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OFFICE OF THE ATTORNEY GENERAL

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November 13, 2023

Alexis Fedorjaczenko, Town Clerk  
Town of Ashfield  
P.O. Box 560  
Ashfield, MA 10963

**Re: Ashfield Annual Town Meeting of May 6, 2023 -- Case # 10963  
Warrant Articles # 27, 34 and 35 (General)<sup>1</sup>**

Dear Ms. Fedorjaczenko:

**Articles 34 and 35** - We approve Articles 34 and 35 from the May 6, 2023 Ashfield Annual Town Meeting, except for the text: (1) in Article 34 that authorizes an arrest without a warrant; and (2) in Article 35 that authorizes the loss of a rental security deposit and a victualer's license for a violation of the Town's plastics ban by-law, that we disapprove because these provisions conflict 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).

**Article 34** - Under Article 34 the Town voted to amend its general by-laws by deleting the old and inserting new text of the "Excessive Noise General Bylaw." The by-law is adopted for purposes of protecting the health and welfare of the citizens of the Town under the authority of G.L. c. 40, § 21 and G.L. c. 111, §§ 142A-142M related to Air Pollution. Section A, "Authority."

**I. Summary of the Bylaw**

The by-law seeks to protect against the "intrusion of excessive noise" by providing a mechanism for control and enforcement. Section B, "Purpose." Section C, "Unlawful Noise Prohibited," prohibits:

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<sup>1</sup> In a decision issued August 7, 2023, we approved Article 27 and, by agreement with Town Counsel as authorized by G.L. c. 40, § 32, extended the deadline for our review of Articles 34 and 35 for 45-days until September 30, 2023. On September 29, 2023, we extended our deadline for review of Articles 34 and 35 for an additional 45-days until November 14, 2023.

excessive, unusually loud, disturbing, or injurious noise that annoys, disturbs, injures or endangers the reasonable quiet, comfort, repose, or the health or safety of others, especially during the hours of 11:00 p.m. and 7:00 a.m.

The by-law exempts certain types of noises from its provisions, including noise related to emergency work, vehicles or equipment; bells or chimes from any school, church or government building; events permitted by the Town such as parades, public gatherings or sporting events; snow removal; and the operation of any activity related to farming. Section D, “Exemptions.” The by-law provides a mechanism for enforcement and penalties through a fine of \$200 per violation and designates the Ashfield Board of Health and Police as the enforcing agents. Section E, “Enforcement and Penalties.” Section E provides for a complaint process that includes a hearing, and Section H authorizes the Board of Health to promulgate rules and regulations to implement the by-law. In addition, Section F (2), “Other Remedies,” authorizes an arrest for a violation of the by-law, as follows (with emphasis added):

**If the person responsible for the activity that violates Section C can be determined, that person may be arrested without a warrant, provided that the violation occurs in the presence of a police officer authorized to serve criminal process.**

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

Our review of Article 34 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. Section F (2) that Authorizes an Arrest Without a Warrant Conflicts with State Law.

Section F (2) authorizes that a person violating the by-law may be arrested without a warrant as follows:

**If the person responsible for the activity that violates Section C can be determined, that person may be arrested without a warrant, provided that the violation occurs in the presence of a police officer authorized to serve criminal process.**

We disapprove the text above in bold and underline because the Town cannot, by way of a town by-law, authorize a police officer to carry out a warrantless arrest. Rather, a warrantless arrest must be based upon the police officer’s determination at the scene that probable cause exists to carry out a warrantless arrest.

The common law authority of a police officer to make a warrantless arrest for a misdemeanor, absent a statute, extends only to those misdemeanors that (1) constitute a breach of the peace, (2) are committed in the presence of the officer, and (3) are continuing at the time the arrest is made. Commonwealth v. Gorman, 288 Mass. 294, 297 (1934). However, not every misdemeanor constitutes a breach of the peace, a core requirement of which is that it has a disturbing effect on the public peace. While the meaning of the expression “breach of the peace” has been said to be elastic, in every situation in which it has been addressed by the courts the behavior has occurred in public. “To find a breach of the peace within the meaning of the Gorman test, an act must at least threaten to have some disturbing effect on the public.” Commonwealth v. Baez, 42 Mass. App. Ct. 565, 570 (1997). See also 11 C.J.S. Breach of Peace § 1 (1938) (defining breach of the peace as a “violation of public order or decorum which disturbs the public peace and tranquility; or any act of disorderly conduct which disrupts the public peace.”) For example, in Gorman the court observed that drunkenness committed in private, while a crime, is not a breach of the peace. Gorman, 288 Mass. at 297.

We are unable to conclude that every violation of Section C, “Unlawful Noise Prohibited,” necessarily has a disturbing effect on the public peace. This determination must be made on a case-by-case basis by the police officer based upon the observed circumstances. For these reasons, we disapprove the warrantless arrest provision in Section F (2) shown above in bold and underline. The Town should consult with Town Counsel with any questions on this issue.

**Article 35** - Under Article 35 the Town voted to add a new general by-law, “Ban on Single-Use Plastic.” We offer the following comments for the Town’s consideration.

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

The purpose of the by-law is to eliminate the sale and use of single use plastic products. Section A, “Purpose and Intent.” The by-law defines the terms used in the by-law including “single use” and “food service ware.” Section B, “Definitions.” Section C, “Use Regulations,” prohibits the sale, distribution and use of “non-complaint food service ware;” polystyrene foam products, plastic bags, plastic beverage straws, stirrers and cutlery. The by-law also imposes obligations on town contractors and lessees when using a town facility or performing work under a town contract or lease, including a requirement that facility rental agreements for town owned property require a contracting party to ensure compliance with the by-law and impose penalties for a violation. Sections C (4) and (6).

