



THE COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL

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September 7, 2022

Lucille A. Dalton, Town Clerk
Town of Southampton
210 College Hwy, Suite 2
Southampton, MA 01073

**Re: Southampton Annual Town Meeting of June 7, 2022 -- Case # 10637
Warrant Articles # 1, 2, 3, 4, 5, 6 and 7 (General)**

Dear Ms. Dalton:

Articles 1, 2, 3, 4, 5, 6 and 7 - We approve Articles 1, 2, 3, 4, 5, 6 and 7 from the June 7, 2022 Southampton Annual Town Meeting. Our comments regarding Article 5 are provided below.

Article 5 - Under Article 5 the Town voted to amend the general by-laws by deleting Article 15, "Soliciting Prohibited," in its entirety and inserting a new Article 15, "Soliciting and Canvassing." The purpose of the new Article 15 is to establish registration and operation requirements for persons intending to solicit or canvas door-to-door in the Town. Section 1. The by-law requires a permit from the Chief of Police prior to engaging in any soliciting or canvassing. Section 2. The by-law defines several terms including "Soliciting" and "Canvassing." Section 3. The by-law also provides several exceptions from the by-law, including "any individual who is acting as part of, at the direction of, or in support of any religious, charitable or political entity, group, organization or cause." Section 4.

Section 5, "Application for Permit," requires a person to submit a permit application in a form determined by the Chief of Police and to pay the required application fee. The by-law requires certain application disclosures and provides that the Chief of Police or designee, will either issue a permit or provide a written denial within 10 days of submission of the application. Sections 5 and 6. The new by-law also includes restrictions on soliciting or canvassing including allowable hours and information about the "do not solicit" list. Sections 7 and 8. Lastly, the by-law provides for revocation and suspension of a permit to solicit or canvass under certain circumstances, an appeal process and a section related to violations and penalties. Sections 10-13.

I. Overview of Applicable Law

The extent of a municipality's authority to regulate door-to-door solicitation and canvassing has been the subject of considerable litigation. Solicitation, whether for commercial or noncommercial purposes, is an activity that is entitled to some measure of protection under the First Amendment to the U.S. Constitution, as applied to the states through the Fourteenth Amendment. See Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) (commercial speech entitled to First Amendment protection); Riley v. Nat'l Fed'n for the Blind, 487 U.S. 781 (1988) (regulations of professional solicitation subject to First Amendment scrutiny); Benefit v. City of Cambridge, 424 Mass. 918, 922 (1997) ("soliciting contributions is expressive activity that is protected by the First Amendment"). By-laws that are limited only to solicitation for commercial purposes are more likely to withstand a constitutional challenge. See Watchtower Bible & Tract Society, Inc. v. Village of Stratton, 536 U.S. 150, 165 (2002) ("Had this provision been construed to apply only to commercial activities and the solicitation of funds, arguably the ordinance would have been tailored to the Village's interest in protecting the privacy of its residents and preventing fraud.")

Because solicitation and canvassing are First Amendment activities, any permitting requirement constitutes a prior restraint. See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 226 (1990) (requiring a permit or license to engage in First Amendment activity is a form of prior restraint). The Supreme Court has held that any permitting system for solicitation, which impinges on First Amendment activity, must set a definite time limit within which the decision maker must either issue the permit or go to court to enjoin the activity. "[A] prior restraint that fails to place limits on the time within which the decision maker must issue the license is impermissible." FW/PBS, Inc. 493 U.S. at 226. Southampton's by-law complies with this requirement by establishing a deadline for the Chief of Police's decision (The Chief of Police "shall either issue a permit...or provide a written denial of the application within 10 days of the submission of the application."). However, in light of the above noted case law, the Town should consult closely with Town Counsel when applying the by-law.

II. Comments on the New Article 15

A. Section 7 – Restrictions and Limitations on Soliciting and Canvassing

Section 7 (A) allows licensed solicitors or canvassers to solicit only between "the hours of 9:00 a.m. 9:00 p.m." In applying this section of the by-law, the Town should be mindful that such a restriction on the hours of solicitation and canvassing may be inconsistent with the holding in Massachusetts Fair Share, Inc. v. Rockland, 610 F. Supp. 682 (D. Mass. 1985). In Massachusetts Fair Share, the court held that by-laws in eighteen towns limiting solicitation to certain daylight hours were unconstitutional. Among the time restrictions considered by the court were one community's provision that limited solicitation to the hours of 9:00 a.m. to 5:00 p.m. and other communities' provisions that prohibited solicitation and canvassing after "sunset" and "daylight hours." The court held that the legitimate municipal interests of reducing crime and public annoyance "can be better served by measures less intrusive than such overly restrictive time limitations." Massachusetts Fair Share, 610 F. Supp. at 689. The Town should discuss this issue in more detail with Town Counsel to ensure that any limitations placed upon the hours that

solicitation and canvassing may occur do not “impermissibly infring[e] upon the first amendment rights” of solicitors. Id. at 689.

B. Section 10 – Suspension and Revocation of Permit

Section 10 (A) authorizes the Chief of Police or designee to revoke or suspend a permit on several grounds including if the permit holder has become a threat or risk to public safety or if the permit holder submitted fraudulent information on the application. However, the by-law is silent as to any due process considerations, such as notice and the right to a hearing before revocation or suspension. In addition, the by-law is silent as to any standards or criteria that will guide the Chief of Police in determining if a permit should be revoked or suspended. This absence of standards or criteria risks potential arbitrary and discriminatory enforcement of the by-law. See Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 363-364 (1973) (“Such vagueness would permit untrammelled [administrative] discretion and arbitrary and capricious decisions...”). The Town should consult with Town Counsel to determine if a future amendment to the by-law is needed to address these issues.

C. Section 13 – Violations and Penalties

Section 13 authorizes the by-law to be enforced through non-criminal disposition under G.L. c. 40, § 21D and imposes a fine for a violation “of up to \$300 as set forth in the Non-Criminal Violation Bylaw, Article XLII.” In addition, Section 13 imposes a fine for the failure to wear or display the provided permit of “up to \$100 per individual and up to \$100 per primary employing entity per violation per day.” However, neither the by-law nor Article XLII, “Non-Criminal Violation Bylaw” establishes a specific penalty for a violation of the by-law.

In order to use G.L. c. 40, § 21D to enforce a by-law violation, the by-law must meet several requirements, including the requirement that the violation be subject to a specific penalty. See G.L. c. 40, § 21D (“Any...town may by...by-law not inconsistent with this section provide for non-criminal disposition of violations of any...by-law or any rule or regulation of any municipal officer, board or department the violation of which is subject to a specific penalty.) In order for the Town to use the non-criminal disposition method of G.L. c. 40, § 21D, it would have to amend the by-law to establish a specific penalty. The Town should consult with Town Counsel with any questions on this issue.

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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cc: Town Counsel Michele Randazzo