



CITY OF SOMERVILLE, MASSACHUSETTS
LAW DEPARTMENT

March 9, 2018

Honorable Board of Aldermen
City Hall
Somerville, MA 02143

Re: Response to Board Item #204975

"That the City Solicitor provide an opinion on whether this Board can require landlords to distribute voter registration forms to all new tenants"

Dear Honorable Board Members:

You have asked whether the Board of Aldermen may enact an ordinance requiring landlords to distribute voter registration forms to all new tenants. In my opinion, while there is a reasonable argument in support of the legality of such an ordinance, there is a reasonable risk of judicial invalidation, if challenged. Therefore, in my opinion, the safest approach is to file a Home Rule Petition.

Under the Amendments to the Constitution of Massachusetts, Article 89, Section 6, a municipality possesses (subject to applicable constitutional provisions and legislation) broad powers to adopt ordinances for the protection of the public health, morals, safety, and general welfare, of a type often referred to as the "police" power. Marshal House, Inc. v. Rent Review and Grievance Board of Brookline, 357 Mass. 716, 717 (1970).

In my opinion, the ordinance fits with the broad powers given to municipalities on the basis that it encourages voting participation.

However, Section 7(5) of the Home Rule Amendment, Mass. Const. Amendment Art. 2 (as amended by amend. Article 89), prohibits municipalities from enacting "private or civil law governing civil relationships except as an incident to an independent municipal power." In Marshal House, Inc. v. Rent Review and Grievance Board of Brookline, 357 Mass. 709 (1970), the Supreme Judicial Court concluded that "[t]he term 'private or civil law governing civil relationships' is broad enough to include law controlling ordinary and usual relationships between landlords and tenants." Id. at 716.

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An enactment that “remake[s], in important aspects,” an agreement governing a “continuing relationship,” and which impacts its enforcement through means “predominantly civil in character,” is likely a private or civil law governing a civil relationship. See Marshal House, 357 Mass. at 716-17. In contrast, an enactment in which “[n]o new rights or obligations between persons are created [and] no existing rights or obligations between persons are modified or abolished,” is likely not a private or civil law governing a civil relationship. See Bloom v. Worcester, 363, Mass. 136 (1973). See also Massachusetts Attorney General Case # 8176, March 20, 2017, pp. 2-3 (attached hereto).

In my opinion, there is a reasonable legal argument that the requirement to distribute voter registration forms to all new tenants does not remake the agreement “in important aspects,” especially if the enforcement mechanism is structured through a system of warnings and fines, where the duty runs to the municipality, as opposed to the creation of a civil remedy. However, in my opinion, there is also a reasonable risk of judicial invalidation, if challenged, on the grounds that the proposed legislation imposes a new obligation on the landlord in contravention of the Home Rule Amendment.

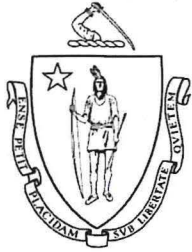
Note that an ordinance which governs a civil relationship may be valid if it is “incident to an independent municipal police power.” However, assuming that the Court concludes that the ordinance governs civil relationships pursuant to Section (5), in my opinion, there is no independent, individual component of municipal authority exercised by the proposed legislation to which the intended regulation of civil relationships would be incidental. Therefore, in order for the ordinance to be valid, in my opinion, the ordinance must be found not to govern civil relationships.

Please contact me with any additional questions or concerns.

Sincerely,

David P. Shapiro
Assistant City Solicitor

enc.



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

March 20, 2017

Deborah F. Dami, Town Clerk
Town of Mashpee
16 Great Neck Road North
Mashpee, MA 02649

RE: Mashpee Fall Annual Town Meeting of October 17, 2016 - Case # 8176
Warrant Articles # 18 and 21 (Zoning)
Warrant Articles # 23, 24, 25 and 26 (General)

Dear Ms. Dami:

Article 26 - Except for a portion of Article 26 (Section 126-4) that requires retail establishments to provide a reusable bag at no cost to certain benefit recipients, we approve Article 26 from the October 17, 2016 Mashpee Fall Annual Town Meeting.¹ (See pages 4 and 5 for Disapprovals). Our comments regarding Article 26 are provided below.

