



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

CENTRAL MASSACHUSETTS DIVISION
10 MECHANIC STREET, SUITE 301
WORCESTER, MA 01608

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

(508) 792-7600
(508) 795-1991 fax
www.mass.gov/ago

May 15, 2023

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

**Re: Wareham Annual Town Meeting of October 24, 2022 -- Case # 10785
Warrant Articles # 21, 22, 23, 24, and 25 (Zoning)
Warrant Article # 11 (General)**

Dear Ms. Bissonnette:

Article 11 - Under Article 11 the Town voted to amend its general by-laws to add a new Division XIII, Article 1, “Waterway Rules,” that regulates the use of vessels and moorings in the Town. We approve Article 11 except for text in: (1) Section 102.0’s definitions of “Great Pond” and “Vessel;” (2) Section 103.1.6 regarding boat registration requirements; (3) Section 112.1 regarding operating vessels near swimming areas; and (4) Section 113.7 regarding requirements for divers, because these provisions are inconsistent with state law, including G.L. c. 90B and 91. 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).¹

In this decision, we briefly describe Article 11; discuss the Attorney General’s limited standard of review of town by-laws under G.L. c. 40, § 32; and explain why, based on that standard, we disapprove Article 11 in part. We also offer comments for the Town’s consideration on the remaining approved text under Article 11.

I. Summary of Article 11

Under Article 11 the Town deleted its existing boating and waterways by-laws in Division IV, Article 1, Section 2 (“Boating Regulations, Harbor Service Permit”); Section 2A, (“Boating

¹ In a decision issued on February 16, 2023 we approved Articles 21, 22, 23, 24, and 25 and by agreement with Town Counsel pursuant to G.L. c. 40, § 32, we extended the deadline for our review of Article 11 for 30-days until February 16, 2023. In a letter dated March 21, 2023 we further extended our deadline for 60-days until May 21, 2023.

Regulations, Mooring Regulations”); and Section 2B, (“Waterways Rules and Regulations”), and inserted a new Division XIII, Article 1, “Waterways Rules.” The stated purpose of the new Waterways by-law is to “provide efficient utilization of harbor areas, to improve the safety of moored vessels, and to provide adequate space for the enjoyment of all the users of the harbors.” Section 1.01, “Purpose.” Section 1.01 states that this purpose will be accomplished by “controlling the placement of moorings, establishing standards for mooring tackle, and by establishing regular, systematic mooring inspections.” The new Waterways by-law includes: (1) definitions for terms used in the by-law; (2) a requirement for a Harbor Service Permit; (3) mooring use requirements, including specifications for the use and location of moorings; (3) requirements for marinas, yacht clubs and commercial moorings; (4) requirements for the use of boats and other vessels; (5) the use of other water related recreational devices, including water trampolines, and kiteboards; and (6) enforcement and penalty provisions.

The Town Meeting Warrant states that the amendments voted under Article 11 are for the purpose of a replacing, clarifying, and adding new provisions regulating the Town’s waterways for safe boating and use of moorings. See Article 11 of the Wareham Annual Town Meeting October 24, 2022 Warrant and Finance Committee Report, at p. 7. The Town’s Finance Committee recommendation states that the by-law is a “comprehensive set of rules which incorporate and expand existing bylaws to provide more consistent and clear regulations addressing access to and enjoyment by the public of Wareham’s waterways.” The by-law (1) clarifies the process for accessing the Town’s mooring waiting list, applying for and obtaining a mooring permit; (2) regulates the installation, use, maintenance, and routine inspection of moorings; (3) allows for imposition of fees associated with the mooring process; and (4) increases penalties for repeated violations of safe boating rules. Id.

II. Attorney General’s Standard of Review of General Bylaws

Our review of Article 11 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.”) 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. 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.

III. Town’s Authority to Adopt Waterways By-laws

Both the Home Rule Amendment and state law provides authority for towns to adopt local by-laws regulating use of waterways under the Town’s jurisdiction, including the use of moorings and vessels. Mad Maxine’s Watersports, Inc. v. Harbormaster of Provincetown, 67 Mass. App. Ct. 804, 811 (2006) (by-law restricting the use of personal watercraft in the Town’s Harbor did not conflict with G.L. c. 90B, the Home Rule Amendment, or public trust doctrine). 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 the Director of Office of Law Enforcement (OLE) within the Executive Office of Energy and Environmental Affairs.^{2, 3} 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.

