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September 27, 2021

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

**Re: Wareham Annual Town Meeting of June 12, 2021 -- Case #10324
Warrant Articles # 12, 13, 15, and 26 (Zoning)
Warrant Article # 24 (General)**

Dear Ms. Bissonnette:

Articles 12, 13, 15, and 24 - We approve Articles 12, 13, 15, and 24 from the Wareham June 12, 2021 Annual Town Meeting. Our comments on Articles 12 and 24 are provided below.

Article 26 - The Attorney General's deadline for a decision on Article 26 is extended for an additional sixty days under the authority conferred by G.L. c. 40, § 32, as amended by Chapter 299 of the Acts of 2000. The agreement with Town Counsel for the sixty-day extension is attached hereto. We will issue our decision on Article 26 on or before **November 25, 2021**.

Article 12 - Under Article 12 the Town voted to amend its zoning by-laws by deleting the Town's existing Sign by-law and inserting a new Article 11, "Signs." The new Article 11 identifies signs that are allowed in all of the Town's zoning districts, allowed in each zoning district, and prohibited in the Town. Our review of the new Signs by-law is governed by the case of Reed v. Gilbert, Arizona, 135 S. Ct. 2218 (2015), where the United State Supreme Court held that content-based sign regulations are unconstitutional if they are not narrowly tailored to serve a compelling state interest.

In the Reed case, the Town of Gilbert, Arizona adopted a comprehensive sign ordinance that required a sign permit for outdoor signs. The sign ordinance exempted 23 types of signs from the permit requirement, including three types of signs that were the focus of the Court's decision: (1) ideological signs; (2) political signs; and (3) temporary directional signs relating to a qualifying event.¹ However, such signs were subject to specific restrictions, including durational and size limitations.

¹ "Qualifying event" was defined in the ordinance as any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." Id. at 2225.

The Petitioners in Reed were the Good News Community Church and its pastor, who placed 15 to 20 signs around the Town informing the public of its worship services. The Petitioners were cited twice for violating the Town's temporary directional sign restrictions. Specifically, the Petitioners were cited for (1) displaying the signs past the time limit required under the ordinance and (2) for omitting the date of the event on the signs. After failing to resolve the matter with the Town, the Petitioners filed a complaint alleging that the sign ordinance violated their free speech rights guaranteed under the First and Fourteenth Amendments to the U.S. Constitution. The Ninth Circuit Court of Appeals held that the sign ordinance's provisions were content-neutral and did not violate the First Amendment. The United State Supreme Court granted certiorari and reversed the Ninth Circuit's decision.

The Supreme Court focused on three categories of signs that, in the Town's ordinance, were exempt from the sign permit requirement but subject to specific durational and size limitations: (1) ideological signs; (2) political signs; and (3) temporary directional signs relating to a qualifying event. First, the Court reiterated that the First Amendment prohibits local governments from restricting expression because of the message, idea, subject matter, or content. Id. at 2226. A regulation is content-based if it applies to a particular speech because of the topic discussed or the idea or message expressed. "This commonsense meaning of the phrase 'content-based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." Id. at 2227. Content-based laws are subject to strict scrutiny and are presumptively unconstitutional. Strict scrutiny requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest. Id. at 2227.

The Supreme Court held that Gilbert's sign ordinance was content-based on its face because the restrictions placed on signs were based entirely on the communicative content of the sign. For example, the sign ordinance defined an ideological sign as a sign that communicates a message or idea that does not fit within another category in the sign ordinance. The ordinance defined a political sign as a sign that is designed to influence the outcome of an election. Finally, a temporary directional sign was defined as a sign that directs the public to church or some other qualifying event. Each of these signs was then subject to different size and durational limitations. Because the sign ordinance was content-based, the Court analyzed it using strict scrutiny.

Strict scrutiny requires the Court to determine whether: (1) the municipality demonstrated a compelling governmental interest and (2) whether the restriction is narrowly tailored to achieve that governmental interest. The Town of Gilbert offered two governmental interests for adopting its sign ordinance: (1) preserving the Town's aesthetic appeal; and (2) traffic safety. Reed, 135 S.Ct. at 2231. The Court assumed for the sake of argument that those were compelling governmental interests but found that the sign ordinance's distinctions were under-inclusive. The sign ordinance was under-inclusive because temporary directional signs are "no greater [an] eyesore" than ideological or political signs, yet, the ordinance allowed unlimited ideological signs while imposing greater restrictions on temporary directional signs. As to traffic safety, the Court found that temporary directional signs did not pose a greater threat to traffic safety than ideological or political signs. ² Id. at 2231-32. Because of this under-inclusiveness, the ordinance was not

² In fact, the Court observed that a "sharply worded ideological sign seems more likely to distract a driver

narrowly tailored to further a compelling governmental interest and therefore failed strict scrutiny review. Id. at 2232.

