



NOTICE

October 12, 2023

Massachusetts General Laws Chapter 40, Section 32 as amended, require that the foregoing posting include the following information:

Claims of invalidity of the foregoing amendments to the Zoning and General By-Laws, by reason of any defects in the procedure of adoption, may only be made within ninety days after the posting of by-law changes.

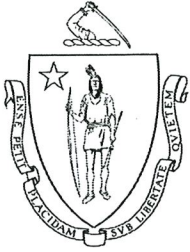
Copies of the amendments to the by-laws may be examined and obtained at the office of the Town Clerk, Town Hall, Scituate, Massachusetts.



Kathleen A. Gardner

Town Clerk

Posted at: Town Hall, Library, Harbormaster and the post offices in Scituate



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

CENTRAL MASSACHUSETTS DIVISION
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October 10, 2023

Kathleen A. Gardner
Town Clerk
Town of Scituate
600 Chief Justice Cushing Way
Scituate, MA 02066

**Re: Scituate Special Town Meeting of April 10, 2023 -- Case # 10883
Warrant Articles # 7 and 8 (General) ¹**

RECEIVED
TOWN OF SCITUATE
TOWN CLERK
2023 OCT 10 PM 12:06

Dear Ms. Gardner:

Article 8 - Under Article 8 the Town adopted a “Overnight Recreational Vehicular Parking on Public Property” by-law that bans the parking of a recreational vehicle on Town-owned property between the hours of 8:00 p.m. and 8:00 a.m. without the written permission of the Select Board. The Town reports to us that the by-law was intended to target overnight sleeping in recreational vehicles at the parking lot at Cole Parkway during the summer season; and further that the by-law is not intended to target, and does not apply to, unhoused individuals without alternative shelter practically available to them. ² The by-law is enforceable by way of a fine of \$200.00 per occurrence. The by-law includes the following clarifying language: “This section of the by-law shall not prevent unhoused individuals from sleeping outdoors on public property, when no alternative shelter is available to them.”

We disapproved a prior by-law adopted by Scituate at the 2022 Annual Town Meeting because the by-law lacked a specific penalty required for civil enforcement under G.L. c. 40, § 21D. (See attached Decision on Case # 10483, Article 26, issued October 11, 2022). The re-drafted by-law now includes the specific penalty amount of \$200.00 per occurrence. In addition, the Town’s existing enforcement by-law, Section 10230, “Criminal and Non-Criminal Disposition of By-Law

¹ We issued our decision approving Article 7 on September 8, 2023.

² According to the Town’s website “Cole Parkway is the primary parking area for the Scituate Harbor Marina, the business and cultural district, and the Harbormaster and Coast Guard buildings. It is also an important link in the Scituate Harborwalk as well as the site of several Town events such as Heritage Days and First Fridays in the Harbor.” https://www.scituatema.gov/sites/g/files/vyhlif3781/f/pages/cole_parkway_redevelopment_committee_revised_charge_092222.pdf (last visited October 7, 2023).

Violations,” supplies the other information necessary for non-criminal enforcement by designating any Scituate police officer as the enforcing person if (as here) no enforcing person is otherwise identified. Section 10230 also states that non-criminal disposition is at the discretion of the enforcing person. Together, the re-drafted by-law and the existing Section 10230 include all the information necessary for non-criminal enforcement under G.L. c. 40, § 21D.

However, as we said in our prior decision, merely re-drafting the by-law to properly authorize non-criminal disposition does not address the Eighth Amendment problem with enforcing the by-law against unhoused persons with no alternative shelter space “practically available” to them. See Martin v. City of Boise, 920 F.3d 584, 604, 618 (2019) cert den’d 140 S.Ct. 674 (2019) (camping ordinance violates the Eighth Amendment because it imposes criminal sanctions against unhoused individuals when no alternative shelter is practically available to them.) Because non-criminal disposition under G.L. c. 40, § 21D could result in a criminal proceeding if the civil fine is not paid, the by-law would violate the Eighth Amendment if enforced against unhoused individuals with no alternative shelter practically available to them. See Johnson v. Grants Pass, 2022 WL 4492090 at *21 (9th Cir. September 28, 2022) (anti-camping ordinance cannot be applied against homeless persons for the mere act of “sleeping in their car at night, when there is no other place in the City for them to go.”)³

As explained below, although we approve the by-law, it cannot lawfully be enforced (either criminally or by way of non-criminal disposition under G.L. c. 40, § 21D) against unhoused persons with no alternative shelter practically available to them, including where such individuals’ only practically available shelter is a vehicle. The Town should also amend the by-law at a future town meeting to clearly state the by-law will not be enforced against such unhoused persons; including, for example, by clarifying what is implied by the term “recreational vehicle,” i.e., that a vehicle used as shelter by an unhoused individual with no alternative shelter practically available to them is not “recreational.”⁴

