

ROBERT W. MURRAY

REAL ESTATE

December 14, 2007

Dear Town Meeting Member:

As you are aware, a Special Town Meeting has been scheduled for Wednesday, December 19th to consider whether taxpayers' dollars should be spent on a legal challenge of the use and occupancy of a building leased by the Department of Homeland Security located at 10 New England Executive Park. As the owner of that building, I feel compelled to provide you with certain information relative to this matter.

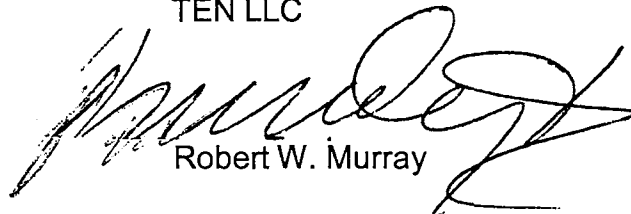
If it is my understanding that the back-up material that has been previously furnished to you was prepared by certain individuals who are opposed to the use and occupancy of this building by the Department of Homeland Security. As you prepare for Town Meeting, I thought it would be appropriate for you to have copies of the following correspondence:

- Letter prepared by my attorney, Hamilton Hackney dated December 14, 2007
- Opinion of Town Counsel dated November 2, 2007
- Memorandum from Police Chief Fran Hart dated November 2, 2007

Thank you for your time and consideration.

Sincerely,

TEN LLC



Robert W. Murray

Enclosures



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December 14, 2007

VIA HAND-DELIVERY

Hon. Albert L. Fay, Jr. and
Members of the Board of Selectmen
Burlington Town Hall
29 Center Street
Burlington, MA 01803

Re: 10 New England Executive Park, Burlington, MA

Dear Chairman Fay and Members of the Board of Selectmen:

Our client, Ten LLC, has asked that we provide you with this letter in connection with its ownership of an office building located at 10 New England Executive Park in Burlington (the "Property"). As you know, Ten LLC has leased the Property to the Department of Homeland Security, Office of Immigration and Customs Enforcement ("ICE") under the terms of a long-term lease. That lease is now in effect and ICE is currently using the building in accordance with the terms of the lease.

We understand that a Special Town Meeting has been called for December 19th to consider a warrant article that would approve funds to be used to challenge ICE's use of the Property "including any subsequent administrative or judicial appeals and to pursue any other legal recourse" in that regard. This challenge would be based on the fact that ICE will use four secured holding rooms at the Property for processing unauthorized aliens prior to their deportation from the United States. We understand that these rooms comprise approximately five percent (5%) of the overall square footage of the office building on the Property and have been deemed to be an allowed accessory use (the "Permitted Accessory Use") by the Inspector of Buildings, in accordance with Section 5.1.4 of the Zoning Bylaws of the Town of Burlington (the "Zoning Bylaws").

This letter highlights some of the potential consequences the Town could face if it (under the direction of Town Meeting or otherwise) seeks to prevent ICE from continuing with its as-of-right use of the Property for public administrative and executive offices and/or Permitted

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Accessory Use. We wish to emphasize that, notwithstanding the following discussion, Ten LLC has made no decisions regarding actions it may take in the future to protect its interests in the Property and the ICE lease.

As you know, on September 7, 2006, the Town's Planning Board approved Ten LLC's application to modify the building at the Property. As the Property would be used for public administrative and executive office space, Ten LLC's application did not request (or require) approval as to use by the Planning Board. On May 29, 2007, the Burlington Building Inspector (the "Inspector") issued a building permit to Ten LLC. Ten LLC and ICE subsequently invested over \$3 million in tenant improvements in the Property, and some have valued the lease payments to be worth approximately \$15 million.

The Zoning Bylaws clearly authorize ICE's use of the Property - public administrative and executive offices. These uses are expressly permitted as of right in the applicable zoning districts for the Property (IH, IG, and A). See Zoning Bylaws §§ 4.2.4.3, 4.2.4.4. Moreover, "a use incidental and subordinate to the principal use of a building, structure or lot, or a use, not the principal use, which is located on the same lot as the principal structure" is allowed, provided it does not occupy more than a combined 25% of the floor area of the building. See id. at §§ 2.82, 5.1.4. Notably, the Zoning Bylaw also permits police stations and other similar institutional uses in the IH, IG, and A districts. See id. at § 4.2.2.6. We further understand that the Town's police station is located in a BL zoning district, which also permits public administrative and executive offices, as well as police stations and other similar institutional uses.

