

**TOWN OF SCITUATE**

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FOR IMMEDIATE RELEASE  
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**ATTORNEY GENERAL'S OFFICE RULES COHASSET BY-LAW INVALID**

On July 3, 2023, the Massachusetts Attorney General's Office (AGO) issued an opinion declaring that a by-law adopted by the Town of Cohasset as the Safe Navigation Bylaw<sup>1</sup> was invalid because the Town of Cohasset did not have the authority to adopt it.

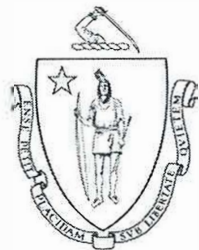
This is important to the Town of Scituate because the Select Board and other town agencies believed that the Cohasset by-law was attempting to regulate and manage activities on and below Scituate waters. The AGO ruled that Cohasset could not regulate beyond its own town boundaries into Scituate waters, nor were they allowed to control what people put in or on top of tidal waters like boats, lobster cars or floats. This would have been devastating for many who rely on fishing for their livelihoods if this law had gone through as written.

The Scituate Select Board, Shellfish Constable and Shellfish Advisory Committee are delighted with the recent ruling by the Massachusetts Attorney General's Office that declared a by-law passed by the Town of Cohasset invalid. The Town of Scituate will continue to be vigilant in protecting the rights of commercial fishermen and our residents to access the waters under the jurisdiction of the Town. We are grateful and wish to thank the Municipal Law Division of the Attorney General's Office for the diligence and for their decision. The Attorney General's Office has ensured that activities such as oyster farming can continue to happen without interference from other towns or cities.

We want to thank the Attorney General's office for recognizing how important it is to protect our citizens' right to fish without fear of outside interference from other towns and cities in Massachusetts.

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<sup>1</sup> Article 15 of the December 12, 2022 Special Town Meeting



THE COMMONWEALTH OF MASSACHUSETTS  
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July 3, 2023

Elisabeth Legge, Town Clerk  
Town of Cohasset  
41 Highland Avenue  
Cohasset, MA 02025

**Re: Cohasset Special Town Meeting of December 12, 2022 -- Case #10849  
Warrant Articles # 7, 10 and 15 (General) <sup>1</sup>**

Dear Ms. Legge:

**Article 15** - Under Article 15 the Town of Cohasset, by citizen petition, adopted a by-law to regulate certain activity in “Cohasset harbor and cove within the territorial limits of the Commonwealth” (“Regulated Area”). The petitioners and Town agree that the Regulated Area includes a portion of the territorial limits of the Town of Scituate.<sup>2</sup> Seemingly recognizing that neither the Home Rule Amendment (Mass. Const. amend. art. 2) nor G.L. c. 40, § 21 authorize a town to regulate beyond its borders, Beard v. Town of Salisbury, 378 Mass. 435, 441 (1979), the by-law recites as its sole authorizing provision a 1953 special act, Chapter 54 of the Acts of 1953 (Act). As explained below, we determine that the by-law adopted under Article 15 is invalid because the Town was not authorized by the Legislature to adopt it. Greater Bos. Real Est. Bd. v. City of Bos., 397 Mass. 870, 876–77 (1986) (when by-law is adopted without express authority from Legislature and is outside scope of municipal authority granted by Home Rule Amendment, by-law is valid only if necessary to effectuate legislative intent embodied in statute relied on as source of municipal power.) The 1953 Act does not expressly or impliedly authorize Cohasset to regulate beyond the borders of Cohasset, or to regulate “the installation of anything placed in or upon tidal waters or affixed thereunder” § 169-4(B), as the by-law attempts to do. Neither is it necessary to regulate in this manner to accomplish the stated authority and objectives in the Act.

As additional grounds for our disapproval of the by-law, we determine that it is preempted

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<sup>1</sup> In a decision issued on March 20, 2023, we approved Articles 7 and 10. On March 10, 2023, by agreement with Town Counsel pursuant to G.L. c. 40, § 32, we extended the deadline for our review of Article 15 until July 4, 2023.

<sup>2</sup> See, e.g., February 14, 2023 letter from Cohasset to AGO, p. 2 (“The Regulated Area encompasses waters of the Commonwealth within the municipal boundary of the Town of Scituate.”)

by G.L. c. 90B, § 15 and G.L. c. 91, § 10A, which grant municipalities the power to manage waters within their respective boundaries (but not beyond those boundaries). In addition, the by-law is preempted by G.L. c. 130, § 57, which grants all towns (including Scituate), the authority to issue licenses for shellfish aquaculture, with the approval of and subject to regulations by the Director of Department of Fisheries and Wildlife, within waters under each town's jurisdiction.

