



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

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December 23, 2021

Ms. Juliana H. Brazile, Town Clerk
Town of Arlington
730 Massachusetts Avenue
Arlington, MA 02476

Re: Arlington Annual Town Meeting of April 28, 2021 -- Case # 10245
Warrant Articles # 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 43, 44, and 48 (Zoning)
Warrant Articles # 6, 8, 9, 11, 12, 13, 14, and 15 (General)

Dear Ms. Brazile:

Article 15 - Under Article 15 the Town voted to adopt a general by-law to grant to domestic partners certain access rights related to town-operated health care facilities, town-operated correctional facilities, and children in town schools. Because the by-law's limited scope does not conflict with the Constitution or laws of the Commonwealth, we approve it as we are required to do under the Attorney General's scope of review of town by-laws. 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).¹

The by-law does not in any way refer to, or result in a redefinition of, the "vital social institution of marriage." Goodridge v. Department of Public Health, 440 Mass. 309, 312 (2003).

¹ In a decision issued on September 28, 2021, this Office (1) approved Articles 6, 8, 9, 11, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 43, and 44; (2) took no action on Articles 12 and 13; and (3) extended our deadline for a decision on Articles 14 and 15 for an additional 60 days until November 27, 2021. On November 1, 2021, we extended our deadline for Article 15 for an additional and final 30 days until December 27, 2021. In a decision dated December 2, 2021, we approved Article 14.

The Commonwealth defines marriage as “the voluntary union of two persons as spouses, to the exclusion of all others,” *id.* at 343, and polygamy is illegal in the Commonwealth. G.L. c. 207, § 4 (“Polygamy prohibited” “A marriage contracted while either party thereto has a former wife or husband living...shall be void.”). Had the by-law attempted to authorize polygamy we would disapprove it based on a clear conflict with these common law and statutory provisions.

Neither does the by-law change the definition of domestic partnership under state law. Although (as discussed herein) the Town has the Home Rule power to define “domestic partnership” for the purpose of its own by-laws, the Town’s definition cannot be applied so as to alter the statutory definition of “domestic partner” under state law and thereby expand any state law benefits. See e.g., West Street Assoc v. Planning Bd of Mansfield, 488 Mass. 319 (2021) (where a town by-law’s definition of medical marijuana dispensary allowed only non-profit entities to operate as medical marijuana dispensaries in town, and where a later statute’s definition of medical marijuana dispensary specifically eliminated the non-profit requirement, the by-law definition was preempted, and the statutory definition prevailed).²

² See, e.g., Chapter 16 of the Acts of 2021, “An Act Providing for Massachusetts Covid-19 Emergency Paid Sick Leave,” and Chapter 175M, § 1 (Family and Medical Leave) that respectively define domestic partner as:

“Domestic partner”, a person not less than 18 years of age who: (i) is dependent upon the employee for support as shown by either unilateral dependence or mutual interdependence that is evidenced by a nexus of factors including, but not limited to: (A) common ownership of real or personal property; (B) common householding; (C) children in common; (D) signs of intent to marry; (E) shared budgeting; and (F) the length of the personal relationship with the employee; or (ii) has registered as the domestic partner of the employee with any registry of domestic partnerships maintained by the employer of either party, or in any state, county, city, town or village in the United States. (Chapter 16 of the Acts of 2021)

"Domestic partner", a person not less than 18 years of age who: (i) is dependent upon the covered individual for support as shown by either unilateral dependence or mutual interdependence that is evidenced by a nexus of factors including, but not limited to: (A) common ownership of real or personal property; (B) common householding; (C) children in common; (D) signs of intent to marry; (E) shared budgeting; and (F) the length of the personal relationship with the covered individual; or (ii) has registered as the domestic partner of the covered individual with any registry of domestic partnerships maintained by the employer of either party, or in any state, county, city, town or village in the United States. (Chapter 175M, § 1)

Further, the by-law does not confer any monetary benefits to members of a domestic partnership. See e.g., Connors v. City of Boston, 430 Mass. 31 (1999) (overturning Boston mayor's executive order extending health insurance benefits to Boston employees' domestic partners and their dependents because the order conflicted with G.L. c. 32B, §§ 2 and 15 (b)).

