



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

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October 27, 2022

Cathryn J. Kato, Town Clerk
Wellesley Town Hall
525 Washington Street
Wellesley, MA 02482

**Re: Wellesley Annual Town Meeting of March 28, 2022 --- Case # 10496
Warrant Articles # 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, and 43 (Zoning)
Warrant Articles # 9, 28, 29, 30, 31, and 32 (General)**

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Dear Ms. Kato:

Article 40 - Under Article 40 the Town voted to amend its zoning by-laws to allow commercial gun shops by special permit in the Town's Business and Industrial Districts. We approve Article 40 because it does not conflict with state law or the Constitution, including the U.S. Supreme Court's recent decision in New York State Rifle & Pistol Association v. Bruen, 142 S.Ct. 2111 (2022) (overturning a New York state gun licensing statute because of conflict with Second and Fourteenth Amendments). 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). However, as explained below, the Town must carefully apply the by-law amendments so that they do not conflict with state law.¹

We briefly describe the by-law amendments adopted under Article 40; discuss the Attorney General's limited standard of review of town by-laws under G.L. c. 40, § 32; and explain why, based on that standard, we approve Article 40.²

We emphasize that our decision implies no agreement or disagreement with any policy views that may have led to the passage of the by-law amendments. The Attorney General's limited standard of review requires her to approve or disapprove the by-law text based solely on its consistency with

¹ In a decision issued on June 30, 2022, we approved Articles 9, 28, 29, 30, 31, 33, 34, 35, 37, 41, 42, and 43. In a decision issued on July 29, 2022, we approved Articles 32, 36, 38, and 39 and extended our deadline for a decision on Article 40 for 90 days until October 31, 2022.

² We approved similar zoning by-laws in decisions issued to the Towns of Dedham on June 15, 2020 (Case # 9741; Westwood on November 23, 2021 (Case # 10145); and Brookline on June 23, 2022 (Case # 10476).

state law and not on any policy views she may have on the subject matter or wisdom of the by-law text. Amherst, 398 Mass. at 795-96, 798-99.

I. Description of Article 40

Article 40 amends Sections 11 and 13 of the Town’s zoning by-laws to add commercial gun shops as a use allowed by special permit in the Town’s Business and Industrial Districts, subject to certain application, use and operational requirements described below. Gun shops are prohibited in the Town’s remaining Districts. Article 40 adds to Section 1B a definition for “Commercial Gun Shop” as follows:

Commercial Gun Shop – Any commercial establishment engaging in whole or in part in the business of a Gunsmith, or the manufacture, sale, or lease to the public of any Weapon, Machine Gun, Ammunition, Bump Stock, Large Capacity Feeding Device, Stun Gun, or Trigger Crank, as such terms are defined in G.L. c. 140, § 121.

Article 40 also amends the Town’s zoning by-laws to add a new Section 25.B.7, “Commercial Gun Shops,” that imposes special permit application requirements and various location, lighting, screening, and signage requirements on gun shops in the Town. In addition, Section 25.B.7 imposes operational requirements on gun shops, including (1) hours of operation; (2) security plans; (3) limiting access by minors; (4) videotaping the parking areas, building entrances and exits, and sales transactions; (5) and prohibiting convicted felons from operating or working at gun shops.

The Special Permit Granting Authority (SPGA) may grant, or grant with conditions, a special permit for a gun shop if the SPGA determines that the application meets all the requirements of Section 25.B. To grant a special permit the SPGA must find that the gun shop:

- (1) Meets all other applicable requirements of the Zoning Bylaw and the permitting requirements of all applicable agencies of the Commonwealth of Massachusetts and the Town, and will otherwise comply with all applicable state and local laws and regulations;
- (2) Is designed to minimize any adverse visual or economic impacts on abutters and other parties in interest;
- (3) Provides adequate security measures to ensure that no individual participants will pose a threat to the health or safety of other individuals; and
- (4) Adequately addresses issues of vehicular and pedestrian traffic, circulation, parking and queuing, especially during peak periods at the Commercial Gun Shop.

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Section 25.B.5 (c) (ii).

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

Our review of Article 40 is governed by G.L. c. 40, § 32 and c. 40A, § 5. 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.