In addition, Section 7 of the by-law (violations and penalties) conflicts with the penalty provisions of G.L. c. 88, § 19 (incorporated into the Act) which limit fines for violations of any by-laws adopted pursuant to the Act to \$20.00. Finally, the by-law's stated effective date ("[t]his Bylaw shall be applicable upon the vote of Town Meeting") (§ 169-8) conflicts with G.L. c. 40, § 32.<sup>3</sup>

We emphasize that our decision in no way implies any agreement or disagreement with the policy views that may have 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 v. Attorney General, 398 Mass. 793, 795-96, 798-99 (1986). We also recognize that, in their submissions to this Office during our review, the petitioners, the Town of Cohasset, and the Town of Scituate take conflicting positions on certain factual issues. It is not necessary to resolve these disputed factual issues in this determination because the scope of our by-law review rests solely on the by-law's conflicts with state law. Id.<sup>4</sup>

In this decision, we discuss the Attorney General's limited standard of review of town by-laws under G.L. c. 40, § 32; summarize the by-law and the Act; and explain why, even under that limited power of disapproval, we must disapprove the by-law because it is not authorized by the Act and conflicts with state law.

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<sup>3</sup> Because we find the by-law lacks validity in that it was not expressly or impliedly authorized by the Act, there is no text that is severable from the remainder (despite the by-law's severability clause in § 169-9) such that we could disapprove just a portion of the by-law and save the remainder. See, e.g., Showtime Entertainment, LLC v. Town of Mendon, 885 F.Supp.2d 479 (2012) (by-law's severability clause not sufficient to save by-law, and problematic text not severable from remainder of by-law, where text was operative language in by-law and by-law did not make sense without it).

<sup>4</sup> During our review of Article 15 we received letters from several interested parties, including the Town's Selectboard and Town Counsels Carolyn Murray and Amy Kwesell, on behalf of the Town; Attorneys Scott Harshbarger, Edward Colbert, III, and Marion Sullivan on behalf of the Friends of Bassing Beach (the petitioners); Attorney Robert W. Galvin on behalf of the Town of Scituate; and Francis G. Basler, County Administrator, on behalf of the Plymouth County Commissioners. We appreciate these letters as they have aided us in our review of Article 15.

We also received numerous communications from various citizens urging our approval of the by-law. We appreciate this input and recognize the importance of the proposed by-law to the Town and its residents. We emphasize that our decision rests solely on the legal determinations explained in this letter and not any determination of disputed factual issues raised by any of the submissions.

## I. Attorney General's Standard of Review

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.”) 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 (“HRA”).

## II. Summary of By-law

The by-law adopted under Article 15 seeks to do two things. First, it prohibits “the installation of anything placed in or upon tidal waters or affixed thereunder” in the Regulated Area, § 169-4(B), which it defines as “the tidal waters and land thereunder of Cohasset harbor and cove within the territorial limits of the Commonwealth, as said harbor and cove appear on the US Coast and Geodetic Survey chart 246 dated March 1948 (25<sup>th</sup> edition) then in effect upon enactment of Chapter 54 of the Acts of 1953.” § 169-3(C).<sup>5</sup>

Second, the by-law dictates that “in that portion of the Regulated Area located north and east of the breakwater, persons may not anchor, beach or run aground any boat for the purpose of engaging in commercial activity.” § 169-4(B). This provision appears to apply exclusively to Scituate territory, including land near or on Bassing Beach.<sup>6, 7</sup>

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<sup>5</sup> The Town’s by-law filing reflects (and Town Counsel has confirmed) that the “US Coast and Geodetic Survey chart 246 dated March 1948 (25<sup>th</sup> edition)” was not included in the town meeting warrant or provided to the voters at the time of the town meeting vote (although Town Counsel informs us that the citizens petitioners brought a very large printout of the 1948 chart to the Select Board hearing/public forum prior to town meeting). We recognize that this is a general by-law, not a zoning by-law, and thus the zoning by-law notice provisions of G.L. c. 40A, § 5 do not apply. For a general by-law, G.L. c. 39, § 10 requires only that “the subjects to be acted upon must be sufficiently stated in the warrant to apprise voters of the nature of the matters with which the meetings authorized to deal.” Johnson v. Town of Framingham, 354 Mass. 750, 753 (1968) (citations and internal quotations omitted). However, the by-law’s definition of “Regulated Area” defines the area by reference to the map and, without the map, the voters lacked full knowledge of the scope of the Regulated Area. Nothing in the text of the by-law or the town meeting warrant states that the Regulated Area includes waters outside the territorial limits of Cohasset. Although not grounds for our disapproval of the by-law, we emphasize that, without the map, Cohasset town meeting voters were not fully informed that they were voting to regulate not just Cohasset territory but Scituate’s too.

<sup>6</sup> See <https://goo.gl/maps/xW9p4738b51nzi3p9>.

<sup>7</sup> Counsel for Scituate contends that the by-law was motivated by a desire to prohibit Scituate from

These restrictions were put in place with the intent “to protect and promote safe and unobstructed navigation for motorboats and other watercraft such that operation thereof shall not (i) endanger the safety of the public, (ii) cause detriment or injury to the natural resource, (iii) injure persons or property or the environment, or (iv) increase congestion of said harbor and cove.” Art. 15, § 169-3(A). “It is also the intent of this Bylaw to protect and promote public availability and use of a valuable conservation and recreation resource.” § 169-3(B).

