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OFFICE OF THE ATTORNEY GENERAL

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March 19, 2021

Michele Bissonnette, Town Clerk
Town of Wareham
54 Marion Road
Wareham, MA 02571

**Re: Wareham Annual Town Meeting of December 12, 2020 -- Case # 10009
Warrant Articles # 22 and 23 (General)**

Dear Ms. Bissonnette:

Article 22 - Under Article 22 the Town voted to prohibit the Board of Health from issuing permits for solid waste removal from residential buildings containing less than three dwelling units unless the person or business has a contract with the Town for solid waste curbside collection. As provided in more detail below, we approve Article 22 because we find no conflict with state law.^{1,2}

Our decision on Article 22's consistency with state law is largely based on the Massachusetts Appeals Court case of Lomberto v. Town of Franklin, 27 Mass. App. Ct. 797 (1989) where the court upheld a by-law that is similar to the by-law adopted by the Town under Article 22. In Lomberto, the court determined that town by-laws limiting solid waste removal only to

¹ The posted Warrant called for Town Meeting to be held on October 26, 2020. However, in accordance with G.L. c. 39, § 10A (as amended by Chapter 53 of the Acts of 2020), Town Meeting was postponed two times: first, from October 26, 2020 to November 23, 2020; and second, from November 23, 2020 to December 28, 2020. On November 30, 2020, the Town Moderator, using the authority granted under G.L. c. 39, § 10A, rescheduled the Town Meeting from December 28, 2020 to the earlier date of December 12, 2020. Town Meeting was ultimately held on December 12, 2020.

² In a decision dated March 10, 2021, we approved Article 23 and extended our deadline for Article 22 for an additional seven days until March 21, 2021.

persons or businesses under contract with the town to collect rubbish constitutes a lawful exercise of a town's authority to protect public health and is not in conflict with G.L. c. 111, § 31A's provisions that prohibit the collection and removal of solid waste in a Town without a permit from the local Board of Health. Lomberto, 27 Mass. App. Ct. at 803.

In this decision, we summarize the by-law amendment adopted under Article 22 and the Attorney General's standard of review of town by-laws, and explain why, based on our standard of review, we approve Article 22 notwithstanding the arguments made to us that Article 22 should be disapproved.

We emphasize that our approval of the by-law 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 law, not on any policy views she may have on the subject matter or the wisdom of the by-law. Amherst v. Attorney General, 398 Mass. 793, 795-96, 798-99 (1986) (requiring inconsistency with state law or the constitution for the Attorney General to disapprove a by-law).

I. Summary of Article 22

Article 22 amends the Town's general by-laws by adding a new by-law that prohibits the Board of Health from issuing permits for solid waste removal from residential buildings containing less than three dwelling units unless the person or business has a contract with the Town for solid waste curbside collection. Division VIII, Article I. The by-law provides that the Board of Health is not prohibited from: (1) issuing temporary permits when there is no solid waste curbside collection contract with the Town or (2) issuing permits for the removal of solid waste from any commercial buildings or residential buildings containing three or more dwelling units. Division VIII, Article I.

The by-law prohibits any person having a contract with the Town from commingling any residential waste collected or received from dwelling units or municipal buildings located in the Town with: (1) commercial or industrial solid waste, or (2) residential waste generated in another municipality. Division VIII, Article II. The by-law also requires that the solid waste collected pursuant to the by-law must be delivered to the Southeastern Massachusetts Resource Recovery Facility (Covanta SEMASS). Division VIII, Article II. Finally, the by-law authorizes the Board of Selectmen to establish the fees and charges for services provided by the Town for the collection and disposal of solid waste. Division VIII, Article III.

II. Attorney General's Standard of Review of General 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, 398 Mass. at 795-96. The Attorney General does not review the policy arguments for or against an 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. Where the Legislature intended to preempt the field on a topic, a municipal by-law on that topic is invalid and must be disapproved. Wendell v. Attorney General, 394 Mass. 518, 524 (1985). It is under this standard of review that we conclude Article 22 is not in conflict with state law.