(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.

In addition, state law gives the local harbormaster authority over temporary mooring of floats and rafts. G.L. c. 91, § 10A (the town's Harbormaster issues permits for the temporary mooring of floats or rafts). Harbormasters also have authority over vessels in the town's harbor. See G.L. c. 102, §§ 21, 24, 25, and 26 (the town's Harbormaster has authority over the movement and anchorages of vessels within the harbor; for ordering the removal of any vessel lying within the harbor or at a public wharf; and for regulating and stationing all vessels in the channels of his harbor, respectively). The Home Rule Amendment, Art. 89, § 6, of the Amendments to the Massachusetts Constitution, also provides authority for towns to regulate the use of waterways within its borders because the Amendment gives municipalities the power to take any action that is not "inconsistent" with State laws or the Constitution. Independent of G.L. c. 90B and c. 91 towns can adopt waterways by-laws if they are not inconsistent with state law.

² 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 M.G.L. c. 21A, §§ 8, 10A, and Chapter 41 of the Acts of 2003, Section 1(a) (4).

³ The Director of the OLE's contact information is: Massachusetts Environmental Police Headquarters, 251 Causeway St., Suite 101, Boston, MA 02114.

IV. Disapproved Text

A. Section 102.0 - Definitions

Section 102.0 defines terms used throughout the new Waterways by-law.

1. *Great Pond*

Section 102.0 defines “Great Pond” as follows:

Great Pond – Any pond or lake that contained more than 10 acres in its natural state. **Great Ponds that once measured 10 acres or greater in their natural state, but which are smaller now, are still considered great ponds.**

We disapprove and delete the text “Great Ponds that once measured 10 acres or greater in their natural state, but which are smaller now, are still considered great ponds.” as shown above in bold and underlined because it is inconsistent with the definition of “Great Pond” under G.L. c. 91, § 35 and 310 CMR 9.00. Both G.L. c. 91, § 35 and the Department of Environmental Protection’s (DEP) Waterways regulations at 310 CMR 9.00 define the term “Great Pond.” Section 35 states that the provisions of G.L. c. 91 regulating great ponds “shall apply to ponds containing in their natural state more than ten acres of land . . .” Section 9.02 of 310 CMR, “Definitions,” defines “Great Pond” in pertinent part as follows:

[A]ny pond which contained more than ten acres in its natural state, as calculated based on the surface area of lands lying below the natural high water mark. . . . The Department shall presume that any pond presently larger than ten acres is a Great Pond, unless the applicant presents topographic, historic, or other information demonstrating that the original size of the pond was less than ten acres, prior to any alteration by damming or other human activity.

Under Section 9.02 , a body of water could lose its Great Pond status if it shrinks in size due to natural processes. However, the by-law’s definition of “Great Pond” includes any pond that exceeded ten acres (at any point in its history) regardless of natural processes that may result in the pond being less than ten acres now. The Town must apply its definition of “Great Pond” consistent with state law. The Town should consult with Town Counsel with any questions on this issue.

2. *Boat or Vessel*

Section 1.02 defines “Vessel” to include seaplanes as follows:

Boat or Vessel – Includes every description of water craft, including **seaplanes and** personal watercraft, when navigating or moored on the water, used or capable of being used as a means of transportation on the water, whether propelled by power, sail, or manually.

We disapprove and delete the words “seaplanes and” as shown above in bold and underline because seaplanes are not included in the definition of “Vessel” under G.L. c. 90B, § 1. General Laws Chapter 90B, Section 1 defines “Vessel” for purposes of regulating vessels under Chapter 90B and excludes seaplanes from the definition of “Vessel” as follows:

Vessel - watercraft of every description, except a seaplane on the water used or capable of being used as a means of transportation on water.

Because seaplanes are excluded from the definition of vessel, the Town does not have the authority to regulate seaplanes as vessels under its G.L. c. 90B, § 15 authority.^{4, 5} For this reason, we disapprove the text above in bold and underline.

