



May 1, 2020

Neil J. Harrington
Town Manager, Town of Salisbury
5 Beach Road
Salisbury, MA 01952
Via email: nharrington@salisburyma.gov

Dear Mr. Harrington,

It has come to the attention of Pacific Legal Foundation (PLF) that the Town of Salisbury (Town) has prohibited owners of second homes from reconnecting to water services in response to the COVID-19 pandemic. PLF is a public interest law foundation that has defended property rights and liberty since 1973, including many cases before the United States Supreme Court. I write this letter to express PLF's opinion that the actions taken by the Town raise serious constitutional concerns with respect to the rights of due process and equal protection. This information is provided for your consideration during the deliberation over whether to extend that prohibition.

I. The Town Must Respect Due Process of Law Even in Times of Crisis

Few rights are more fundamental than the right to retreat to one's own home. The U.S. and Massachusetts constitutions accord special significance to the home, a place where in the words of the Massachusetts founding-era son James Otis, one is entitled to feel "as a prince in his castle."

The right to connect with a public utility, such as water, that is necessary for civilized habitation, is a property interest. In fact, the Supreme Court of the United States recognized this right in *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978). So important is the access to water that Massachusetts has categorized the water industry as an "essential" service during the COVID-19 pandemic. See *COVID-19: Essential Services*, Mass.gov (Accessed Apr. 30, 2020),

<https://www.mass.gov/info-details/covid-19-essential-services>. Further, the Massachusetts regulatory code specifies that every building designed for occupancy with plumbing fixtures must be supplied with water. 248 C.M.R. § 10.14(1)(a).

Owners of property located in Salisbury therefore possess a valuable, “essential” right to flowing water in addition to the right to occupy the property they own. And where the Town moves to deprive those homeowners of this right, it must comply with the Constitution’s requirement that due process of law be provided. No exigency will excuse compliance with these requirements, which are (1) notice, (2) an opportunity to be heard, and (3) a final decision rendered by a neutral decisionmaker. *See Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

Certain rights, including the right to due process of law, are beyond the power of government officials to suspend. “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

By failing to craft a process by which objecting homeowners may challenge an erroneous or unjustified deprivation of water services before a neutral decisionmaker, the Town risks running afoul of important and longstanding constitutional limitations imposed by the Due Process Clause of the Fourteenth Amendment. *See Mathews*, 424 U.S. at 334–35; *Memphis Light*, 436 U.S. at 11–13. Owners of seasonal homes in Salisbury may have strong reasons—even health-related reasons—for returning to occupy these homes, yet the Town’s prohibition provides no apparatus for the evaluation of their rights and exigencies on an individualized basis.

II. Salisbury's Prohibition Appears Arbitrary

One of the reasons American law demands meaningful process to contest a deprivation of liberty or property is for the protection of individuals from arbitrary and erroneous exercises of authority. Salisbury's prohibition on seasonal water connections appears arbitrary and further exposes the Town to liability under the Equal Protection Clause of the Fourteenth Amendment. *See Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 352 (1918) ("The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."). The Equal Protection Clause defends not only the property interests of Americans, but other, more general liberty interests as well. And it specifically prohibits irrational, arbitrary, and suspect laws that treat similarly situated persons differently. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

Because the Town's prohibition only applies to re-connections of water services, it treats the homeowners who are returning to their homes now differently than those whose water services are already turned on. That latter class of homes, and the individuals who come to reside in them, present no lesser risk of spreading disease to the community than the seasonal homeowners who need water connected to their homes to return to them now. In fact, individuals whose water is already connected and who may rent to vacationers may be unfairly privileged over owner-occupiers who simply want to return to reside in their own Salisbury seasonal homes. The law therefore treats some seasonal homeowners differently from others based on the arbitrary distinction between whether their water is *currently* disconnected.

The purported threat from outside vectors for COVID-19 is therefore not addressed in a targeted manner. And this is particularly worrisome when it is the fundamental right to occupy one's private home that is being deprived. The

prohibition likewise does not take into account the locations from which the affected homeowners are traveling. And it takes no account of the risks these homeowners might be fleeing *from*—vulnerable populations such as the elderly or the immunocompromised would have a particularly strong interest in returning to their seasonal home in Salisbury to shelter in safety from the pandemic.

III. Salisbury's Prohibition on Water Reconnections Should Not be Extended In the Same Form

It is evident that too little care was taken in devising a local rule that deprives seasonal homeowners of an important property right. More consideration for due process must be accorded to seasonal homeowners seeking to return to Salisbury. Should the Town extend this order without doing so, it opens itself up to potential legal challenges from homeowners seeking to preserve their constitutional rights.

Sincerely,

A handwritten signature in black ink that reads "Daniel Thayer Woislaw". The signature is written in a cursive, slightly slanted style.

Daniel Woislaw

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