



THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

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August 8, 2017

Carlene C. Hamlin, Town Clerk  
Town of South Hadley  
116 Main Street  
South Hadley, MA 01075

**RE: South Hadley Annual Town Meeting of May 10, 2017 - Case # 8353  
Warrant Article # 24 (Zoning)  
Warrant Articles # 11, 12, 13, 21 and 22 (General)**

Dear Ms. Hamlin:

**Articles 11, 12, 13, 21, 22 and 24** - Except for the disapproval of certain text in Article 13 (Section 18-1, pertaining to the date of the annual Town election - see pages 4-5), we approve Articles 11, 12, 13, 21, 22 and 24 from the May 10, 2017 South Hadley Annual Town Meeting. Our comments regarding Articles 11, 12 and 13 are provided below.

**Article 11** - Article 11 amends the Town's general by-laws to allow the South Hadley Police Department to fingerprint applicants for Ice Cream Vendor permits. The motion at Town Meeting further explains that the purpose of Article 11 is to "use said fingerprints to search Ice Cream Vendor License applicant's criminal history in accordance with MGL Chapter 270 subsection 25 and MGL Chapter 6 section 172B ½."

1. **General Laws Chapter 6, Section 172B ½.**

General Laws Chapter 270, Section 25, pertains to ice cream truck vending and permit requirements and provides in sub-section (c) as follows:

The department of public safety shall adopt regulations relative to the annual permitting of ice cream truck vendors. Such regulations shall include, but not be limited to: (i) a requirement that all applications for an ice cream truck vending permit or applications for renewal thereof shall include the applicant's fingerprints and a current photo of the applicant...

However, in order for a municipality to access state and national fingerprints, the Town will likely be required to adopt a by-law in accordance with G.L. c. 6, § 172B ½. This statute allows cities and towns to obtain both state and national fingerprint-based criminal history, as follows:

Municipalities may, by local ordinance, require applicants for licenses in specified occupations to submit a full set of fingerprints for the purpose of conducting a state and national criminal history records check pursuant to sections 168 and 172 and 28 U.S.C. § 534. Fingerprint submissions may be submitted by the licensing authority to the identification unit within the department of state police through the criminal history systems board, or its successor, for a state criminal records check and to the Federal Bureau of Investigation for a national criminal records check.

The Executive Office of Public Safety and Security (“EOPSS”) has issued an Informational Bulletin which explains the requirements for town by-laws and the procedures for obtaining criminal history information.<sup>1</sup> The EOPSS information explains the requirement that the by-law must be forwarded to the State Identification Section of the Massachusetts State Police (SIS) and copied to the Massachusetts Department of Criminal Justice Information Services Office of the General Counsel to coordinate approval by the FBI Access Integrity Unit (AIU). The Town should consult with Town Counsel to determine whether the Town must also adopt a by-law pursuant to G.L. c. 6, § 172B ½.

## 2. Fines.

The new by-law provides in relevant part:

No person shall engage in ice cream truck vending in the Town of South Hadley unless s/he shall have been issued a valid permit to do so by the Permitting Authority. Such permit shall be conspicuously displayed and clearly visible on the windshield of any ice cream truck operated or from which ice cream or any other prepackaged food product is sold. Whoever violates this section shall be assessed a fine of \$500. Each day that such person is in operation in violation of this section may be considered a separate violation. (emphasis added).

Although we approve the by-law adopted under Article 11, the Town may only assess a fine of \$500 if it is enforcing a violation of G.L. c. 270, § 25, not for a by-law violation. If the Town is pursuing a violation of the state statute, G.L. c. 270, § 25, (as opposed to a by-law violation), it may seek the punishments set forth in the statute. However, if the Town is pursuing a violation of the by-law, G.L. c. 40, § 21 precludes the Town from assessing a fine in excess of \$300. Our approval of the amendments adopted under Article 11 is limited to a construction that the penalties provided are for a violation of G.L. c. 270, § 25 only, not for a violation of the by-law itself. The Town should consult with Town Counsel on this issue.