Section C (6) authorizes the forfeiture of a rental agreement security deposit for a violation of the by-law as follows (emphasis added):

All facilities rental agreements for any town owned property or facility shall include a provision requiring contracting parties to assume responsibility for preventing the utilization and/or distribution of non-compliant food service ware. **The facility rental agreement shall indicate that the violating contractor’s security deposit will be forfeited if the town administrator**

**determines that non-compliant food service ware was utilized in the violation of the rental agreement.**

Section D of the by-law provides exemptions from the by-law's requirements. Section E authorizes "hardship deferments" upon written application to the Board of Health and after a public hearing, where the Board of Health can defer application of the by-law for up to one year upon a showing of hardship, as defined in the by-law. The by-law also provides standards to govern the Board of Health's hardship determination process. Section E. Section F, "Enforcement," designates the Board of Health as the primary enforcement agent and authorizes the Board of Health to promulgate regulations related to the enforcement of the by-law. Section F (2) authorizes criminal, civil or other legal remedies to address violations of the by-law and further authorizes that violations are "subject to the administrative penalty (see fine table below)." The Fine Table provides as follows, with emphasis added:

Fine Table

First Infraction – Warning

Second Infraction - \$100.00 fine

Third Infraction - \$200.00 fine

Subsequent Infractions - \$300.0 **or loss of victualer's license**

All fines must be paid in full to apply for licenses.

**II. The Penalties of Forfeiture of a Rental Agreement Security Deposit and Loss of Victualer's License Exceed the Penalties Allowed Under G.L. c. 40, § 21**

1. **Section C (6) – Forfeiture of Town Facility Rental Security Deposit**

We disapprove the text in Section C (6), shown above in bold and underline (pp. 3-4), because under G.L. c. 40, § 21, the Town cannot require the forfeiture of a rental agreement security deposit as a penalty for a by-law violation. General Laws Chapter 40, Section 21 limits the fine amount for a by-law violation to \$300. See G.L. c. 40, § 21 ("Towns may...except as herein provided, affix penalties for breaches thereof not exceeding three hundred dollars for each offense...").

General Laws Chapter 40, Section 21 limits the penalty a Town can impose for a by-law violation to an amount not to exceed three hundred dollars. The by-law cannot impose an additional fine in the amount of a forfeited security deposit. Because this penalty provision conflicts with G.L. c. 40, § 21, we disapprove the text in Section C (6) shown above in bold and underline. The Town should consult with Town Counsel regarding any questions about enforcement of the by-law.

2. Section (F) – Fine Table – Loss of Victualer’s License

Section F, Fine Table, authorizes a penalty for a third offense of “\$300.00 **or loss of victualer’s license**” (emphasis added). As discussed above, G.L. c. 40, § 21 limits the fine amount for a by-law violation to \$300. Therefore, the loss of one’s victualer’s license as a penalty for a violation of the Town’s “Ban of Single-Use Plastic” by-law exceeds the Town’s authority under G.L. c. 40, § 21. For this reason, we disapprove the text in Section F, Fine Table, shown above in bold and underline. The Town should consult with Town Counsel with any questions.

**IV. Additional Comments**

1. Section F (1) – Rules and Regulations

Section F (1) authorizes the Board of Health to promulgate regulations and to take all other actions reasonable and necessary to enforce the by-law, “including, but not limited to, inspecting any vendor’s premises to verify compliance.” Any rules or regulations adopted by the Board of Health must be consistent with state law. See American Lithuanian Naturalization Club v. Board of Health of Athol, 446 Mass. 310, 321 (2006) (“A town may not promulgate a regulation that is inconsistent with State law.”) The Town should discuss with Town Counsel any proposed rules or regulations adopted under Section F (1) to ensure that they comply with state law.

2. Section F (1) - Inspection of Vendor Premises

In addition, with respect to any regulations promulgated by the Board of Health that authorize the inspection of a vendor’s premises to verify compliance with the by-law, the Town should be mindful that municipal officials do not have the authority to conduct non-emergency warrantless searches of private property without permission of the owner. Commonwealth v. John G. Grant & Sons Co., Inc., 403 Mass. 151, 159-60 (1988). The U.S. Supreme Court has held that warrants are required for non-emergency administrative inspections. Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1966) (requiring warrant for health inspector non-emergency entry); See v. City of Seattle, 387 U.S. 541 (1966) (requiring warrant for nonemergency inspection by fire chief). “[A]dministrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure.” See, 387 U.S. at 545. Massachusetts courts have similarly recognized that “statutes can no longer convey blanket powers of warrantless entries.” Commonwealth v. Hurd, 51 Mass. App. Ct. 12, 17 (2001) (holding that G.L. c. 129, § 7 does not authorize warrantless searches for animal inspection). The Town should consult with Town Counsel regarding any questions.

**V. Conclusion**

We approve Article 35 except for the text in Section C (6) authorizing forfeiture of a security deposit for a violation of the by-law and the text in Section F, Fine Table authorizing the loss of a victualer’s license for a violation of the by-law, that we disapprove for violation of G.L. c. 40, § 21. The Town should consult with Town Counsel with any questions.

**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,

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cc: Town Counsel Donna L. MacNicol