B. Section 130.0 - Harbor Services Permit General Rules

Section 103.1.6 requires visiting boat owners to obtain Massachusetts registration and title as follows:

Visiting boat owners who are registered in another state are allowed to boat in Massachusetts for up to 60 consecutive days without obtaining a Massachusetts registration and title. If a vessel is kept in excess of the 60 consecutive days, the vessel must obtain a Massachusetts registration and title certificate. All out of state registrations assigned to moorings and dock spaces will be submitted to the Massachusetts Department of Revenue for review of excise tax.

We disapprove and delete Section 103.1.6 because it is inconsistent with G.L. c. 90B, § 15, which prohibits towns from adopting by-law regarding the numbering of vessels (“Nothing in this section shall be construed as prohibiting any city or town from regulating, by ordinance or by-law . . . other than numbering, of such vessels on such waters of the commonwealth . . .”). Vessels are assigned numbers at the time of registration. G.L. c. 90B, § 3, and 323 CMR 2.03. Moreover, not all vessels are subject to the statutory requirement to obtain Massachusetts registration and title after 60 days. G.L. c. 90B, § 2. For these reasons, we disapprove and delete Section 103.1.6.

⁴ The definition of “Vessel” under federal law also excludes seaplanes on the water. See 33 C.F.R. 183.3 (defining “vessel” as “every description of watercraft, other than a seaplane on the water, used or capable of being used as a means of transportation on the water.”)

⁵ Section 102 defines “boat” and “vessel” synonymously, but these terms have distinct meanings under federal and state law. For example, under federal law a boat is a specific type of vessel. See 33 C.F.R. 183.3 (defining “boat” as “any vessel (1) Manufactured or used primarily for noncommercial use; (2) Leased, rented, or chartered to another for the latter's noncommercial use; or (3) Operated as an uninspected passenger vessel subject to the requirements of 46 CFR chapter I, subchapter C”).

C. Section 112.0 Vessel Operation

Section 112.1 (B) prohibits vessels from operating at more than headway speed when the vessel is within three hundred feet of a swimming area as follows:

A vessel will not be operated at more than headway speed:

* * *

B. When the vessel is being operated within three hundred feet (300') of a swimming beach, **unless operating in an area designated for higher speeds.**

We disapprove and delete the text “, unless operating in an area designated for higher speeds” as shown above in bold and underline, because it is inconsistent with 323 CMR 2.07 (3) (c), which prohibits motorboats from operating at a speed greater than headway speed within 300 feet of a swimming area. 323 CMR Section 2.07 (3) (c) does not provide an exception to the headway speed limitation within 300 feet of a swimming area. For this reason, we disapprove and delete the text “, unless operating in an area designated for higher speeds” as shown above in bold and underline.

D. Section 113.0 Divers

Section 113.7 imposes requirements on divers as follows:

1. No person shall dive within the waters of the Town of Wareham without displaying an "Alpha" or red and white diver's flag which is clearly visible within a radius of three hundred feet (300').

2. No diver shall be further than one hundred feet (100') from the diver's flag at any time while at or under the surface of the water.

3. No person shall dive within any navigational channels within Wareham's waterways without notifying the Harbormaster.

We disapprove Sections 113.7 (1) and (2) as shown above in bold and underlined because they conflict with G.L. c. 90B, § 13A, which imposes requirements on scuba divers as follows:

Every scuba diver or group of scuba divers while swimming on or under the surface of the waters of the commonwealth shall display for each diver or group of divers as a warning device to boat operators, a diver's flag, so called, constructed of rigidly supported material at least twelve inches by fifteen inches in area of red background with a white diagonal stripe. Such diver's flag shall be displayed on a boat or surface float and shall extend a minimum distance of three feet from the surface of the water. Divers shall remain in an area within one hundred feet of such displayed diver's flag while at or near the surface of the water. A boat operator within sight of a diver's flag shall proceed with caution and within a radius of one hundred feet

of such flag shall proceed at a speed not to exceed three miles per hour.

Section 13A requires that divers display a red and white “diver’s flag” meeting specific criteria, and it does not allow an “alpha” flag to be substituted for a red and white diver’s flag. Section 13A also specifies the means by which the required flag must be displayed (requiring the flag be a minimum size and elevated at least 3 feet above the water). Section 113.7 (1) does not include these requirements but rather requires the flag to be visible from 300 feet.

