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OFFICE OF THE ATTORNEY GENERAL

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October 26, 2015

Mary Courtney Kennedy, Town Clerk
Town of Williamstown
31 North Street
Williamstown, MA 01267

**Re: Williamstown Annual Town Meeting of May 19, 2015 - Case # 7594
Warrant Articles # 38, 39 and 40 (Zoning)
Warrant Articles # 28, 33, 34, 35, 36, 37, 41 and 42 (General)**

Dear Ms. Kennedy:

Article 41 – Except for by-law text that requires retail establishments to charge a fee for certain bags and related text that exempts certain benefit recipients from the fee, we approve Article 41 (“Reduction of Single Use Bags”) from the Williamstown Annual Town Meeting of May 19, 2015.¹

As for more fully explained below, the disapproved text requires retail establishments to charge a set fee for certain bags provided to customers and requires retailers to exempt certain benefit recipients from that fee. See Sections 3 (d), (e) and (f) and Section 5 (a)). This text conflicts with Section 7(5) of the Home Rule Amendment, Mass. Const. amend. art. 2., which prohibits municipalities from enacting “private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power.” The requirement in Section 5 (a) that retail establishments treat benefit recipients differently from other customers also conflicts with state and federal regulations that require equal treatment for benefit recipients.²

I. Summary of Article 41.

Article 41, a citizen petition warrant article, prohibits retail establishments in the Town from providing customers with single-use plastic bags (as defined in the by-law). (Section 3(a)). If a retail establishment provides bags to customers, those bags must be recyclable paper bags,

¹ In a decision issued August 14, 2015 we approved Articles 28, 33, 34, 35, 36, 37, 38, 39, 40 and 42.

² Because we disapprove and delete the fee requirement, the exemption for benefit recipients is arguably moot, but we explain the conflict with state and federal regulations because it is an independent basis for the disapproval of Section 5(a).

reusable carryout bags, compostable plastic bags, or marine degradable plastic bags, all as defined in the by-law. (Section 3(b)).

The by-law requires retail establishments to charge a fee for certain bags³ they provide to customers, as follows (emphasis supplied):

3(d) Any retail establishment that provides a recyclable paper bag, a compostable plastic bag, or a marine degradable plastic bag, with the exception of produce bags and product bags, to a customer must charge the customer 10 cents (\$0.10) for each bag provided, except as otherwise provided in Section 5 of this chapter.

3(e) No retail establishment shall rebate or otherwise reimburse a customer any portion of the 10-cent (\$0.10) charge required in Subsection (d), except as otherwise provided in Section 5 of this chapter.

3(f) All monies collected by a retail establishment under this chapter will be retained by that retail establishment.

The by-law also requires retail establishments to exempt recipients of certain benefit programs from the fee requirement, as follows (emphasis supplied):

5(a) All retail establishments must provide at the point of sale, free of charge, either reusable bags or recyclable paper bags or both, at the establishment's option, to any customer participating either in the Special Supplemental Food Program for Women, Infants, and Children (WIC) pursuant to M.G.L. c. 111, or in the Supplemental Nutrition Assistance (SNAP) Program pursuant to M.G.L. c. 18.

We disapprove and delete the text in bold and underlined above in Section 3 (d-f) and 5 (a) for the reasons detailed below.

II. Attorney General's Standard of Review.

We acknowledge the communications with our Office, both in favor of and opposing the amendments adopted under Article 14. These letters and materials have aided our review. Pursuant to G.L. c. 40, § 32, the Attorney General has a limited power of disapproval with every “presumption made in favor of the validity of municipal by-laws.” *Amherst v. Attorney General*, 398 Mass. 793, 796 (1986). In order to disapprove any portion of a proposed by-law, the Attorney General must cite an inconsistency between the by-law adopted by the Town and the Constitution or laws of the Commonwealth. *Id.* We emphasize that our decision 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

³ The by-law provides that “[a] retail establishment may provide or sell reusable carryout bags to its customers or to any person.” Section 4 (a).

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. *Id.* at 795-96, 798-99.

