



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

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April 11, 2024

Beth R. Klein, Town Clerk
Town of Sudbury
322 Concord Road
Sudbury, MA 01776

**Re: Sudbury Special Town Meeting of October 23, 2023 -- Case # 11254
Warrant Article # 3 (Zoning)
Warrant Articles # 1 and 2 (General)**

Dear Ms. Klein:

Articles 1, 2 and 3 - We approve Articles 1, 2 and 3 from the October 23, 2023 Sudbury Special Town Meeting, except for certain text adopted under Article 2 related to removal of double poles, that we disapprove on preemption grounds. See Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986) (requiring inconsistency with state law or the constitution for the Attorney General to disapprove a by-law). We explain this disapproval below, and offer comments for the Town's consideration on other sections of the general by-laws.

I. Summary of Articles 1, 2 and 3

Under Article 1 the Town amended the general by-laws to make "Clerical and Ministerial Revisions,"¹ as well as renumbering and non-ministerial revisions as follows:

To renumber and recaption the General Bylaws of Town by (a) assigning a chapter/article number to each of the General Bylaws; (b) by renumbering each section of each bylaw accordingly; (c) by inserting chapter, article, section and subsection titles; and (d) by updating internal references to reflect the new numbering systems, as well as the following non-substantive clerical and

¹ The "Clerical and Ministerial Revisions" included standardizing references and numbers; spelling and punctuation corrections; gender neutral terms; replacing several terms (for example, "Town Treasurer," "Treasurer/Collector" and "Tax Collector" with the "Town Treasurer-Collector"); and repealing Article VIII, "Planning Board" and Article XXIII, "Water Resource Protection Committee (WRPC) Annual Report to the Town of Sudbury."

ministerial changes, all as set forth in the Final Draft of the Code of the Town of Sudbury, dated September 2023, on file with the Town Clerk.

Under Article 2, the Town amended the general by-laws to make “minor substantive specific changes...as set forth in the Final Draft of the Code of the Town of Sudbury, dated September 2023, on file with the Town Clerk, with text to be inserted in underline and text to be deleted in strikethrough.”

Under Article 3 the Town amended the zoning by-laws to make “Clerical and Ministerial Revisions,”² as well as renumbering and non-ministerial revisions as follows:

To renumber and recaption the Zoning Bylaw of Town by (a) designating the Zoning Bylaw as Chapter 295 of the Code of the Town of Sudbury; (b) inserting article, section and subsection titles; and (c) updating internal references to reflect the new number system, as well as the following non-substantive clerical and ministerial changes...all as set forth in the Final Draft of the Code of the Town of Sudbury, dated September 2023, on file with the Town Clerk.

The Town provided us with documents reflecting the amendments adopted under Articles 1, 2 and 3, including the revisions with new text shown in underline and deleted text shown in strikethrough. We approve the amendments adopted under Articles 1, 2 and 3, except for the changes to Sections 265-8 and 265-9 of the general by-laws, as explained below. Our approval of the remaining portions of the recodified general and zoning by-laws is limited solely to those changes that were identified in the documents submitted to this Office and does not include any other changes.

II. Attorney General’s Standard of Review of General By-laws and General Preemption Principles

Our review is governed by G.L. c. 40, § 32. Under 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, 398 Mass. at 795-96. 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 bylaw.”) To disapprove a by-law (or any portion thereof), the Attorney General must cite to an inconsistency between the by-law and the state Constitution or laws. Id. at 796. This is because a municipality has no power to adopt a by-law that is “inconsistent with the constitution or laws enacted by the [Legislature].” Home Rule Amendment, Mass. Const. amend. art. 2, § 6.

In determining whether a by-law is inconsistent with a state statute, the “question is not whether the Legislature intended to grant authority to municipalities to act...but rather whether

² The “Clerical and Ministerial Revisions” included standardizing references, numbers and capitalization; spelling and punctuation corrections; gender neutral terms; and replacing several terms (for example “occupancy permit” with “certificate of occupancy”).

the Legislature intended to deny [a municipality] the right to legislate on the subject [in question].” Town of Wendell, 394 Mass. at 524 (1985). “This intent can be either express or inferred.” St. George Greek Orthodox Cathedral of Western Mass. v. Springfield, 462 Mass. 120, 125-26 (2012). Local action is precluded in three instances: (1) where the “Legislature has made an explicit indication of its intention in this respect”; (2) where “the State legislative purpose can[not] be achieved in the face of a local by-law on the same subject”; and (3) where “legislation on a subject is so comprehensive that an inference would be justified that the Legislature intended to preempt the field.” Town of Wendell, 394 Mass. at 524. “The existence of legislation on a subject, however, is not necessarily a bar to the enactment of local ordinances and by-laws exercising powers or functions with respect to the same subject[, if] the State legislative purpose can be achieved in the face of a local ordinance or by-law on the same subject[.]” Bloom v. Worcester, 363 Mass. 136, 156 (1973); see Town of Wendell, 394 Mass. at 527-28 (“It is not the comprehensiveness of legislation alone that makes local regulation inconsistent with a statute...The question...is whether the local enactment will clearly frustrate a statutory purpose.”).

