



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

CENTRAL MASSACHUSETTS DIVISION
10 MECHANIC STREET, SUITE 301
WORCESTER, MA 01608

MAURA HEALEY
ATTORNEY GENERAL

(508) 792-7600
(508) 795-1991 fax
www.mass.gov/ago

October 31, 2022

Colette M. Williams, Town Clerk
Town of Brewster
2198 Main Street
Brewster, MA 02631

**Re: Brewster Annual Town Meeting of May 14, 2022 -- Case # 10575
Warrant Article # 18 (General)**

Dear Ms. Williams:

Under Article 18 the Town voted to amend the general by-laws to add a new Chapter 98, “Hunting in the Punkhorn Parklands” that prohibits hunting in the Punkhorn Parklands (“Punkhorns”) except for bow hunting during the three-week period beginning on the first Monday in December of each year. In addition, the new Chapter 98 prohibits the discharge of firearms in the Punkhorns.

We approve Article 18 because it is consistent with G.L. c. 131, § 59, that prohibits hunting on “any land owned or leased by the commonwealth or any political subdivision thereof” *unless* “the authorities or persons having the control and charge of such reservations, parks, commons or other lands” authorizes hunting on such land during the applicable open season. G.L. c. 31, § 59.

In this decision, we summarize the by-law adopted under Article 18; discuss the Attorney General’s standard of review of town by-laws under G.L. c. 40, § 32; and then explain why, based on our standard of review, we approve Article 18.¹

I. Summary of Article 18

Under Article 18, a citizen petitioned article, the Town voted to amend the general by-laws to add a new Chapter 98, “Hunting in the Punkhorn Parklands.” The new Chapter 98 prohibits several activities within the Punkhorns including: (1) the discharge of any gun; (2) the

¹ On August 12, 2022, by agreement with Town Counsel pursuant to G.L. c. 40, § 32, we extended the deadline for our review of Article 18 for 45-days until October 8, 2022. On October 3, 2022, by agreement with Town Counsel pursuant to G.L. c. 40, § 32, we extended the deadline for our review of Article 18 for an additional 30-days until November 7, 2022.

release of an arrow from a bow; (3) hunting; (4) trapping; (5) poisoning; and (6) fireworks. In addition, as an exception to the hunting prohibition, Chapter 98 authorizes bow hunting during a three-week period beginning on the first Monday in December of each year, as follows:

No person shall discharge any gun, including paint ball guns, fowling piece, pistol, or firearm or release an arrow from a bow or hunt or trap or poison or set fire to any material known as fireworks, or other combustible matter, within the Town-owned land known as the Punkhorn Parklands; provided however, this section shall not apply to any person abating nuisance or in the exercise of duty required by law: provided further that bow hunting only shall only be permitted during a three-week period beginning on the first Monday in December of each year.

II. Attorney General’s Standard of Review and General Preemption Principles

Our review of Article 18 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 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.”) In order 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. 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. Moreover, where the Legislature intended to preempt the field on a topic, a municipal by-law on that topic is invalid and must be disapproved. Town of Wendell v. Attorney General, 394 Mass. 518, 524 (1985).

In determining whether a by-law is inconsistent with a state statute, the “question is not whether the Legislature intended to grant authority to municipalities to act...but rather whether the Legislature intended to deny [a municipality] the right to legislate on the subject [in question].” Town of Wendell, 394 Mass. at 524 (1985). “This intent can be either express or inferred.” St. George Greek Orthodox Cathedral of Western Mass. v. Springfield, 462 Mass. 120, 125-26 (2012). Local action is precluded in three instances: (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”; and (3) where “legislation on a subject is so comprehensive that an inference would be justified that the Legislature intended to preempt the field.” Town of Wendell, 394 Mass. at 524. “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 v. Worcester, 363 Mass. 136, 156 (1973); see Town of 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.”).

III. Municipal Power to Regulate Hunting and the Discharge of Firearms

Article 18 prohibits both hunting (with allowance for bow hunting during a limited time period in December) and the discharge of firearms. Because a municipality's power to regulate hunting differs from its power to regulate the discharge of firearms, it is important to distinguish between the two.

