ANDERSON & KREIGER LLP

MEMORANDUM

To: David Ramsay
TOWN OF DOVER

cc: William Lahey
Anderson & Kreiger LLP

From: Kevin D. Batt
ANDERSON & KREIGER LLP

Re: Implications for Public Projects of Article 12 in 2013 Dover Town Meeting Warrant

Date: May 1, 2013

On March 14, 2013, I provided you a memorandum reviewing the legal effect of adoption of Article 12 in the 2013 Town Meeting warrant, submitted as a citizens' petition, on the powers of boards and commissions with respect to projects constructed on municipal lands under their custody and control. Article 12 seeks to require that design, plans, specifications and cost estimates be submitted for Town Meeting approval for any project exceeding $50,000 in total cost on any Town-owned land for which half or less of the cost, including donations, is to come from Town appropriations, prior to any such project's commencement. As an example, a project funded wholly with private donations, even if it did not require Town appropriations from Town Meeting, would be required to obtain Town Meeting approval.

The proponents have since submitted a motion under the article that has narrowed the substantive provisions and recast the proposal as a motion to enact a new Town Bylaw. As currently formulated, the motion would require design, plans, specifications and cost estimates for any project on land under the custody and control of the Park and Recreation Commission with estimated costs of $150,000 or more to come before Town Meeting for approval.[1] The proposed bylaw also provides that its requirements are to be construed "in addition to" G. L. c. 44, §53A and G. L. c. 45, §5. You requested that I revisit my previous memorandum in light of the motion. While the motion's narrowing of its reach to municipal land under the custody and control of the Park and Recreation Commission removes projects on other municipal land from

[1] The motion, as currently drafted, is limited to prohibiting the "expenditure of funds by the Board of Selectmen" on such projects prior to Town Meeting approval. We are bringing this language to the attention of the proponent to see if the proponent wants to broaden its reach to other spending authorities.

its purview, I continue to doubt Town Meeting's authority to constrain statutory powers of the Board of Selectmen and the Park and Recreation Commission in such a way.

Generally, Town Meeting, as the local legislative body, enacts laws and makes appropriations, while boards and commissions often take action pursuant to their own powers and duties spelled in statutes. A legislative body cannot compel such boards and commissions to act when they are acting within their exclusive statutory powers. *See, e.g., Anderson* v. *Board of Selectmen of Wrentham*, 406 Mass. 508, 513-514 (1990) (selectmen not bound by town meeting vote purporting to set Town's percentage of contribution to employees' group insurance premiums), *Breault* v. *Auburn*, 303 Mass. 424, 427- 428 (1939) (Board of Health not bound by town meeting vote directing hiring of health inspector), *Lead Lined Pipe* v. *Wakefield,* 223 Mass. 485, 487 (1916) (town meeting vote directing selectmen to hire engineer held to be advisory only, and otherwise void), *Cox* v. *Segue*, 206 Mass. 380, 383 (1910) (town meeting not empowered to impose duties on assessors).

M. G. Chapter 44, §53A, authorizes "an officer or department of any . . . town . . . [to] accept grants or gifts of funds" and expend such funds for the purposes of the grant or gift, subject to approval of the School Committee (gifts for educational purposes) or the Board of Selectmen (gifs for other purposes). Thus, to spend gifts or grants provided for the purpose of making improvements to park land would generally not require Town Meeting approval. A court would probably find that the statute preempts the local article if any conflict between them arose. Thus, improvements funded with only gifts or grants may escape from the requirements of the article. Improvements funded in part with prior Town appropriations, as well as gifts and grants, could be subject to the article requirements. Of course, in such cases, the Town would have previously reviewed proposed projects, at least in concept, prior to authorizing such appropriations. In such circumstances, the motion under article 12, if adopted, would require a second review of the project, as shown in final plans and specifications, before work on such proposed projects commenced.

The motion, if adopted, could also conflict with the statutory powers of the Park and Recreation Commission under M.G. Chapter 45, §5.

> [The Park and Recreation Commission] <u>may lay out and improve public parks</u>, make rules for their use and government, appoint all necessary engineers, surveyors, clerks and other officers, including a police force to act in such parks, define their powers and duties and fix their compensation and do all acts needful for the proper execution of their powers and duties. They shall have the authority given to the mayor, aldermen, selectmen, road commissioners and tree warden respectively by section seven of chapter eighty-four and by chapter eighty-seven, in places under their jurisdiction. Subject to appropriation, such boards shall also have the power to conduct park programs and recreation activities at places other than such public parks. (Emphasis supplied).

This statute confers power to improve parks upon Park Commissioners. No approval to proceed with improvements is required from Town Meeting under the statute. The Dover Park and Recreation Commission could make a reasonable claim under this statute that it is authorized to proceed without Town Meeting approval, if no appropriation is required for a project.

As a final note, should the article be adopted, it will undergo review by the Attorney General. Should it be approved, litigation by or against boards and commissions may ensue to resolve conflict between state statutory powers and the local requirement proposed in the article.

If you or the Selectmen have additional questions, please contact me.