



**Bernstein, Shur,
Sawyer & Nelson, P.A.**
Jefferson Mill Building
670 North Commercial Street
Suite 108
PO Box 1120
Manchester, NH 03105-1120

T (603) 623 - 8700
F (603) 623 - 7775

Roy W. Tilsley, Jr.
Shareholder
603-665-8823 direct
rtilsley@bernsteinshur.com

VIA E-MAIL

November 23, 2021

Carl Lindquist, Chair
Dalton Planning Board
756 Dalton Road
Dalton, NH 03598

Re: Dalton, New Hampshire Zoning Ordinance

Dear Chairman Lindquist:

Please be advised that this Office has been retained by Rev. Dr. Fred R. Anderson, President of the Forest Lake Association (FLA), and by FLA member Dr. Adam M. Finkel, on behalf of the Association's Dalton members. As you know, my clients were active last year in commenting on the proposed Permanent Zoning Ordinance (PZO) drafted by the Planning Board.

At my clients' request, I have reviewed the PZO draft dated November 19, 2020 ("Draft Ordinance"). As I understand it, this Ordinance was presented to the Dalton Planning Board in the hopes that they would put it before the voters at the March 2021 Town Meeting. It is also my understanding that the Planning Board, rather than submitting the proposed Zoning Ordinance to the voters, requested that the voters approve one additional year of Emergency Temporary Zoning, which was passed by majority vote in June 2021.

The proposed Ordinance operates similarly to the Town's existing Emergency Temporary Ordinance. The proposed Ordinance creates one Town-wide district in which certain, primarily residential, uses are allowed as a matter of right. Additional uses including small businesses and some agricultural businesses are allowed by Special Exception issued by the Town Zoning Board of Adjustment (ZBA). Anything larger than a small business, as defined by the Zoning Ordinance, is not allowed in the Town unless the Town issues a Variance for a particular use.

As an initial matter, the category of Small Business in the proposed Ordinance is broader than it sounds. Zoning Ordinances are typically broken down into residential, agricultural, business, commercial, and industrial uses. The proposal seems to lump the latter three into one category

defined by the number of employees. This could be a very broad category and many operations which could be large-scale and/or create nuisances in the community might technically be defined as small businesses simply because of the number of employees they have. This ill-defined category might lead to businesses being able to locate wherever they please in the Town.

Like the current Emergency Ordinance, certain uses, beyond the standard residential and agricultural uses, are allowed by Special Exception in the Draft Ordinance. This means that any proposed business use which meets the definitions of Article 4, Section 4 of the proposal can apply to the ZBA for a Special Exception provided the Applicant can convince the ZBA that it meets the criteria. The ZBA is obligated to grant the Special Exception if the Applicant can show that the proposal meets the requirements of Article 4, Section 5 of the Ordinance. This creates a subjective analysis by the ZBA which can be difficult for the Town to control. The criteria for Special Exceptions are easier to meet than the criteria for a Variance from the terms of the Zoning Ordinance. Essentially, a special exception is an allowed use in a given zoning district subject to certain conditions. In contrast, a variance is a constitutional relief valve which allows a use that is normally not allowed in a given zoning district, in order to avoid a "taking" of property through the application of the zoning ordinance. A variance is much more difficult to obtain than a special exception. For example, a zoning ordinance that prevents a property from being used for any viable purpose might create an unconstitutional taking of a particular property.

Moreover, while the criteria for a Variance are established by RSA 674:33 and have been interpreted by the New Hampshire Supreme Court in many cases, the Town's Special Exception Criteria are unique and more subject to interpretation. As such, to the extent that the Town is looking to establish some parameters where certain types of businesses may locate in the Town, an Ordinance that relies on Special Exceptions for most business operations could make it difficult to ultimately control what businesses are approved and where they are located. In summary, given that your ZBA is brand new and given that the Special Exception analysis can be subjective, this process is not the Town's best protection against a large-scale business, *or a business with 25 or fewer employees but posing some serious potential hazard(s)*, locating in an inappropriate area of the Town and threatening the environment, public health, and/or nearby property values.

The best way for the Town to assure some control over where certain types of businesses are located would be to adopt a Zoning Ordinance with multiple districts based on where it is best to locate certain uses in Town. Most Zoning Ordinances contain districts for commercial uses, office uses, industrial uses and other types of uses. This allows the Town to create a Zoning Map and have control over where certain uses are allowed.