Article 40, as an amendment to the Town’s zoning by-laws, must be accorded deference. W.R. Grace & Co. v. Cambridge City Council, 56 Mass. App. Ct. 559, 566 (2002) (“With respect to the exercise of their powers under the Zoning Act, we accord municipalities deference as to their legislative choices and their exercise of discretion regarding zoning orders.”). When reviewing zoning by-laws for consistency with the Constitution or laws of the Commonwealth, the Attorney General’s standard of review is equivalent to that of a court. “[T]he proper focus of review of a zoning enactment is whether it violates State law or constitutional provisions, is arbitrary or unreasonable, or is substantially unrelated to the public health, safety or general welfare.” Durand v. IDC Bellingham, LLC, 440 Mass. 45, 57 (2003). “If the reasonableness of a zoning bylaw is even ‘fairly debatable, the judgment of the local legislative body responsible for the enactment must be sustained.’” Id. at 51 (quoting Crall v. City of Leominster, 362 Mass. 95, 101 (1972)). However, a municipality has no power to adopt a zoning 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 25.B.7 (d)’s Location Requirements May Merit a Future Clarifying Amendment

Section 25.B.7 (d) (i) imposes location requirements on commercial gun shops. Section 25.B.7 (d) (i) (1) prohibits gun shops from locating within 500 feet of: (1) public or private schools; (2) childcare facilities; and (3) “[a]ny establishment catering to or providing services primarily intended for minors, as determined by the Special Permit Granting Authority.”³

The by-law does not define the phrase “establishment catering to or providing services primarily intended for minors.” Rather, the by-law authorizes the SPGA to make that determination during its review of the special permit application. However, without standards and criteria to guide the SPGA in the decision-making process, the by-law is susceptible to arbitrary or unequal enforcement. See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225-26 (1990) (no system of prior restraint may place “unbridled discretion in the hands of a government official or agency.”) The Town should consult with Town Counsel to determine whether a future amendment is needed to address this issue.

³ We note that the by-law’s buffer zone requirements for gun shops are similar to the buffer zone requirements imposed on other intensive land uses in the Town. For example, the Town imposes a buffer requirement of 350 feet between an adult entertainment use and a school, a park, a religious use, and the boundaries of a residential zoning district. Sections 6.3.B .5 (b) and (c). Registered marijuana dispensaries are prohibited within 500 feet of schools, childcare facilities and other places that cater to minors. Section 6.3.B.6 (d) (i). It is unclear what impact the buffer zone requirements, combined with other factors, may have on the ability of a commercial gun shop to operate within the Town. However, the Attorney General’s review of the by-law does not and cannot include the kind of factual inquiry required to make that determination.

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IV. The Town Must Apply the By-law Consistent with State Laws Applicable to Firearms Dealers

There are numerous state laws and regulations governing the safety of gun shop premises and the licensing requirements for gun dealers. Those laws include (but are not limited to) the requirements in G.L. c. 140, § 123 (imposing conditions on firearm sales licenses issued under G.L. c. 140, § 122), and 940 Code Mass. Reg. 16.00 et seq. (imposing conditions on the sale of handguns in Massachusetts). The Town should consult closely with Town Counsel to ensure that the by-law amendments adopted under Article 40 are applied consistent with those state laws.

V. Article 40 Does Not Conflict with the Court’s Holding in New York State Rifle & Pistol Association v. Bruen

We have analyzed the question whether Article 40 is implicated by the United States Supreme Court’s decision in New York State Rifle & Pistol Association v. Bruen, 142 S.Ct. 2111 (2022). In Bruen, the Court held that New York’s handgun licensing law requiring individuals to show “proper cause” before they could be licensed to carry a concealed weapon in most public places violated the Second and Fourteenth Amendments of the United States Constitution. Bruen, 142 S.Ct. at 2156. Justice Kavanaugh’s concurring opinion, joined by Chief Justice Roberts, also reaffirmed the Court’s prior holdings in District of Columbia v. Heller, 554 U.S. 570, 626-27 & n.26 (2008), and McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (plurality opinion), that certain gun regulations, including those that: (1) prohibit the possession of firearms by felons and the mentally ill; (2) forbid the carrying of firearms in sensitive places such as schools and government buildings; and (3) impose conditions and qualifications on the commercial sale of arms, are presumptively lawful. Id. at 2162.

Because Bruen involved the constitutionality of a handgun licensing law and did not limit a municipality’s zoning power to regulate the siting and operation of gun dealer businesses, the Bruen Court’s holding does not provide grounds for this Office to disapprove Article 40. The Town should consult with Town Counsel with any questions on the scope of the Court’s holding in Bruen.⁴

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⁴ The Town may also wish to consult the advisory issued by the AGO and the Executive Office of Public Safety and Security that includes guidance on how to apply the state’s firearms licensing laws in light of the Bruen decision. The advisory may be found here: [download \(mass.gov\)](#). The Town should consult with Town Counsel with any questions on this advisory.

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,

MAURA HEALEY
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