Section 113.7 (2) requires divers to stay within 100 feet of the flag when under the water. However, this requirement is inconsistent with G.L. c. 90B, § 13A, which requires divers to stay within 100’ of the flag “when at or near the surface of the water” only. According to OLE, the statute requires divers to stay close to the flag only when near the surface because that is the time when there is a risk that a diver will interact with a vessel and this risk is not present at deeper depths. By requiring a diver to stay within 100 feet of a diver’s flag while underwater, Section 113.7 (2) conflicts with Section 13A and we disapprove it on this basis.

V. Additional Comments on Approved Text

A. Section 102.0 - Definitions

Section 102.0 defines terms used throughout the new Waterways by-law. Section 102.0 defines “Personal Watercraft” as follows:

Personal Watercraft – Includes every description of watercraft propelled by an internal combustion engine commonly referred to as “jet skis” and watercraft shaped like a surfboard propelled by the wind, commonly referred to as “wind surfers.”

The Division of Law Enforcement adopted regulations at 323 CMR 4.00 that govern the operation of personal watercraft. Section 4.02 of 323 CMR, “Definitions,” defines “Personal Watercraft” as follows:

Personal watercraft shall mean a vessel propelled by a water jet pump or other machinery as its primary source of motor propulsion which is designed to be operated by a person sitting, standing or kneeling on the vessel rather than being operated in the conventional manner by a person sitting or standing inside the vessel.

Section 4.02 defines personal watercraft as a vessel propelled by a water jet pump and operated by a person who is sitting, standing or kneeling on the vessel. However, the by-law’s definition of “personal watercraft” is not limited to watercraft that is propelled by a water jet pump, but rather includes watercraft propelled by an internal combustion engine and by wind power. The by-law’s definition is also not limited to watercraft operated by a person sitting, standing or kneeling on the vessel rather than inside the vessel. The Town must apply its definition of “Personal Watercraft” consistent with state law and may wish to discuss with Town Counsel amending the definition to match the definition in state law at 323 CMR 4.00.

B. Section 130.0 - Harbor Services Permit General Rules

1. *Section 103.1.1*

Section 103.1.1 prohibits a vessel from “being held by mooring or dock” without obtaining a Harbor Service Permit from the Town’s Harbormaster as follows:

No person will keep any vessel within the waters of the Town of Wareham, held by mooring or dock, without first obtaining a Harbor Service Permit from the Harbormaster. This will include all personal watercraft. No vessel may be anchored in the waters of Wareham for more than six (6) consecutive days without a Harbor Service Permit. Anchoring will be prohibited within all designated mooring areas. Anchoring will be at the discretion of the Harbormaster.

a. Section 103.1.1’s Anchoring Provisions

Section 103.1.1 provides that “Anchoring shall be at the discretion of the Harbormaster.” General Laws Chapter 102, Section 21 authorizes a harbormaster to adopt regulations for anchorage and managing vessels at the anchor. The Town’s Harbormaster has authority under G.L. c. 102 to adopt regulations regarding anchoring, which can include the location of anchorage. However, if the Harbormaster seeks to prevent a vessel from anchoring in town waters, even if the vessel otherwise complies with anchoring regulations, the Harbormaster could exceed the authority given to the Harbormaster under G.L. c. 102. Preventing a vessel from anchoring could present a risk to public safety and is broader than the statutory authority to manage the stationing of anchored vessels. See Commonwealth v. Perkins, 223 Mass. 84 (1916) (upholding regulation requiring schooners to moor in area defined by harbormaster regulation and discussing rationale of regulation to prevent fouling of vessels because of stationing). The Town must apply Section 103.1.1’s anchoring provisions consistent with state law and may wish to discuss this issue with Town Counsel.

b. Section 103.1.1’s Harbor Services Permit

Section 103.1.1 prohibits vessels within the Town’s waters from being held to a mooring or dock without a Harbor Service Permit from the Harbormaster. Section 103.1.1 also requires a Harbor Service Permit for any vessel anchored in the Town’s waters for more than six consecutive days. A Harbor Service Permit is defined as “an annual permit issued by the Harbormaster for an assigned mooring location with or without a vessel, vessel at a slip or dock whether commercial or private, a temporary float or raft or outhauling mooring.” See Section 1.02 “Definitions.”