In this decision we summarize the by-law and the Attorney General's standard of review under G.L. c. 40, § 32, and then explain why, based on that standard of review, we approve the by-law. 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, 398 Mass. at 795-96.

I. Summary of Article 15

Under Article 15 Town Meeting voted to amend the town's general by-laws to add a new Article 23, "Domestic Partnership," that gives certain rights and benefits to domestic partnerships of two or more persons. The by-law allows people to affirm, under penalties of perjury, that they are in committed relationships and meet the other requirements in the by-law to qualify as a "domestic partnership." Once they so affirm and register with the town clerk, they are entitled to share in the visitation and access rights listed in the by-law. The by-law defines "Domestic partnership" as follows:

"Domestic partnership" shall mean two or more persons who meet all of the following requirements and who register their domestic partnership in accordance with Title I, Article 23, Section 3.

- (1) They have made a commitment of mutual support and caring for their domestic partners;
- (2) They reside together and intend to do so indefinitely;
- (3) They share basic living expenses;
- (4) They are at least eighteen (18) years of age;
- (5) They are competent to enter into a contract; and
- (6) They are not married to anyone or related to each other by blood closer than would bar marriage in the Commonwealth of Massachusetts.

Section 2 (A).

Section 2 (D) defines “Domestic Partner” as “a person who meets the requirements of . . . Section 2(A)” and registers with the town clerk under Section 3 of the by-law. Domestic partners may register with the town clerk on forms to be prescribed by the town clerk to make an official record of their domestic partnership. Section 3, “Registration, Amendment, Termination.” Domestic partners may also amend or terminate the domestic partnership pursuant to Sections 3 (B) and (C) of the by-law, respectively.

Domestic partners who file their domestic partnership with the town clerk are entitled to certain visitation rights at town operated and maintained healthcare facilities and correctional facilities and access to children and records in town schools. Section 5, “Rights of Domestic Partners.” Specifically, Section 5 provides as follows:

Persons who have registered their domestic partnership with the Town Clerk pursuant to Title I, Article 23, Section 3 are entitled to the following rights:

(A) Visitation at health-care facilities.

(1) A domestic partner shall have the same visitation rights as a spouse or parent of a patient at all health-care facilities operated and maintained by the Town. A dependent shall have the same visitation rights as a patient’s child.

(2) The term “health care facilities” includes hospitals, convalescent facilities, mental health care facilities, nursing homes, and other short and long- term care facilities operated and maintained by the Town.

(B) Visitation at correctional facilities.

(1) A domestic partner shall have the same visitation rights at all correctional facilities operated and maintained by the Town as a spouse or parent of a person in custody. A dependent shall have the same visitation rights afforded to the child of a person in custody.

(2) The term “correctional facilities” includes, but is not limited to, holding cells, jails and juvenile correction centers operated and maintained by the Town.

(C) Access to children's school records and personnel.

(1) A domestic partner who is also the custodial parent or legal guardian of a child may file a school authorization form at, or send a letter to, the child's school to indicate that the parent's domestic partner shall have

access to the child's records, access to school personnel in matters concerning the child and access to the child, including the right to remove such child from the school for sickness or family emergency. The school shall afford such person access as directed by the child's parent.

(2) When a domestic partnership is terminated pursuant to Title I, Article 23, Section 3(C), it is the responsibility of the parent or guardian to notify the school, in writing, of the termination of rights of the former domestic partner.

(3) As used herein, the term "school" shall only include facilities owned and operated by the Town and shall include, but shall not be limited to, high schools, vocational schools, junior high and middle schools, elementary schools, preschools and preschool programs, after-school programs and day-care programs, provided that such are owned and operated by the Town.

Lastly, the by-law prohibits discrimination against anyone who seeks the benefits conferred under the by-law.