During our review of Article 22, we received input urging our Office to disapprove Article 22 on various grounds, including both procedural and substantive grounds. Some parties urged our Office to disapprove Article 22 because it was adopted at a Town Meeting with low attendance due in part to COVID concerns and confusion about the time and location of the meeting. In addition, the oppositions allege that the by-law is unlawful because: (1) it does not include an “opt out” provision; (2) it forces residents to use a specific trash hauler company; (3) it is an unlawful tax; and (4) it is unfair to elderly and low income residents.

We appreciate the public input as it has informed our review of the by-law and emphasized the importance of the issues at stake. As explained in more detail below, based on our standard of review and the Town’s authority under the Home Rule Amendment and state law, we have determined that the asserted deficiencies do not provide grounds for us to disapprove Article 22. However, we also conclude that Board of Selectmen’s authority to impose fees and charges for services provided under the by-law must be applied consistent with state law.

III. State Law Governing A Town’s Authority to Regulate Solid Waste Removal

Towns have broad authority to regulate the collection and disposal of solid waste. Bonollo Rubbish Removal v. Town of Franklin, 886 F.Supp. 955, 964 (D. Mass. 1995) (a town by-law that requires trash haulers under contract with the town to deliver trash collected to a specific facility was authorized under G.L. c. 111, §§ 31A and 31B because entering into waste disposal contracts was a clear and foreseeable result of the statutory scheme) citing Tri-State Rubbish v. Waste Management, Inc., 998 F.2d 1073, 1077-78 (1st Cir. 1993) (“waste disposal . . . is a traditional local-government function”). There are several statutes that expressly grant towns the authority to enact by-laws pertaining to the collection and disposal of solid waste, including allowing towns to require local permits for solid waste collection and disposal. General Laws Chapter 111, Section 31A specifically prohibits the collection and removal of solid waste in a Town without a permit from the local Board of Health and provides in pertinent part as follows: ³

No person shall remove or transport garbage, offal or other offensive substances through the streets of any . . . town without first obtaining a permit from the board of health of such . . . town; provided, however, that no rules or regulations shall restrict the hours of the day

³ In addition, G.L. c. 111, § 31B authorizes boards of health to adopt rules and regulations for the control of the removal, transportation or disposal of garbage, offal, or other offensive substances. Section 31B authorizes fines of not more than one thousand dollars for violations of Section 31A and any rules or regulations adopted by the board of health.

when garbage, offal or other offensive substances may be collected in areas zoned for business, commercial or industrial use. An application for such permit shall be in such form and contain such information, on oath, as such board shall require. All such permits shall expire at the end of the calendar year in which they are issued, but may be renewed annually on application as herein provided. No permit shall be transferred except with the approval of the said board.

Towns also have the authority pursuant to G.L. c. 44, § 28C (g) to contract for the disposal of solid waste at facilities of their choosing and specify the rate to be charged by the disposal. Section 28C (g) provides as follows:

In addition to any other power conferred by law, a . . . town may from time to time contract for the operation by others of any solid waste facility or facilities financed or to be financed by such . . . town in whole or in part under this section or any other general or special law or may from time to time lease the same to others for operation by them and may contract with any such operator for the disposal of refuse, garbage and waste, or for any of the foregoing, or for the purchase or use of by-products or residue resulting from the operation of such facilities.

General Laws Chapter 111, Section 31A and Chapter 44, Section 28C (g) therefore authorize municipalities in the Commonwealth to arrange for the collection and disposal of solid waste in their towns in any manner they deem to be cost effective and in furtherance of the public health. Bonollo Rubbish Removal, 886 F.Supp. 955 at 964. The by-law adopted under Article 22 is consistent with this legislative authority.