In holding that the Town’s sign ordinance was unconstitutional, the Court offered guidance on the types of sign regulations that may be adopted consistent with the First Amendment. The Court noted that the Town had ample content-neutral options to regulate signs. In a concurring opinion, Justice Alito offered specific examples of sign regulations that could be imposed so long as they are not content-based:

- Rules regulating size;
- Rules regulating location;
- Rules distinguishing between lighted and unlighted signs;
- Rules distinguishing between signs with fixed messages and electronic signs with messages that change;
- Rules that distinguish between the placement of signs on commercial and residential property;
- Rules distinguishing between on premises and off-premises signs;
- Rules restricting the total number of signs allowed per mile of roadway; and
- Rules imposing time restrictions on signs advertising a time event.

Reed, 135 S.Ct. at 2233.

Within the framework of Reed decision, we review the new Article 11.

Based upon our standard of review, we cannot conclude that the new Article 11 would be construed as content-based and subject to the strict scrutiny standard. Even if we were to conclude that the amendments are content-based and thus subject to strict scrutiny, we do not have the factual record necessary to determine whether the amendments are narrowly tailored to serve a compelling municipal interest. Therefore, there is no basis upon which we may disapprove the new Article 11. However, the Town may wish to discuss the Reed decision with Town Counsel.

Article 24 - Under Article 24 the Town voted to amend the general by-laws to add a new Division XIII, Article 1, prohibiting the sale of alcoholic beverages in containers commonly referred to as “nips.” The new Article 1 provides as follows:

The sale of alcoholic beverages in containers less than or equal to 100 milliliters is prohibited within the Town of Wareham effective May 11, 2022.

The new Article 1 prohibits the sale of alcoholic beverages in containers less than or equal to 100 milliliters. These containers are commonly referred to as “nips.” The new Article 1 provides that the prohibition will take effect on May 11, 2022.

In this decision, we summarize the Attorney General’s standard of review of town by-laws; and then explain why, based on our standard of review, we approve Article 24. We emphasize that our approval in no way implies any agreement or disagreement with the policy views that led to the passage of the by-laws. The Attorney General’s limited standard of review requires her to

than a sign directing the public to a nearby church meeting.” Id. at 2232.

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. Amherst v. Attorney General, 398 Mass. 793, 795-96, 798-99 (1986).

I. 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 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, the Attorney General must cite an inconsistency between the by-law and the *state Constitution or laws* (emphasis added). 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) (emphasis added). “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).

II. Article 24's Consistency with State Law

A. By-laws Banning Particular Activities Generally

This Office has approved bans on several types of activities, including bans on the sale of nips.³ For example, this Office has approved by-laws banning the sale of plastic water bottles; plastic straws; Styrofoam containers; plastic bags; soft drinks; and balloons.⁴ Towns have used their home rule powers to prohibit, within their borders, certain commercial activities that state statutes generally recognize as lawful and that are widely accepted in the remainder of the Commonwealth. Amherst, 398 Mass. 793, at 798, n. 8 (the town’s by-law prohibiting the discharge of firearms within the town limits was not inconsistent the State’s hunting statutes). We again point out that the Attorney General has no power to disapprove a by-law merely because a town, in comparison to the rest of the has chosen a novel, unusual, or experimental approach to a perceived problem. Indeed, the Supreme Judicial Court has upheld such by-laws and has overturned the Attorney General’s disapproval of them where they did not create any specific conflict with state law. Amherst, id.; see also Milton v. Attorney General, 372 Mass. 694, 695-96 (1977).

In addition, G.L. c. 40, § 21, specifically authorizes municipalities to adopt certain categories of local legislation, including “[f]or directing and managing their prudential affairs,

³ See our decision to the Town of Falmouth dated March 22, 2021 (Case # 9915).

⁴ See, e.g., our decisions to the Towns of: Concord dated September 5, 2012 (Case # 6273); Rockport dated September 17, 2018 (Case # 9140); Hamilton dated July 27, 2015 (Case # 7516); Marblehead dated August 14, 2014 (Case # 7178); West Tisbury dated October 4, 2019 (Case # 9358); and Nantucket dated August 5, 2015 (Case # 7525), respectively.

preserving peace and good order...”, and “[c]onsiderable latitude is given to municipalities in enacting local by-laws.” Mad Maxine’s Watersports, Inc. v. Harbormaster of Provincetown, 67 Mass. App. Ct. 804, 807 (2006). However, 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. For the reasons discussed herein, and under our standard of review, we approve Article 24 because we cannot conclude it is inconsistent with state law.

