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July 3, 2014

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

Re: Plymouth Annual Town Meeting of April 5, 2014 ------- Case # 7090
Warrant Article # 29 (Zoning)
Warrant Articles # 11 and 35 (General)

Dear Mr. Pizer:

Articles 11 and 35 - We approve Articles 11 and 35 from the April 5, 2014, Annual Town Meeting. Our comments on Article 35 are provided below.

Article 29 - Article 29 requires that, if an appeal is filed with the Zoning Board of Appeals concerning a property, the Board "shall require signage to notify the public, to be posted at the subject site" (presumably to notify the public about the pending appeal). As explained below, we disapprove and delete Article 29 because it is vague and violates the due process clause of the Fourteenth Amendment. Specifically, Article 29 does not identify who must satisfy the requirements of the by-law.

I. Text of Article 29.

Article 29 amends Section 205-6, "Zoning Board of Appeals," Subsection B "Public hearing; notice" as follows [new text in **bold**]:

> Upon receipt of an appeal, the Board shall set a reasonable time for a hearing within 65 days of filing and give notice thereof in accordance with applicable statutory provisions. **In addition, [sic] Board shall require signage to notify the public, to be posted at the subject site. The specific requirements of said signage shall be a prescribed in the Board's Procedural Rules and Regulations current at the time of the filing of the appeal.**

II. Grounds for Disapproval.

We disapprove and delete Article 29 because it is unconstitutionally vague. "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 of law.'" Commonwealth v. Carpenter, 325 Mass. 519, 521 (1950) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926). Vague laws violate due process because they do not limit the exercise of discretion by officials and engender the possibility of arbitrary and discriminatory enforcement. See Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 363-364 (1973) ("Such vagueness would permit 'untrammeled (administrative) discretion'...and arbitrary and capricious decisions. ..."). These vagueness principles apply equally to municipal by-laws and regulations. See Druzik v. Board of Health of Haverhill, 324 Mass. 129, 134 (1949). Of course, "proscribed conduct is not always capable of precise legal definition. Jaquith v. Commonwealth, 331 Mass. 439, 442 (1954). Legislative language need not be 'mathematical[ly] precis[e]' in order to pass constitutional muster." Williams, 395 Mass. at 304. An ordinance is not vague "if it requires a person to conform his conduct to an imprecise but comprehensible normative standard." Commonwealth v. Orlando, 371 Mass. 732, 734 (1977). But by-laws and ordinances must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

Article 29 requires a sign to be posted on property that is the subject of an appeal to the Town's Board of Appeals. Presumably, the by-law's signage requirement would be in addition to the G.L. c. 40A's notice requirements for appeals to the Town's Zoning Board of Appeals. The by-law is silent on who is responsible for posting the sign. Absent any such designation in the by-law, the by-law fails to provide adequate notice to satisfy due process requirements. Likewise, because the by-law is silent on who is responsible for posting the sign, we are unable to determine whether such requirement is consistent with the Constitution or laws of the Commonwealth.[1] On this basis we must disapprove and delete Article 29.

Article 35 - Article 35 amends the Town's general by-laws, Article IV "Wild Animals" by making a number of changes pertaining to permits for wild animals. For the reasons provided below, we cannot conclude that Article 35 is inconsistent with state law or the Constitution. Therefore, we approve its provisions.

I. Text of Article 35.

Article 35 adds a new Section 23-19.B, which prohibits the issuance of a permit for animals that are part of a traveling exhibition or show and live in mobile housing facilities. As amended, 23-19 provides as follows (new text in bold):

[1] For example, requiring an appellant to place a sign on another's property raises a number of potential issues that would require further analysis by this Office.

23-19 A Permit required.

It shall be unlawful for any person to keep, maintain or have in his or her possession or under his or her control within the town any dangerous animal or reptile or carnivorous, wild animal or other animal or reptile of wild, vicious or dangerous propensities without obtaining an animal permit therefor from the Board of Selectmen.

23-19.B
Under no circumstance will a permit be issued for the possession of any animal as described in 213-19 (a) if the animal is part or [sic] a traveling exhibition or show living in a mobile housing facility. An animal is deemed to be part of a traveling exhibition or show if, during the 15-day period preceding any proposed use in a traveling exhibition or show, such animal was traveling in a mobile housing facility.