Article 26 - Article 26 amends the Town's General By-laws to add a new Chapter 126, "Prohibited Activities," Article I, "Single-Use Plastic Bag."² As more fully explained below, the disapproved text requires retail establishments to provide reusable bags at no cost to certain benefit recipients. See Section 126-4, "Reusable Bag Policy." The requirement of Section 126-4 that requires retail establishments to treat benefit recipients differently from other customers conflicts with Section 7 (5) of the Home Rule Amendment, Mass. Const. amend. Art. 2., which prohibits municipalities from enacting "private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power." This text also conflicts with state and federal regulations that require equal treatment for benefit recipients.

I. Summary of Article 26.

Article 26 provides that "[s]ingle-use plastic carryout bags shall not be sold, provided, or distributed to a customer or any other person by any person, owner, or operator of any establishment" with the Town. See Section 126-3 (A). If a retail establishment provides bags to customers, "with or without charge," those bags must be paper bags, reusable bags or boxes.

¹ In a decision issued February 16, 2017 we approved Articles 18, 21, 23, 24 and 25.

² We note that the new Chapter 126, Article I uses the term "ordinance" throughout. Cities adopt ordinances and Towns adopt by-laws. The Town may wish to amend these references at a future Town Meeting.

However, the Section 126-4 of the by-law would have required that reusable bags be provided at no cost to certain benefit recipient customers, as follows (emphasis added):

Notwithstanding the provisions of §126-3B, an establishment shall provide a reusable bag at no cost upon the request of the customer who uses a voucher issued under the Special Supplemental Food Program for Women, Infant and Children (WIC) pursuant to M.G.L. c. 111.

Customers are encouraged to bring their own reusable shopping bags to stores. Establishments may provide reusable bags at no charge, or charge a reasonable fee for each paper or other bag, as they desire. Establishments are strongly encouraged to make reusable bags available for sale to customers at a reasonable price.

We disapprove and delete the text in bold and underlined above in Section 126-4 for the reasons detailed below.³

II. Attorney General's Standard of Review.

Pursuant to G.L. c. 40, § 32, the Attorney General has a limited power of disapproval with every "presumption made in favor of the validity of municipal by-laws." Amherst v. Attorney General, 398 Mass. 793, 796 (1986). In order to disapprove any portion of a proposed by-law, the Attorney General must cite an inconsistency between the by-law adopted by the Town and the Constitution or laws of the Commonwealth. Id. We emphasize that our decision in no way implies any agreement or disagreement with the policy views that led to the passage of the by-law. The Attorney General's limited standard of review requires her to approve or disapprove by-laws based solely on their consistency with state and federal law, not on any policy views she may have on the subject matter or wisdom of the by-law. Id. at 795-96, 798-99.

III. Home Rule Amendment Limitations on Town By-laws.

Section 7(5) of the Home Rule Amendment, Mass. Const. amend. art. 2; prohibits municipalities from enacting "private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power." The Supreme Judicial Court first interpreted the meaning of this clause in Marshal House, Inc. v. Rent Review and Grievance Board of Brookline, 357 Mass. 709 (1970), in which the Court held that a by-law enacting a form of "rent control" was an impermissible private or civil law governing a civil relationship. The Court admitted that "[a]mbiguity exists . . . concerning the meaning of . . . § 7(5)." Id. at 713. Nonetheless, the Court concluded that "[t]he term 'private or civil law governing civil relationships' is broad enough to include law controlling ordinary and usual relationships between landlords and tenants." Id. at 716. The Court noted that the by-law "affords . . . the power in effect to remake, in important respects, the parties' contract creating a tenancy" by "restrict[ing] the rent which may be charged to the tenant" the proposed by-law "directly intervenes in the continuing landlord-tenant relationship." Id. at 715-16. Since the municipal board, operating pursuant to the challenged by-law, could "remake, in important respects, the

³ We disapproved a similar provision in a decision issued October 26, 2015 (Case # 7594) to Williamstown.

parties' contract" and thereby alter a "continuing . . . relationship," the by-law was a private or civil law governing a civil relationship.