Should Town Meeting authorize a challenge to ICE's use of the Property, that action could expose the Town (and possibly certain officials) to claims and potentially significant liability. We note in particular that: (1) the Town's law enforcement officials have not identified any safety concerns relating to ICE's processing of unauthorized aliens at the Property, (2) the Town would be attempting to challenge an as-of-right use under the Town's Zoning Bylaws, and (3) numerous recent public statements raise serious concerns about the true motivation behind any such challenge.

Beyond the clear language of the Zoning Bylaws allowing ICE to use the Property for public administrative and executive offices and the Permitted Accessory Use, there is another more fundamental barrier to any zoning challenge Town Meeting may pursue. As has been discussed by Town Counsel in other correspondence to the Board of Selectmen, local restrictions on the siting of a Department of Homeland Security facility would be preempted by federal law. See, e.g., Galvan v. Press, 347 U.S. 522, 531 (1954) (because laws and regulations pertaining to immigration are entrusted exclusively to Congress, federal immigration legislation pre-empts any state or local law on the matter). There can be no debate that the federal government retains



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exclusive control over the regulation of immigration-related activities. See Herrera-Inirio v. Immigration & Naturalization Servs., 208 F.3d 299, 307 (1st Cir. 2000) (“In short, immigration is uniquely a matter of federal, not local, concern.”).¹

Given the clear lack of any valid grounds to challenge ICE’s use of the Property, any such attempt to do so would be actionable under various federal and state laws. For instance, challenging ICE’s use arguably deprives Ten LLC and ICE of equal protection under the law in violation of 42 U.S.C. § 1983. Under the Zoning Bylaws, ICE’s use of the Property is permitted as-of-right. Moreover, the Permitted Accessory Use is in compliance with the Zoning Bylaws and it is our understanding that it is also consistent with prior interpretation and application of the accessory use provisions of the Zoning Bylaws. To deny ICE the use of the Property in the face of the plain language of the Zoning Bylaws and this prior interpretation and application amounts to the “intentional[] treatment [of Ten LLC and ICE] differently from others similarly situated” with “no rational basis for the difference in treatment.” See Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). In a comparable situation considered by the United States Supreme Court, a landowner sought to connect her property to the municipal water supply. See id. at 563. Even though the municipality only required a 15-foot easement from other property owners seeking access to the water supply, the municipality required that the landowner grant the municipality a 33-foot easement. Id. Using the “traditional equal protection analysis,” the Supreme Court upheld the landowner’s claims that the municipality’s demand was “irrational and wholly arbitrary.” Id. at 563-64.

Challenging ICE’s use of the Property could also expose the Town to liability under the Massachusetts Civil Rights Act. See Mass. Gen. Laws ch. 12, §§ 11H, 11I. To the extent that “threats, intimidation or coercion” are used in connection with challenges to ICE’s use of the Property, liability may lie. See Tortora v. Inspector of Bldgs. of Tewksbury, 41 Mass. App. Ct. 120, 123 (1996) (upholding claim based on building inspector’s threats to have plaintiff’s building permit revoked and to arrest plaintiff for minor infractions); see also Avasli v. Armstrong, 56 Mass. App. Ct. 740, 750 (2002) (“intimidation” under the Massachusetts Civil Rights Act involves creating “fear for the purpose of compelling or deterring conduct”). Public statements by municipal officials that they will do everything in their powers to stop a project (including, for example, requesting that a building inspector not issue an occupancy permit) would support a claim under Mass. Gen. Laws ch. 12, §§ 11H, 11I. See Bell v. Mazza, 394 Mass. 176, 184 (1985) (upholding plaintiff’s claim for violation of civil rights where defendant, among other things, warned plaintiff that he “would do anything, at any cost, to prevent the . . . construction of any tennis court.”).

¹ As a point of clarification, this letter is not being written on behalf of ICE, nor do we represent ICE. We are not aware of any decision by ICE either to assert or to waive its sovereign federal authority to pre-empt local regulation if Town Meeting were to authorize a zoning challenge.

Any litigation commenced by the Town in connection with the ICE's use of the Property may also violate Mass. Gen. Laws ch. 231, § 6F, which prohibits "wholly insubstantial" or "frivolous" claims "not advanced in good faith." Sanctions for bad faith conduct under this statute include paying the other party's attorneys fees and other costs. See Vittands v. Sudduth, 49 Mass. App. Ct. 401, 412 (2000). Based on the express language of the Zoning Bylaws and the pre-emption issue - coupled with evidence of an improperly motivated challenge - a court could conclude that any lawsuit challenging ICE's use of the Property was meritless, advanced in bad faith, and in violation of Mass. Gen. Laws ch. 231, § 6F.

