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February 2, 2022

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

**Re: Wareham Fall Annual Town Meeting of October 25, 2021 --- Case # 10374  
Warrant Articles # 6, 15, and 19 (General)**

Dear Ms. Bissonnette:

**Articles 6 and 15** - We approve Articles 6 and 15 from the October 25, 2021 Wareham Special Town Meeting.

**Article 19** - Under Article 19 the Town voted to amend the general by-laws by adding new Sections 5 and 6 to Division I, Article II, “Board Meetings and Hearings,” regarding participation in local public hearings. Except for Section 6’s requirement that all town boards and committees, including the Board of Selectmen, are required to allow public comment time at their meetings, which we disapprove and delete because it is inconsistent with G.L. c. 30A, §§ 18-25 (the Open Meeting Law) and it unlawfully interferes with the Board of Selectmen’s executive authority, we approve Article 19.

In this decision, we summarize the by-law amendments adopted under Article 19 and the Attorney General’s standard of review of town by-laws, and then explain why, based on our standard of review, we must disapprove and delete Section 6 as indicated below in underline because it is inconsistent with G.L. c. 30A, § 20 (f) and the Board of Selectmen’s executive authority.

As with our review of all by-laws, we emphasize that our partial disapproval does not imply 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 wisdom of the by-law. 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).

## **I. Summary of Article 19**

Under Article 19, a citizen petitioned article, Town Meeting voted to add new Sections 5 and 6 to Division I, Article II, requiring local boards to allow remote participation at hearings and to accept public comments during the hearing, as follows:

### **Section 5:**

The Board of Selectmen, Zoning Board of Appeals, Conservation Commission, Planning Board, Board of Health, and any other Board which deals with Land Use or holds Adjudicatory hearings shall cause all its meetings to be shown live through ZOOM or another secure, reliable video platform that empowers residents to participate in hearings and meetings as if they were in the meeting room. The website and code shall be placed on every agenda and shall be found electronically via the already established News & Announcements system, <http://www.wareham.ma.us/subscriber.shtml>, and on the Town's Website, a notice of the hour and place of their regular meetings.

### **Section 6:**

The Board of Selectmen, Zoning Board of Appeals, Conservation Commission, Planning Board, Board of Health, and any other Board which hold Adjudicatory hearings shall be forbidden to refuse to acknowledge or accept comments from residents during Citizen's Participation, Citizen's Input for hearings, or at any other time in which Citizens are invited to participate in a meeting, as long as they do not address any issues that are currently before a Court of Law. Threatening to sue the Town, or filing an appeal to a Board decision shall not prohibit a resident from participating in other matters which come before the Town's Boards, Committees and Commissions.

## **II. Attorney General's Standard of Review**

Our review of Article 19 is governed by G.L. c. 40, § 32. 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 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). “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. Section 6's Requirement that the Town's Local Boards and Committees Allow Public Speak Time at Their Hearing Is Inconsistent with the Open Meeting Law and Unlawfully Interferes with the Board of Selectmen's Executive Functions**

#### **A. General Laws Chapter 30A, §§ 18-25, the Open Meeting Law**

We disapprove Sections 6's mandatory requirement that Town's Boards and Committees are "forbidden to refuse to acknowledge or accept comments from residents" and thus must allow public comments at their hearings, because it is inconsistent with the G.L. c. 30A, §§18-25, the State's Open Meeting Law. General Laws Chapter 30A, Section 20 (f) gives the chairperson of a board or committee the discretion to allow public comments at meetings as follows:

No person shall address a meeting of a public body without permission of the chair, and all persons shall, at the request of the chair, be silent.

Section 6 does not allow a Board or Committee Chairperson to exercise any discretion regarding public comments and instead forbids a Board or Commission from refusing to accept comments from residents. By requiring the Town's boards and committees to allow public speak time at a hearing, Section 6 takes away the authority given to the committee or board chairperson under Section 20 (f) to control public speak time. For this reason, Section 6 is inconsistent with G.L. c. 30A, § 20 (f) and must be disapproved and deleted.

#### **B. The Board of Selectmen's Executive Functions**

In addition, Section 6 as applied to the Town's Board of Selectmen is an unlawful directive from the legislative branch (Town Meeting) to the executive branch (the Board of Selectmen) on matters within the exclusive authority of the executive branch: the discretion of the Board establishes the rules that apply to its meetings in order to carry out their executive authority and their numerous statutory duties. Town Meeting serves as "the legislative body for the town." Conroy v. Conservation Commission of Lexington, 73 Mass. App. Ct. 552, 558 (2009). As such, Town Meeting is "vested the traditional powers of the legislative branch of any level of government, i.e., the power to make laws (by-laws) and the power of the purse." Wright v. Town of Bellingham, 2007 WL 1884657 (Mass. Land Ct.), quoting Town Meeting Time, 2d Ed. 1984. However, there are restrictions placed on the legislative power of Town Meeting. A legislative body cannot interfere with the executive branch on a matter which is in the exclusive authority of the executive branch. See Anderson v. Board of Selectmen of Wrentham, 406 Mass. 508 (1990) (Selectmen not bound by Town Meeting vote purporting to establish the Town's rate of contribution for group insurance benefits); Russell v. Canton, 361 Mass. 727 (1972) (Town Meeting could authorize the Board of Selectmen to take land by eminent domain, but could not direct how much land was to be taken); Breault v. Auburn, 303 Mass. 424 (1939) (Town Meeting vote directing board of health to hire an employee was ineffective because hiring power was solely conferred on board); Lead Lined Iron Pipe v. Wakefield, 223 Mass. 485 (1916) (Town Meeting vote directing the board of selectmen to hire an engineer was void).

The Board of Selectmen has numerous statutory duties that they are required to fulfill and often must work within prescribed time limits. By requiring the Board to devote time at each Board hearing for public comment, Town Meeting has potentially limited the Board's ability to carry out these statutory duties. Massachusetts courts have long recognized that "when a board of selectmen

is acting in furtherance of a statutory duty, the town meeting may not command or control the board in the exercise of that duty.” Anderson, 406 Mass. at 512. Thus, requiring the Board of Selection to allow public speak time at its hearing is inconsistent with state law. For this additional reason, we disapprove and delete Section 6 as indicated above in underline.

We recognize that the possible intent of the by-law is to promote open and participatory political process in the Town, a laudable goal. However, because Section 6’s public speak time requirement conflicts with state law and unlawfully interfere with the executive branch, it must be disapproved.

**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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