conditions to improve the parking lot of the Shopping Center***.

Conclusion

While this memorandum has summarized feasible options available to the Town of Topsfield with regard to long-standing physical conditions at the Topsfield Village Shopping Center, in my opinion, depending on the level of the violation, in many of these options the cost is high while the likelihood of success is minimal. In my further opinion, the most effective and successful option is to work with the Inspector of Buildings, Fire Department and Board of Health to determine if any conditions rise to the level of being in violation of statutes or regulations.

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[2] Examples of valid public purposes are roadways, municipal buildings, and public parks.