Three years later, in Bloom v. City of Worcester, 363 Mass. 136 (1973), the Court held that the creation of a municipal human rights commission was not an enactment of private or civil law governing a civil relationship. The Court distinguished its case from Marshal House as follows: "No new rights or obligations between persons are created by the ordinance; no existing rights or obligations between persons are modified or abolished." Id. at 146. "At most . . . the ordinance and activities undertaken pursuant to it can encourage a person by moral suasion to do what the [state] law governing his civil relationships already requires him to do." Id. at 147.

Together, Marshal House and Bloom suggest certain distinguishing features of private or civil laws governing civil relationships. An enactment that "remake[s], in important respects," an agreement governing a "continuing . . . relationship," and which impacts its enforcement through means "predominantly civil in character," is likely a private or civil law governing a civil relationship. See Marshal House, 357 Mass. at 716-17. Put differently, "[d]oes the by-law so directly affect the [retailer-customer] relationship, otherwise than 'as an incident to an exercise of independent municipal power,' as to come within § 7(5)?" Id. at 717. In contrast, an enactment in which "[n]o new rights or obligations between persons are created [and] *no existing rights or obligations between persons are modified or abolished*," Bloom, 363 Mass. at 146 (emphasis added), is likely not a private or civil law governing a civil relationship.⁴

Here, the proposed by-law text in Section 126-4 requires retail establishments to provide a reusable bag, at no cost, upon the request of certain benefits recipient customers. Unlike the ordinance considered in Bloom, under the proposed by-law "existing rights or obligations between persons are modified or abolished." Bloom, 363 Mass. at 146. These requirements "directly affect" the manner in which a retail establishment sells (or provides) products to its customers. Marshal House, 357 Mass. at 717. When a town by-law purports to dictate to a retailer what products it must or must not charge its customers for, the by-law fundamentally alters the retailer-customer relationship. Therefore, the proposed by-law is an enactment of private or civil law governing civil relationships in contravention of the Home Rule Amendment.

Still, "[a]n ordinance which governs a civil relationship may be valid despite the proscription of § 7(5) if it is 'incident to an exercise of an independent municipal power.'" Bannerman v. City of Fall River, 391 Mass. 328, 332 (1984) (quoting Mass. Const. amend. art. 2, § 7(5)). However, "[f]urtherance of the general public welfare is insufficient justification for an ordinance which otherwise violates § 7(5)." Id. Rather, the impact on civil relationships must be incident to the exercise of "some independent, individual component of the municipal police power." Marshal House, 357 Mass. at 718. We can identify no independent, individual component of municipal authority exercised by the proposed by-law text, to which the intended

⁴ This conception of private or civil law is consistent with that offered by other legal authorities. "Private law consists of the substantive law which establishes legal rights and duties between and among private entities, law that takes effect in lawsuits brought by one private entity against another. Gary T. Schwartz, The Logic of Home Rule and the Private Law Exception, 20 UCLA L. Rev. 671, 688 (1973). Examples include "contracts, property, and torts." Id. at 687. "[A] municipality is considered to have enacted private law when an ordinance significantly affects private legal relationships...." Note, Municipal Home Rule Power: Impact on Private Legal Relationships, 56 Iowa L. Rev. 631, 631 (1971).

regulation of civil relationships would be incidental. *Cf. id.* (“We perceive no component of the general municipal police power, other than the regulation of rents itself, to which such regulation fairly could be said to be incidental.”). The proposed text in Section 126-4 (set forth above in bold and underline) therefore constitutes an invalid private or civil law governing civil relationships.

