



CITY OF SOMERVILLE, MASSACHUSETTS LAW DEPARTMENT

BY ELECTRONIC MAIL

April 7, 2021

The Honorable Joseph A. Curtatone
City of Somerville
93 Highland Avenue
Somerville, MA 02143

Re: Proposed Chemical Crowd Control Agents and Kinetic Impact Projectiles Ordinance

Dear Mayor Curtatone:

I write to provide the opinion you requested regarding the proposed Chemical Crowd Control Agents and Kinetic Impact Projectiles Ordinance, which was recommended for passage by the Legislative Matters Committee on April 1, 2021. I understand what the Somerville City Council aims to achieve with this proposed ordinance, largely coming as a proactive step in reaction to law enforcement response to some well-publicized recent protests. My office did work collaboratively with the City Council, and the Law Department provided lengthy feedback directly to the City Council over the course of several committee meetings and review of the various drafts of this legislation. In this memo, I want to address 3 topical areas that are worth your careful consideration.

Initially, the City of Somerville is a body politic and political subdivision of the Commonwealth of Massachusetts, see *Green v. Commonwealth*, 13 Mass.App.Ct. 524 (1982). Specifically, Somerville is a city pursuant to Chapter 181 of the Acts of 1871 of the Commonwealth of Massachusetts, as passed by the state legislature and signed by the governor. The current Charter was first enacted by the Commonwealth with the passage of Chapter 240 of the Acts of 1899. It has been amended numerous times by home rule petitions, submitted by the City Council/Board of Aldermen and by the Mayor, which were thereafter enacted as Special Acts by the state legislature and governor. As a result, in my opinion, the City of Somerville lacks the authority to establish laws that are contrary to state law. Rather, the City may file home rule petitions with the state legislature, which, when passed, become Special Acts that take precedence over the general laws of the Commonwealth.



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CHEMICAL CROWD CONTROL AGENTS AND KINETIC IMPACT PROJECTILES

The provisions of the ordinance banning certain crowd control agents that are available for use by police, including pepper spray, effectively usurps the authority of the police chief and the mayor. Section 20 of the City Charter and G.L. c. 41 s. 98 establish the ability of the police chief to run the police department, including the deployment of public safety resources. As G.L. c. 41 s. 98 states:

[Police officers] may carry within the commonwealth such weapons as the chief of police or the board or officer having control of the police in a city or town shall determine; provided, that any law enforcement officer of another state or territory of the United States may, while on official business within the commonwealth, carry such weapons as are authorized by his appointing authority.

Chapter 41, Section 98 establishes that the police chief, and the mayor as the appointing authority, have the authority to decide what weapons, or crowd control agents, may be carried by Somerville police officers. An ordinance intended to dictate what crowd control agents Somerville police officers may or may not carry conflicts with the plain language and intent of G.L. c. 41, s.98 on its face, frustrating the purpose of this statute.

The Somerville City Charter sets forth the separation of powers between the executive branch, being the mayor, and the legislative branch consisting of the city council. See Title I, Section 2. The mayor may never exercise any legislative power, and the city council may never exercise any executive power. *Id.* The Charter states that "[the] executive powers of the city shall be vested solely in the mayor, and may be exercised by him either personally or through the several officers and boards in their respective departments, under his general supervision and control." Title IV, Section 20. Therefore, "the city council's authority is limited largely to a check on the mayor's executive function through the power of appropriation." *City Council of Boston v. Mayor of Boston*, 383 Mass. 716, 720 (1981).

Finally, inconsistencies between an ordinance, Somerville Police Policies and Procedures and Mass Police Training Council training is generally problematic. With conflicting policies, training and ordinances, officers are in the confusing position of determining what policy or procedure to follow or what tools they are allowed to use in their job. The potential would be high for an officer to unwittingly violate the ordinance, in relying on their Departmental and law enforcement training.

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MUTUAL AID

At times, Somerville relies on the public safety assistance of sworn officers from other jurisdictions, an arrangement allowed by the mutual aid statute, G.L. c. 40 s. 8G. The proposed ordinance, at (c)4., restricts their discretion and limits their defenses because it ignores that mutual aid is governed by state law. G.L. c. 40, s. 8G states, in pertinent part, that police officers from other jurisdictions who respond to a Somerville request for mutual aid

shall have all the immunities and powers granted to them in the municipalities that employ them, including, but not limited to, powers of arrest . . . [D]uring a mutual aid response for another city or town, a participating police officer shall maintain the right of indemnification granted by law, or by his home city or town, or both, for all claims arising out of any action within the scope of his employment in accordance with a valid mutual aid agreement.

It will be difficult for the City to solicit assistance from other communities if Somerville's police rules and regulations depart substantially and impractically from standard public safety practices. Furthermore, if the officers from other jurisdictions act in accordance with the usual public safety practices, but violate a Somerville rule, they will lose the protection of indemnity for actions carried out within the scope of their employment.

QUALIFIED IMMUNITY

The proposed ordinance states an intent to eliminate qualified immunity for police officers, see (d)3., meaning that a Somerville police officer would be unable to rely on the defense that he or she was trained to respond in the manner that has resulted in litigation against the officer. An officer is protected by qualified immunity when they act in accordance with a "clearly established law." Whether an action by a Somerville police officer violated "clearly established law" is a question of constitutional law left to the findings of a judge in federal or state court. State and federal courts are unlikely to adopt the position that a police policy, even if ordained by a local municipal body, is "clearly established law." In my opinion, to be recognized as "clearly established law" requires plaintiffs to point to already existing judicial decisions that addressed the same or similar facts. Since a state or federal court judge will determine if the constitutional claims brought against the officer(s) allege a violation of clearly established law, an ordinance that states it is clearly established law will have no legal consequence.

Please let me know if you have any questions or if I can be of any further assistance in this matter.

Sincerely,



Francis X. Wright, Jr.
City Solicitor