The by-law contains certain exemptions (§ 169-5(A) - § 169-5(F)) and allows for waivers from its provisions to be granted by the Cohasset Selectboard only in “unusual circumstances” after a finding that “the requested installation will not impede or deter navigation or effect the recreation or conservation of the Regulated Area.” § 169-6(A).

The by-law imposes fines of “not less than \$100 and not more than \$200” for violations pursuant to the Town’s General By-laws, Article I, Section 1-6.” § 169-7(A). Further, “[e]ach point of contact, connection, attachment, anchoring or mooring upon the land under tidal waters in violation of this Bylaw may constitute a separate offense.” § 169-7(A). Any obstructions caused by unpermitted installations in the Regulated Area “shall be subject to removal by the [Cohasset] Harbormaster without notice,” and the costs of removal and storage of such obstructions will include “all costs and labor” and will be charged to the owner. § 169-7(B)

The by-law states that its requirements “are in addition to the requirements of state and federal law, and with the exception thereof shall apply notwithstanding any other rules or regulations with provisions to the contrary.” § 169-3(D). The by-law states it will be “applicable upon the vote of Town Meeting” (§ 169-8).

### **III. The Act**

The Town claims authority for its proposed by-law under the Act, which authorizes the Town to adopt by-laws regulating “the *operation* of and limiting the *speed of motor boats* in Cohasset harbor and cove . . . and of the *mooring* and *anchoring of boats, lobster cars* or *floats* therein.” (emphasis added). The Act directs such by-laws be tailored towards the following objectives: (1) ensuring that “such motor boats shall not be operated in a manner” that (a) “endangers the safety of the public” or (b) “is detrimental or injurious to the neighborhood or to the value of property therein,” and (2) “the congestion of said harbor and cove is lessened.” The Act also gives the Town power to adopt by-laws regulating all town and common landings. The entire text of the Act is reproduced below (and attached as Exhibit A):

#### **Chapter 54 of the Acts of 1953: An Act for the Regulation of the Common and Town Landing Places in the Town of Cohasset and of Cohasset Harbor:**

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pursuing any type of commercial shell fishing program in Scituate waters. The petitioners’ motive in proposing the by-law and Town Meeting’s motive for adopting the by-law are beyond the scope of our review and therefore immaterial to our determination. See *Durand v. IDC Bellingham, LLC*, 440 Mass. 45, 51 (2003) (analysis of by-law’s validity “is not affected by consideration of the various possible motives that may have inspired legislative action.”)

Be it enacted... as follows:

SECTION 1. The inhabitants of the town of Cohasset shall have jurisdiction over all common and town landings therein, with power to govern, control and regulate them, and may make such by-laws and adopt such rules and regulations not inconsistent with the laws of the commonwealth as they shall deem proper to carry into effect the provisions of this act. The selectmen of said town shall have the immediate custody of said landings and the duty of enforcing such by-laws, rules or regulations as shall be made or adopted by the town, under this section.

SECTION 2. The inhabitants of the town of Cohasset may, by by-laws, provide for the regulation and enforcement of rules and regulations for the operation of and limiting the speed of motor boats in Cohasset harbor and cove within the territorial limits of the commonwealth, and of the mooring and anchoring of boats, lobster cars or floats therein, to the end that such motor boats shall not be operated in a manner which endangers the safety of the public or is detrimental or injurious to the neighborhood or to the value of property therein, and the congestion of said harbor and cove is lessened. The provisions of this section shall be enforced by the harbormaster, assistant harbor master and police officers authorized to make arrests.

SECTION 2A. Section nineteen of chapter eighty-eight of the General Laws relative to publication and penalties shall apply to such by-laws, rules and regulations made and adopted under the provisions of this chapter.

SECTION 3. This act shall take effect upon its passage.

Section 2A of the Act states that the “publication and penalties” provisions of G.L. c. 88, § 19 will apply to any by-laws adopted pursuant to the Act. Last amended in 1945, G.L. c. 88, § 19 states (with emphasis added):

#### **Section 19: Use of common landing places**

Section 19. The city council of a city and the selectmen of a town may make rules and regulations concerning the use of a common landing place laid out under this chapter; provided, that no such rule or regulation shall be effective unless it shall have been published in one or more newspapers, *if there be any published in the city or town in which the public landing is located, otherwise in one or more newspapers published in the county in which the city or town is situated.* Any person convicted of a violation of any such rule or regulation shall be punished by a fine of not more than twenty dollars.

The legislation was filed at the beginning of the 1953 legislative session as H.1300, *An Act for the regulation of the common and town landing places in the town of Cohasset and of Cohasset harbor.* According to its caption, the bill was filed by state Representative Hurwitz of Cohasset as a petition of Helen Scripture and the other selectmen of the Town of Cohasset, “for legislation to regulate the common and town landing places in the town of Cohasset.” No floor remarks are recorded in any of the available legislative materials. It does not appear that the legislation was

subject to debate. At some point in the process, the bill was amended by adding the words, “within the territorial limits of the commonwealth,” to the phrase, “within Cohasset harbor and cove.” From the record, it appears that the Act passed both chambers on voice votes.

