



MARTHA COAKLEY
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL

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

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

March 14, 2013

Sent Via Electronic Mail

Diane Crory
Town Clerk
Town of Littleton
P.O. Box 1305
Littleton, MA 01460

**RE: Littleton Special Town Meeting of November 14, 2012 - Case # 6593
Warrant Articles # 17 and 18 (General)**

Dear Ms. Crory:

Articles 17 and 18 - We approve the amendments to the Town's by-laws adopted under Articles 17 and 18 on the Warrant for the Littleton Special Town Meeting that convened on November 14, 2012. Our comments regarding Article 18 are provided in more detail below.

Article 18 - The amendments adopted under Article 18 add a new Chapter 163, "Valuable Second Hand Items," to the Town's General By-laws. The new Chapter 163 pertains to the purchasing, or purchasing and selling of:

Gold or silver, coins, stamps, other precious metals, jewelry, and electronics...

Given the variety of second hand items which the by-law addresses, there are several General Laws that pertain to some of these various items. General Laws Chapter 140, Sections 54-56 and 202-205 pertains to "dealers in or keepers of shops for the purchase, sale or barter of junk, *old metals or second hand articles...*" (emphasis added). General Laws Chapter 266, Section 142A pertains to "*gold, silver or platinum*" dealers (emphasis added). Lastly, G.L. c. 140, § 70-85 pertains to pawnbrokers. Therefore, the portions of the by-law pertaining to "other precious metals," second hand "electronics," and "gold or silver," as well as any articles deposited in pawn, would be subject to the provisions of the various General Laws set forth above. The Town should consult with Town Counsel regarding these General Laws to ensure that the "Valuable Second Hand Items" by-law is being applied consistently with the relevant General Laws.

With that framework, we offer comments on the specific portions of the by-law.

1. Sections 163-1 and 163-2, License Requirement and Application.

The by-law requires that anyone engaged in the business of “purchasing, or purchasing and selling, or who keeps a place of business in the Town of Littleton for purchasing, or purchasing and selling, either [second hand] gold or silver, coins, stamps, other precious metals, jewelry and electronics,” must be duly licensed by the Board of Selectmen. The by-law provides that the license application “shall set forth the name of the party to be licensed, the nature of the business and the building or place in which it is to be carried on.” However, the by-law is silent as to the procedures the Board of Selectmen will follow in reviewing and granting (or denying) the application for license. The Town may wish to consult further with Town Counsel regarding the procedures that will be utilized when reviewing and granting (or denying) a license application.

The by-law further provides that “the fee for such license shall be determined by the Board of Selectmen.” We approve this portion of the by-law but caution the Town that although a municipality may impose fees, it “has no independent power of taxation.” Silva v. City of Attleboro, 454 Mass. 165, 169 (2009). In distinguishing valid fees from impermissible taxes, the Supreme Judicial Court has noted that fees tend to share the following common traits: (1) fees, unlike taxes, are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society; (2) user fees (although not necessarily regulatory fees) are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge; and (3) fees are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses. See Silva, 454 Mass. at 168 (citing Emerson College v. City of Boston, 391 Mass. 415, 424-25 (1984)). The Town may wish to consult with Town Counsel to ensure that any license fees established under the by-law constitute valid fees rather than impermissible taxes.

2. Section 163-3, Record of Purchases.

The by-law requires that the dealer or keeper of the shop shall record, at the time of purchase “the name, age, and residence, giving a street and number, of the person from who the purchase was made.”

General Laws Chapter 266, Section 142A requires gold and silver dealers to keep a record as follows:

Whoever is in the business of purchasing gold, silver or platinum shall enter in a book kept for that purpose a description of the item, quantity purchased, the purchase price and the name and address of the seller; provided that the purchase price of such item is at least fifty dollars. Any person who sells gold, silver or platinum shall be required to show to the buyer prior to said sale identification which includes a photograph of said seller.

The Town should ensure that the by-law is applied to gold and silver dealers in a manner consistent with G.L. c. 266, s 142A.

3. Section 163-7, Revocation of License.

Section 163-7 provides as follows:

Any violation of any provision of the license or any rule or regulation that may be adopted by the Board of Selectmen in accordance with this Article shall be sufficient cause and reason to revoke said license. Prior to any suspension or revocation, the Board of Selectmen shall hold a public hearing, giving written notice to the licensee. Such notice shall be mailed by certified mail, return receipt requested, or shall be delivered in hand by a constable authorized to provide such service.

We approve this section of the by-law but caution the Town that the Board of Selectmen has no power to adopt rules and regulations which are inconsistent with state law. “A town may not promulgate a regulation that is inconsistent with State law.” American Lithuanian Naturalization Club v. Board of Health of Athol, 446 Mass. 310, 321 (2006). We suggest that the Town discuss with Town Counsel any proposed rules and regulations to ensure they comply with state law.

Further, we note that the by-law is silent as to the procedures that will govern the suspension/revocation hearing. The only hearing procedure addressed in the by-law is the type and manner of notice that will be given to the license holder. In order to avoid any due process challenges, the Town may wish to consult with Town Counsel regarding a future amendment to the by-law to clarify the hearing procedures.

4. Section 163-8, Penalty for Violation of Article.

Section 163-8 authorizes violations of the by-law to be addressed either by way of a criminal complaint or through the non-criminal disposition procedures in G.L. c. 40, § 21D. The by-law establishes the penalty for a violation of the by-law at \$300. We approve this portion of the by-law but caution the Town that some violations of the specific General Laws related to junk dealers, pawnbrokers and gold and silver dealers, carry their own specific penalties, and therefore, the Town must ensure that the by-law is applied consistently with those General Laws.

For example, G.L. c. 140, § 55, pertains to second hand dealers and provides that if a dealer continues to sell items after his license is revoked, he is subject to a fine of \$20; General Laws Chapter 140, § 74, pertains to pawnbrokers and sets the fine at not more than \$200 for the failure to allow records to be inspected and \$50 for operation without a license. We suggest the Town consult further with Town Counsel regarding the proper application of this section of the by-law.

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,

MARTHA COAKLEY
ATTORNEY GENERAL

Nicole B. Caprioli

By: Nicole B. Caprioli
Assistant Attorney General
Municipal Law Unit
10 Mechanic Street, Suite 301
Worcester, MA 01608
(508) 792-7600 ext. 4418
nicole.caprioli@state.ma.us

cc: Town Counsel Tom Harrington (via electronic mail)