



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

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July 12, 2016

Laurence R. Pizer, Town Clerk
Town of Plymouth
11 Lincoln Street
Plymouth, MA 02360

**RE: Plymouth Annual Town Meeting of April 2, 2016 - Case # 7893
Warrant Articles # 24 and 26 (Zoning)**

Dear Mr. Pizer:

Articles 24 and 26 - We approve Articles 24 and 26 from the April 2, 2016, Plymouth Annual Town Meeting. Our comments on Article 24 are provided below.

Article 24 - Article 24 amends Section 205-19 of the Town's zoning by-laws, "Signs," to allow school information display boards at the Town's high schools subject to specific regulations. According to the material submitted to us, school information display boards are a common tool for conveying information related to student safety, various school activities and community events and the Plymouth School Committee would like to install a display board at Plymouth South High School. Such display boards will continue to be prohibited for all other uses in the Town.

While we approve Article 24, the Town should be aware of the recent Supreme Court decision in Reed v. Gilbert, Arizona, 135 S. Ct. 2218 (2015), which held that the Town's content-based sign regulation was unconstitutional because it was not narrowly tailored to serve a compelling state interest.

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 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.

If a sign by-law is challenged in court, it is the municipality's burden to demonstrate that the sign by-law is narrowly tailored to achieve a compelling government interest. Reed, 135 S.Ct. at 2231. A municipality usually attempts to meet that burden by citing to a statement of purpose or findings in the by-law itself. *See, e.g., Commonwealth v. Weston W.*, 455 Mass. 24, 27-28, 36 (2009) (ordinance included a series of findings made by the council followed by a statement of purpose, supporting the trial court judge's finding that the council adopted the ordinance only 'after months of planning, debating, and researching models from other cities'). Only after the community demonstrates the legitimate goals of the by-law can the court determine whether the by-law is narrowly tailored to achieve those goals.

Article 24 allows school information display boards at the Town's high schools subject to specific regulations. The sign provision adopted under Article 24 appears to be allowed under Reed. See id. at 2233 (Alito, J., concurring in the judgment) ("In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. . . . They may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.") (internal citation omitted). However, if Article 24 was considered to be a content based restriction subject to strict scrutiny, we note that the documents submitted to this Office related to Article 24 do not include all of the facts necessary for a determination whether the by-law is

² In fact, the Court observed that a "sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting." Id. at 2232.

narrowly tailored to achieve a legitimate and compelling governmental interest.³ The determination of these issues must be left for a court, which would be better equipped to find the facts on a full record and determine whether the by-law is valid.

Additionally, we do not opine whether the Town's existing sign provisions would be upheld by a court after review on a fuller factual record, or whether a court would determine that the Town's sign regulations impermissibly restrict freedom of speech. We strongly suggest that the Town discuss the Reed decision with Town Counsel. Specifically, the Town should discuss with Town Counsel whether its existing sign regulations need further amendment and whether all existing sign regulations should be enforced in light of Reed.

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,

MAURA HEALEY
ATTORNEY GENERAL

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cc: Town Counsel Elizabeth L. Lane

³ In determining whether a by-law is inconsistent with the Constitution and laws of the Commonwealth, the Attorney General has available to her the materials that the Town Clerk is required to submit pursuant to G.L. c. 40, § 32:

... a certified copy of such by-law with a request for its approval, a statement clearly explaining the proposed by-law, including maps and plans if necessary, and adequate proof that all of the procedural requirements for the adoption of such by-law have been complied with.

The Attorney General's review under G.L. c. 40, § 32, is limited to the text "of the proposed by-law . . . and adequate proof that all of the procedural requirements for the adoption of such by-law have been complied with." It is under these parameters that we review Plymouth's sign by-law amendment adopted under Article 24.

At a legal meeting of the Annual Town Meeting of the Town of Plymouth held on 5 April 2016, the following business was transacted under Article Twenty-four.

ARTICLE 24: To see if the Town will vote to amend its Zoning Bylaw, Section 205-19: Signs, as on file with the Town Clerk, to allow School Information Display Boards for High Schools, grades nine through twelve (a School Information Display Board is illuminated by internal Light Emitting Diodes (LED) and used as a community communication tool), as well as amend associated definitions, procedures, and schedules, or take any other action relative thereto.

