



Massachusetts

Laura Rótolo  
Staff Counsel  
& Community Advocate  
(617) 482-3170 ext. 311  
Lrotolo@aclum.org

June 13, 2019

**Via Hand Delivery**

Members of the Somerville City Council  
Somerville City Hall  
93 Highland Avenue  
Somerville, MA 02143

Re: Somerville Welcoming Community Ordinance

Dear City Councilors:

Thank you for the opportunity to offer thoughts on the proposed "Somerville Welcoming Community Ordinance." By way of introduction, I am an attorney at the American Civil Liberties Union of Massachusetts, where I focus on state and municipal policies affecting immigrants. Together with several community groups and Mayor Curtatone, I had the privilege of being involved in efforts to pass the Somerville Trust Ordinance in 2014. Somerville was one of the very first cities in Massachusetts to recognize the importance of passing a Trust Act, and since then, dozens of other cities and towns have followed suit.

This letter addresses a question raised about section 2(f) of the proposed ordinance, relating to procedures for when police encounter a person who is operating a vehicle without a license. For the reasons stated below, it is my opinion that the language of section 2(f) is wholly within the power of the City Council to pass, and would be of great benefit to Somerville and beyond.

**1. Police have discretion either to arrest or summons a person found driving without a license.**

It is undisputed that, pursuant to G. L. c. 90, s. 21, a police officer is authorized to arrest without a warrant a person who drives without a license in violation of G. L. c. 90, s. 10.

The Supreme Judicial Court has held that a municipal legislative body may not control another municipal entity's exercise of a statutory *duty*. See Breault v. Auburn, 303 Mass. 424 (1939) (Town meeting could not vote to direct board of health to hire an employee because hiring power belonged solely to the board). But, a statutory grant of *authority* is not the same as a statutory *duty*. Were it, police officers would be mandated to arrest a person any time they could establish probable cause of a crime.

Instead, police officers regularly make decisions about whether or not to arrest for a violation of law. And in the case of operating without a license, officers regularly decide whether to enforce the law by arresting the person or by causing a summons to be issued through the mail.

## **2. The proposed ordinance maintains police's discretion to arrest a person driving without a license.**

The proposed ordinance does not prohibit police department arresting a person who is operating a vehicle without a license. The ordinance states that police "shall, *whenever possible*, and if there are no other violations causing the person to be arrested, issue a summons" instead of taking the person into custody. The "whenever possible" clause is meant to maintain the officer's discretion.

Police officers make complicated case-by-case decisions during vehicle stops, and there may be a variety of factors—including officer safety, suspicion of criminal activity, or inability to identify the driver—that would lead a police officer to arrest the person and take them into custody. The ordinance does not create a bright line rule that police may never make an arrest.

The "whenever possible" clause is meant to create a policy that favors a summons over an arrest when the circumstances allow it. The ordinance would create a preference toward a summons, given the positive impact that such a policy can have on the immigrant community, and the public at large.

## **3. The City Council has the power to legislate on matters relating to the police discretion.**

The City Council, like the Board of Aldermen before it, has the power "to make ordinances and to affix penalties for the violation thereof." Somerville City Charter, §17.4. This includes the power to legislate over police matters, which this body has done previously. For example, this body legislates on the selection process for, qualifications of, and duties of the Police Chief. Code 1963, §§ 7-4—7-8, 7-10; 10-16 and 17; See also Code 1963, § 12-25A; Ord. No. 2004-10, 7-22-2004 (legislating police details, "The chief of police or his or her designee shall have the authority to require police details at any time he or she shall determine in his or her discretion

that it is in the interest of public safety to do so.”).

In fact, ordinance No. 2014 passed by this body on October 23, 2014 (known as the “Trust Ordinance”) directly limited police’s authority to arrest. Attachment A. The ordinance was based on the assumption that police had authority to detain a person on an immigration detainer. The Supreme Judicial Court later ruled that such a detention is an arrest, and that police have no such arrest authority under Massachusetts law. Lunn v. Commonwealth, 477 Mass. 517, 537 (2017). At the time, however, police departments often detained persons on immigration detainers. The Trust Ordinance mandated that:

“Except as provided in subsection (b), a law enforcement official shall not detain an individual on the basis of a civil immigration detainer request after that individual becomes eligible for release from custody.”

The ordinance, thus, actually prohibited police from arresting a person, despite their believed authority and discretion to make that arrest. To my knowledge, the police have not challenged the authority of this ordinance, and have abided by it.

#### **4. Other Massachusetts municipal legislative bodies have limited the discretion of their police departments.**

Several dozen municipalities in Massachusetts have passed policies delineating police discretion as they relate to non-citizens. For example, the town of Amherst recently passed a community bylaw that prohibits police from asking about immigrants status and limiting the kind of communications that police may have with federal immigration authorities. Attachment B.