Challenging ICE's use of the Property could also lead to tort liability under state law. Ten LLC and ICE have entered into a valuable, long-term lease agreement, and ICE currently occupies the Property pursuant to that lease. Challenging ICE's use of the Property on frivolous grounds in order to prevent ICE from exercising its lease rights could be deemed intentional interference with the Ten LLC's contractual and advantageous business relationship with ICE. See Powers v. Leno, 24 Mass. App. Ct. 381, 382-83 (1987) (finding grounds for a claim where defendant "intentionally interfered with the plaintiffs' relationship by maliciously bringing or continuing the litigation so as to delay and derail the agreement" where defendant, among other things, stated that he would "make sure these condominiums are never built. I'll delay it in court forever, even if I have to spend one million dollars").

In the same vein, a lawsuit complaining of the Building Inspector's failure to enforce the Zoning Bylaws that is both meritless and driven by improper motivations may also support claims for abuse of process and malicious prosecution. See Vittands, 49 Mass. App. Ct. at 406.

While Massachusetts has enacted a so-called "anti-SLAPP" statute, which seeks to protect parties exercising their right to petition government from frivolous claims, that statute is not applicable to municipalities or individuals acting on a municipality's behalf. See Mass. Gen. Laws ch. 231, § 59H. According to the Massachusetts Supreme Judicial Court, the anti-SLAPP statute was enacted "to provide a quick remedy for those *citizens* targeted by frivolous lawsuits based on their government petitioning activities." Kobrin v. Gastfriend, 443 Mass. 327, 331 (2005) (emphasis added). Accordingly, the anti-SLAPP statute would not protect the Town or individuals acting on its behalf from any of the foregoing claims as a result of any efforts to pursue a zoning challenge. See id.; Moriarty v. Sullivan, 2006 WL 2089773, at *4-5 (Mass. Super. May 16, 2006).

Town Meeting members should also be mindful of the Town's past experience in this area, specifically the Pheasant Ridge Assocs. Ltd. P'ship v. Town of Burlington, 399 Mass. 771 (1987) case. In analogous circumstances, Town Meeting authorized the exercise of eminent domain over a 14.5-acre parcel of property that was the subject of an application for a permit to




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construct low and moderate income housing. Id. at 773. The Supreme Judicial Court held that the Town, "acting through its town meeting, was concerned only with blocking the plaintiffs' development." Id. at 779. It held that the Town acted in bad faith, and that the taking was "unlawful and void." Id. at 780.

Ten LLC would urge the Board of Selectmen to counsel Town Meeting to give serious and careful consideration to the foregoing risks, as well as the Town's experience in the Pheasant Ridge case, before voting on the warrant article next week.

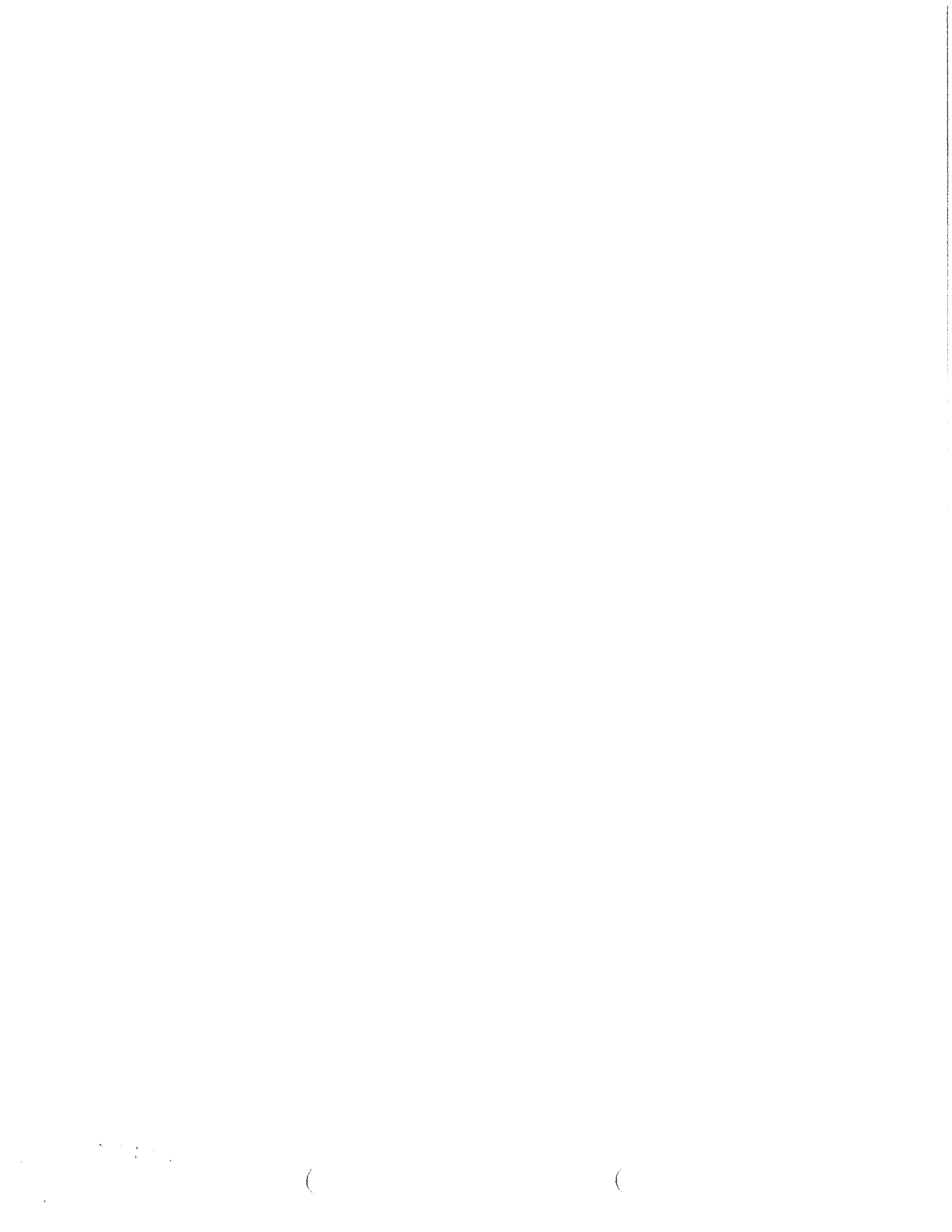
Thank you for your time and attention to these matters.