In this decision we briefly summarize the Attorney General’s standard of review of town by-laws, and the mechanisms available for enforcement of town by-laws. Then we explain the basis for our approval of the by-law only is so far as it is *not* applied to unhoused persons with no alternative shelter practically available to them, including where such individuals’ only practically available shelter is a vehicle.⁵

³ On August 25, 2023 a petition for writ of certiorari was filed in City of Grants Pass, Oregon, Petitioner v. Gloria Johnson, et al, No. 23-175, requesting that the U.S. Supreme Court consider the question: “Does the enforcement of generally applicable laws regulating camping on public property constitute “cruel and unusual punishment” prohibited by the Eighth Amendment?” The Town should monitor the Court’s decision on the petition and for any ultimate decision on the question presented.

⁴ When considering the by-law, we are guided by the Supreme Judicial Court’s instruction that “[I]f a sensible construction is available, we shall not construe a statute to make a nullity of pertinent provisions or to produce absurd results.” Flemings v. Contributory Retirement Appeal Bd., 431 Mass. 374, 375-76 (2000); see Manning v. Boston Redev. Auth., 400 Mass. 444, 453 (1987) (“A statute or ordinance should not be construed in a way that produces absurd or unreasonable results when a sensible construction is readily available”).

⁵ We appreciate the letter submitted by Attorney Ruth A. Bourquin of the American Civil Liberties Union (ACLU) dated October 2, 2023 opposing the by-law.

I. Attorney General's Standard of Review

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 v. Attorney General, 398 Mass. 793, 795-96 (1986). 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 Constitution or laws of the Commonwealth. Id. at 796. "As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid." Bloom v. Worcester, 363 Mass. 136, 154 (1973).

II. Criminal and Non-Criminal Disposition Enforcement of Town By-laws

There are two available methods for towns to enforce violations of town by-laws: criminal prosecution under G. L. c. 40, § 21 that authorizes towns to enforce by-law violations "by indictment or [criminal] complaint before a district court;" and non-criminal disposition pursuant to G.L. c. 40, § 21D.

Pursuant to G.L. c. 40, § 21D, "[a]ny town may by ordinance or by-law not inconsistent with this section provide for non-criminal disposition of violations of any ordinance or by-law...the violation of which is subject to a specific penalty." The statute describes certain requirements for the content of such by-laws, including the requirement that the by-law specify whether non-criminal disposition is mandatory or at the option of the enforcing officer. G.L. c. 40, § 21D, ¶ 2. The by-law must also identify the specific penalty (not exceeding three hundred dollars) for violations of the by-law. G.L. c. 40, § 21D, ¶ 5.

Chapter 40, Section 21D also provides details of the non-criminal disposition enforcement process. In sum, the statute establishes a non-criminal citation scheme, but if the civil citation is not timely paid the enforcing officer retains the discretion to apply for a criminal complaint (pursuant to G.L. c. 40, § 21).

III. The By-law Should Be Amended to Specifically Exempt Unhoused Individuals with No Alternative Shelter Practically Available to Them, and Should Not Be Enforced Against Them in the Interim

We acknowledge that the by-law nods at the Martin holding by stating: "This section of the by-law shall not prevent unhoused individuals from sleeping outdoors on public property, when no alternative shelter is available to them." However, the by-law does not exempt unhoused individuals from its scope, such that, depending on how the by-law is construed, unhoused individuals could be subject to criminal penalties for sleeping overnight in recreational vehicles on Town-owned property unless they have permission to do so from the Selectboard. Any such enforcement would squarely implicate holdings of Martin and Johnson.

The Martin court determined that the Cruel and Unusual Punishments Clause of the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on

public property for homeless individuals who cannot obtain shelter. The Martin court emphasized that criminalization is not appropriate if an impacted individual has no shelter space “practically available” to them. Id. at 618. Similarly, in Johnson the court affirmed the district court’s ruling that “the City of Grants Pass cannot, consistent with the Eighth Amendment, enforce its anti-camping ordinances against homeless persons for the mere act of sleeping outside with rudimentary protection from the elements, or for sleeping in their car at night, when there is no other place in the City for them to go.” Id. at *21. Where a by-law or ordinance provides for initial civil enforcement but carries potential criminal penalties for continued non-compliance, as does the non-criminal disposition mechanism of G.L. c. 40, § 21D, the Eighth Amendment is also implicated. See Johnson, 2022 WL 4492090 at *15-16 (“Imposing a few extra steps before criminalizing the very acts Martin explicitly says cannot be criminalized does not cure the anti-camping ordinances’ Eighth Amendment infirmity.”)