General Laws Chapter 91, Section 10A authorizes the Harbormaster to require a permit for temporary moorings and floats and to impose a “reasonable fee” for such permits as follows:

Notwithstanding any contrary provision of law, the harbormaster of . . . town or whomsoever is so empowered by said . . . may authorize by permit the mooring on a temporary basis of floats or rafts held by anchors or bottom moorings within the

territorial jurisdiction of such . . . town upon such terms, conditions and restrictions as he shall deem necessary. He shall act on applications for such permits within a period of fifteen days from receipt thereof.

A reasonable fee for such mooring permit, proportionate to the . . . town's cost of overseeing mooring permits, may be imposed by the . . . town or whoever is so authorized by the . . . town, but no mooring fee shall discriminate on the basis of residence. Any mooring fee collected shall be deposited into and used in accordance with the purposes of a municipal waterways improvement and maintenance fund established pursuant to section 5G of chapter 40.

Section 10A authorizes a Town to charge a fee for mooring permits and is silent on fees for vessels. The Harbor Service Permit is defined as the annual permit issued by the Harbormaster "for an assigned mooring location with or without a vessel, vessel at a slip or dock whether commercial or private, a temporary float or raft or outhauling mooring." It is unclear from the definition of Harbor Service Permit and Section 130.1.1's prohibition on vessels being anchored for more than six consecutive days without a Harbor Service Permit whether the Town is requiring a Harbor Service Permit for vessels or solely for moorings as allowed under Section 10A.⁶ The Town may wish to clarify this text at a future Town Meeting.

In addition, a municipality may impose fees on owners of boats moored in the town harbor. See Commonwealth v. Caldwell, 25 Mass. App. Ct. 91, 97 (1987) (upholding a fee for boats moored in the Town's harbor as a lawful fee). However, a town does not have the "independent power of taxation." Silva v. City of Attleboro, 454 Mass. 165, 169 (2009). 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)). The Town should consult with Town Counsel to ensure that the fee amount for the Harbor Service Permit constitutes a valid fee rather than an impermissible tax. In addition, the Town may wish to amend the definition of Harbor Service Permit and Section 103.1.1 to make it clear whether it is requiring a permit solely for moorings or also for vessels.

⁶ Based on the Attorney General's limited record and limited standard of review of town by-laws pursuant to G.L. c. 40, § 32, we cannot determine that the proposed by-law is pre-empted by the federal Rivers and Harbors Act, which provides in pertinent part that "[n]o taxes, tolls, operating charges, fees, or any other impositions whatever" may be imposed on any vessel by a non-Federal interest when operating on waters subject to federal authority, except in specific instances, "reasonable fees charged on a fair and equitable basis that are used solely to pay the cost of a service to the vessel or water craft; (b) enhance the safety and efficiency of interstate and foreign commerce; and (c) do not impose more than a small burden on interstate or foreign commerce." 33 U.S.C. § 5(b). The Town should consult with Town Counsel with any questions on this issue.

3. *Section 103.1.7*

Section 103.1.7 the, which will be set by the Board of Selectmen pursuant to G.L. c. 44, § 22F (and requires the Town's Department of Natural Resources (DNR) to collect the Harbor Service Permit fees. Sections 103.1.7 (2) (3) and (7). Section 103.1.7 (7) requires the Harbor Service Permit fees to be deposited into a receipt reserved for appropriation account to be used to defray the costs of operating the DNR.

While we approve Section 103.1.7, it is unclear what type of account the Town is referring to with the language "receipt reserved for appropriation account." General Laws Chapter 44, Section 53, provides that "[a]ll moneys received by a city, town or district officer or department, except as otherwise provided by special acts and except fees provided for by statute, shall be paid by such officers or department upon their receipt into the city, town or district treasury." Under Section 53, all money received by the Town becomes a part of the general fund, unless the Legislature has expressly made other provisions that are applicable to such receipt. In the absence of any general or special law to the contrary, the fees established in the by-law must be deposited with the Town Treasurer and made part of the Town's general fund, pursuant to G.L. c. 44, § 53. An example of such a general law is G.L. c. 40, § 5G, which authorizes a Municipal Waterways Improvement and Maintenance Fund. The Municipal Waterways Improvement and Maintenance Fund is a receipt reserved for appropriation fund that can be used for harbor related fees. The Town does not specifically mention the Municipal Waterways Improvement and Maintenance Fund authorized under G.L. c. 40, § 5G, and thus it is not clear whether the Town is referring to this fund when it requires fees to be deposited in a "receipt reserved for appropriation account." The Town must apply Section 103.1.7 consistent with G.L. c. 40, § 5G and c. 44, § 53 and the Town may wish to discuss this issue with Town Counsel to determine if a future clarifying amendment is needed.