III. The Amendments Adopted Under Article 2 to Sections 265-8 and 265-9 are Preempted by G.L. c. 164

Under Article 2 the Town amended Chapter 265, “Utility Lines and Poles,” Article II, “Removal of Double Poles,” Section 265-8, “Exception for Emergencies,” and Section 265-9, “Future replacement pole installation” to add text found in G.L. c. 164, § 34B, as follow (new text in underline, deleted text in strikethrough):

265-8

In the event of an emergency caused by weather conditions, accidents or acts of God, temporary repairs may be made to damaged poles resulting in a multiple pole, so long as the multiple pole is removed and replaced by a single pole within a reasonable period of time not to exceed ~~(60)~~ 90 days; provided, however, that for any approved commercial or industrial construction project, the completion of which is expected to take longer than one year, such pole shall be removed within six months of the date of installation of the new pole.

265-9

All future replacement utility pole installations shall be coordinated between all occupants to provide for the transfer of all wires to a new replacement pole so that all old poles or temporary devices are removed within a reasonable period of time not to exceed ~~(60)~~ 90 days; provided, however, that for any approved commercial or industrial construction project, the completion of which is expected to take longer than one year, such pole shall be removed within six months of the date of installation of the new pole.

Although the text to be added to Sections 265-8 and 265-9, shown above in underline, matches G.L. c. 164§ 34B, we disapprove and delete the new text (“90...; provided, however, that for any approved commercial or industrial construction project, the completion of which is expected to take longer than one year, such pole shall be removed within six months of the date

of installation of the new pole”) because local enforcement of c. 164, § 34B is prohibited.³ Boston Edison Co. v. Town of Bedford, 444 Mass. 775 (2005) (invalidating by-law regulating double poles because preempted by G.L. c. 164).

In Boston Edison Co. the Supreme Judicial Court struck down a town by-law that fined pole owners \$100 per day for each double pole set that remained beyond the 90-day limit established under G.L. c. 164, § 34B. The Court held that G.L. c. 164 is a comprehensive statutory scheme for the regulation of public utilities, and that local regulation of subject matters governed by Chapter 164 is preempted. The Court concluded that “local regulations such as the bylaw here would frustrate the goal of G.L. c. 164 to ensure uniform and efficient utility services to the public.” Id. at 783. The Court noted the danger that myriad local enforcement provisions pose to the uniform and efficient delivery of utility services:

Local enforcement could lead to a system dominated by inappropriate economic incentives that compel pole owners to devote resources to those cities and towns where the penalties are the most onerous. One town may increase its fines above those imposed by other municipalities to persuade pole owners to shift their focus to removing the poles within its borders. Permitting a town to manipulate the prioritization of pole removal to the disadvantage of other municipalities would threaten the provision of uniform and efficient utility services to the public.

Id. at 784-785.

Because the Town is preempted from adopting local regulation of subject matters governed by Chapter 164, including double poles, we disapprove and delete the proposed amendments to Section 265-8 and 265-9, shown above in underline (“90...; provided, however, that for any approved commercial or industrial construction project, the completion of which is expected to take longer than one year, such pole shall be removed within six months of the date of installation of the new pole”). The Town should consult with Town Counsel with any questions on this issue.

In addition, the Town should consult with Town Counsel regarding the existing text in Article II, “Removal of Double Poles,” that imposes requirements on the removal, relocation and alteration of utility poles and imposes fines for failure to comply with the by-law provisions.⁴

³ G.L. c. 164, § 34B, provides as follows: “A distribution company or a telephone company engaging in the removal of an existing pole and the installation of a new pole in place thereof shall complete the transfer of wires, all repairs, and the removal of the existing pole from the site within 90 days from the date of installation of the new pole; provided, however, that for any approved commercial or industrial construction project, the completion of which is expected to take longer than one year, said company shall be required to remove such pole within six months from the date of installation of the new pole. The owner of such pole shall notify all other users of the starting date of such removal and installation work at least 48 hours prior to the commencement of such work, and said owner shall require all other users to remove their wiring and other attachments from the poles in a timely manner.”

⁴ According to the editorial notations in the Town’s general by-laws, Sections 265-5 through

Although this text was not amended under Article 2 and is therefore not before the Attorney General for review and approval, the Town should consult with Town Counsel to determine whether the Town's existing by-law may be preempted by state law, and if so, whether the by-law should be deleted from the Town's by-laws.

IV. Additional Comments on the General By-laws for the Town's Consideration

We approve the remaining changes adopted under Articles 1, 2 and 3, and we offer the following comments for the Town's consideration.