SCHOOL COMMITTEE

ARTICLE 24:

Mr. Moody moved that the Town vote to amend the Zoning Bylaw, Section 205-19: Signs, as on file with the Town Clerk, to allow School Information Display Boards for High Schools in accordance with the Final Report and Recommendation of the Planning Board voted January 4, 2016 as found on pages 305-306 of the Annual Town Meeting Report & Recommendations of the Advisory & Finance Committee.

2016 Annual Town Meeting

Article 24

FINAL REPORT AND RECOMMENDATION OF
THE PLANNING BOARD TO SEE IF THE TOWN
WILL VOTE TO AMEND ITS ZONING BYLAW, SECTION 205-19 SIGNS,
TO ALLOW SCHOOL INFORMATION DISPLAY BOARDS FOR ACTIVE
KINDERGARTEN THROUGH TWELFTH GRADE SCHOOLS

DATE OF PUBLICATION OF PUBLIC HEARING: December 16, 2015
December 23, 2015
DATE OF PUBLIC HEARING: January 4, 2016

VOTE: On January 4, 2016, the Planning Board voted (5-0) to **support** the following amendment to Town Meeting:

PROPOSED AMENDMENT:

Underlined words added

§ 205-19 Signs. [Amended 4-21-1974 ATM by Art. 65; 4-17-1975 ATM by Art. 68; 4-10-1976 ATM by Art. 56; 4-24-1979 ATM by Art. 66; 4-20-1982 STM by Art. 44; 4-2-1983 ATM by Art. 29; 4-5-1989 ATM by Art. 31; by 10-26-2004 FTM by Article 21; 4-6-2013 ATM by Art. 29]]

G. **Special regulations.**

- (1) **Filling station.** Gasoline filling stations and garages may divide the one architectural sign affixed to the front wall of the building to which they are entitled as hereinabove provided into separate signs affixed to and parallel to such wall and indicating the separate operations or departments of the business. In addition, one sign standing or otherwise indicating the company whose gasoline is being sold and

the price of gasoline being sold may be erected of such type, in such location, and in such manner as is otherwise permitted. The standard type of gasoline pump bearing thereon in usual size and form the name of the type of gasoline and the price thereof shall not be deemed to be in violation of this bylaw. Temporary or moveable signs of any and every type are specifically prohibited.

- (2) **Uses or activities above first floor.** Such uses or establishments may display architectural and/or hanging architectural signs as permitted under this bylaw for first floor tenants provided that this sign or signs and the signs otherwise permitted for the first floor establishments do not in combination exceed the dimensional limits for placement of signs for the first floor establishments.
- (3) **Iconographic signs.** An iconographic sign may be erected in lieu of a sign otherwise permitted by this bylaw if it meets the dimensional regulations for the sign for which it is being substituted.
- (4) **School Information Display Boards.** School Information Display Boards are allowed for active ~~kindergarten through twelfth grade schools~~ high schools (Grades nine through twelve) provided such boards:
 - (i) Do not exceed 24 square feet in size;
 - (ii) Are located adjacent to the school's primary entrances;
 - (iii) Do not obstruct vehicular sight-lines and
 - (iv) Are located within the Obery Street Overlay District or Rural Residential (RR) District.

NEED AND JUSTIFICATION

Nationally, school information display boards have become a common tool for conveying information related to student safety, various school activities and community events. The Plymouth School Department would like to install a display board located at Plymouth South High School.

This amendment limits the location of display boards to high schools, (grades nine through twelve). Display boards will continue to be prohibited for all other uses.

The board can only be illuminated by Light Emitting Diodes (LEDs).

INTENT

The intent of this amendment is to allow for the installation of information display boards for high schools located in Plymouth.

TOWN OF PLYMOUTH

Tim Grandy, Chair

Paul McAlduff, Vice Chair

Malcolm MacGregor, Clerk

Marc Garrett

Kenneth Buechs

BEING A MAJORITY OF THE PLANNING BOARD

DATE SIGNED BY THE PLANNING BOARD: _____

DATE FILED WITH TOWN CLERK: _____

c: Town Clerk
Board of Selectmen
Advisory and Finance Committee

The motion PASSED unanimously.