Sincerely,


Hamilton Hackney

cc: John W. Giorgio, Esq.
Robert W. Murray
Phyllis E. Etsell
Mark T. Vaughan, Esq.

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November 2, 2007

John W. Giorgio
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BY FACSIMILE - (781) 270-1608
AND FIRST CLASS MAIL

Hon. Albert L. Fay, Jr. and
Members of the Board of Selectmen
Burlington Town Hall
29 Center Street
Burlington, MA 01803

Re: Local Authority to Regulate Department of Homeland Security Facility

Dear Members of the Board of Selectmen:

You have requested an opinion regarding the Town's authority to regulate the use of office space leased by the Department of Homeland Security for regional offices at 10 New England Executive Park (the "Property"). You have also informed me that a small portion of the facility (less than five percent) will be used to detain unauthorized aliens for an hour or two while the paperwork requiring their detention is processed.

As I understand the facts, in September, 2006, the owner of a building located in the IG Zoning District obtained approval from the Planning Board for a "Minor Engineering Change" to the Property under the site plan review provisions of the zoning by-law. The minor changes included certain exterior alterations. At the hearing, the applicant indicated that the building would be leased to the Federal Department of Homeland Security for offices. It is my understanding that office use is an allowed use in the IG Zoning District. At the hearing, the owner of the building did not mention a temporary detention facility.

I have discussed this matter with the Building Inspector who is of the opinion that the use of this building as office space is an allowed use in the IG District, and that because the area of the office space used as a detention for the unauthorized aliens constitutes less than five percent of the total area, it is an allowed accessory use. I concur in the Building Inspector's analysis.

I would also like to apprise you of the Federal preemption issues that arise when seeking to regulate immigration-related matters on the local level.

In my opinion, the Town may not seek to regulate immigration-related activities because, under the U.S. Constitution, the federal government retains exclusive power to regulate immigration. Article I, §9, cl. 1 of the United States Constitution vests control of immigration with the federal

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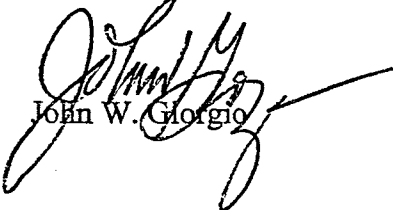
government. The Supremacy Clause, Article 6, cl. 2, provides that the laws of the United States, enacted pursuant to the power of the Constitution, shall be the supreme law of the land. Thus, the activities of federal entities are shielded by the Supremacy Clause from direct state regulation, unless Congress provides "clear and unambiguous" authorization for such local regulation. See EPA v. State Water Resources Control Board, 426 U.S. 200, 211 (1976); Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 180 (1988). Because the establishment of laws and regulations pertaining to immigration are entrusted exclusively to Congress, federal immigration legislation preempts any state or local law on the matter. Galvan v. Press, 347 U.S. 522, 531 (1954). Congress's legislative power in enacting immigration-related laws is pervasive and encompassing; "immigration is uniquely a matter of federal, not local, concern." See Herrera-Inirio v. Immigration and Naturalization Service, 208 F.3d 299 (1st Cir. 2000).