III. Home Rule Amendment Limitations on Town By-laws.

Section 7(5) of the Home Rule Amendment, Mass. Const. amend. art. 2, prohibits municipalities from enacting “private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power.” The Supreme Judicial Court first interpreted the meaning of this clause in Marshal House, Inc. v. Rent Review and Grievance Board of Brookline, 357 Mass. 709 (1970), in which the Court held that a by-law enacting a form of “rent control” was an impermissible private or civil law governing a civil relationship. The Court admitted that “[a]mbiguity exists . . . concerning the meaning of . . . § 7(5).” *Id.* at 713. Nonetheless, the Court concluded that “[t]he term ‘private or civil law governing civil relationships’ is broad enough to include law controlling ordinary and usual relationships between landlords and tenants.” *Id.* at 716. The Court noted that the by-law “affords . . . the power in effect to remake, in important respects, the parties’ contract creating a tenancy.” *Id.* by “restricting[ing] the rent which may be charged to the tenant” the proposed by-law “directly intervenes in the continuing landlord-tenant relationship.” *Id.* at 715. Since the municipal board, operating pursuant to the challenged by-law, could “remake, in important respects, the parties’ contract” and thereby alter a “continuing . . . relationship,” the by-law was a private or civil law governing a civil relationship.

Three years later, in Bloom v. City of Worcester, 363 Mass. 136 (1973), the Court held that the creation of a municipal human rights commission was not an enactment of private or civil law governing a civil relationship. The Court distinguished its case from Marshal House as follows: “No new rights or obligations between persons are created by the ordinance; no existing rights or obligations between persons are modified or abolished.” *Id.* at 146. “At most . . . the ordinance and activities undertaken pursuant to it can encourage a person by moral suasion to do what the [state] law governing his civil relationships already requires him to do.” *Id.* at 147.

Together, Marshal House and Bloom suggest certain distinguishing features of private or civil laws governing civil relationships. An enactment that “remake[s], in important respects,” an agreement governing a “continuing . . . relationship,” and which impacts its enforcement through means “predominantly civil in character,” is likely a private or civil law governing a civil relationship. See Marshal House, 357 Mass. at 716-17. Put differently, “[d]oes the by-law so directly affect the [retailer-customer] relationship, otherwise than ‘as an incident to an exercise of independent municipal power,’ as to come within § 7 (5)?” *Id.* at 717. In contrast, an enactment in which “[n]o new rights or obligations between persons are created [and] *no existing rights or obligations between persons are modified or abolished*,” Bloom, 363 Mass. at 146 (emphasis added), is likely not a private or civil law governing a civil relationship.⁴

⁴ This conception of private or civil law is consistent with that offered by other legal authorities. “Private law consists of the substantive law which establishes legal rights and duties between and among private entities, law that takes effect in lawsuits brought by one private entity against another.” Gary T. Schwartz, The Logic of Home Rule and the Private Law Exception, 20 UCLA L. Rev. 671, 688 (1973). Examples include “contracts, property, and torts.” *Id.* at 687. “[A] municipality is considered to have enacted private law when an ordinance significantly affects private legal relationships” Note, Municipal Home Rule Power: Impact on Private Legal Relationships, 56 Iowa L. Rev. 631, 631 (1971).

Here, the proposed by-law text requires retail establishments to charge a fee if they provide certain types of bags to their customers, prohibits retailers from reimbursing customers for this fee, requires retailers to retain the money collected from the bag fee, and requires retailers to exempt certain benefits recipients from the bag fee. (Sections 3(d), (e) and (f) and Section 5(a)). Unlike the ordinance considered in Bloom, under the proposed by-law “existing rights or obligations between persons are modified or abolished.” Bloom, 363 Mass. at 146. These requirements “directly affect” the manner in which a retail establishment sells (or provides) products to its customers. Marshal House, 357 Mass. at 717. When a town by-law purports to dictate to a retailer what products it must (or must not) charge its customers for, and how much a retailer must charge for the product, the by-law fundamentally alters the retailer-customer relationship. Therefore, the proposed by-law is an enactment of private or civil law governing civil relationships in contravention of the Home Rule Amendment.

Still, “[a]n ordinance which governs a civil relationship may be valid despite the proscription of § 7(5) if it is ‘incident to an exercise of an independent municipal power.’” Bannerman v. City of Fall River, 391 Mass. 328, 332 (1984) (*quoting* Mass. Const. amend. art. 2, § 7(5)). However, “[f]urtherance of the general public welfare is insufficient justification for an ordinance which otherwise violates § 7(5).” Id. Rather, the impact on civil relationships must be incident to the exercise of “some independent, individual component of the municipal police power.” Marshal House, 357 Mass. at 718. We can identify no independent, individual component of municipal authority exercised by the proposed by-law text, to which the intended regulation of civil relationships would be incidental. Cf. id. (“We perceive no component of the general municipal police power, other than the regulation of rents itself, to which such regulation fairly could be said to be incidental.”). The proposed text therefore constitutes an invalid private or civil law governing civil relationships.

