



THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

CENTRAL MASSACHUSETTS DIVISION  
10 MECHANIC STREET, SUITE 301  
WORCESTER, MA 01608

ANDREA JOY CAMPBELL  
ATTORNEY GENERAL

(508) 792-7600  
(508) 795-1991 fax  
www.mass.gov/ago

August 26, 2024

Sarah B. Gmeiner, Town Clerk  
Town of South Hadley  
116 Main Street, Room M11  
South Hadley, MA 01075

**Re: South Hadley Annual Town Meeting of May 8, 2024 -- Case # 11422**  
**Warrant Article # 27 (Zoning)**  
**Warrant Articles # 21, 22, 23, 25, and 26 (General)**

Dear Ms. Gmeiner:

**Articles 21, 22, 23, 25, and 26** - We approve Articles 21, 22, 23, 25, and 26 from the May 8, 2024 South Hadley Annual Town Meeting. Our comments regarding Article 26 are provided below.

**Article 27** - The Attorney General's deadline for a decision on Article 27 is extended for an additional 30 days under the authority conferred by G.L. c. 40, § 32. The agreement with Town Counsel for the 30-day extension is attached. We will issue our decision on Article 27 on or before **September 26, 2024**.

**Article 26** - Under Article 21 the Town amended its general by-laws to replace Chapter 141, "Municipal Charges Lien" with new text.<sup>1</sup> We approve Article 21 because we cannot conclude that it is inconsistent with state law. See Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986) (requiring inconsistency with state law or the constitution for the Attorney General to disapprove a by-law). However, we offer comments for the Town's consideration on the new Chapter 141.

**I. Summary of the By-law**

The new by-law, "Municipal Charges Lien," is authorized by G.L. c. 40, § 58. Section 141-1, "Authority." The purpose of the by-law is to provide the Town with a "comprehensive and efficient method of collecting a charge and/or fee" when an owner of real property fails or refuses to pay "a charge and/or fee" when due by placing a lien upon the real estate. Section 141-

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<sup>1</sup> Additionally, under Article 26 the Town voted to adopt the provisions of G.L. c. 40, § 58. We take no action on this portion of the vote because it is not a by-law amendment and therefore not subject to the Attorney General's review and approval under G.L. c. 40, § 32.

2, “Purpose and intent.” The by-law provides that the municipal charges lien will apply to municipal charges or penalties, including interest and the cost of recording the lien, for the following municipal charges and/or fees: (1) charges or penalties imposed for violations of the Town’s general or zoning by-laws; (2) charges or penalties for violations of the Massachusetts sanitary codes or building codes; (3) police detail charges and service fees; (4) curbside recycling fees and trash collection fees; (5) street excavation permit fees and charges; and (6) landfill tipping fees. Section 141-3, “Applicability.”

The municipal charges lien will take effect upon the recording of a statement establishing the amount due and other required information (Section 141-4, “When effective”) and the Town Clerk will notify the issuing department head of all tickets that have been paid or appealed by the end of each month. Section 141-5, “Collection of lien.” Finally, the by-law includes provisions related to the certification of the charge or fee by the Assessor, Release of the Lien, and Abatement. Section 141-6, “Unpaid liens;” Section 141-7, “Release of lien;” and Section 141-8, “Abatement.”

## **II. Attorney General’s Standard of Review of General By-laws**

Our review of Article 26 is governed by G.L. c. 40, § 32. Under 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.”) To disapprove a by-law (or any portion thereof), the Attorney General must cite to an inconsistency between the by-law and the state Constitution or laws. Id. at 796. “This is because 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.

## **III. The Town Must Apply the By-Law Consistent with G.L. c. 40, § 58**

General Laws Chapter 40, Section 58, the Municipal Charges Lien statute, authorizes Towns to impose a lien on real property for non-payment of local charges or fees, in relevant part as follows:

Any...town may impose a lien on real property located within the...town for any local charge or fee that has not been paid by the due date...provided, that a separate vote at a town meeting...is taken for each type of charge or fee.

Here, Section 141-3 of the by-law provides that, in addition to certain local municipal charges, the Municipal Charges Lien will also apply to “charges or penalties” for certain violations of the Town’s by-laws and state sanitary codes or building codes.

There are no appellate level judicial decisions to guide the Town or this Office in determining whether the non-payment of a penalty assessed under a local by-law or a state code, constitutes a “local charge or fee” for purposes of the Municipal Charges Lien statute, though case law suggests that in general, fees may be different than fines. Compare, e.g., Emerson

College v. City of Boston, 391 Mass. 415, 424 (1984) (“Fees imposed by a governmental entity tend to fall into one of two principal categories: user fees, based on the rights of the entity as proprietor of the instrumentalities used or regulatory fees (including licensing and inspection fees), founded on the police power to regulate particular businesses or activities.” (internal citations omitted)) with G.L. c. 40, § 21 (“Towns may...make such...by-laws, not repugnant to law, as they may judge most conducive to their welfare...They may...affix penalties for breaches thereof not exceeding three hundred dollars for each offense, which shall enure to the town or to such uses as it may direct”) and Burwick v. Mass. Highway Department, 57 Mass. App. Ct. 302, 308 (2003) (noting generally that statutory fines are a deterrent to a violation).

Under our standard of review, we cannot conclude that including unpaid penalties for certain by-law or code violations on the list of “municipal charges and/or fees” subject to the provisions of G.L. c. 40, § 58 conflicts with state law. Therefore, we approve Article 26. See Amherst, 398 Mass. at 795-96. However, we encourage the Town to consult with Town Counsel and the Department of Revenue/Division of Local Services (DOR/DLS) on this issue to ensure the proper application of the by-law.

In addition, the Town should consult with Town Counsel to ensure the proper application of the by-law to any “charges or penalties for violations” of the Massachusetts state sanitary code or building code because the by-law does not identify the applicable local charges or fees under these codes. Moreover, the application of the by-law to these charges may be limited to only those local fees authorized under the codes. For example, the Building Code, 780 CMR § 109.4 authorizes a local fee for failure to obtain a permit as follows: “[a]ny person who commences any work on a building, structure, electrical, gas, mechanical or plumbing system before obtaining the necessary permits shall be subject to a fee established by the building official that shall be in addition to the required permit fees.” And the State Sanitary Code, 105 CMR § 410.002 authorizes the local Board of Health to identify violations and order corrections and imposes penalties. See 105 CMR §§ 410.002 and 410.920 to 410.940. The Town should consult with Town Counsel and DOR/DLS to ensure the proper application of Section 141-3.

**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.**

Very truly yours,

ANDREA JOY CAMPBELL  
ATTORNEY GENERAL

*Nicole B. Caprioli*

By: Nicole B. Caprioli  
Assistant Attorney General  
Municipal Law Unit  
10 Mechanic Street, Suite 301  
Worcester, MA 01608  
(508) 792-7600 ext. 4418

cc: Town Counsel Lisa Mead