C. Section 103.0 Mooring Specifications

Section 103.2.1 authorizes the "Harbormasters" of the town to require a vessel owner to increase the minimum mooring standard for any vessel if the minimum standard would be inadequate for the vessel because of unusual design, such as but not limited to weight, windage, or draft. General Laws Chapter 102, § 19 authorizes towns to appoint "a harbor master and assistant harbor masters." The powers and duties of a Town's Harbormaster and Assistant Harbormaster are defined in G.L. c. 102, §§ 20 and 21, which allow the Town to have one "Harbormaster" with the Assistant Harbormasters under the control of the Harbormaster. See G.L. c. 102, § 20. It is unclear whether the term "Harbormasters" means that the Town has more than one "Harbormaster" or if it includes any Assistant Harbormasters the Town may have.⁷ The Town should discuss this issue with Town Counsel to determine if a future amendment to the by-law is needed to clarify this terminology.

⁷ The new Waterways by-law uses the term "deputy harbormaster" in several sections. See Sections 115.2 and 115.3. State law does not authorize the appointment of "deputy harbormasters" or grant them authority under state law. However, we construe the term "deputy harbormaster" to mean "assistant harbormaster." The Town may wish to amend the Waterways by-law to use the term "Assistant Harbormaster" as that term is used in state law.

D. Section 104.0 Mooring Use and Section 104.9 Voluntary Surrender of Mooring

Section 104.5.6 authorizes the Harbormaster to remove and dispose of any abandoned, unidentifiable or unpermitted mooring. Similarly, Section 104.9 authorizes the Harbormaster to dispose of moorings that are not removed within fourteen days of a permit holder surrendering a Harbor Service Permit. It is not clear what the Town means by the Harbormaster disposing of abandoned mooring. However, there are a number of state statutes that govern unclaimed or forfeited property, including mooring and floats. See e.g., G.L. c. 135, § 8 (unclaimed property in possession of police); c. 257 (seizure and libeling of forfeited property). The Town must apply the disposal of abandoned moorings and floats in Sections 104.5 and 104.9 consistent with state law. The Town may wish to discuss this issue in more detail with Town Counsel.

E. Section 105.0 Fish Carts and Stakes

Section 105.9 requires Harbormaster approval for the placement of “fish carts or stakes” in Town waters. “Fish carts and stakes” are not defined in the by-law. According to OLE, they are not a term of art in the fishing community. Therefore, it is not clear what activity requires the Harbormaster’s approval. If Section 105.9 requires Harbormaster approval of fishing gear, it may be inconsistent with state law because a town may regulate fishing and aquaculture only for specific species. See G.L. c. 130, § 52 and 57. If the Town is requiring approval of the placement of a structure in navigable waters, then such approval may be consistent with the Town’s authority under G.L. c. 91, § 10A to require approval for the placement of temporary moorings, floats and rafts. The Town may wish to amend this text at a future Town Meeting to make it clear what activity requires approval of the Harbormaster under Section 105.9. The Town should discuss the application of Section 105.9 with Town Counsel.

F. Section 109.0 Vessels Left on Town Property

Section 109.14 authorizes the Town to remove any vessels left of Town property if is determined to be a hazard to people or property, if the owner is unknown, if it is not legally permitted, or is located in an unapproved area. Section 109.16 states that any removed vessel that is unclaimed after thirty days after removal may be considered “abandoned” and be disposed of by the Town, including through an auction. General Laws Chapter 91, Sections 38-48 govern abandoned vessels. The Town must apply the disposal of vessels left on Town property in violation of the Waterways by-law consistent with G.L. c. 91, §§ 38-48. The Town may wish to discuss this issue in more detail with Town Counsel.

G. Section 112.0 Aircraft

Section 112.3 regulates the operation of seaplanes as follows:

Seaplanes, float planes, or aircraft adapted to water will only be allowed to operate from or upon waterways in the Town of Wareham that are approved by the FAA as a suitable landing site, or in the event of an emergency. The Harbormaster will be

notified prior to the scheduled takeoff or landing of any seaplane or aircraft adapted to water. All No Wake/Headway Speed areas must be adhered to.