The apparent intent of the required charge for bags is to encourage customers to bring their own bags to use at retail establishments. This environmental goal is an important legislative policy. However, the Attorney General’s review of bylaws pursuant to G.L. c. 40, § 32, is limited to the bylaw’s consistency with state substantive and procedural law, rather than a consideration of the policy arguments for or against the enactment. Amherst v. Attorney General, 398 Mass. 793, 798-799 (1986) (“Neither we nor the Attorney General may comment on the wisdom of the town’s by-law.”). The Town must leave it to the retail establishment to determine whether or not it will charge a fee for the bags it provides to its customers. Because Sections 3(d), (e) and (f) and Section 5(a) in Article 41 conflicts with state substantive law, they are disapproved and deleted.⁵ **[Disapproval # 1 of 2].**

⁵ We approve the remainder of Article 41. With the disapproved text deleted from the by-law, Williamstown’s “reduction of single use bags” by-law is similar to other by-laws we have approved. See Brookline Case # 6608 issued April 5, 2013; Manchester by the Sea Case # 6652 issued July 24, 2013; Great Barrington Case # 6706 issued August 19, 2013; Marblehead Case # 7178 issued August 14, 2014; Provincetown Case # 7375 issued January 26, 2015; Falmouth Case # 7422 issued February 19, 2015; Hamilton Case # 7516 issued July 27, 2015; Concord Case # 7519 issued July 30, 2015; Harwich Case # 7597 issued August 14, 2015; and Wellfleet Case # 7599 issued August 14, 2015.

IV. Section 5 (a) Conflicts with Federal and State Law.

The requirement in Section 5(a) exempting certain benefit recipients from the bag fee also conflicts with state and federal law governing the SNAP program and the WIC program. According to written communications we received from the U.S.D.A and the Department of Transitional Assistance, federal regulations at 7 CFR § 278.2 govern these benefit programs and supersede any state or local regulations that are in conflict:

7 CFR § 278.2 (b) *Equal treatment for coupon customers.* Coupons shall be accepted for eligible foods at the same prices and on the same terms and conditions applicable to cash purchases of the same foods at the same store except that tax shall not be charged on eligible foods purchased with coupons. However, nothing in this part may be construed as authorizing FNS to specify the prices at which retail food stores may sell food. However, public or private nonprofit homeless meal providers may only request *voluntary* use of food stamps from homeless food stamp recipients and may not request such household using food stamps to pay more than the average cost of the food *purchased* by the public or private nonprofit homeless meal provider contained in a meal served to the patrons of the meal service. For purposes of this section, “average cost” is determined by averaging food costs over a period of up to one calendar month. Voluntary payments by food stamp recipients in excess of such costs may be accepted by the meal providers. The value of donated foods from any source shall not be considered in determining the amount to be requested from food stamp recipients. All indirect costs, such as those incurred in the acquisition, storage, or preparation of the foods used in meals shall also be excluded. In addition, if others have the option of eating free or making a monetary donation, food stamp recipients must be provided the same option of eating free or making a donation in money or food stamps. ***No retail food store may single out coupon users for special treatment in any way.*** (Emphasis supplied)

According to the U.S.D.A. and the Department of Transitional Assistance, the requirement in Section 5(a) that retail establishments provide certain bags to these benefit recipients conflicts with 7 CFR §278.2 by treating such benefit recipients differently from other customers. On this additional basis we disapprove and delete Section 5 (a) from the by-law text. ⁶ ⁷**[Disapproval #2 of 2].**

⁶ According to the U.S.D.A. and the Department of Transitional Assistance, in order to allow for special treatment of such customers, including exempting those customers from a bag fee, the Town would need to request a waiver of 7 CFR § 278.2. The Town should consult with Town Counsel regarding this waiver requirement.

⁷ The disapproval of the fee exemption for benefit recipients in Section 5 (a) also arguably invalidates the fee requirement itself (Sections 3 (d), (e), and (f)). It is not clear that Town Meeting would have adopted the fee requirement without the exemption for benefit recipients, and the exemption is crucial to the operation of the by-law. See Showtime Entertainment LLC v. Ammendolia, 885 F.Supp.2d 479, 490 (D.Mass. 2012) (use of the word “may” in special permit authority text invalidates entire special permit requirement).

V. Effective Date of By-law.

Finally we note that Section 7 (b) of the by-law indicates that it will “take effect 6 months after its adoption.” It is not clear when the Town intended the by-law to go into effect. The by-law is not legally effective until it is approved by our Office and the posting/publication requirements of G.L. c. 40, § 32 are satisfied. *See* G.L. c. 40, § 32. We note that most other towns that have adopted similar by-laws have provided retailers a six month time period (after Attorney General approval) to prepare before the by-law is enforced. The Town should consult with Town Counsel on this issue.

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 that 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 voted by Town Meeting, unless a later effective date is prescribed in the by-law.

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