Because it was styled as a bylaw change, the Attorney General’s office reviewed the legality of the ordinance and found that the bylaw “does not conflict with the Constitution or laws of the Commonwealth.” Attachment C.

#### **5. A policy giving preference to a summons over an arrest can benefit public safety.**

Somerville has for many years been a leader in speaking out on behalf of its immigrant population, marking the important contributions that immigrants make, and passing policies to protect immigrants in the city.

In 2014, when Somerville passed the Trust Ordinance, it recognized that "The federal government's Immigration and Customs Enforcement ("ICE") Secure Communities program uses local law enforcement data to identify suspected "criminal aliens" in local custody." This continues to be the case. Whenever a person is arrested, in Somerville –or anywhere else in the United States– ICE is automatically notified.

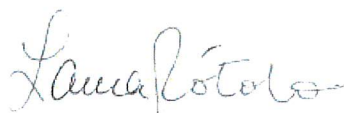
Secure Communities has been one of the main drivers of the dramatic increase in immigration arrests. Transactional Records Clearinghouse, *Where Secure Communities Removals Now Occur*, Nov. 13, 2018, available at <https://trac.syr.edu/immigration/reports/537/>. It is also a driver of the increased arrests at courthouses, since ICE learns of the fact that a person will be in court on a certain date by learning of their arrest.

For this reason, some police departments are making efforts to avoid arresting persons who are vulnerable to being detained by ICE. Because the Secure Communities database is triggered only by an arrest and accompanying fingerprint, by issuing a summons instead of making an arrest, the officer can ensure that the person in question is compelled to go to court to face the penalties for violating the law, while avoiding entering the person into the problematic federal database. Such a policy can have a positive impact on public safety. When immigrants and their family members know that their local police department is looking out for their best interests, and not collaborating in their deportation, community members may trust their police department and may be more willing to come forward to report crimes, act as witnesses, and seek help when needed.

In conclusion, the proposed ordinance is within the power of the City Council to pass, and would benefit the community as a whole, much in the way that the 2014 Trust Ordinance has. I am happy to answer any questions the councilors may have in deliberating this proposal.

Thank you for your consideration of this important effort.

Sincerely,





CITY OF SOMERVILLE, MASSACHUSETTS  
BOARD OF ALDERMEN

**Docket # 197939**

Officer's Communication  
Ordinance

Regular Meeting, October 23, 2014  
Item ID 10499

**SUMMARY:** Assistant City Solicitor submitting an updated Trust Act Ordinance as approved at the Committee on Legislative Matters on October 22, 2014.

**COMPLETE TEXT:**

To the Honorable Board:

Attached you will find the Trust Act Ordinance as approved by the Committee on Legislative Matters on Wednesday, October 22, 2014.

Please feel free to contact me with any questions.

Very truly yours,  
David Shapiro  
Assistant City Solicitor

**RESULT: ORDINANCE ORDAINED. [UNANIMOUS]**

**AYES:** Connolly, Rossetti, Sullivan, White Jr., McLaughlin, Heuston, McWatters, Lafuente, Niedergang, Gewirtz, Ballantyne

ORDINANCE ORDAINED. BY THE BOARD OF ALDERMEN OF THE CITY OF SOMERVILLE, MA, AT A REGULAR MEETING ON THE 23rd DAY OF OCTOBER, 2014.

APPROVED BY THE MAYOR OF THE CITY OF SOMERVILLE, MA, ON THE 29th DAY OF OCTOBER, 2014.

ATTEST:

John J. Long, City Clerk

**CITY OF SOMERVILLE**  
**ORDINANCE NO. 2014-07**  
**In Board of Aldermen: October 23, 2014**

Be it ordained by the Board of Aldermen, in session assembled, that the Code of Ordinances of the City of Somerville is amended by adding the following provisions to the Code of Ordinances of the City of Somerville:

WHEREAS, The City of Somerville seeks to ensure that all immigrants are able to fully participate in the civic and economic life of their neighborhoods and nurture and grow the spirit of unity in our City; and

WHEREAS, The City of Somerville desires to provide opportunity, access, and equality for immigrants, and highlight the essential role immigrants have played and continue to play in moving Somerville forward; and

WHEREAS, The federal government's Immigration and Customs Enforcement ("ICE") Secure Communities program uses local law enforcement data to identify suspected "criminal aliens" in local custody; and

WHEREAS, ICE issues civil immigration detainer requests which allow for prolonged detention during which ICE investigates the immigration status of suspected "criminal aliens" in local custody; and

WHEREAS, In other jurisdictions, honoring civil immigration detainer requests based on less than probable cause has been ruled a violation of the Fourth Amendment, exposing local law enforcement agencies to liability under 42 U.S.C. § 1983; and

WHEREAS, When local law enforcement officials indiscriminately honor all ICE civil immigration detainer requests, including those that target non-criminal aliens, immigrant residents are less likely to cooperate and public trust erodes, hindering the ability and effectiveness of Somerville's police force; and

WHEREAS, A local Trust Act is necessary to establish the City's policy for responding to ICE's civil immigration detainer requests;

NOW THEREFORE, Be it ordained by the Board of Aldermen of Somerville, as follows:

Section 1. Definitions.