A review of the Massachusetts General Laws and the Acts and Resolves from 1954 to the present reveals no subsequent references to the Act, or to Cohasset’s authority under the Act. We found no court decisions or other AGO decisions construing the Act.

#### **IV. The Town’s Ability to Regulate in the Regulated Area is Dependent on the 1953 Act**

The Town and the petitioners recognize that but for the 1953 Act the Town has no power to regulate in the Regulated Area as the by-law defines it. This is because the Regulated Area extends beyond the territorial limits of Cohasset, and the Town ordinarily has no power to regulate anything outside its territorial limits. Beard v. Town of Salisbury, 378 Mass. 435, 441 (1979) (“Although the Home Rule Amendment confers broad powers on municipal governments, it does not appear to be so expansive as to permit local ordinances or by-laws that, as here, regulate outside a municipality’s geographic limits.”) (internal citations omitted). See also G.L. c. 40, § 21 (authorizing towns to adopt by-laws on various topics “which shall be binding upon all inhabitants thereof and all persons *within their limits*”) (emphasis supplied). Cohasset, like all towns, has authority under the HRA and various statutes to adopt local by-laws regulating the use of waterways within the territorial limits of the Town. See, e.g., Mad Maxine’s Watersports, Inc. v. Harbormaster of Provincetown, 67 Mass. App. Ct. 804, 811 (2006) (affirming town’s authority to restrict the use of personal watercraft in Provincetown Harbor within the town’s territorial limits). General Laws Chapter 90B, Sections 11 and 15 authorize towns to regulate activities or vessels on town waters, so long as the local regulation does not conflict with the provisions of G.L. c. 90B and the by-law is approved by the Director of Office of Law Enforcement (OLE) within the Executive Office of Energy and Environmental Affairs (EOEEA). This Office has approved many such by-laws that regulate activities or vessels within town waters (with a reminder to the town that the by-law will also need separate approval by OLE.)<sup>8</sup>

Here, however, the by-law attempts to regulate outside the boundaries of the Town, and thus requires some other legislative authority to do so. The by-law cites the Act as its sole authorizing provision. The by-law’s validity therefore hinges on whether the Act authorizes the Town to adopt the by-law.

#### **V. Scope of Town’s Authority Under the Act**

When, as here, a town adopts a by-law not authorized by the HRA or other express authorization by the Legislature, the by-law is “valid only if it is necessary to effectuate the legislative intent embodied in the statute relied on as the source of municipal power.” Greater Bos. Real Est. Bd. v. City of Bos., 397 Mass. 870, 876–77 (1986) (recognizing that “powers provided by necessary implication must be essential and not merely convenient to the implementation of express powers conferred by statute.”). As the court in Greater Bos. Real Est. Bd. recognized, if a

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<sup>8</sup> See, e.g., Chatham Case # 10646A (Article 43) issued December 9, 2022 (by-law pending OLE approval).

by-law is not authorized by the HRA the deferential scope of review of HRA, § 6 is not applicable:

As we recognized in Church v. Boston, 370 Mass. 598, 601 (1976), “where we are dealing with a subject as to which no local action may be taken without explicit legislative authorization, the scope of that permissible local action is not determined broadly under § 6 of the Home Rule Amendment... The situation ... is analogous to that existing prior to the Home Rule Amendment where a municipality had ‘only those powers which are expressly conferred by statute or necessarily implied from those expressly conferred or from undoubted municipal rights or privileges.’ Atherton v. Selectmen of Bourne, 337 Mass. 250, 255-256 (1958).”

Greater Bos. Real Est. Bd. v. City of Bos., 397 Mass. 870, 77 (1986).

Under this analysis, and as explained below, we determine that the Act does not expressly or impliedly authorize Cohasset to regulate beyond the borders of Cohasset, or to regulate “the installation of anything placed in or upon tidal waters or affixed thereunder” § 169-4(B), as the by-law attempts to do. Moreover, the by-law’s attempt to regulate activities outside the territorial limits of Cohasset and subject matter not listed in the Act is not “necessary to effectuate the [Act’s] legislative intent.” Greater Bos. Real Est. Bd., 397 Mass. at 876–77.

**V. The Act Does Not Expressly Authorize Cohasset to Regulate Beyond its Borders or Regulate the Installation of “Anything Placed in or Upon the Tidal Waters or Affixed Thereunder”**

It is beyond dispute that here the text of the Act does not expressly grant the Town authority to regulate activities outside the territorial limits of the Town or regulate “anything placed in or upon the tidal waters or affixed thereunder.” In relevant part, the Act authorizes the Town to adopt by-laws regulating “the speed of motor boats in Cohasset harbor and cove within the territorial limits of the commonwealth,” and by-laws regulating “the mooring and anchoring of boats, lobster cars<sup>9</sup> or floats therein.” Act, Section 2. Simply put, the Act does not state that Cohasset has the authority to regulate outside its territorial limits, or the authority to regulate “anything placed in or upon the tidal waters or affixed thereunder.”

