

MARTHA COAKLEY  
ATTORNEY GENERAL

# THE COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL

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November 5, 2009

Diane Crory, Town Clerk  
37 Shattuck Street – P.O. Box 1305  
Littleton, MA 01460

**RE: Littleton Annual Town Meeting of May 4, 2009 --- Case # 5310  
Warrant Articles # 15, 23, 24, and 25 (General)**

Dear Ms. Crory:

**I. Summary of Decision Regarding Votes Taken Under Warrant Articles # 15, 23, 24, and 25.**

**Article 15** - We return with the approval of this Office the amendments to the Town by-laws adopted under this Article on the warrant for the Littleton Town Meeting that convened on May 4, 2009, except as provided below. [See page # 2 for Disapproval # 1 of 1]

**Articles 23, 24, and 25** - We return with the approval of this Office the amendments to the Town by-laws adopted under these Articles on the warrant for the Littleton Annual Town Meeting that convened on May 4, 2009. Our comments on Article 23 are provided in more detail below.

**II. Details of Decision Regarding Votes Taken Under Warrant Articles # 15 and 23.**

**Article 15** - The amendments adopted under Article 15 delete from the Town's general by-laws the existing text of Chapter 53 and insert a new Chapter 53. The new Chapter 53 pertains to the consumption of alcohol and marijuana<sup>1</sup> and provides as follows (with emphasis added):

No person shall consume an alcoholic beverage as defined by General Laws Chapter 138, Section 1, as amended, or possess an open container of such beverage, or smoke, ingest, or otherwise use or consume marijuana or tetrahydrocannabinol as defined by General Laws Chapter 94C, Section 1, within the limits of any park, playground, public building, schoolhouse, school grounds, cemetery, parking lot or any area owned or under the control of the Town of Littleton, nor shall any person consume an alcoholic beverage, or consume marijuana or tetrahydrocannabinol on any public way or way to which the public has a right of access as invitees or licensees, including any person in a motor vehicle while it is

<sup>1</sup> For ease of reference, the term "marijuana" shall also include the term "tetrahydrocannabinol."



in, on, or upon any public way or any way to which the public has a right of access as aforesaid, within the Town of Littleton; and no person shall consume any alcoholic beverages or consume marijuana or tetrahydrocannabinol as previously defined, in, on, or upon any private land or place without the consent of the owner or person in control of such private land or place.

In relevant part, Section 53-1 prohibits the use of marijuana “in, on, or upon any private land or place without the consent of the owner or person in control of such private land or place.” We disapprove and delete the prohibition on the use of marijuana on private land as indicated in Section 53-1 above by underline because it is inconsistent with G.L. c. 94C, § 32L, and thus, invalid under Article 89, Section 6, of the Amendments to the Massachusetts Constitution.<sup>2</sup>  
**[Disapproval # 1 of 1]**

Section 6 of Article 89 of the Amendments to the Massachusetts Constitution (the “Home Rule Amendment”) provides in pertinent part as follows:

[a]ny city or town may, by the adoption, amendment, or repeal of local . . . by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court . . . .

“Municipalities may not adopt by-laws or ordinances that are inconsistent with State law.” Boston Edison v. Town of Bedford, 444 Mass. 775, 780-81 (2005) *quoting* Boston Gas Co. v. Newton, 425 Mass 697, 699 (1997). “To determine whether a local ordinance is inconsistent with a statute, this court has looked to see whether there was either an express legislative intent to forbid local activity on the same subject or whether the local regulation would somehow frustrate the purpose of the statute so as to warrant an inference that the Legislature intended to preempt the subject.” Boston Edison, 444 Mass. at 781. “The legislative intent to preclude local action must be clear.” Bloom v. Worcester, 363 Mass. 136, 155 (1973).

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General Laws Chapter 94C, Section 32L, was added to the General Laws by Chapter 387 of the Acts of 2008, “An Act establishing a Sensible State Marihuana Policy,” and provides as follows (with emphasis added):

Notwithstanding any general or special law to the contrary, possession of one ounce or less of marihuana shall only be a civil offense, subjecting an offender who is eighteen years of age or older to a civil penalty of one hundred dollars and forfeiture of the marihuana, but not to any other form of criminal or civil punishment or disqualification. . . .

Except as specifically provided in “An Act Establishing A Sensible State Marihuana Policy,” neither the Commonwealth nor any of its political subdivisions or their respective agencies, authorities or instrumentalities may impose any form of penalty, sanction or

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<sup>2</sup> This Office has previously disapproved similar by-laws prohibiting the use of marijuana on private land. Those by-laws were adopted by the following Towns: the Town of Medway (approved in part by this Office in a letter dated June 8, 2009) and the Town of Hopkinton (approved in part by this Office in a letter dated September 6, 2009).

disqualification on an offender for possessing an ounce or less of marihuana. By way of illustration rather than limitation, possession of one ounce or less of marihuana shall not provide a basis to deny an offender student financial aid, public housing or any form of public financial assistance including unemployment benefits, to deny the right to operate a motor vehicle or to disqualify an offender from serving as a foster parent or adoptive parent. Information concerning the offense of possession of one ounce or less of marihuana shall not be deemed "criminal offender record information," "evaluative information," or "intelligence information" as those terms are defined in Section 167 of Chapter 6 of the General Laws and shall not be recorded in the Criminal Offender Record Information system.