In Lomberto v. Town of Franklin, 27 Mass. App. Ct. 797 (1989), the Massachusetts Appeals Court expressly affirmed that town by-laws limiting solid waste removal only to persons or businesses under contract with the town to collect rubbish constitutes a lawful exercise of a town's authority to protect public health and is not inconsistent with G.L. c. 111, § 31A.⁴ In that

⁴ The by-law upheld in the Lomberto case provides as follows and is almost identical to the by-law adopted by Wareham under Article 22:

Article 87–120: Solid Waste Collection

“1. No permit for the removal of solid waste from residential buildings containing less than three dwelling units shall be issued by the Board of Health of the Town of Franklin pursuant to G.L. c. 111, § 31A, except to the person or persons having a contract with the Town for the curbside collection of solid waste from such residential dwelling units located therein. Nothing contained in this By-Law shall prohibit the Board of Health from issuing temporary permits pursuant to G.L. c. 111, § 31A during any period of time when the curbside collection of solid waste is not being performed by any person pursuant to a contract with the Town. This By-Law shall also not prohibit the Board of Health from issuing permits pursuant to G.L. c. 111, § 31A for the removal of solid waste from any commercial buildings or residential buildings containing three or more dwelling units.

“2. Any person having a contract with the Town for the curbside collection of solid waste shall not commingle any residential waste collected or received from dwelling units or municipal buildings located in the Town pursuant to its contract with the Town, with commercial or industrial solid

case, a trash hauler who held a trash removal permit issued by the Town of Franklin challenged the town's by-law that allowed only persons under contract with the town to collect rubbish from residential buildings containing fewer than three units. The plaintiff claimed that the by-law is invalid because it was not prompted by a true concern for public health and was not "protected" by G.L. c. 111, §§ 31A and 31B. The court, citing the Home Rule Amendment and G.L. c. 43B, the Home Rule Procedures Act, concluded that the by-law constituted a lawful exercise of the Town's power under G.L. c. 111, §§ 31A and 31B to determine what is beneficial to the public health to the Town. "The objective of [the by-law] is protection of the public health, a concern which, as it pertains to the disposal of waste materials, the Legislature, through G.L. c. 111, §§ 31A and 31B has expressly left to local government." *Id.* at 802.

The by-law voted by Wareham under Article 22 is almost identical to the by-law upheld in Lomberto. Thus, in light of the Town's broad home rule power and the state statutory provisions detailed herein, we conclude that the by-law prohibiting the Board of Health from issuing permits for solid waste removal from residential buildings containing less than three dwelling units unless the person or business has a contract with the Town for solid waste curbside collection is not in conflict with state law. However, as explained herein, any fee or charge imposed by the Town for solid waste collection and disposal must be a lawful fee and cannot be an unlawful tax.

IV. Comments on Specific Provisions of the By-law and Assertions that the By-law Should be Disapproved

A. Assertions that Article 22 is Procedurally Inconsistent with State Law

1. *Town Meeting was Poorly Attended Due to COVID and Confusion Over the Date and Location of Town Meeting*

Among the arguments we received urging disapproval of Article 22 is that it was adopted at a Town Meeting that was sparsely attended due to COVID concerns and confusion over the date and location of the Town Meeting. As provided below, this does not provide a ground upon which to disapprove Article 22.

In determining whether a by-law is inconsistent with the Constitution and laws of the Commonwealth, the Attorney General has available to her the materials which the Town Clerk is required to submit pursuant to G.L. c. 40, § 32:

. . . . a certified copy of such by-law with a request for its approval, a statement clearly explaining the proposed by-law, including maps and plans if necessary, and adequate proof

waste, or residential waste generated in another Municipality. In addition, such person shall deliver on behalf of the Town to the Wheelabrator Millbury, Inc. refuse to energy facility only solid waste collected or received from residential dwelling units and municipal buildings located within the Town pursuant to its contract with the Town.

that all of the procedural requirements for the adoption of such by-law have been complied with.