In my further opinion, any local restrictions imposed on the siting of a Department of Homeland Security temporary detention facility would be preempted by federal law. Congress has enacted comprehensive legislation regarding immigration. See 8 U.S.C. §1101-1505. Within Congress's legislative scheme are laws which give the Attorney General authority to "arrange for appropriate places of detention for aliens detained pending removal or a decision on removal authority," including the use of "facilities adapted or suitably located for detention" that are available for rental. See 8 U.S.C. § 1231. Because Congress possesses plenary authority over immigration-related matters, it may freely displace, or preempt state laws. See Hoodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 290 (1981). In my opinion, the Town cannot regulate the Department of Homeland Security's location or operation of its office space and detention facility. Compare Fabiano v. Boston Redevelopment Authority, 49 Mass. App. Ct. 66, 71 (2000) (holding that there can be no state or local regulation of the siting of Post Office buildings).

Finally, it is my opinion that it would be inadvisable for the Town to seek to regulate an area that has been preempted by federal law as such local regulations would likely be unenforceable. Moreover, should such a regulations be challenged in court, the Town would likely incur substantial legal expenses in defending its regulations.

Please do not hesitate to contact me should you have any questions concerning this matter.

Very truly yours,


John W. Giorgio

JWG/rbh
cc: Town Administrator

TO: Residents of Burlington
From: Chief Fran Hart
RE: Proposed Immigration and Custom Enforcement Processing Center
Date: November 2, 2007

I have become aware of concerns among some of our residents regarding the plans of the Immigration and Customs Enforcement (ICE) branch of the United States Department of Homeland Security to locate a processing center here in Burlington. While on its surface, this might be a daunting thought, it is my considered opinion that there is very minimal risk associated with this plan.

The most important fact to state is that no detainees will be lodged overnight. The building will serve mainly as a processing center, comprised mostly of office space. While there will be three secure holding areas, there will be no bed space. These holding areas are designed to house detainees for a very short time – 1-2 hours - while they await transportation to secure facilities.

The transportation of detainees will be accomplished through contractual arrangements ICE has with the various county sheriff's departments. There will be no drain on the resources of the Burlington Police Department specifically, or the town generally.

The people brought to this center will generally be charged with being illegal aliens. The vast majority of these detainees are otherwise hard-working, decent people with no criminal records. In cases where they do have criminal records, ICE is usually processing them post-incarceration, meaning that they are transported directly from prison to the processing center. If ICE did not process these people after serving their time, they would simply assimilate into society, posing the potential risk of engaging in criminal behavior again. Through the efforts of ICE, these people end up deported rather than finding their way back to local communities.

The building will be nondescript with no telltale signs of being "jail-like." It is located in the New England Executive Park and will appear to most observers as just another office building. The area where prisoners will be delivered to, or transported from, looks like a typical side entrance, which is secured by a fence.

The building has state-of-the-art security features including video capture throughout the building. Two people staff a control room, which is used to control and observe the secure area. These control personnel are in addition to the processing staff. All doors are controlled by the control room operators. As an added security feature, no entrance can be gained to the control room from the secured areas. Key-card access is required for the entry door, while subsequent access requires that personnel be "buzzed-in" after visual confirmation of who is seeking entrance.

While evaluating the level of risk this operation might pose, I reluctantly submit that our current police station operates with more negative features than this building will impose. Please consider the table below:

Feature	Police Station	Processing Center
Neighborhood	Residential	Commercial
Houses Detainees Overnight	Yes	No
Dedicated Control Personnel for Secure Area	No	Yes
Video Capture Throughout Building	No	Yes
Operates 24 Hours Per Day	Yes	No

I recently met with representatives of ICE, along with Town Administrator Robert Mercier and Selectman Gary Gianino and Walter Zenkin. During our conversation, I was satisfied with the answers I heard concerning the operation and the security measures that would be put in place. While there is risk in everything, I believe that ICE has sufficient resources, staffing and training to appropriately manage the minimal risk involved. As Police Chief, if I had any doubts, I would voice my opposition. I do not have those doubts. To the contrary, ICE will be elevating our level of protection by deporting criminals who are here illegally, reducing potential threats to our neighborhoods.