



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

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November 23, 2022

James F. Hagerty, Town Clerk
Town of Southborough
17 Common Street
Southborough, MA 01772

**RE: Southborough Annual Town Meeting of May 4, 2022 - Case # 10586
Warrant Articles # 26, 29, 30, 31, and 34 (General)**

Dear Mr. Hagerty:

Article 34 - Under Article 34 (a citizen-petitioned article), the Town voted to amend its general by-laws, Chapter 9 Committees, to add a new “Southborough PILOT Committee”. The vote authorized the Committee to research what other municipalities require for payment in lieu of taxes (PILOT) agreements with non-profit organizations. We approve the by-law amendments except for 1) the text that authorizes the Committee to engage in discussions with Southborough non-profits “with the objective of establishing formal agreements;” and 2) the text in Section 3 that authorizes “another Town official or elected Town Board” to appoint the Committee and accept responsibility for the Committee if the Selectboard does not establish the Committee within a certain time period. The disapproved text conflicts with the executive power of the Selectboard under state law, and the appointment text is also unlawfully vague.

We note that our partial disapproval implies no agreement or disagreement with any policy views that may have led to the passage of the bylaw amendments. 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, 798-99 (1986).

In this decision, we summarize Article 34; 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 certain text in Article 34.¹

¹ In a decision issued August 24, 2022 we approved the other Articles in this Case and extended our deadline for decision on Article 34 through November 23, 2022 by agreement with Town Counsel as authorized by G.L. c. 40, § 32.

I. Summary of Article 34

Article 34 requires the Selectboard to appoint the PILOT committee within 45 days of the Attorney General's approval of the by-law amendments² and designates the composition of the Committee. (Section 2). The Committee is authorized to research what other municipalities require of non-profit entities in PILOT agreements and the legal requirements for such agreements. (Section 1). The by-law also authorizes the Committee to engage in discussions with Southborough non-profits of a certain size as follows (emphasis supplied):

- **Engage in discussions with non-profit entities owning real property in Southborough valued in toto more than six million dollars, with the objective of establishing formal agreements through which these entities contribute reasonable annual PILOT (Payment in Lieu of Taxes) amounts to cover the Town's cost of providing services for them, their staff/employees, for their students, and for others associated with their activities in the Town.**

Further, the by-law amendments establish a process if the Selectboard does not appoint the Committee within the 45-day period (emphasis supplied):

#3 That if the Select Board is not able, or chooses not, to properly establish such a committee within 45 days of the Attorney General's approval of this article, another elected Town Official or elected Town Board may accept responsibility for, and organize, such Standing Committee.

We disapprove and delete the text in bold and underlined above because these sections of the by-law conflict with the power of the Selectboard under state law, and the appointment text in Section #3 is also impermissibly vague.

II. The Attorney General's Standard of Review

Our review of Article 34 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, 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. However, a municipality has no power to adopt a zoning by-law that is "inconsistent with the constitution or laws enacted by the [Legislature]." Home Rule Amendment, Mass. Const. amend. art. 2, § 6.

² We approve this text but note that the by-law amendments have no lawful effect until the Attorney General approves them and the Town completes the other publishing and posting requirements of G.L. c. 40, § 32. *See* Note, p. 4

III. The Disapproved Text Conflicts with the Executive Function of the Selectboard

In town government the legislative branch and the executive branch have separate and distinct roles. 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. 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).

Article 34 does not authorize the Southborough PILOT Committee to enter into PILOT agreements on the Town’s behalf, and nothing in the Town’s existing by-laws grants such power to any other board or committee. Therefore, the power to enter into PILOT agreements rests solely with the Selectboard as the chief executive officer of the Town. To allow a separate committee to “engage in discussions” with such non-profits regarding such PILOT agreements, when it is the Selectboard that has ultimate authority to decide the terms of such agreements, would impermissibly interfere with the Selectboard’s executive function. 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. See also Board of Public Works of Wellesley v. Board of Selectmen of Wellesley, 377 Mass. 621, 630-31 (1979) (because only board of selectmen had power to retain town counsel town meeting vote authorizing payment of legal fees by special counsel retained by board of public works was invalid); Finamore v. Dowgiewicz, 2008 WL 3316206 (Mass.Super.Ct. 2008) (town’s Screening and Finance Committees had no independent authority to enter into contract with special legal counsel because such power was solely vested in the Board of Selectmen and Town Administrator).

Similarly, it is the Selectboard that has power to appoint members of boards and committees unless a statute or by-law provides otherwise in clear terms. A by-law that grants the appointment power to another official, board or committee must identify the person or entity that will exercise the appointment power. By-laws may not grant powers or impose restrictions that are vague and ambiguous. See O’Connell v. Brockton Bd. of Appeals, 344 Mass. 208, 212 (1962) (“A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process law.... And this is no less true of a municipal ordinance or regulation.”) (internal quotations and citations omitted). The text purporting to grant the appointment power to another (unnamed) elected Town Official or (unnamed) elected Town Board if the Selectboard fails to act is vague and unworkable. It does not establish what should happen if more than one elected Town Official or elected Town Board “accept[s] responsibility” for the standing committee. Because this text interferes with the executive power of the Selectboard on terms that are unlawfully vague, we disapprove it.

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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