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<sup>1</sup> The Informational Bulletin can be found here: <http://www.mass.gov/eopss/docs/chsb/civil-fingerprint-june-2011.pdf>

### 3. Issuance of a Permit.

The Town's new by-law provides: "No person shall engage in ice cream truck vending in the Town of South Hadley unless s/he shall have been issued a valid permit to do so by the Permitting Authority." (emphasis added). The Permitting Authority is defined as "[t]he South Hadley Chief of Police or a qualified person authorized by him." The Town must apply this section consistent with G.L. c. 270, § 25, which allows the ice cream truck vendor to secure a valid permit from either the municipality where they live or the municipality where they will operate an ice cream truck. *See* G.L. c. 270, § 25 ("no person shall engage in ice cream truck vending unless he shall have been issued a valid permit to do so by the permitting authority within the municipality wherein the permit applicant lives or intends to operate an ice cream truck.") The Town should consult with Town Counsel with any questions on this issue.

**Article 12** - Article 12 adopts a new, unnumbered general by-law, "Refusal to issue permits and or licenses due taxes or fees owed." The vote at Town Meeting provides that the by-law will "allow the Town of South Hadley to withhold permits for any property which has outstanding taxes and fees owed to the municipality including but [not] limited to taxes, fee or liens consistent with Chapter 40 subsection 58." Although it appears that the new by-law is intended to be adopted in accordance with G.L. c. 40, § 57, the by-law does not include the text required pursuant to G.L. c. 40, § 57.

General Laws Chapter 40, Section 57, is a local option statute that allows a town to adopt a by-law regarding the denial, revocation, or suspension of local licenses and permits for failure to pay local taxes, fees, assessments, betterments or municipal charges. The statute requires specific text in the by-law, as follows:

(a) The tax collector or other municipal official responsible for records of all municipal taxes, assessments, betterments and other municipal charges, hereinafter referred to as the tax collector, shall annually, and may periodically, furnish to each department, board, commission or division, hereinafter referred to as the licensing authority, that issues licenses or permits including renewals and transfers, a list of any person, corporation, or business enterprise, hereinafter referred to as the party, that has neglected or refused to pay any local taxes, fees, assessments, betterments or other municipal charges, and that such party has not filed in good faith a pending application for an abatement of such tax or a pending petition before the appellate tax board.

(b) The licensing authority may deny, revoke or suspend any license or permit, including renewals and transfers of any party whose name appears on said list furnished to the licensing authority from the tax collector or with respect to any activity, event or other matter which is the subject of such license or permit and which activity, event or matter is carried out or exercised or is to be carried out or exercised on or about real estate owned by any party whose name appears on said list furnished to the licensing authority from the tax collector; provided, however, that written notice is given to the party and the tax collector, as required by applicable provisions of law, and the party is given a hearing, to be held not earlier than fourteen days after said notice. Said list shall be prima facie evidence for denial, revocation or suspension of said license or permit to any party. The tax collector shall have the right to intervene

in any hearing conducted with respect to such license denial, revocation or suspension. Any findings made by the licensing authority with respect to such license denial, revocation or suspension shall be made only for the purposes of such proceeding and shall not be relevant to or introduced in any other proceeding at law, except for any appeal from such license denial, revocation or suspension. Any license or permit denied, suspended or revoked under this section shall not be reissued or renewed until the license authority receives a certificate issued by the tax collector that the party is in good standing with respect to any and all local taxes, fees, assessments, betterments or other municipal charges, payable to the municipality as the date of issuance of said certificate.

(c) Any party shall be given an opportunity to enter into a payment agreement, thereby allowing the licensing authority to issue a certificate indicating said limitations to the license or permit and the validity of said license shall be conditioned upon the satisfactory compliance with said agreement. Failure to comply with said agreement shall be grounds for the suspension or revocation of said license or permit; provided, however, that the holder be given notice and a hearing as required by applicable provisions of law.