Town Counsel and counsel for petitioners contend that the Act expressly authorizes Cohasset to regulate beyond the borders of Cohasset because Section 2 of the Act grants to Cohasset the power to regulate “in Cohasset harbor and cove within the territorial limits of the commonwealth” regardless of town borders. See, e.g., petitioners’ letter at p. 6 (“The drafters plainly and clearly established the territorial limits of Section 2 with reference to all of the waters in Cohasset Harbor that flow within the territorial limits of the Commonwealth of Massachusetts, irrespective of which side of the border those waters may sit.”)

We do not agree that the Act’s reference to “Cohasset harbor and cove within the territorial

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<sup>9</sup> A lobster car is defined by the Merriam-Webster online dictionary as “a slatted container in which live lobsters are kept under water awaiting sale or transportation.” Lobster Car, Merriam-Webster, <https://www.merriam-webster.com/dictionary/lobster%20car> (last visited June 29, 2023).



limits of the commonwealth” qualifies as an express delegation of authority. To determine whether a statute includes an express delegation of authority, courts first look to the plain words of the statute. See, e.g. Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 457 Mass. 663, 678 (2010) (“We read the quoted provision in § 69K as an express legislative directive to the siting board to stand in the shoes of any and all State and local agencies with permitting authority over a proposed ‘facility’”); Tri-Nel Mgmt., Inc. v. Bd. of Health of Barnstable, 433 Mass. 217, 220 (2001) (“Through the plain language of G.L. c. 111, § 31, the Legislature has delegated boards of health the power to adopt reasonable health regulations.”); Church v. City of Bos., 370 Mass. 598, 601 (1976) (“[T]he plaintiffs are aided little by the requirement of clear authorization for local action because clearly local action is authorized here” where the statute states “said city may by ordinance control the rent for the use or occupancy of housing accommodations in structures having three or more dwelling units.”) Here the plain words of the Act include no express delegation of power to Cohasset to regulate beyond its territory or to regulate all the activities the by-law seeks to regulate.

Moreover, the Legislature’s use of the term “within the territorial limits of the commonwealth” in the Act does not support the petitioners’ argument. Petitioners contend that “the legislature specifically added the words ‘within the territorial limits of the commonwealth’ by way of an amendment to the initial Act (House No. 1300), thereby demonstrating its intention to include all of the Commonwealth’s waters in Cohasset Harbor in the Act.” During our review, we received a communication from the Deputy General Counsel of the Executive Office of Energy and Environmental Affairs (EOEEA letter) who explains the effect of the phrase “within the territorial limits of the commonwealth” in the Act:

The term “within the territorial limits of the commonwealth” is best read to refer to the *seaward* limit of state waters and not to the lateral extent of Cohasset’s control, because Massachusetts territory ended at the harbor mouth at the time Chapter 54 was enacted. In 1947, the Supreme Court held in *U.S. v. California* that waters of the marginal sea – seaward of the states’ internal waters – are held by the federal government. 332 U.S. 19 (1947). Congress conveyed ownership of the territorial sea to the states by enacting the Submerged Lands Act in May 1953. 43 U.S.C. § 1311. The Submerged Lands Act, however, was not enacted until 3 months *after* Massachusetts enacted Chapter 54 of the Acts of 1953. Thus, at the time Chapter 54 was enacted, the territorial limit of Massachusetts was the closing line at the mouth of Cohasset harbor.

Thus, rather than expanding the lateral scope of Cohasset’s regulatory authority, the addition of the phrase “within the territorial limits of the commonwealth” in the Act imposes a limit on Cohasset’s authority to the seaward limit of state waters. In any event, we agree with the EOEEA that the phrase “within the territorial limits of the commonwealth” does not qualify as an express grant of authority to Cohasset to regulate beyond its town boundaries.

**VI. The Act Does Not Impliedly Authorize the Town to Regulate Outside its Borders or With the Broad Scope Indicated in the By-law.**

A. The Act Does Not Imply a Right to Regulate Beyond Cohasset Borders.

We also cannot conclude that the extension of the Town's regulatory authority beyond town borders is necessarily implied in or incident to the powers expressly granted in the Act. Indeed, it is difficult to imagine any scenario where the express power to regulate *inside* town borders implies a grant of power to regulate *outside* town borders, and this is not the case here.