We approve Section 112.3 because towns have authority to regulate the use of aircraft including seaplanes.⁸ However, local laws regulating seaplanes may require approval of the Aeronautics Division within MassDOT. General Laws Chapter 90, Section 39B requires MassDOT review and approval of local laws that regulate the use and operation of aircraft. See Roma v. Board of Appeals of Rockport, 478 Mass. 580, 592 n. 9 (2018) (the notice and safety requirements for noncommercial private restricted landing areas under G. L. c. 90, § 39B, fourth par., still apply, as does “the continuing authority of the division under the aeronautics code over aircraft landing areas that do not fall within the narrow definition of a noncommercial private restricted landing area.”). In addition, G.L. c. 131, § 45, ¶ 2 requires approval of local laws that regulate the “use and operation of aircraft equipped with floats or other means of transportation on water” See Pearson v. Town of Plymouth, 44 Mass App. Ct. 741, 744 n. 7 (1998) (a town by-law regulating floating airplanes was invalid unless it was approved by the Massachusetts Aeronautics Division). The Town should discuss with Town Counsel whether Section 112.3 needs approval from MassDOT before it can take effect.

H. Sections 115.0 Enforcement and Penalties

Section 115 includes the enforcement procedures for violations of the new Waterways by-law. Section 115.1 “Compatibility” states that the regulations of Commonwealth, including “the most current version of Chapter 90B,” are incorporated into the Town’s Waterways by-law.⁹ Section 115.2 states the Waterways by-law shall be enforced by: (1) the Harbormaster; (2) the Natural Resource Officer; and (3) any Wareham Police Officer. Section 115.3 states that the Waterways by-law can be enforced through a criminal proceeding or through non-criminal disposition under G.L. c. 40, § 21D, with penalties of fifty dollars for the first offense; one hundred dollars for the second offense; and three hundred dollars for subsequent offenses. Because state laws including G.L. c. 90B and applicable state statutes are incorporated by reference into the new Waterways by-laws, the Town must apply its enforcement provisions consistent with state law, as detailed below.

General Laws Chapter 90B, Section 12 identifies the state and local officials that can enforce the provisions of c. 90B and the regulations adopted under it as follows:

The provisions of this chapter and all rules and regulations made under the authority thereof shall be enforced by the director, deputy directors of enforcement, chiefs of enforcement, deputy chiefs of enforcement, environmental police officers and deputy environmental police officers of the division of law enforcement, department of fisheries, wildlife and environmental law enforcement, by harbor masters and assistant harbor masters, by police officers assigned to harbor patrol, by fish and game wardens, by members of the state police, and by city and town

⁸ See G.L. c. 90, § 35 (b) (defining “Aircraft” as “any contrivance now known, or hereafter invented, used or designed for navigation of or flight in the air.”)

⁹ General Laws Chapter 90B is a state statute and is not a state regulation.

It would be inconsistent with G.L. c. 90B for the Town to allow any town official (for example, the Natural Resource Officer) other than those listed in c. 90B to enforce its provisions. The Town must apply Section 115's enforcement provisions consistent with G.L. c. 90B.

In addition, Section 115.3 allows fine amounts that are different than the amounts allowed as penalties for violations of Chapter 90B, and the regulations adopted under it, which are provided in G.L. c. 90B, § 14 and c. 21A, §§ 10G and 10H. Section 14 establishes penalties from ten dollars to five hundred dollars for Chapter 90B violations. In addition, Section 10H establishes a \$50 fine for non-criminal disposition of regulations promulgated pursuant to chapter 90B, which is assessed through a process established in Section 10G. When the Harbormaster or other person authorized under G.L. c. 90B is enforcing violations of G.L. c. 90B, they must ensure that they are imposing the correct fine amount as required under G.L. c. 90B. The Town should discuss this issue with Town Counsel.

VI. Conclusion

Except for the text we disapprove and delete as described in more detail above, we approve the Town's new Waterways by-law. However, we strongly suggest that the Town discuss the remaining portions of the by-law with Town Counsel to ensure it is properly applied.

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,

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

Kelli E. Gunagan

By: Kelli E. Gunagan
Assistant Attorney General
Municipal Law Unit
10 Mechanic Street, Suite 301
Worcester, MA 01608
(508) 792-7600

cc: Town Counsel Richard P. Bowen