I hereby certify that there was a quorum present at the Annual Town Meeting at which this action was taken.

Witness my hand and seal of the Town of Plymouth this day, July 12, 2016.

Laurence R. Pizer
Town Clerk

At a legal meeting of the Annual Town Meeting of the Town of Plymouth held on 5 April 2016, the following business was transacted under Article Twenty-six.

ARTICLE 26: To see if the Town will vote to amend its Zoning Bylaw, Section 205-27, Special permit uses, as on file with the Town Clerk, to allow by right public safety buildings and uses in all districts, as well as amend associated definitions, procedures, and schedules, or take any other action relative thereto.

PLANNING BOARD

ARTICLE 26:

Mr. Moody moved that the Town vote to amend the Zoning Bylaw, Section 205-27: Special Permit Uses, as on file with the Town Clerk, to allow by right public safety buildings and uses in all districts, as well as amend associated definitions, procedures, and schedules, in accordance with the Final Report and Recommendation of the Planning Board voted January 25, 2016 as found on pages 311-312 of the Annual Town Meeting Report & Recommendations of the Advisory & Finance Committee.

2016 Annual Town Meeting

Article 26

FINAL REPORT AND RECOMMENDATION OF THE PLANNING BOARD
ON AN AMENDMENT TO THE ZONING BYLAW
TO ALLOW BY-RIGHT PUBLIC SAFETY BUILDINGS AND USES
IN ALL DISTRICTS

DATE OF PUBLICATION OF PUBLIC HEARING: January 6, 2016
January 13, 2016
DATE OF PUBLIC HEARING: January 25, 2016

VOTE: On January 25, 2016, the Planning Board voted (4-0) to support the following amendment to Town Meeting:

PROPOSED AMENDMENT:
(underlined wording added)
(strikethrough wording deleted)

§205-27. Special permit uses.

- E. **Town buildings and uses.** Except for public safety buildings and uses, which are allowed by-right in all districts, other Town buildings and uses require a special permit pProvided that such uses shall be in character with the surrounding district, and that no use of an industrial or commercial nature (such as a town garage) shall be located in a residential zone.

NEED AND JUSTIFICATION

Providing adequate public safety coverage for Town residents is critical. Public safety buildings and uses include fire stations, police stations and emergency management facilities. The special permit process adds time and significant costs (to the taxpayers) to the construction of public facilities.

Furthermore, such projects are fully vetted through the Town's Building Committee's review process and site plan review through the Planning Board which serve as forums for public participation.

INTENT

The intent of this amendment to protect the health, safety and welfare of Plymouth's residents by allowing by-right the construction of public safety facilities and uses throughout the Town of Plymouth.

TOWN OF PLYMOUTH

Tim Grandy, Chair

Malcolm MacGregor

Paul McAlduff

Kenneth Buechs

Marc Garrett

BEING A MAJORITY OF THE PLANNING BOARD

DATE SIGNED BY THE PLANNING BOARD: _____

DATE FILED WITH TOWN CLERK: _____

cc: Town Clerk
Board of Selectman
Advisory and Finance Committee

MOTION TO AMEND:

Ann Pizer, Precinct 3, moved to amend Article 26 by replacing “all districts” with “the North Plymouth Service Area.”

Mr. Landers moved the previous question. The motion PASSED.
On Ms. Pizer’s motion to amend, the motion FAILED.

Mr. Landers moved the previous question on the main motion. The motion PASSED.

On a roll call vote, the motion PASSED with 83 in favor and 16 in opposition.

I hereby certify that there was a quorum present at the Annual Town Meeting at which this action was taken.

Witness my hand and seal of the Town of Plymouth this day, July 12, 2016.

Laurence R. Pizer
Town Clerk

Bylaw changes adopted by Fall Annual Town Meeting, April 2,
2016 and approved by the Attorney General of the Commonwealth

Claims of invalidity by reason of any defect in the procedure of
adoption or amendment may only be made within ninety days of
this posting.

Copies of the bylaws are available for examination and may be
obtained at the Town Clerk's Office.