(a) "Civil immigration detainer request" means a non-mandatory request issued by an authorized federal immigration officer under Section 287.7 of Title 8 of the Code of Federal Regulations to a local law enforcement official to maintain custody of an individual for a period not to exceed forty-eight (48) hours, excluding Saturdays, Sundays, and holidays, and advise the authorized federal immigration officer prior to the release of that individual.

(b) "Convicted" means a state of having been proved guilty in a judicial proceeding, unless the conviction has been expunged or vacated pursuant to applicable law.

(c) "Eligible for release from custody" means that the individual may be released from custody because any of the following conditions has occurred:

(1) All criminal charges against the individual have been dropped or dismissed;

(2) The individual has been acquitted of all criminal charges filed against him or her;

(3) The individual has served all the time required for his or her sentence;

(4) The individual has posted a bond, or has been released on his or her own recognizance;

(5) The individual has been referred to pre-trial diversion services;

(6) The individual is otherwise eligible for release under state or local law.

(d) "Law enforcement official" means any City of Somerville department, or officer or employee of a City of Somerville department, authorized to enforce criminal statutes, regulations, or local ordinances; operate jails or maintain custody of individuals in jails; and operate juvenile detention facilities or maintain custody of individuals in juvenile detention facilities.

## Section 2. Detainment.

(a) Except as provided in subsection (b), a law enforcement official shall not detain an individual on the basis of a civil immigration detainer request after that individual becomes eligible for release from custody,

(b) Law enforcement officials may continue to detain an individual in response to a civil immigration detainer request for up to forty-eight (48) hours after that individual becomes eligible for release from custody, excluding Saturdays, Sundays, and holidays, if the individual meets any of the following criteria:

(1) ICE has a criminal warrant for the individual;

(2) The individual has ever been convicted of a violent crime as defined in Massachusetts General Laws Chapter 140, Section 121;

(3) In the past ten (10) years, the individual has been convicted of a felony as defined in Massachusetts General Laws Chapter 274, Section 1;

(4) The individual is a current registrant on the Massachusetts Sex Offender Registry;

(5) The individual is identified in the federal government's consolidated Terrorist Watchlist.

(c) Law enforcement officials shall make good faith efforts to seek federal reimbursement for all costs incurred in continuing to detain an individual pursuant to this Section.



### Section 3. Reporting.

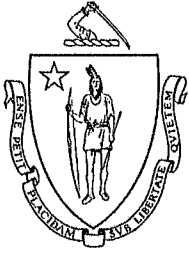
Beginning no later than December 31, 2015, and no later than December 31 of each subsequent year, the Somerville Police Chief shall submit a report to the Clerk of the City of Somerville, and the Clerk shall forward the report to the Mayor of the City of Somerville and shall docket the report and include the docket on the agenda of the next-occurring meeting of the Somerville Board of Aldermen. The report shall include the following information for the preceding twelve (12) month period:

- (a) A statistical breakdown of the total number of civil immigration detainer requests lodged with the City's law enforcement officials, organized by the reason(s) given for the request;
- (b) A statistical breakdown of the total number of individuals that City law enforcement officials detained pursuant to Section 2(b), organized by the reason(s) supporting the detention;
- (c) The total number of individuals transferred to ICE custody; and
- (d) A statistical breakdown of the total cost reimbursements received from the federal government pursuant to Section 2(c), organized by individual case.

Approved:

William A White Jr / JJC  
President





THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

CENTRAL MASSACHUSETTS DIVISION  
10 MECHANIC STREET, SUITE 301  
WORCESTER, MA 01608

MAURA HEALEY  
ATTORNEY GENERAL

(508) 792-7600  
(508) 795-1991 fax  
www.mass.gov/ago

November 3, 2017

Sandra J. Burgess, Town Clerk  
Town of Amherst  
4 Boltwood Avenue  
Amherst, MA 01002

**Re: Amherst Annual Town Meeting of April 26, 2017 - Case # 8478**  
**Warrant Articles # 32, 33, 35 (Zoning)**  
**Warrant Articles # 24, 26, 28, 29 (General)**  
**Warrant Article # 25 (Historic)**

Dear Ms. Burgess:

**Article 29** – We approve Article 29 (“Town of Amherst Sanctuary Community Bylaw”) from the Amherst Annual Town Meeting of April 26, 2017.<sup>1</sup>

The Sanctuary Community Bylaw limits police investigatory authority based on immigration status, prohibits police detentions based on civil immigration detainer requests or ICE administrative warrants, and requires reports of the number of civil immigration detainer requests lodged with the Town and the Town’s response to the requests. We approve the by-law because it does not conflict with the Constitution or laws of the Commonwealth. Indeed, the Massachusetts Supreme Judicial Court recently affirmed that law enforcement officials lack authority under Massachusetts law to arrest an individual pursuant to a request contained in a Federal civil immigration detainer. Lunn v. Commonwealth, 477 Mass. 517 (2017). We explain our decision below.