Similarly, in Pottinger v. City of Miami, the district court held that “[a]s long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the eighth amendment — sleeping, eating and other innocent conduct.” 810 F. Supp. 1551, 1565 (S.D. Fla. 1992). The court observed that “resisting the need to eat, sleep or engage in other life-sustaining activities is impossible. Avoiding public places when engaging in this otherwise innocent conduct is also impossible.” Id.

The Supreme Judicial Court has repeatedly affirmed that the law of Massachusetts “does not permit punishment of the homeless simply for being homeless.” Commonwealth v. Magadini, 474 Mass. 593, 601-02 (2016) (citing Commonwealth v. Canadyan, 458 Mass. 574, 579 (2010) ((setting aside finding that defendant violated condition of probation where homeless shelters did not have technology required for compliance)).

Consequently, we construe the by-law in light of these Eighth Amendment concerns. See Demetropolos v. Commonwealth, 342 Mass. 658 (1961) (“where a statute may be construed as either constitutional or unconstitutional, a construction will be adopted which avoids an unconstitutional interpretation”). We note also the plain fact that a vehicle used as shelter by an unhoused person with no practically available alternative shelter is not “recreational” under any accepted meaning of that term. Accordingly, we do not interpret the by-law to apply to unhoused individuals using vehicles for shelter when no other shelter is practically available to them; and note that any contrary interpretation would pose serious concerns under the Eighth Amendment. The Town should amend the by-law at a future Town Meeting to more expressly exempt unhoused individuals with no adequate alternative shelter; and in the interim cannot enforce the by-law against such individuals.⁶

⁶ The First Circuit and Massachusetts appellate courts have not yet adopted the reasoning of the Martin decision. However, in Geddes v. City of Boston, 2021 WL 5441085 (2021), Justice Gaziano of the Supreme Judicial Court remanded the matter to the Superior Court for development of a complete factual record for ultimate resolution of several legal issues, including “whether to adopt Martin or a similar interpretation, and, if so, the meaning of “practically available [alternate shelter]”; [and] whether art. 26 of the Massachusetts Declaration of Rights is more expansive in this area than the Eighth Amendment.” The Geddes case resolved by stipulation of dismissal before the factual record could be developed.

VI. Conclusion

Although we approve the by-law because it has a lawful application (in that non-criminal disposition is now an available enforcement mechanism), the Town should not enforce the by-law against unhoused individuals with no adequate alternative shelter and should amend the by-law at a future town meeting to more specifically exempt such unhoused individuals from its scope, so that the Town avoids any violation of the Eighth Amendment rights of the unhoused population.

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,

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

Margaret J. Hurley

By: Margaret J. Hurley
Assistant Attorney General
Municipal Law Unit
10 Mechanic Street, Suite 301
Worcester, MA 01608
(508) 792-7600 ext. 4402

cc: Town Counsels David A. DeLuca and Joseph W. Proctor

WARRANT

ARTICLE 8 – General Bylaw Amendment – New Section 30125 – Overnight Recreational Vehicular Parking on Public Property

To see if the Town will vote to amend the Town of Scituate General By-Laws, Section 30100 Miscellaneous, by adding the following new section:

Section 30125 - Overnight Recreational Vehicular Parking on Public Property

No person shall park a recreational vehicle on Town-owned property between the hours of 8:00 P.M. and 8:00 A.M. without the written approval of the Select Board. A recreational vehicle is a motor vehicle or trailer that includes living quarters designed for accommodation. Any person that violates this bylaw shall be punished with a fine of \$200 per occurrence. This section of the bylaw shall not prohibit unhoused individuals from sleeping outdoors, on public property, when no alternative shelter is available to them.

or take any other action relative thereto.

Sponsored By: Select Board

MOTION ARTICLE 8 – General Bylaw Amendment – New Section 30125 – Overnight Recreational Vehicular Parking on Public Property

Select Board- Tony Vegnani

I move that the Town amend the Town of Scituate General By-Laws, Section 30100 Miscellaneous, by adding the following new section:

Section 30125 - Overnight Recreational Vehicular Parking on Public Property

No person shall park a recreational vehicle on Town-owned property between the hours of 8:00 P.M. and 8:00 A.M. without the written approval of the Select Board. A recreational vehicle is a motor vehicle or trailer that includes living quarters designed for accommodation. Any person that violates this bylaw shall be punished with a fine of \$200 per occurrence. This section of the bylaw shall not prohibit unhoused individuals from sleeping outdoors, on public property, when no alternative shelter is available to them.

Quantum of vote: Majority

Advisory Committee-Lynda Ferguson

VOTE- Declared Unanimous in Favor

I hereby certify the foregoing to be a True Copy Attest.


Kathleen A. Gardner
Town Clerk