II. The Attorney General's Standard of Review of By-laws

Our review of Article 15 is governed by G.L. c. 40, § 32. 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, 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.") Rather, to disapprove a by-law (or any portion thereof), the Attorney General must cite an inconsistency between the by-law and the state Constitution or laws. Id. at 796. Where the Legislature intended to preempt the field on a topic, a municipal by-law on that topic is invalid and must be disapproved. Wendell v. Attorney General, 394 Mass. 518, 524 (1985).

III. Article 15 Does Not Conflict with State Law

During the course of our review, we considered whether the by-law's definition of domestic partnership, and the rights and benefits given to a domestic partnership under the by-law, conflict with state law. As provided in more detail below, based on the Attorney General's standard of review, we find no conflict with the Constitution or laws of the Commonwealth and therefore approve Article 15.

A. Definition of "Domestic Partner"

Several municipalities have adopted domestic partnership by-laws to grant certain rights and benefits to domestic partners, and we have approved several such by-laws because we

determined that they do not conflict with the laws or Constitution of the Commonwealth.³ Moreover, in a case presenting two questions regarding a Boston petition for special legislation to authorize a domestic partnership by-law, the Massachusetts Supreme Judicial Court has implicitly recognized the authority of cities and towns to choose how to define a “domestic partner” in local ordinances and by-laws. Opinions of the Justices to the House of Representatives, 427 Mass. 1211, 1217-1218 (1998) (“the term ‘domestic partner’ may be defined with reference to the city’s existing domestic partnership ordinance.”) In Opinion of the Justices, the Court considered whether the House could act on Boston’s home rule petition “which allow[ed] the City of Boston to define the terms ‘domestic partners’ and ‘dependents,’ from time to time,” or whether the petition constituted an improper delegation of the powers of the Legislature in violation of the Constitution of the Commonwealth.” Id. at 1212. Although the Court specifically declined to answer the question “whether the city... constitutionally may provide health insurance benefits to “domestic partners” and their “dependents” without first obtaining the approval of the Legislature,” id. at 1213, the Court determined that the City had the power to define “domestic partners” for the purposes of its ordinances. Id. at 1217-1218.

However, as with any by-law or ordinance, if a domestic partnership provision conflicts with state law, it exceeds a municipality’s power under the Home Rule Amendment, art. 89, § 6, of the Amendments to the Massachusetts Constitution, and the Home Rule Procedures Act, G.L. c. 43B, § 13. See, e.g., Connors v. City of Boston, 430 Mass. 31 (1999) (Boston mayor’s executive order extending health insurance benefits to Boston employees’ domestic partners and their dependents was inconsistent with G.L. c. 32B, §§ 2 and 15 (b) and thus exceeded the City’s Home Rule power).

With this precedent as a guide, we determine that the Town has the power to define what qualifies as a “domestic partnership” in the Town, and the Town’s definition here presents no clear conflict with state law. The fact that Arlington has defined a “domestic partnership” to mean (among other criteria) “two or more persons” who “reside together” and have made a “commitment of mutual support and caring” to each other does not create a clear conflict with any state statute, including the state’s ban on polygamy in G.L. c. 207. § 4. Nor does it conflict with the Commonwealth’s definition of a lawful marriage as “the voluntary union of two persons as spouses, to the exclusion of all others.” Goodridge, 440 Mass. at 343. Put simply, the by-law does not attempt to confer marriage status on domestic partners. Further, Arlington’s definition of domestic partnership presents no clear conflict with any other provision of state law. On this basis,

³ The Attorney General approved domestic partnership by-laws adopted by the Towns of Brewster, Brookline, Nantucket, Provincetown and Truro (See e.g. Truro decision dated November 9, 2005 (Case # 3566)).

we are bound to approve it. Amherst, 398 Mass. at 795-96 (requiring inconsistency with state law or the constitution for the Attorney General to disapprove a by-law).⁴