I. Summary of the Sanctuary Community By-Law.

The by-law adopted under Article 29 “affirms that Amherst is a welcoming town and seeks to ensure public safety and trust between law enforcement and all members of [the Amherst] community.” The by-law imposes various requirements on local officials including:

- A law enforcement official shall not initiate an investigation or take law enforcement action (as defined in the by-law) on the basis of actual or perceived

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<sup>1</sup> On August 31, 2017, we issued a decision on Articles 24, 25, 26, 28, 32, 33, 34, and 35.

immigration status, including the initiation of a stop, an apprehension, arrest or any other contact.

- A law enforcement official shall not detain an individual on the basis of a civil immigration detainer request or ICE administrative warrant after the individual is eligible for release from custody, unless ICE has a criminal warrant issued by a judicial officer, for the individual.
- A law enforcement officer shall not inquire about an individual's immigration status unless required by federal or state law.
- A law enforcement officer shall not communicate with ICE regarding the immigration status of a person in custody, except for any information required to be shared by 8 U.S.C. § 1373.<sup>2</sup>
- On petition by three registered voters, the Town Manager shall submit a report to the Select board detailing the number of civil immigration detainer requests lodged with Town law enforcement officials, the number of individuals so detailed, the number of individuals transferred to ICE custody, and information about requests for certification of U Visas.

## II. Attorney General's Standard of Review of Town By-laws.

Pursuant to G.L. c. 40, § 32, the Attorney General has a "limited power of disapproval," and "[i]t is fundamental that every presumption is to be made in favor of the validity of municipal by-laws." Amherst v. Attorney General, 398 Mass. 793, 796 (1986). The Attorney General does not review the policy arguments for or against the enactment. Id. at 798-99 ("Neither we nor the Attorney General may comment on the wisdom of the town's by-law.") Rather, in order to disapprove a by-law (or any portion thereof), the Attorney General must cite an inconsistency between the by-law and the state Constitution or laws. Id. at 796. "As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid." Bloom v. Worcester, 363 Mass 136, 154 (1973) (emphasis added). "The legislative intent to preclude local action must be clear." Id. at 155. Massachusetts has the "strongest type of home rule and municipal action is presumed to be valid." Connors v. City of Boston, 430 Mass. 31, 35 (1999) (internal quotations and citations omitted).

## III. Analysis and Conclusion.

We determine that the Amherst Sanctuary Community Bylaw does not conflict with the Constitution or laws of the Commonwealth. On the contrary, the by-law's central mandate – that Amherst law enforcement officials shall not detain individuals solely on the basis of a civil immigration detainer request or ICE administrative warrant - is in harmony with the Lunn court's conclusion that "Massachusetts law provides no authority for Massachusetts [law enforcement

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<sup>2</sup> 8 U.S.C. § 1373, entitled Communication between government agencies and the Immigration and Naturalization Service, forbids a federal, state or local government from outlawing their officials' voluntary cooperation with INS. See City of New York v. United States, 179 F.3d 29, 37 (2d Cir. 1999).

officers] to arrest and hold an individual solely on the basis of a Federal civil immigration detainer, beyond the time that the individual would otherwise be entitled to be released from State custody.” Lunn v. Commonwealth, 477 Mass. 517, 537 (2017). We also conclude that the remaining requirements of the by-law (prohibiting investigations and law enforcement actions solely on the basis of immigration status; prohibiting inquiries about immigration status unless required by state or federal law; prohibiting sharing of immigration status information with ICE except as is required by 8 U.S.C. § 1373; requiring certain reporting of arrest/detention statistics, etc.) do not conflict with the Constitution or laws of the Commonwealth. Amherst, 398 Mass. at 796. On this basis, we approve the Amherst Sanctuary Community Bylaw.

**Note:** Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the Town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were approved by the Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,

MAURA HEALEY  
ATTORNEY GENERAL

*Margaret J. Hurley*

By: Margaret J. Hurley  
Chief, Central Massachusetts Division  
Director, Municipal Law Unit  
10 Mechanic Street, Suite 301  
Worcester, MA 01608  
(508) 792-7600 ext. 4402

cc: Town Counsel Joel B. Bard