First, the Act was adopted by way of the petition for special act process granted in Section 8 of the HRA:

*Section 8. Powers of the General Court.* - The general court shall have the power to act in relation to cities and towns, but only by general laws which apply alike to all cities or to all towns, or to all cities and towns, or to a class of not fewer than two, and by special laws enacted (1) on petition filed or approved by the voters of a city or town, or the mayor and city council, or other legislative body, of a city, or the town meeting of a town, *with respect to a law relating to that city or town.*

HRA, art. 89, § 8 (emphasis supplied). The special act petition process is intended to provide a city or town the right to petition the Legislature for a “special law” that applies to that one city or town. *Id.* That is what Cohasset did here by petition of the selectmen of the Town of Cohasset, through a bill filed by state Representative Hurwitz of Cohasset, “An Act for the regulation of the common and town landing places in the town of Cohasset and of Cohasset harbor.” Reading the Act as a whole, its provisions are tailored to address only matters local to Cohasset. Section 1 of the Act gives to “the inhabitants of the Town of Cohasset” jurisdiction over all common and town landings therein.” Act, Section 1. The Act’s Section 2 states the purpose of authorizing Cohasset to regulate “the operation and speed of motor boats in Cohasset harbor and cove within the territorial limits of the Commonwealth,” and regulate the “mooring and anchoring of boats, lobster cars and floats therein” as follows:

to the end that such motor boats shall not be operated in a manner which endangers the safety of the public or is detrimental or injurious to the neighborhood or to the value of property therein, and the congestion of said harbor and cove is lessened.

The words “neighborhood” and “property” can reasonably be understood to mean those neighborhoods and properties in Cohasset.

That the Act was intended to apply only to matters local to Cohasset is also reflected in the publication provisions incorporated into the Act. The Act incorporates the “publication and penalties” provisions of G.L. c. 88, § 19 which require the publication of rules and regulations in a town-circulated newspaper or, if none is available, a county-circulated newspaper:

no such rule or regulation shall be effective unless it shall have been published in one or more newspapers, *if there be any published in the city or town in which the public landing is located, otherwise in one or more newspapers published in the county in which the city or town is situated.*

G.L. c. 88, § 19 (emphasis supplied). There is no provision in the Act for publication of any by-

law to other towns. Importantly, Cohasset and Scituate are not in the same county; Cohasset is in Norfolk County and Scituate is in Plymouth County. It is reasonable to assume that, if the Legislature intended to authorize Cohasset to adopt by-laws binding upon activities in other communities, it would have been explicit in that unusual grant of authority and require notice to those other communities. The Legislature “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” Whitman v. American Trucking Associations, 531 U.S. 457, 468 (2001).

Town Counsel and counsel for the petitioners contend that the Act impliedly grants Cohasset the authority to regulate outside its borders because, they contend, at the time the Act was adopted in 1953, it was commonly understood the “Cohasset harbor and cove” extended beyond the territorial limits of Cohasset. They point to several maps to buttress this argument, including the “US Coast and Geodetic Survey chart 246 dated March 1948 (25<sup>th</sup> edition) then in effect upon enactment of Chapter 54 of the Acts of 1953” to which the by-law refers. But the Act itself does not refer to any map and we are unable to conclude that the mere existence of certain maps that may label “Cohasset Harbor” in a way that includes Scituate territory is sufficient to establish a legislative intent to grant Cohasset the authority to regulate beyond its borders. We acknowledge the rule of statutory construction that “[w]here a word is not defined in a statute, [courts] give the word its usual and accepted meaning, so long as those meanings are consistent with the statutory purpose.” Seideman v. Newton, 452 Mass. 472, 477-478 (2008), and cases cited. Here, even if we assume the term “Cohasset harbor and cove” was commonly understood to mean territory outside the border of Cohasset, grafting this expansive definition onto the Act would be inconsistent with the Act’s statutory purpose.<sup>10</sup>

To conclude that the Act impliedly granted to Cohasset the right to regulate outside the town borders would be to ignore: (i) the “special” nature of the special legislation; (ii) the stated purpose of the Act; and (iii) the publication provisions incorporated into the Act. There is no legal authority for doing so.

B. The Act Does Not Impliedly Authorize Cohasset to Prohibit All Things Placed in or Upon Tidal Waters.

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<sup>10</sup> While the Town’s own prior by-law definition of “Cohasset Harbor” does not bind how we ought to interpret the use of the same term in a preceding act passed by the Legislature, it is instructive to note that, immediately after the 1953 Act, the Town adopted “Harbor Regulations” in Article 49 which expressly reference the 1953 Act and define the term “Harbor” as :

All that body of water *in Cohasset* lying inside a line projected across the channel in a straight line from White Head Dolphin at Long’s Point to White Rock and by the same course and shall not include the channel extending seaward beyond that point.

Article 49 (emphasis supplied). It seems unlikely based on this roughly contemporaneous text that the Cohasset Town Meeting understood the Act to grant the Town powers to regulate beyond its borders.

Further, it is not reasonable to conclude that the Act impliedly granted Cohasset the power to regulate “anything placed in or upon the tidal waters or affixed thereunder.” By-law, § 169-4(B). The Act expressly grants Cohasset only the power to regulate “the operation and speed of motor boats in Cohasset harbor and cove within the territorial limits of the Commonwealth,” and regulate the “mooring and anchoring of boats, lobster cars and floats therein.” It cannot reasonably be construed that this grant of power brings with it the power to prohibit all things “placed in or upon the tidal waters or affixed thereunder.” Cf. Bd. of Appeals of Hanover v. Hous. Appeals Comm. in Dep’t of Cmty. Affs., 363 Mass. 339, 354 (1973) (Though reference in G.L.c. 40, § 20 to “requirements and regulations” is somewhat ambiguous, Legislature’s clear purpose was to include local zoning by-laws and ordinances.”)