B. Visitation at Town Operated Healthcare and Correctional Facilities

Because towns have authority to regulate activities at town owned and operated facilities, Arlington has the power to authorize and regulate visitors at town operated healthcare and correctional facilities. In addition, the by-law's provision of visitation rights to domestic partners does not conflict with any state law applicable to visitation at healthcare and correctional facilities and is consistent with such statutes. See, e.g., G.L. c. 127, § 36C (protecting inmates' general right to receive visitors: "A correctional institution, jail or house of correction shall not: (i) prohibit, eliminate or unreasonably limit in-person visitation of inmates; or (ii) coerce, compel or otherwise pressure an inmate to forego or limit in-person visitation.") During the course of our review of Article 15, we received a communication from the Department of Public Health that confirmed the by-law's visitation provisions do not conflict with state law. Because the town has authority to regulate activities at town facilities, and here has done so consistent with state law, we approve this portion of Article 15.

C. Access to Children's School Records and Children at School

The by-law's text that empowers a domestic partner to provide written authorization for another partner to access the school records of his/her child does not conflict with Massachusetts law. The provisions of 603 CMR 23.00: Student Records - Education Laws and Regulations allow such access upon the partner's written authorization:

(d) The eligible student or the parent may have the student record inspected or interpreted by a third party of their choice. Such third party shall present specific written consent of the eligible student or parent, prior to gaining access to the student record.

During the course of our review of Article 15, we received a communication from the Massachusetts Department of Elementary and Secondary Education ("DESE") confirming that the school record access provisions of the by-law do not conflict with state law. Because the school

⁴ Arlington is the first town to adopt a by-law defining domestic partnership to include two or more people. It is our understanding that the Cities of Somerville and Cambridge have adopted domestic partnership ordinances that extend certain rights and benefits to domestic partnerships consisting of two or more persons. These ordinances are not subject to review by the Attorney General's Office. We are also informed that municipalities in other states are considering similar domestic partnership local enactments. We are not aware of any pending or successful legal challenges to the Somerville or Cambridge ordinances, or the local enactments in other jurisdictions.

record access provision does not conflict with state law, we approve it. However, the Town should consult with Town Counsel to ensure that the by-law's provisions are carried out consistent with all applicable provisions in state law, including 603 CMR 23.00: Student Records - Education Laws and Regulations.

Similarly, the by-law's text that allows a domestic partner to authorize another partner to pick up a child at school in light of illness or family emergency does not conflict with state law. According to DESE, there is no state statute or regulation that limits the parties to whom a parent can authorize release of a child.⁵ Rather, each school district sets the policies and requirements for releasing a student to someone other than a parent.⁶ Thus, the Town should consult with Town Counsel to ensure that the by-law's provision regarding releasing a child to another partner is consistent with any Arlington School District policies.

D. The Town Should Consider Future Clarifying Amendments

Although we find no conflict between the Town's domestic partnership by-law adopted in Article 15 and the Constitution or laws of the Commonwealth, certain text in the by-law would benefit from a future clarifying amendment. Section 7 "Reciprocity" states that "All rights, privileges and benefits shall be extended to domestic partnerships registered pursuant to similar laws enacted in other jurisdictions." It is unclear whether this means that domestic partnerships registered in other municipalities (Somerville and Cambridge for example) are entitled to the rights and benefits of the Arlington by-law. The Town may wish to consult with Town Counsel regarding future clarifying amendments.

IV. Conclusion

Because the limited scope of the domestic partnership by-law does not conflict with state law, including the Commonwealth's ban on polygamy (G.L. c. 207, § 4) we approve the by-law.

⁵ General Laws Chapter 71, Sections 55A requires a child showing signs of ill health or of being infected with a disease dangerous to the public health to be sent home immediately, or as soon as safe and proper conveyance can be found. In addition, G.L. c. 71, § 56 requires the school to notify a parent or guardian of a sick child who needs medical treatment. However, neither statute limits to whom an ill student can be released.

⁶ See, e.g., Boston Public Schools "School Access for Visitors:" "The school will not release a student to anyone other than a custodial parent without the parent's consent and proper identification." (<https://www.bostonpublicschools.org/Page/8266>) (last visited 12/15/21).

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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