(d) The board of selectmen may waive such denial, suspension or revocation if it finds there is no direct or indirect business interest by the property owner, its officers or stockholders, if any, or members of his immediate family, as defined in section one of chapter two hundred and sixty-eight A in the business or activity conducted in or on said property. *See* G.L. c. 40, § 57.<sup>2</sup>

The by-law adopted under Article 12 does not include the text that is required to be included in the by-law pursuant to G.L. c. 40, § 57. Therefore, the new by-law departs significantly from the text the legislature has mandated be included in any by-law adopted pursuant to G.L. c. 40, § 57. It is unclear whether the new by-law is sufficient for the Town to utilize the provisions of G.L. c. 40, § 57. The Town should discuss with Town Counsel whether the by-law should be amended at a future Town Meeting to include the text required under G.L. c. 40, § 57.

**Article 13** - Article 13 makes a number of changes to various sections of the Town's general by-laws as set forth in "Appendix E" and provided to us by the Town Clerk. Our approval of the amendments adopted under Article 13 (except for the disapproval of certain text in Section 18-1, as discussed below), is limited solely to those changes that were identified in the documents submitted to this Office.

1. Chapter 18 - Elections and Elected Officials.

Article 13 proposes to amend Section 18-1, "Annual Elections" by deleting the word "April" (shown below in ~~strikethrough~~) and inserting the word "September" (shown below in *italic*). Article 13 also proposes to add new text (shown below in *italic*), so that Section 18-1 would read as follows (with additional emphasis added):

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<sup>2</sup> In addition, G.L. c. 40, § 57 specifically prohibits its application to several license and permits enumerated in the statute.

The annual election of Town officers shall be held on the second Tuesday of April September of each year. *The Selectboard may adjust this schedule to accommodate religious holidays or coordinate changes to the state or federal elections held in some years in September. The Selectboard must vote to make the change 90 days prior to the election and inform the Town Clerk in writing.*

We disapprove and delete the text above shown in italic, bold and underline ("September" and "or coordinate changes to the state or federal elections held in some years in September"), because it is inconsistent with G.L. c. 39, § 9A. (Disapproval # 1 of 1).<sup>3</sup>

The proposed changes would have (1) changed the Town's annual election from April to September and (2) authorized the Selectboard to further adjust the date of the Town's annual election "to coordinate changes to the state or federal elections held in some years in September." These proposed changes conflict with G.L. c. 39, § 9A, which requires the election of town officials and other matters to be determined by ballot take place in February, March, April, May or June. Specifically, G.L. c. 39, § 9A provides in relevant part:

Except as otherwise provided by special law or a charter adopted or revised or amended under Sections two, three, or four of Article LXXXIX of the Amendments to the Constitution of the Commonwealth, a town may provide by charter or by-law that the election of town officials and other matters to be determined by ballot shall take place in February, March, April, May or June before or after the annual meeting held for the transaction of other business, provided said annual meeting for the transaction of other business is also held or commences in February, March, April, May or June. The time and place of holding such election and vote and meeting for the transaction of other business may be stated in one warrant for the annual town meeting if called within thirty-five days of each other and such election and vote shall be deemed parts of the annual town meeting. If the election and other matters to be determined upon by ballot and the annual meeting for the transaction of other business are more than thirty-five days apart, separate warrants shall be used.

Because the proposed change of the date of the Town's annual election from April to September conflicts with G.L. c. 39, § 9A, we must disapprove and delete the amendments above in italic, bold and underline ("September" and "or coordinate changes to the state or federal elections held in some years in September").

**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

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<sup>3</sup> We note that many of the changes set forth in Appendix E amended the general by-laws "consistent with Massachusetts General Court Chapter 458 of the Acts of 2012," ("An Act Establishing a Selectboard-Town Administrator Form of Government for the Town of South Hadley.") However, this Special Act did not include a provision to change the date of the Town's annual election from April to September.

**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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