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July 19, 2021

Benjamin Kaufman, Town Clerk
Town of Brookline
333 Washington Street
Brookline, MA 02445

**Re: Brookline Special Town Meeting of November 17, 2020 -- Case # 10029
Warrant Articles # 7, 23, and 25 (Zoning)
Warrant Articles # 8, 14, 17, 20, 21, 22, 24, 28, 29, and 30 (General)**

Dear Mr. Kaufman:

Article 14 - We approve Article 14 from the November 17, 2020 Brookline Special Town Meeting that prohibits the sale of tobacco products to anyone born after January 1, 2000.¹ This letter briefly describes the by-law; discusses the Attorney General’s limited standard of review of town by-laws under G.L. c. 40, § 32; and then explains why, governed as we are by that standard, we are not persuaded by the arguments made to us that the by-law should be disapproved. Our analysis is substantially influenced by the Massachusetts Appeals Court decision in RYO Cigar Ass’n v. Boston Public Health Com’n, 79 Mass. App. Ct. 822, 832, review denied, 461 Mass. 1102 (2011), reaffirming the principle that “municipal regulation of tobacco sales in Massachusetts is a well-recognized and proper exercise of local power.”

As with our review of all by-laws, we emphasize that our approval does not imply any agreement or disagreement with the policy views that led to the passage of the by-law. The Attorney General’s limited standard of review requires her to approve or disapprove by-laws based solely on their consistency with state and federal 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). The state constitution’s Home Rule Amendment, as ratified by the voters themselves in 1966, confers broad powers on individual cities and towns to legislate in areas that previously were under the Legislature’s exclusive control. Towns have used these home-rule powers to prohibit, within their borders, certain commercial activities that state statutes generally recognize as lawful and that are widely accepted in the remainder of the Commonwealth—for

¹ In a decision issued on April 26, 2021, we approved Articles 7, 8, 17, 20, 22, 23, 24, 25, 28, 29 and 30. Also on April 26, 2021, by agreement with Town Counsel pursuant to G.L. c. 40, § 32, as amended by Chapter 299 of the Acts of 2000, we extended our deadline for review of Articles 14 and 21 for 90-days until July 19, 2021. In a decision issued on July 14, 2021, we approved Article 21.

example, coin-operated amusement devices, or self-service gas stations. Amherst, 398 Mass. at 798 n.8. The Supreme Judicial Court has upheld such by-laws and has overturned the Attorney General’s disapproval of them where they did not create any specific conflict with state law. Amherst, id.; see also Milton v. Attorney General, 372 Mass. 694, 695-96 (1977). The Attorney General thus has no power to disapprove a by-law merely because a town, in comparison to the rest of the state, has chosen a novel, unusual, or experimental approach to a perceived problem.

I. Description of Article 14

In Article 14, the Town voted to make several changes to Article 8.23, “Tobacco Control,” that prohibit the sale of tobacco or e-cigarette products to anyone born after January 1, 2000. Article 14 also amends the signage requirements for establishments selling tobacco or e-cigarette products to include a requirement to post a sign stating that the sale of tobacco products is prohibited to anyone born after January 1, 2000.

Specifically, Article 14 amends Section 8.23.5, “Sale and Distribution of Tobacco Products,” in relevant part as follows (new text in **bold** and underline and deleted text in strike-through):

D. Prohibition of Sales ~~to Minors~~ - No person, firm, corporation, establishment, or agency shall sell tobacco or e-cigarette products to ~~a minor~~ **anyone born after 1/1/2000.**

* * *

H. Required Signage

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(ii) The owner or other person in charge of an entity authorized to sell tobacco or e-cigarette products at retail shall conspicuously post a sign stating that “The sale of tobacco or e-cigarette products to someone ~~under the minimum legal sales age of 21 years of age~~ **born after 1/1/2000** is prohibited.” The notice shall be no smaller than 8.5 inches by 11 inches and shall be posted conspicuously in the retail establishment in such a manner so that they may be readily seen by a person standing at or approaching the cash register. The notice shall directly face the purchaser and shall not be obstructed from view or placed at a height of less than four (4) feet or greater than eight (8) feet from the floor.

According to the sponsors of Article 14, the intent of the amendments is to incrementally increase the number of people who are unable to purchase tobacco products in Brookline until, eventually, the prohibition applies to everyone.²

² “Tobacco Free Generation: Brookline Passes New Restriction Aiming to Phase out Tobacco Sales to Young Smokers,” *The Boston Globe*, November 24, 2020 (quoting Kate Silbaugh, co-petitioner). Although Brookline is the first Massachusetts municipality to amend its by-laws to achieve the goal of a “Tobacco Free Generation,” it is a world-wide movement. Id. See also “Tobacco Free Generations,” World Health

II. The 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, 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, in order 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) (emphasis added). “The legislative intent to preclude local action must be clear.” Id. at 155.

III. Challenge to the Validity of Article 14

We have received numerous letters from organizations raising various challenges to the validity of Article 14.³ Although, as discussed below, we are unable to agree that any of these arguments furnishes a basis for disapproval of the by-law, we greatly appreciate these submissions, which have substantially assisted us in our review. We also appreciate the numerous letters from organizations offering legal arguments in support of Article 14.⁴ These letters have helped inform our understanding of the issues raised by the by-law.

Towns may regulate tobacco sales as a proper exercise of local power. RYO Cigar Ass’n, 79 Mass. App. Ct. at 832. Moreover, we do not find that Article 14 conflicts with Chapter 157 of the Acts of 2018, “An Act Protecting Youth from the Health Risks of Tobacco and Nicotine Addiction.” (the Act). Thus, as explained in more detail below, and based on our standard of review, we conclude that Article 14’s ban on the sale of tobacco products to those born after January 1, 2000 is within the Town’s authority to safeguard public health.