It is my understanding that there is concern about a proposal, which has not yet been submitted to the Town, to locate a large landfill within the Town. While RSA 149-M provides the State with authority to regulate many aspects of landfill design and use, RSA 149-M:9(VII) specifically provides that local land use regulation of landfill facility location is lawful if administered in good faith. In North Country Environmental Services, Inc. v. Town of

Bethlehem, 150 N.H. 606 (2004), the New Hampshire Supreme Court upheld the Town of Bethlehem's use of provisions of its zoning ordinance to prevent the expansion of an existing landfill in town. Similarly crafted ordinance provisions in Dalton, written or administered in good faith, would provide the Town with the ability to regulate the location of future landfills and other similar uses with potential for significant harm within Dalton. Most municipalities have ordinances which regulate where such potentially harmful uses can, and cannot, be located.

The Town has the right to create Zoning Districts and to determine what types of uses, including landfills, are allowed in each district. While I appreciate that the Town may not be currently laid out in a way that certain uses are currently concentrated in certain areas, I would urge you to consider a proposed Ordinance that creates Zoning Districts in which large-scale, potential nuisance uses, such as a landfill, chemical storage facility, wastewater treatment plant, gas stations, or the like, can be restricted to a certain district(s) where their impact on the remainder of the community can be limited. Proximity to other types of uses, road access, environmental and health concerns, noise, and traffic concerns are all appropriate issues the Town could consider in determining where potentially harmful uses can be more safely and appropriately located.

An Ordinance which created Zoning Districts would require the ZBA to grant a variance in order for an applicant to proceed with a use which is not allowed in the applicant's district by the Ordinance. As mentioned above, variance criteria are set out by statute and have been interpreted by case law. The existing special exception criteria in the Temporary Zoning Ordinance are more subjective and easier to meet. It would be much more difficult for a potentially hazardous use to obtain a variance to operate in a zoning district where it is not allowed than it would be for it to obtain a special exception from the existing Temporary Ordinance.

Specifically with regard to landfills, the New Hampshire Supreme Court has clearly established that local communities have the ability to regulate where a landfill can be located within the community by properly enacted zoning laws enforced in good faith. The State's ability to regulate landfills simply does not preempt the ability of municipalities to adopt zoning regulations regarding where a landfill may be located within the Town. NCES v. Bethlehem, 150 N.H. 606 (2004). A comprehensive zoning ordinance is exactly the type of good-faith regulation which has been recognized as valid by the Courts and by DES. To the extent that landfills, or other potentially noxious uses of land, may pose a danger to the Town or its environment, permitting these uses only in one or more zone(s) where these dangers are minimized is the type of good faith regulation which the Town is entitled to adopt and enforce. Even if a Court somehow determined that a zoning regulation was preempted due to a lack of good faith, such preemption would not affect the remainder of the ordinance.

In addition to considering the creation of one or more other appropriate zoning districts, I urge the Planning Board to create an Industrial District within Dalton, appropriately sized so as to anticipate one or more future sitings of a bulk chemical storage facility, landfill, or other needed/desired potentially harmful use, and located in a portion of the Town relatively

November 23, 2021

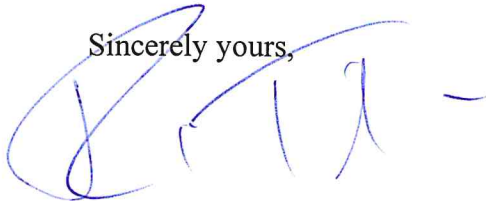
Page 4

sequestered from the locality's most environmentally sensitive resources and clusters of nearby residences.

Finally, it is my understanding that the potential landfill developer has not filed any formal applications with the Town. Obviously, if an application were to be filed now, it would be addressed under the existing Temporary Ordinance. Pursuant to RSA 676:12, once legal notice of any proposed changes to the ordinance has been posted, no permits shall be issued for the 120-day period prior to the meeting at which the ordinance would be voted on if the proposed ordinance would justify the refusal of the permit.

It is my clients' hope that this letter will address some concerns that have been addressed to my clients in this process. Please do not hesitate to contact me if you have any questions or concerns.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Roy W. Tilsley, Jr.", with a horizontal line extending to the right.

Roy W. Tilsley, Jr.

Cc: Planning Board Members

Board of Selectmen

Laura Spector Morgan