The Attorney General's review under G.L. c. 40, § 32 is limited to the text "of the proposed by-law . . . and adequate proof that all of the procedural requirements for the adoption of such by-law have been complied with." We interpret the phrase "procedural requirements" in G.L. c. 40, § 32 to refer primarily, if not exclusively, to those requirements established by statute as basic conditions essential to the validity of Town Meeting action, rather than to all possible procedural requirements that might govern the conduct of Town Meeting itself. The Town Clerk certified to this Office that the Town Meeting Warrant was noticed in accordance with G.L. c. 39, § 10, and was postponed and rescheduled in accordance in G.L. c. 39, § 10A. The Town Clerk also certified to us that the Town's quorum requirement necessary for the conveying of Town Meeting was met. We conclude that the Town complied with the notice requirements for the Town Meeting Warrant. Whether Town Meeting was poorly attended, and the legal effect of poor attendance upon the validity of votes taken at that Town Meeting, is a determination that goes beyond the limited review process of the Attorney General set forth in G.L. c. 40, § 32. Therefore, we cannot disapprove Article 22 on this basis.

2. *Warrant Article 22 Did Not Give Sufficient Notice of the By-law To Be Voted On At Town Meeting*

A second argument made by those urging disapproval of Warrant Article 22 is that it did not give sufficient notice to the Town residents of the by-law that was proposed to be adopted. General Laws Chapter 39, Section 10 requires in pertinent part that "[t]he warrant for all town meetings shall state the time and place of holding the meeting and the subjects to be acted upon thereat." The subject matter requirement of G.L. c. 39, §10 "means only that the subjects to be acted upon must be sufficiently stated in the warrant to apprise voters of the nature of the matters with which the meetings authorized to deal. It does not require that the warrant contain an accurate forecast of the precise action which the town meeting will take on these subjects." Johnson v. Town of Framingham, 354 Mass. 750 753 (1968) (citations and internal quotations omitted). This allows voters to be notified of the nature of the matters to which town meeting is authorized to deal. Burlington v. Dunn, 318 Mass. 216, 219 (1945). A warrant complies with Section 10 if it indicates "with substantial certainty the nature of the business to be acted on." Tuckerman v. Moynihan, 82 Mass 562, (1933), quoting, Coffin v. Lawrence, 143 Mass 110, 122 (1886) "The articles . . . are the mere abstracts which are to be laid before the inhabitants for their action." Tuckerman, 82 Mass. at 565. "Toward this end, warrant articles will be construed liberally, and it has been held that any article is legally sufficient if it gives intelligible notice of the issue to be acted upon." Coffin v. Lawrence, 143 Mass. 110 (1888).

Warrant Article 22 apprised the residents of the Town that they would be asked to vote to adopt a by-law that established a process, including fees, for the operation of Town's solid waste program. More importantly, Warrant Article 22 referred the residents to a copy of the by-law that was on file with the Town Clerk. Specifically, Warrant Article 22 provided as follows:

ARTICLE 22 - ESTABLISH SOLID WASTE AND RECYCLING FEE

To see if the Town will establish a by-law in accordance with MGL c. 44, § 28C, and case law thereunder, and any other enabling authority a process and system of fees to cover all costs of operating the Town's integrated municipal solid waste programs; a copy of said by-law is on file in the office of the Town Clerk; or take any other action relative thereto.

Based on the text of Warrant Article 22, we conclude that the Town complied with the requirements of G.L. c. 39, § 10 and provided sufficient notice to the residents of the subject matter to be voted on under Article 22.

For the reasons provided above, we approve Article 22 because we conclude it was adopted using procedures that complied with state law.

B. Assertions that Article 22 is Substantively Inconsistent with State Law

1. *Article 22 Imposes An Unlawful Tax*

Article III of the by-law authorizes the Board of Selectmen to establish fees and charges for any facilities and services provided by the Town in relation to the collection and disposal of solid waste. This Article is consistent with state law because towns have the authority to impose fees and charges for services it provides and for the issuance of permits, licenses, and other approvals. Silva v. City of Attleboro, 454 Mass. 165, 166 (2009) (a charge assessed by municipalities for a burial permit is a valid regulatory fee); G.L. 44, § 22F. However, any fee or charge imposed by the Town must be a lawful fee and may not be an unlawful tax.