**VII. The Ability to Regulate Outside Cohasset Borders, and to Prohibit All Things in Tidal Waters, Is Not Necessary to Achieve the Express Powers Granted in the Act**

Neither can it be said that the by-law is necessary to achieve the purpose of the Act. See Greater Bos. Real Est. Bd. v. City of Bos., 397 Mass. 870, 876–77 (1986) (when by-law is adopted without express authority from Legislature and is outside scope of municipal authority granted by HRA, by-law is valid only if necessary to effectuate legislative intent embodied in statute relied on as source of municipal power.) As explained above, the Act is focused primarily with reducing congestion in the harbor and cove by allowing Cohasset to regulate the operation and speed of motorboats and regulate the mooring and anchoring of boats, lobster cars and floats. There is nothing to indicate that, to achieve these stated objectives, Cohasset must have the power to regulate outside the boundaries of the Town or prohibit any thing “placed in or upon the tidal waters or affixed thereunder,” By-law, § 169-4(B). See Greater Boston Real Estate Bd. v. Boston, 397 Mass. 870, 878 (1986) (ordinance invalid where it had only “minimal” logical connection to preserving rental housing stock); Cf. Flynn v. City of Cambridge, 383 Mass. 152, 159 (1981) (upholding ordinance regulating removal of rental housing from market because “the power to control removals from the rental housing market is essential to the operation of [the authorizing legislation], and is therefore conferred by implication in the rent control statute”).

**VIII. Because the Regulated Area Includes Area Outside the Municipal Territory of Cohasset the By-law Conflicts with and is Preempted by G.L. c. 90B, § 15 and G.L. c. 91, § 10A**

As noted earlier, the Attorney General must disapprove a by-law if it conflicts with state law. Amherst, 398 Mass. at 796. Municipalities have “considerable latitude” in legislating, and so there must be a “sharp conflict” with state law before a local enactment may be disapproved. Bloom, 363 Mass. at 154. “The legislative intent to preclude local action must be clear.” Id. at 155.

“This intent can be either express or inferred.” St. George Greek Orthodox Cathedral of Western Massachusetts, Inc. v. Fire Dept. of Springfield, 462 Mass. 120, 125-26 (2012). Local action is precluded in essentially three instances, paralleling the three categories of federal preemption: (1) where the “Legislature has made an explicit indication of its intention in this respect”; (2) where “the State legislative purpose can[not] be achieved in the face of a local by-

law on the same subject”; or (3) where “legislation on a subject is so comprehensive that an inference would be justified that the Legislature intended to preempt the field.” Wendell v. Attorney General, 394 Mass. 518, 524 (1985). “The existence of legislation on a subject, however, is not necessarily a bar to the enactment of local ordinances and by-laws exercising powers or functions with respect to the same subject[, if] the State legislative purpose can be achieved in the face of a local ordinance or by-law on the same subject[.]” Bloom, 363 Mass. at 156; see Wendell, 394 Mass. at 527-28 (“It is not the comprehensiveness of legislation alone that makes local regulation inconsistent with a statute. . . . The question . . . is whether the local enactment will clearly frustrate a statutory purpose.”).

We agree with the conclusion of the Deputy General Counsel of EOEEA that the by-law’s attempt to regulate outside the bounds of Cohasset poses an “irreconcilable conflict with general laws empowering each municipality to manage waters within its boundaries.” EOEEA letter, April 12, 2023, pp. 2-3. Specifically, G.L. c. 90B, § 15 authorizes municipalities to regulate vessels on waters within the city or town (and authorizes joint regulation of waters lying in more than one municipality); and G.L. c. 91, § 10A authorizes municipal harbormasters to authorize temporary mooring of floats or rafts held by anchors or bottom moorings “within the territorial jurisdiction of such city or town.” As EOEEA concludes, “each of these sections is intended to, and does, provide each municipality with authority to regulate the use of waters lying within its jurisdiction.” EOEEA letter, p. 3.

If a town is allowed to regulate the waters outside town boundaries, there could be conflicting results where one town allows an activity in an area within its town boundary and the other town prohibits the same activity in the same location. Courts have pointed to such potentially conflicting regulatory results to determine that local by-laws are preempted by state statutes. In Wendell v. Attorney General, 394 Mass. 518 (1985), the statute established a “pesticide board” within the state Department of Food and Agriculture and empowered a subcommittee of the board to “register” a pesticide for general or restricted use if the subcommittee found that the pesticide met specific statutory criteria. Id. at 526, 528-29. In the face of this scheme, “[t]he Wendell by-law contemplate[d] the possibility of local imposition of conditions on the use of a pesticide beyond those established on a Statewide basis under the act.” Id. at 528. The court held that “[a]n additional layer of regulation at the local level, in effect second-guessing the subcommittee, would prevent the achievement of the identifiable statutory purpose of having a centralized, Statewide determination [and] . . . frustrate the purpose of the act.” Wendell, 394 Mass. at 529. See also St. George Greek Orthodox Cathedral of Western Massachusetts, Inc. v. Fire Department of Springfield, 462 Mass. 120, 125-126 (2012) (Springfield fire box ordinance preempted because it created “an additional layer of regulation imposing requirements beyond those contemplated by the [state board].”)

