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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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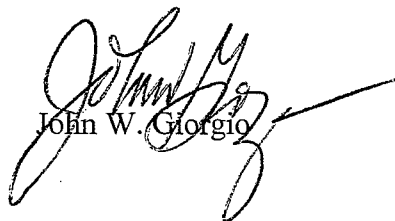
government. The Supremacy Clause, Article 6, cl. 2, provides that the laws of the United States, enacted pursuant to the power of the Constitution, shall be the supreme law of the land. Thus, the activities of federal entities are shielded by the Supremacy Clause from direct state regulation, unless 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