We reiterate that the Attorney General’s review of bylaws pursuant to G.L. c. 40, § 32, is limited to the bylaw’s consistency with state substantive and procedural law, rather than a consideration of the policy arguments for or against the enactment. *Amherst*, 398 Mass. at 798-799 (“Neither we nor the Attorney General may comment on the wisdom of the town’s by-law.”). The Town must leave it to the retail establishment to determine whether or not it will charge a fee for the bags it provides to its customers. Because the portion of Section 126-4 shown above in bold and underline conflicts with state substantive law, it is disapproved and deleted. **[Disapproval # 1 of 2].**

IV. Section 126-4 Conflicts with Federal and State Law.

Section 126-4’s requirement that retailers provide certain Women, Infants and Children (WIC) benefit recipients a reusable bag at no charge conflict with the laws governing the WIC program. The United States Department of Agriculture’s (USDA) Food and Nutrition Service (FNS) oversees the implementation of the WIC program through the states.⁵ Retail establishments participating in the WIC program must treat WIC benefit recipients the same as other customers. *See* 7 CFR 246.12 (h)(3)(iii) (“The vendor must offer program participants, parents, or caretakers of infant or child participants, and proxies, the same courtesies offered to other customers.”)⁶

In September of 2014, the USDA FNS published its “Operating Rules Women, Infants and Children (WIC) Electronic Benefits Transfer (EBT)” regulations. *See* <https://www.fns.usda.gov/sites/default/files/wic/WIC-EBT-Operating-Rules-September-2014.pdf> Section 4, pertaining to “WIC Vendor Requirements,” provides in Section 4.7.5.6 (b), “Bottle Deposits and Grocery Bag Fees” (effective October 1, 2014), as follows:

WIC Vendors are not required to provide grocery bags for WIC customers if they are not provided to other customers in compliance with the WIC “Equal Treatment” policy (246.12 (h)(3)(iii)). WIC Vendor systems shall credit grocery bag use to the WIC Participant’s non-WIC item purchases. If any credit remains, the remainder shall be applied to the WIC purchases.

⁵ WIC is a federal program created to safeguard the health of low-income women, infants, and children who are at nutrition risk. The program is administered by local agencies and receives both federal and state funds. *See* USDA WIC website (mission statement) at <https://www.fns.usda.gov/wic/about-wic-wics-mission>. The program establishes eligibility requirements. However, any family enrolled in certain other benefit programs, including Supplemental Nutrition Assistance Program (SNAP) are automatically eligible for WIC. *See* USDA WIC website (eligibility requirements) at <https://www.fns.usda.gov/wic/wic-eligibility-requirements>.

⁶ This is similar to the requirements for the SNAP program found at 7 CFR §278.2 which provides in relevant part “[n]o retail food store may single out coupon users for special treatment in anyway.”

Although we recognize the beneficial policy considerations behind this provision, the provision conflicts with the regulations governing WIC programs, and we therefore must disapprove and delete the text in bold and underlined above. **[Disapproval # 2 of 2]**.

V. Effective Date of By-law.

Finally, we note that Section 126-5 indicates that the by-law shall “take effect after 12 months from the date of its adoption.” It is not clear when the Town intended the by-law to go into effect. The by-law is not legally effective until it is approved by our Office and the posting/publication requirements of G.L. c. 40, § 32 are satisfied. *See* G.L. c. 40, § 32. The Town should consult with Town Counsel on this issue.

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

Nicole B. Caprioli

By: Nicole B. Caprioli
Assistant Attorney General
Municipal Law Unit
10 Mechanic Street, Suite 301
Worcester, MA 01608
(508) 792-7600 ext. 4418
nicole.caprioli@state.ma.us

cc: Town Counsel Patrick J. Costello