The same principles apply here. The purpose of G.L. c. 90B, § 15 and G.L. c. 91, § 10A is to authorize municipalities to manage activities within their borders under the conditions stated in each statute. Where the Legislature has specifically authorized municipalities to regulate the waters within their respective borders so long as the statutory requirements are met, a by-law from one town that adds an additional layer of regulation to the waters of another town, with potentially conflicting results, cannot stand. St. George, 462 Mass. at 125-126.

**IX. The By-law Impermissibly Interferes with Scituate’s Legislatively Granted Authority to Issue Shellfish Licenses Within Its Borders**

We are also persuaded by EOEEA’s conclusion that the by-law impermissibly interferes with Scituate’s authority, granted by G.L. c. 130, § 57, to issue licenses for shellfish aquaculture, with the approval of and subject to regulations by the Director of Department of Fisheries and Wildlife, within waters under its jurisdiction. EOEEA letter, p. 4. This legislative authorization includes licenses for the “plac[ing] [of] shellfish in or under protective devices affixed directly to the tidal flats or land under coastal waters, such as boxes, trays, pens, bags, or nets” and “grow[ing] shellfish by means of racks, rafts or floats.” G.L. c. 130, § 57. Section 169-4(B) of the by-law seeks to prohibit “the installation of anything placed in or upon tidal waters or affixed to land thereunder” and the use of vessels for commercial purposes. As applied to Scituate waters, the by-law could interfere with shellfish aquaculture activities validly permitted by Scituate, with the approval of the Director, and thus presents a direct conflict with G.L. c. 130, § 57.

**X. The Penalty and Effective Date Provisions of the By-law Also Conflict with State Law**

In addition to the conflicts with state law detailed thus far, the penalty and effective date provisions of the by-law also conflict with other provisions of state law, as explained below.

A. The Penalties Conflict with the Allowable Penalties Incorporated into the Act.

Section 7 of the by-law (violations and penalties) imposes fines of “not less than \$100 and not more than \$200 for violations pursuant to the Town’s General By-laws, Article I, Section 1-6.” § 169-7(A). Further, “[e]ach point of contact, connection, attachment, anchoring or mooring upon the land under tidal waters in violation of this Bylaw may constitute a separate offense.” § 169-7(A). Any obstructions caused by unpermitted installations in the Regulated Area “shall be subject to removal by the Harbormaster without notice,” and the costs of removal and storage of such obstructions will include “all costs and labor” and will be charged to the owner. § 169-7(B)

All these penalty provisions conflict with the allowable penalties referenced in the Act. The Act states that “[G.L. c. 88, § 19] relative to publication and penalties shall apply to such by-laws, rules and regulations made and adopted under the provisions of this chapter.” Act, Section 2A. G.L. c. 88, § 19 (incorporated into the Act) limits fines for violations of any by-laws to \$20.00: “Any person convicted of a violation of any such rule or regulation shall be punished by a fine of not more than twenty dollars.” G.L. c. 88, § 19 does not provide for fines “not less than \$100 and not more than \$200,” or the seizure of equipment and additional costs of removal and storage.

B. The By-Law Also Conflicts with State Law Insofar as It Purports to Make the By-law “Effective Immediately.”

Finally, the by-law’s stated effective date (“This Bylaw shall be applicable upon the vote of Town Meeting”) conflicts with the effective date provisions of G.L. c. 40, § 32. Under G.L. c. 40, § 32, a by-law must first be approved by the Attorney General, and then must be posted or published, before it goes into effect:

Before a by-law or an amendment thereto takes effect it shall also be published in a town bulletin or pamphlet, copies of which shall be posted in at least five public places in the town; and if the town is divided into precincts, copies shall be posted in one or more public places in each precinct of the town; or instead of such publishing in a town bulletin or pamphlet and such posting, copies thereof may be published at least twice at least one week apart in a newspaper of general circulation in the town.

## **XI. Conclusion**

We conclude that the by-law adopted under Article 15 is invalid because the Town was not authorized by the Legislature to enact it. The cited authorizing provision for the by-law, Chapter 54 of the Acts of 1953, does not expressly or impliedly empower Cohasset to regulate beyond the Town's borders, or with the broad scope attempted in the by-law. In addition, the by-law is preempted by G.L. c. 90B, § 15 and G.L. c. 91, § 10A, and conflicts with Scituate's legislatively granted authority to issue shellfish licenses within its borders pursuant to G.L. c. 130, § 57. On these grounds we disapprove the by-law adopted under Article 15.

**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 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.

Very truly yours,  
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