A. Towns Cannot Regulate Hunting Except as Provided in Chapter 131

The activity of hunting is comprehensively regulated by General Laws Chapter 131 and related statutes and regulations that preempt the field. Chapter 131 imposes "carefully guarded conditions by which one may hunt in the Commonwealth safely, provisions by which one is licensed, and provisions designed to preserve and maintain the wildlife and natural resources of the Commonwealth." Amherst, 398 Mass. at 797. Chapter 131 grants the Director of the Department of Fish and Game/Division of Fisheries and Wildlife (DFW Director) wide-ranging authority over hunting and trapping in the Commonwealth (see generally G.L. c. 131, § 4, and 321 CMR 3.01 *et seq.*), and further grants the DFW authority to adopt comprehensive regulations governing hunting and trapping, which are embodied in 321 CMR 3.00 *et seq.* Pursuant to G.L. c. 131, § 5, "Except as provided in rules and regulations made under authority of this section, and except as otherwise provided in [Chapter 131], a person shall not fish, hunt or trap ...".

Chapter 131 does not expressly preempt local regulation of hunting. However, the broad scope of Chapter 131, and the extensive powers granted to the DFW Director to regulate hunting, indicate a legislative intent that Chapter 131 occupies the field of hunting regulation. Towns are therefore preempted from regulating hunting except as expressly provided in Chapter 131. See Boston Edison Co. v. Town of Bedford, 444 Mass. 775 (2005) (town by-law imposing fines for failure to remove utility poles preempted by the comprehensive, uniform state regulation of utilities in G.L. c. 164); Wendell, 394 Mass. at 518 (town by-law regulating the use of pesticides in town frustrates the statutory purpose of centralized regulation of pesticide use).

Because of the Legislature's comprehensive grant of authority to the DFW to be the exclusive, state-wide regulator of hunting in the Commonwealth, towns are preempted from imposing by-law requirements which are inconsistent with G.L. c. 131 and related statutes and regulations. Thus, towns may only impose their local hunting requirements in those two categories expressly provided in Chapter 131: municipally owned lands (see G.L. c. 131, § 59); and Great Ponds not exceeding 500 acres in size (see G.L. c. 131, § 45).

B. Towns May Regulate the Discharge of Firearms Within Their Borders

By contrast, towns are allowed to regulate the discharge of firearms within their borders. See Brown v. Carlisle, 336 Mass. 147, 150-151 (1957) (upholding a firearm discharge by-law because "[t]he enumeration of [Chapter 131 and other] statutes demonstrates that the State has not excluded the type of legislation here undertaken by the defendant town...*We are not confronted with an attempt to regulate hunting....*" (emphasis supplied). See also Amherst, 398 Mass. at 797-798 (rejecting argument that Amherst's firearm discharge by-law is preempted by

Chapter 131 because “the Amherst by-law in no way frustrates those sections” of Chapter 131 which “concern the safe use of certain firearms.”).

IV. Article 18 is Consistent with General Laws Chapter 131, § 59 that Prohibits Hunting on Town-Owned Land Unless the Town Allows It

We approve Article 18 because it is consistent with the statutory prohibition of hunting on town-owned land without town authorization. General Laws Chapter 131, Section 59 provides that a person shall not hunt on “any land owned or leased by the commonwealth or any political subdivision thereof” except that the persons having control and charge of such lands may “permit the hunting, within said boundaries during the applicable open season of any birds or mammals,” as follows (with emphasis added):

A person shall not hunt, or in any manner molest or destroy, any bird or mammal within the boundaries of any reservation, park or common, or any land owned or leased by the commonwealth or any political subdivision thereof, or any land held in trust for public use; except that the authorities or persons having the control and charge of such reservations, parks, commons or other lands, may, with such limitations as they deem advisable, permit the hunting, within said boundaries during the applicable open season of any birds or mammals. The authorities or persons having the control and charge of such reservations, parks, commons or land owned or leased or held for public use, the director of law enforcement, his deputy directors of enforcement, chiefs of enforcement, deputy chiefs of enforcement, environmental police officers, deputy environmental police officers, wardens and members of the state police in areas over which they have jurisdiction and all officers qualified to serve criminal process shall enforce this section.

This section shall not apply to state forests acquired under section thirty or section thirty-three of chapter one hundred and thirty-two or any other provision of law, or to state parks and reservations under the control of the division of forests and parks of the department of environmental management. Nothing in this section shall be deemed to prohibit any agency of the commonwealth or any political subdivision of the commonwealth from permitting the hunting, during the applicable open season, in any area owned or leased by it, of any bird or mammal, or from entering into agreements with the director for the establishment of wildlife management areas.