A municipality may impose fees, but it “has no independent power of taxation.” Silva, 454 Mass. at 169. In distinguishing valid fees from impermissible taxes, the Supreme Judicial Court has noted that fees tend to share the following common traits: (1) fees, unlike taxes, are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society; (2) user fees (although not necessarily regulatory fees) are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge; and (3) fees are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses. *See Silva*, 454 Mass. at 168 (citing Emerson College v. City of Boston, 391 Mass. 415, 424-25 (1984)).

Article III does not impose a specific fee or charge, but rather authorizes the Board of Selectmen to establish a fee or charge.⁵ As written, the by-law’s fee provision is not in conflict

⁵ Some members of the public argued that Article 22 discriminates against people with disabilities and low-income residents because people with limited income cannot afford to pay for solid waste removal. The Attorney General respects these concerns and the sincerity with which they have been advanced. However, the Attorney General’s standard of review does not permit her to disapprove a by-law based on

with the Emerson College analysis. However, the Town should consult with Town Counsel to ensure that any fees established under the by-law follow the legal requirements to be valid fees rather than impermissible taxes.⁶

V. Substantive Comments on Article II’s Requirement that Certain Solid Waste Collected Be Delivered to the Southeastern Massachusetts Resource Recovery Facility

Article II of the by-law requires solid waste collected from residential dwelling units and municipal buildings pursuant to a contract with the Town to be delivered to the Covanta SEMAS facility.⁷ Local laws that require solid waste to be delivered to a specific private facility, so-called “flow control” laws, have been held by the United States Supreme Court to be in conflict with the Commerce Clause of the United States Constitution. C & A Carbone v. Town of Clarkstown, 511 U.S. 383 (1994); see also United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgt. Authority, 550 U.S. 330 (2007) (regulatory “flow control” laws that direct solid waste to publicly-owned facilities do not run afoul of the Commerce Clause of the United States Constitution). While local laws cannot require solid waste to be delivered to a specific private facility, towns are allowed to enter into contracts with solid waste haulers that include provisions requiring delivery to a specific facility. Bonollo, 886 F.Supp. at 964 and G.L. c. 44, § 28C (g).

Article II’s requirements apply to a solid waste removal company that has a contract with the Town.⁸ We understand that the Town will enter into a contract, if it has not already, with a solid waste hauling company to remove solid waste from residential dwellings and municipal property. Thus, it is unclear whether the by-law itself imposes the requirement for delivery to Covanta SEMAS or the by-law restates a requirement that is or will be included in a contract with the Town. Because the case law is clear that a town cannot by local law require that solid waste be delivered to a specific privately-owned facility, Article II’s requirement cannot apply to a solid waste hauler that does not have such requirement as part of its contract with the Town. The Town should discuss the application of Article II with Town Counsel to avoid a violation of the Commerce Clause of the United States Constitution as described in the Clarkstown and Oneida-Herkimer cases cited above.

her own policy preferences or concerns, and based on our standard of review, and the absence of any caselaw so holding, we cannot conclude that this by-law violates anti-discrimination laws.

⁶ Town Counsel represented to this Office that the Selectmen have established a fee policy that includes an opt out provision as well as an income based senior citizen price reduction program.

⁷ Covanta SEMAS is a privately owned waste-to-energy and recycling facility located in Rochester, MA <https://www.covanta.com/where-we-are/our-facilities/semass>.

⁸ The Town of Franklin included a similar provision in its by-law that required a trash hauler who had a contract with the Town to deliver solid waste collected on behalf of the Town to the Wheelabrator Millbury, Inc. facility. Lomberto, 27 Mass. App. Ct. at 798 n. 1.

VI. Conclusion

We approve Article 22 because it is consistent with G.L. c. 111, § 31A, c. 44, § 28C (g), and the Town's Home Rule Authority, and constitutes a lawful exercise of a town's power to determine what is beneficial to the public health of the Town. However, the Town should consult closely with Town Counsel to ensure that any fees imposed under the by-law constitute valid fees rather than impermissible taxes.

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,
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