1. Chapter 124 – Boating

Under Article 2 the Town amended Chapter 124, "Boating" to add a new Section 124-4 as follows:

Violations of this bylaw are subject to a penalty as provided in Chapter 1, Article I, General Penalty.

The existing Chapter 124 regulates the operation of motorboats upon any portion of the Sudbury River or its tributaries within the Town. See Section 124-1. We approve the amendments to Chapter 124 adopted under Article 2. However, the Town should consult with Town Counsel to determine whether the new Section 124-4 needs to be submitted to the Director of Office of Law Enforcement (OLE) within the Executive Office of Energy and Environmental Affairs for approval. General Laws Chapter 90B, Sections 11 and 15 authorize towns to regulate activities or vessels on town waters, so long as the local regulation does not conflict with the provisions of G.L. c. 90B and the regulations are approved by OLE.^{5, 6} General Laws Chapter 15 states as follows:

(a) The provisions of this chapter shall govern the numbering, operation, equipment and all other matters relating thereto of any vessel subject to the provisions of this chapter or of any rule or regulation made under authority hereof, whenever any such vessel shall be operated or maintained on the waters of the commonwealth, or whenever any activity regulated by said chapter or said rules and regulations shall take place thereon.

265-10 were originally adopted as Article XXX of the General By-laws on April 2, 2002, prior to the Court's decision in Boston Edison Co. v. Town of Bedford, 444 Mass. 775 (2005).

⁵ Sections 11 and 15 refer to the "director," defined in Section 1 as "the director of the division of law enforcement of the department of fisheries, wildlife and environmental law enforcement." However, the Division of Law Enforcement is now the Office of Law Enforcement within the Executive Office of Energy and Environmental Affairs. See G.L. c. 21A, §§ 8 and 10A, and Chapter 41 of the Acts of 2003, Section 1(a) (4).

⁶ The Director of the OLE's contact information is: Massachusetts Environmental Police Headquarters, 251 Causeway St., Suite 101, Boston, MA 02114.

(b) Nothing in this section shall be construed as prohibiting any city or town from regulating, by ordinance or by-law, not contrary to the provisions of this chapter or of any rule or regulation made under authority hereof, other than numbering, of such vessels on such waters of the commonwealth as lie within the city or town, or such activities which take place thereon. Such cities and towns may, by joint action, provide for such regulations for such waters lying in two or more cities or towns.

(c) No such ordinance or by-law shall be valid unless it shall have been approved by the director and published in a newspaper of general distribution in said city or town not less than five days before the effective date thereof.

The Town should consult with Town Counsel to determine if this amendment requires the approval of OLE before it can take effect. See G.L. c. 90B, §§ 11 and 15.

2. Chapter 72 – Town Property

Under Articles 1 and 2 the Town made minor revisions to Chapter 72, “Town Property,” including amendments to Section 72-2A, “Sale of Tax possession property,” in relevant part as follows (new text in underline and deleted text in strikethrough):

Section 72-2A:

The Select Board ~~are~~ is hereby empowered to sell at public auction all or any of the Town property acquired by virtue of sale for nonpayment of taxes, which sales have been confirmed by the Land Court or the ~~Tax Commissioner~~ Commissioner of the Department of Revenue, and ~~they are~~ it is authorized to give deeds therefor.

Section 72-2B:

~~At such sale or any adjournment thereof,~~ The Select Board may reject any and all bids at such sale or any adjournment thereof, if, in ~~their~~ its opinion, no bid is made which approximates the fair value of the property.

Although we approve the identified changes to Chapter 72, the Town should consult with Town Counsel prior to taking any action related to property acquired for non-payment of taxes in light of the Supreme Court’s decision in Tyler v. Hennepin County, 598 U.S. 631 (2023) (sections of Minnesota’s tax lien foreclosure law violate the Takings Clause of the Fifth Amendment and are unconstitutional). The Tyler decision is important because the Minnesota statutory scheme is similar to Massachusetts’ Tax Lien Foreclosure Law. See also the Attorney General’s guidance entitled “Guidance About Tax Lien Foreclosures After the Supreme Court’s Decision in *Tyler v Hennepin County*.”⁷ The Town should consult with Town Counsel prior to taking any action related to tax title property.

⁷ The Attorney General’s guidance can be found here:

(<https://www.mass.gov/files/documents/2023/10/18/Tax%20Lien%20Foreclosure%20Guidance%20FINAL.pdf>)

V. Conclusion

We approve the by-law amendments adopted under Articles 1, 2, and 3, except for the text added to Sections 265-8 and 265-9 under Article 2, that we disapprove as explained above in Section III. The Town should consult with Town Counsel with any questions.

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.

Very truly yours,

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cc: Town Counsel Lee S. Smith