B. No Clear Preemption by General Laws Chapter 138, “Alcoholic Liquors”

As noted earlier, the Attorney General must disapprove a by-law if it conflicts with state law. Amherst, 398 Mass. at 796. Municipalities have “considerable latitude” in legislating, so there must be a “sharp conflict” with state law before a local enactment may be disapproved. Bloom, 363 Mass. at 154. “The legislative intent to preclude local action must be clear.” Id. at 155. “This intent can be either express or inferred.” St. George Greek Orthodox Cathedral of Western Massachusetts, Inc. v. Fire Dept. of Springfield, 462 Mass. 120, 125-26 (2012). Local action is precluded in essentially three instances, paralleling the three categories of federal preemption: (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”; or (3) where “legislation on a subject is so comprehensive that an inference would be justified that the Legislature intended to preempt the field.” Wendell v. Attorney General, 394 Mass. 518, 524 (1985). “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, 363 Mass. at 156; *see* 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.”). Because Article 24’s ban on the sale of nips pertains to alcohol beverages, we specifically address Article 24’s consistency with G.L. c. 138, “Alcoholic Liquors.” For the reasons provided below, we cannot conclude that a by-law banning the sale of nips is inconsistent with G.L. c. 138.

The “[r]egulation of the liquor industry in Massachusetts is comprehensive and pervasive.” Cellarmaster Wines of Mass., Inc. v. Alcoholic Bevs. Control Commn., 27 Mass. App. Ct. 25, 27, 534 N.E.2d 21 (1989). The Legislature set out a broad prohibition in the first sentence of G.L. c. 138, § 2, which provides, in pertinent part: “No person shall ... sell or expose or keep for sale, store, transport ... alcoholic beverages or alcohol, *except as authorized by this chapter* (with emphasis added.) Pursuant to G.L. c. 138, the local liquor licensing authority (LLA) issues retail licenses for both on-premises consumption and off-premises consumption of alcoholic beverages. *See* G.L. c. 138, §§ 12 and 15, respectively. Once the LLA grants a license, the Alcohol Beverage Control Commission (“ABCC”) approves the license, and then the LLA issues the license upon the payment of the required fees. *See, e.g.*, G.L. c. 138, § 15. The LLA is authorized to adopt reasonable rules and regulations with respect to the issuance of these licenses. *See* G.L. c. 138, § 23. While G.L. c. 138 is comprehensive statute that governs the alcoholic beverage licenses, we are unable to find any case law that suggests the laws pertaining to the licensing of alcohol constitute a state-wide “comprehensive” act that preempt local a by-law prohibiting the sale of

nips. More specifically, we find nothing in G.L. c. 138 or the case law that (1) explicitly preempts local law; (2) conflicts with Article 24; or (3) intends to “occupy the field” of the sale of alcoholic beverages in containers less than or equal to 100 milliliters so as to preclude by-laws that ban the sale of nips.

While there are no court cases that address local bans on the sale of nips, the ABCC recently issued a decision explaining that the ABCC does not have jurisdiction to review bans on the sale of nips when adopted as a regulation by the LLA pursuant to G.L. c. 138, § 23. In the ABCC’s decision; 180 Broadway Liquor Inc., et al, May 26, 2020 (<https://www.mass.gov/doc/chelsea-9-licensees-appeal-no-nips-5-26-2020/download>) the ABCC acknowledged that LLAs are authorized to adopt reasonable requirements with respect to the alcohol licenses. See G.L. c. 138, § 23 and City of Revere v. Aucella, 369 Mass. 138, 145 (1975) (local licensing authorities have the power to make regulations governing the conduct of the licensed business.) In its decision, the ABCC noted that the LLA adopted the regulation banning the sale of nips pursuant to its Section 23’s authority to adopt regulations applicable to all licensees in order to protect the public’s health and safety. However, the ABCC concluded that it does not have jurisdiction to consider whether such a ban was a “reasonable” regulation. Such a question was for the courts to answer not the ABCC.⁵ If a challenge is brought before a court, we cannot predict with any certainty whether a local ban on the sale of nips would be upheld by the courts. Moreover, such prediction is beyond the scope of the by-law review process performed by this Office pursuant to G.L. c. 40, §32.

For the reasons provided above, we do not construe G.L. c. 138 to preempt a local by-law banning the sale of nips. Therefore, we conclude that Article 24 consistent with state law. However, we strongly suggest that the Town discuss the issues discussed above with Town Counsel.

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.

⁵ In addition, the ABCC issued two decisions addressing a ban on nips as a condition of a local license. In the ABCC’s decision, Fernandez Brothers Liquors, Inc., March 23, 2016 (<https://www.mass.gov/doc/boston-fernandez-brothers-inc-appeal-no-nips-03-23-2016/download>), the ABCC concluded that the condition banning the sale of nips imposed by Boston’s Licensing Board was within its lawful discretion and statutory authority. However, in the ABCC’s decision, Codman Square Liquors, LLC, December 14, 2016 (<https://www.mass.gov/doc/boston-codman-square-liquors-llc-appeal-12-14-2016/download>), the ABCC concluded that the condition banning the sale of nips imposed by Boston’s Licensing Board exceeded the Licensing Board’s authority because in this case it was imposed without: (1) without factual grounds; (2) without explanation; (3) without prior notice; and (4) without giving the applicant the opportunity to oppose the condition.

Very truly yours,
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