As used herein, "possession of one ounce or less of marihuana" includes possession of one ounce or less of marihuana or tetrahydrocannabinol and having cannabinoids or cannabinoid metabolites in the urine, blood, saliva, sweat, hair, fingernails, toe nails or other tissue or fluid of the human body. Nothing contained herein shall be construed to repeal or modify existing laws, ordinances or bylaws, regulations, personnel practices or policies concerning the operation of motor vehicles or other actions taken while under the influence of marihuana or tetrahydrocannabinol, laws concerning the unlawful possession of prescription forms of marihuana or tetrahydrocannabinol such as Marinol, possession of more than one ounce of marihuana or tetrahydrocannabinol, or selling, manufacturing or trafficking in marihuana or tetrahydrocannabinol. Nothing contained herein shall prohibit a political subdivision of the Commonwealth from enacting ordinances or bylaws regulating or prohibiting the consumption of marihuana or tetrahydrocannabinol in public places and providing for additional penalties for the public use of marihuana or tetrahydrocannabinol.

General Laws Chapter 94C, Section 32L, provides that possession of one ounce or less of marijuana is a non-criminal offense that subjects offenders to a \$100 civil fine and forfeiture of the marijuana. General Laws Chapter 94C, Section 32L, explicitly authorizes municipalities to prohibit the consumption of marijuana in public places and to provide for additional penalties for public use.<sup>3</sup> However, the statute expressly prohibits the Commonwealth, the cities and towns of the Commonwealth, and their agencies from imposing any other form of penalty, sanction, or disqualification for possessing an ounce or less of marijuana. The "legislative intent to preclude local action" regarding any conduct other than public consumption or public use of marijuana is clear. See Bloom v. City of Worcester, 363 Mass. 136, 155 (1973). The proposed by-law's prohibition on the use of marijuana in, on, or upon private land is thus inconsistent with G.L. c. 94C, § 32L, and outside the Town's Home Rule Amendment power. See Section 6 of Article 89 of the Amendments to the Massachusetts Constitution. For these reasons, we disapprove and delete that portion of Chapter 53-1 that prohibits the use of marijuana on private land.

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<sup>3</sup> Section 32L does not define "public," "public place," or "public use." However, the term "public" has been defined in cases as "affecting or likely to affect persons in a place to which the public or a substantial group has access." Commonwealth v. A Juvenile, 368 Mass. 580, 586 (1975) *quoting Alegata v. Commonwealth*, 353 Mass. 287, 304 (1967).

**Article 23** - The amendments adopted under Article 23 amend Chapter 18, "Finances," Article III, "Purchasing," Section 18-7 "Advertisement for certain proposals," by deleting "\$10,000" and inserting "25,000" in the first sentence of Section 18-7. As amended, the first sentence in Section 18-7 provides as follows [new text in **bold**]:

No contract for the purchase of equipment, supplies, or material, the actual or estimated cost of which amounts to **\$25,000** or more, except in cases of special emergency involving the health or safety of the people or their property shall be awarded unless proposals for the same have been invited by advertisement in at least one newspaper published in the Town or, if there is not such newspaper, in a newspaper published in the county, such publication to be at least one week before the time specified for the opening of said proposals.

As amended, Section 18-7 increases the threshold amount for contracts for the purchases of equipment, supplies, and materials that must be awarded after invitations have been advertised in a newspaper. We approve the amendments to Section 18-7, but caution the Town that many of the existing portions of the proposed by-law are inconsistent with the current versions of the state bidding and procurement laws, including G.L. c. 30B.

General Laws Chapter 30B, Section 5, requires notices for invitations for bids and requests for proposals under G.L. c. 30B, § 6, to be published at least once, not less than two weeks prior to the time specified for the receipt of bids, in a newspaper of general circulation within the area served by the governmental body. General Laws Chapter 30B, Section 5, requires the notice to be published not less than two weeks prior to receipt of the bids, while the by-law only requires the notice to be published at least one week prior to the time specified for the opening of the proposals. Moreover, G.L. c. 30B, §§ 5 and 6, pertain to procurement contracts in the amount of "\$25,000 or more." There is nothing in these statutes that refer to "estimated costs of which amount to \$25,000 or more."

Finally, since Section 18-7, as amended, specifically refers to equipment and supplies, it is not clear whether it was intended to apply to non-construction services and construction services. Thus, we caution the Town that Section 18-7 must be applied in a manner consistent with state bidding and procurement laws, including G.L. c. 30B and our approval is so limited. We suggest that the Town discuss with Town Counsel a further amendment to Section 18-7 to make it consistent with state bidding and procurement laws.

**Note:** Under G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the town has first satisfied the posting/publishing requirements of this section. 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.

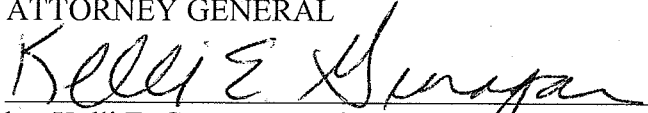
If the Attorney General has disapproved and deleted one or more portions of any by-law or by-law amendment submitted for approval, only those portions approved are to be posted and published pursuant to G.L. c. 40, § 32. We ask that you forward to us a copy of the

final text of the by-law or by-law amendments reflecting any such deletion. It will be sufficient to send us a copy of the text posted and published by the Town Clerk pursuant to this statute.

Nothing in the Attorney General's approval authorizes an exemption from any applicable state law or regulation governing the subject of the by-law submitted for approval.

Very truly yours,

MARTHA COAKLEY  
ATTORNEY GENERAL

A handwritten signature in dark ink, appearing to read "Kelli E. Gunagan", is written over a horizontal line.

by: Kelli E. Gunagan, Assistant Attorney General  
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enc.

cc: Town Counsel