Another change amends Section 23-22, "Exceptions" to read as follows (deletions in strikethrough):

The provisions of 23-29 [sic], 23-20 and 23-21 shall not apply to any duly licensed ~~menagerie~~, zoo, ~~circus~~ or bona fide educational or medical institution, including a veterinarian, or any duly licensed place where such animals are kept.

Section 23-19 (A) requires a local animal permit from the Board of Selectmen ("Selectmen") for anyone who keeps, maintains or has in his or her possession or under his or her control any dangerous animal . . . wild animal or other animal . . . of wild, vicious or dangerous propensities. Section 23-19 (B) prohibits the Selectmen from issuing a permit for such animals if they are part of traveling exhibition or show living in a mobile housing facility. Section 23-22[2] provides an exemption from such prohibition for a duly licensed zoo, bona fide educational or medical institution, including a veterinarian, or any duly licensed place where such animals are kept.

II. Attorney General's Standard of Review.

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 v. the Attorney General, 398 Mass. 793, 795-96 (1986). To disapprove a by-law, the Attorney General must cite an inconsistency between the by-law and the Constitution or laws of the Commonwealth. Amherst, 398 Mass. 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). "The

[2] Section 23-22 provides an exemption from the prohibition in Section 23-29. However, there is no Section 23-29. It appears that the Town meant to reference Section 23-19. We suggest that the Town fix this typographical error at a future Town Meeting.

legislative intent to preclude local action must be clear." Bloom, 363 Mass. at 155. The Attorney General's review of town by-laws pursuant to G.L. c. 40, § 32, is limited to the by-law's consistency with state substantive and procedural law, rather than a consideration of the policy arguments for or against the enactment. Amherst, 398 Mass. at 798-99 ("Neither we nor the Attorney General may comment on the wisdom of the town's by-law.")[3]

III. Analysis of Article 35.

Under the Attorney General's standard of review of town by-laws, Article 35 presents no clear violation of state law or the Constitution.

General Laws Chapter 40, Section 21, authorizes towns to adopt by-laws, not repugnant to law, as they may judge most conducive to their welfare including by-laws "[f]or directing and managing their prudential affairs, preserving peace and good order. . . ." "Considerable 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.

We have considered whether the by-law's prohibition on the issuance of a local animal permit for certain wild and dangerous animals requires disapproval of the by-law as inconsistent with state (or federal) law and have concluded that it does not. Both federal and state law[4] establish licensing requirements for the keeping and transportation of certain wild animals. *See* 7 U.S.C. § 2132 *et seq*, the federal "Animal Welfare Act"; G.L. c. 131, § 23; and 321 C.M.R §§ 2.12 and 2.15 2. The purpose behind these licensing requirements includes the protection of the public health, welfare and safety when wild animals are possessed, maintained or propagated in Massachusetts and to prevent the potential public menace, disease, personal injury and property damage when certain wild animal are released from captivity. *See e.g.* 321 C.M.R § 2.12 (1). The Town's licensing scheme does not interfere with these state and federal requirements.

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[3] 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-law. 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 (1986). This Office has previously approved a similar by-law adopted by the Town of Braintree (see decision dated October 31, 2001).

[4] Section 2.12 (1) of 321 C.M.R expressly provides that its regulations are "promulgated and effective in addition to and in conjunction with 7 U.S.C. § 2132 *et seq.* as amended, commonly known as the federal Animal Welfare Act and the licensing program of the United States Department of Agriculture. Compliance with the requirements of the United States Department of Agriculture does not exempt an applicant from compliance with 321 CMR 2.12 or other laws of Massachusetts. Thus, the issuance of the so-called federal exhibitor's permit to any person other than a zoo, as defined in 321 CMR 2.12(2), does not exempt that person from compliance with 321 CMR 2.12 and its licensing provisions."

The by-law's prohibition on a local animal permit for certain wild and dangerous animals appears to be within the Town's authority to regulate for public health, welfare and safety and does not frustrate the purposes of federal and state law. Therefore, we approve 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 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.

Very truly yours,

Kelli E. Gunagan

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cc: Town Counsel Elizabeth A. Lane