During the course of our review, we have considered the argument raised by the opponents that the by-law is unlawful because it conflicts with the Act. We do not agree. The Act amends several state laws in order to reduce underage access to and use of tobacco products. Section 9 of

Organization-Europe, https://www.euro.who.int/_data/assets/pdf_file/0008/343376/20170428_WHO-TobaccoFreeGeneration-DRAFT09.pdf

³ We appreciate the letters we received opposing Article 14 from, among others, Jonathan Shaer on behalf of the New England Convenience Store and Energy Marketers Association and Elias Audy on behalf of the Business Retail Association of Brookline.

⁴ We also appreciate the letters we received in favor of Article 14 from Mark Gottlieb and Chris Banthin of Northeastern University School of Law’s Public Health Advocacy Institute and Chris Bostic on behalf of Action on Smoking and Health.

the Act amends G.L. c. 270, § 6 to increase the minimum age for purchase of tobacco products to twenty-one years old.⁵ Section 22 provides as follows:

This act shall preempt, supersede or nullify any inconsistent, contrary or conflicting state or local law relating to the minimum sales age to purchase tobacco products; provided, that this act shall neither preempt, supersede nor nullify any inconsistent, contrary or conflicting local law in effect on December 30, 2018 that prohibits the sale of tobacco products to persons under the age of 19, 20, or 21 as applied to persons who attained the age of 18 before December 31, 2018. This act shall not otherwise preempt the authority of any city or town to enact any ordinance, by-law or any fire, health or safety regulation that limits or prohibits the purchase of tobacco products.

While it is true that the statute expressly preempts “any *inconsistent, contrary or conflicting* state or local law relating to the *minimum sales age* to purchase tobacco products” (Section 22, emphasis supplied), the preemptive effect of the statute is limited to local laws that would *allow* tobacco sales to those under the age of twenty-one (except in the limited circumstances listed in Section 22). The by-law amendments adopted under Article 14 are not inconsistent with these statutory provisions. The statute and the by-law both aim for the same goal of barring the sale of tobacco products to those under the age of twenty-one. The by-law simply goes further than the statute and imposes an incremental increase in the age limit such that, eventually, no one will be able to purchase tobacco products in the Town. Section 22 of the Act expressly allows for such supplemental regulation: “This act shall not otherwise preempt the authority of any city or town to enact any ordinance, by-law or any fire, health or safety regulation that limits or prohibits the purchase of tobacco products.”⁶ We thus determine that the by-law amendments adopted under Article 14 are valid because they complement the goals of the Act and do not interfere with the accomplishment of those goals. See Lovequist v. Conservation Comm’n of Dennis, 379 Mass. 7, 14-15 (1979) (“Since the language of the by-law parallels that of the statute, it appears plain that [the by-law] furthers rather than derogates from the legislative purpose embodied in the [Act].”). See also Bloom v. Worcester, 363 Mass.136, 156 (1973) (“If the State legislative purpose can be achieved in the face of a local ordinance or by-law on the same subject, the local ordinance or by-law is not inconsistent with the State legislation, unless the Legislature has expressly forbidden the adoption of local ordinances and by-laws on that subject.”)

The court’s decision in Tri-Nel Mgt., Inc. v. Board of Health of Barnstable, 433 Mass. 217 (2001) illustrates this principle. In Tri-Nel the opponents challenged a board of health regulation prohibiting smoking in food service establishments, lounges, and bars in the Town. Among other arguments they asserted that the regulation conflicted with G. L. c. 270, s. 22, which prohibits smoking in certain restaurants and other public places. The court rejected the assertion that the BOH regulation’s broader scope presented a conflict with the statute: “[The statute] sets forth minimum statewide restrictions on smoking in restaurants to protect and accommodate the

⁵ Section 6 previously prohibited the sale of tobacco products to any person under eighteen years of age.

⁶ Further, Section 22 specifically provides that it does not preempt pre-existing laws in effect as of December 30, 2018 that ban the sale of tobacco products to people under the age of 21. Thus, it appears that the intent of the Act is to leave in place more restrictive bans and only preempt less restrictive bans.

nonsmoking public. The board's ban placing additional restrictions on smoking, furthers, rather than frustrates, this intent. Accordingly, the board's regulation does not conflict with [the statute].” Id. at 224-225.

Our determination is further informed by the broad public health power of municipalities to regulate tobacco products. Massachusetts courts have consistently recognized that the “municipal regulation of tobacco sales in Massachusetts is a well-recognized and proper exercise of local power.” RYO Cigar Ass’n, 79 Mass. App. Ct. at 832 (Public Health Commission regulation banning the sale of cigar wraps was a permissible exercise of the Commission’s authority to safeguard public health and was rationally related to the permissible purpose of protecting residents from the harmful effects of tobacco use). Preventing and deterring tobacco use is a legitimate municipal goal. Id. at 828. On several occasions, the Supreme Judicial Court has “recognized the ill effects of tobacco use, particularly when it involves minors, as a legitimate municipal health concern justifying additional municipal regulation of tobacco products.” Tri-Nel Mgmt., 433 Mass. at 220. The Act cited by the opponents specifically preserves this municipal regulatory power: “This act shall not otherwise preempt the authority of any city or town to enact any ordinance, by-law or any fire, health or safety regulation that limits or prohibits the purchase of tobacco products.” The Town’s by-law banning the sale of tobacco products to those born after January 1, 2000 is within the Town’s authority to safeguard public health.

IV. Conclusion

Because we find no conflict between Article 14 and the Constitution or laws of the Commonwealth, we approve Article 14.

Note: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the Town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were approved by the Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,

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