Because Article 18 is consistent with Chapter 131 that authorizes towns to determine whether to allow hunting on town-owned property, we approve it.

V. Article 18 Must be Applied Consistent with General Laws Chapter 131, § 45 that Requires Great Ponds to be Accessible for Hunting

General Laws Chapter 131, Section 45 requires that a Great Pond “shall be public for the purpose of hunting or boating thereon.” Further, G.L. c. 131, § 45 provides that “[a]ll persons shall be allowed reasonable means of access to such ponds for the purposes aforesaid,” which includes hunting. General Laws Chapter 131, Section 45, provides in relevant part as follows, with emphasis added:

Except as otherwise provided in this section and elsewhere in this chapter, every great pond not actively being used as a source of water supply of any town, water supply or fire district or public institution, and not subject to the provisions of section one hundred

and sixty of chapter one hundred and eleven, shall be public for the purpose of hunting or boating thereon and shall, notwithstanding the provisions of any special law relating to fisheries in any particular place, be open to all inhabitants of the commonwealth for fishing purposes; provided that any city or town in which the whole or any portion of any great pond not exceeding five hundred acres in extent is situated may, as to so much thereof, as is located within its boundaries, make and enforce rules and regulations relative to hunting, fishing and boating thereon....Any such rules or regulations shall, to the extent that they authorize hunting or fishing or, both, be subject to the approval of the director, and to the extent that they authorize any other use thereof, be subject to the approval of the commissioner of environmental protection or to the extent that they impose restrictions upon the speed limit, a limitation on engine horsepower, a prohibition of the use of internal combustion engines, a ban on water skiing and other high speed uses, and a limitation of such uses to certain areas and certain times, be subject to the approval of the director of law enforcement. All persons shall be allowed reasonable means of access to such ponds for the purposes aforesaid.

General Laws Chapter 131, Section 45 defines a “Great Pond” as: “a natural pond the area of which is twenty acres or more.” According to the Massachusetts Department of Environmental Protection, there are several Great Ponds located in Brewster. See <https://www.mass.gov/doc/massachusetts-great-ponds-list/download>. Moreover, it appears that some of these Great Ponds are located in or near the Punkhorns, including Seymour Pond, Upper Mill Pond and Walkers Pond. See Northern Punkhorn Trail Map available on the Town’s website (https://brewster-ma.gov/files/Punkhorn_North_Section_Trail_Map.pdf).² The Town must ensure that Article 18 is applied consistent with G.L. c. 131, § 45. Thus, the Town cannot apply Article 18’s hunting prohibition to any Great Pond located in the Punkhorns.³ Further, to the extent the Punkhorns abut a Great Pond, the Town cannot apply the by-law in such a way as to impede access to Great Ponds for the statutorily protected activities of hunting, fishing, and boating, as established by G.L. c. 131, § 45. The Town should consult with Town Counsel with any questions on this issue.

²See also DEP Great Pond Information as follows: (1) Walkers Pond: <https://www.mass.gov/doc/walkerspond/download> (2) Seymour Pond: <https://www.mass.gov/doc/dfwseymopdf/download>; and (3) Upper Mill Pond: <https://www.mass.gov/doc/dfwwalkupdf/download>.

³ We note that G.L. c. 131, § 45 grants to certain categories of cities and town the right to make rules and regulations regarding hunting on great ponds not exceeding five hundred acres, but it requires that such rules and regulations be approved by the Director. See Pearson v. Plymouth, 44 Mass. App. Ct. 741, 744 (1998) (“All such [great pond] rules and regulations are subject to the approvals of various State administrative agencies having special competence and responsibility in the particular subject, e.g., ...rules and regulations authorizing hunting and fishing are subject to the approval of the director of fisheries and wildlife.”)

VI. Conclusion

Because the by-law adopted under Article 18 is consistent with G.L. c. 131, § 59, we approve it. However, the Town is not authorized to prohibit hunting on Great Ponds and the by-law cannot apply to any Great Ponds in the Town, except as outlined in G.L. c. 131, § 45.

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
ATTORNEY GENERAL

Margaret J. Hurley

by: Margaret J. Hurley, Assistant Attorney General
Chief, Central Massachusetts Division
Director, Municipal Law Unit
Ten Mechanic Street, Suite 301
Worcester, MA 01608
(508) 792-7600 x 4402

cc: Town Counsel Gregg J. Corbo