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DIVISION OF LOCAL MANDATES

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October 1, 2008

Mr. Fred B. Arnold, II, Chairman
Southwick Board of Selectmen
454 College Way
Southwick, Massachusetts 01077

RE: Regulations Governing Excavation and Trench Safety, 520 CMR 14.00

Dear Chairman Arnold:

This letter is in response to your request for an opinion relative to the Local Mandate Law, G. L. c. 29, s. 27C, and the above-captioned regulations of the state Department of Public Safety (DPS). DPS promulgated these regulations in November of 2007, as required by G. L. c. 82A. The purpose of this law is to protect the general public from the hazards of construction-related trenches left unattended at the end of a work period. To this end, the law requires that public agencies, including cities and towns, designate a trench permitting authority and enforce the safety requirements to be established more specifically by regulation.

During a meeting with your Chief Administrative Officer, Fire Chief, Public Works Director, and Building Inspector, we identified three distinct types of costs municipalities may incur as a result of this regulation. The first is the expense of meeting permit requirements and complying with the standards for securing unattended trenches at municipal work sites. Second, there is the administrative expense of reviewing applications and issuing permits. The third is the cost of enforcing permit compliance, and in the case of violations, conducting hearings on permit suspension or revocation, and re-inspecting a work site for compliance to allow work to resume. Although we recognize that these costs may accumulate to significant amounts, the State Auditor's Division of Local Mandates (DLM) has reached the conclusion that the Local Mandate Law does not apply to these regulations. This is primarily because the safety standards set for unattended trenches apply generally across the public and private sectors. Further,

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the law allows cities and towns to develop their own permit language, as long as the minimum statutory requirements are met. As demonstrated by the DPS model permit, this may include a requirement that permit holders reimburse municipalities for any administrative and enforcement costs. The following discussion further explains this conclusion.

As you know, the Local Mandate Law was adopted as part of Proposition 2 1/2 to protect municipalities from state imposed costs. In relevant part, it provides that post-1980 laws and regulations that impose additional costs upon cities and towns must either be fully funded by the Commonwealth, or subject to local acceptance. The law allows municipalities to petition DLM for a determination of the amount of new costs imposed, and to petition superior court for an exemption from complying with the new mandate, until the Commonwealth assumes the cost.

However, the Local Mandate Law does not shield cities and towns from every type of state requirement resulting in additional local spending. The courts have ruled that G. L. c. 29, s. 27C applies only to state laws and regulations adopted after 1980 that impose cost obligations particularly upon *cities and towns*; it does not apply to generally applicable state requirements that govern public and private sector activities alike. See *Town of Norfolk vs. Department of Environmental Quality Engineering*, 407 Mass. 233 (1990) and *City of Cambridge vs. Attorney General*, 410 Mass. 165 (1991). Because the standards for securing unattended trenches apply across the board to private and public excavators, these compliance costs are beyond the scope of the Local Mandate Law.

As for the administrative expenses of reviewing permit applications and issuing permits, both the law and regulations allow that "...the local permitting authority may charge a reasonable fee to cover the administrative costs incurred in connection with the review and processing of permits." See 520 CMR 14.03(6) and G. L. c. 82A, s. 2. Additionally, as long as certain minimum requirements are satisfied, the law provides that each permitting authority may determine the specific content for the trench permit to be used within its territory. To assist with the development of these forms, DPS has issued a model trench permit. Among other things, this model contains text that would require a permit holder to agree to reimburse the community for "any and all costs and expenses incurred" in connection with the permit and any enforcement actions or remedial measures deemed necessary. (See enclosure.) Accordingly, the regulations do not impose administrative or enforcement costs upon municipalities in their capacity as permitting authorities, so there is no cost for further review under the Local Mandate Law.

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Please be aware that this conclusion is subject to revision in the event that you raise additional factors that would lead to a different result. Moreover, this opinion does not prejudice your right to seek judicial review of the issues pursuant to G. L. c. 29, s. 27C(e). Please contact me with any further concerns you may have with this or other matters impacting local spending.

Sincerely,

A handwritten signature in cursive script that reads "Emily D. Cousens". The signature is written in black ink and is positioned above the typed name.

Emily D. Cousens, Esq.
Director, Division of Local Mandates

Enclosure