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November 17, 2014

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

**Re: Littleton Annual Town Meeting of May 5, 2014 - Case # 7150
Warrant Articles # 17 and 19 (Zoning)
Warrant Article # 25 (General)**

Dear Ms. Crory:

Article 25 - We approve Article 25 from the May 5, 2014, Littleton Annual Town Meeting.¹

I. Attorney General's Standard of Review.

Pursuant to G.L. c. 40, § 32, the Attorney General has a limited power of disapproval of proposed by-laws with every "presumption made in favor of the validity of municipal by-laws." Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986). In order to disapprove any portion of a proposed by-law, the Attorney General must cite an inconsistency between the by-law adopted by the Town and the Constitution or laws of the Commonwealth. Amherst, 398 Mass. at 796. The Attorney General's review of by-laws pursuant to G.L. c. 40, § 32 is limited to the by-law's consistency with substantive and procedural law, rather than a consideration of the policy arguments for or against the enactment. Amherst, 398 Mass. at 798-799 ("Neither we nor the Attorney General may comment on the wisdom of the town's by-law.")

II. Article 25 – Veteran's Preference.

Article 25 amends the Town's general by-laws to add a new Chapter 32, "Veteran's Preference." The by-law requires that preference be given to qualified veterans in the hiring of Town employees, with certain exceptions. Specifically, the new Chapter 32 states:

¹ In a decision issued August 19, 2014 we approved Articles 17 and 19 and the related map amendments.

In the employment of individuals for all positions subject to this Chapter, preference shall be given to citizens of the Commonwealth who have been residents of the Commonwealth for at least six months at the commencement of their employment who are veterans as defined in G.L. c. 4, § 7, Clause 43, and who are qualified to perform the work to which the employment relates. “Preference” in this context means that if two or more individuals are equally qualified to perform the work to which the employment relates, the qualified veteran, as defined in this provision, shall be offered the position over the other qualified candidates.

In light of the fact that Chapter 32 is limited to Town employment positions (rather than bidders or subcontractors), and establishes a preference for Commonwealth residents who are veterans, we approve it. The text of Chapter 32 is quite different from the residency requirements which were overturned in two recent cases, Utility Contractors Assoc. of New England, Inc. v. City of Fall River, 2011 WL 4710875 (D. Mass. 2011) (hereafter “Fall River”); Merit Const. Alliance v. City of Quincy, 2012 WL 1357656 (D. Mass. 2012) (hereafter “Quincy”), on the basis that they are preempted by the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq. (ERISA). The residency restrictions in Fall River and Quincy required bidders and subcontractors to hire city residents in certain ratios to non-residents. Such requirements are absent in the Littleton by-law. We thus approve the text in Chapter 32, but the Town should be aware that the residency portion of the hiring preference may still be challenged in court on the basis that it violates the Privileges and Immunities Clause of the United States Constitution. *See Massachusetts Council of Constr. Employers, Inc. v. Mayor of Boston*, 384 Mass. 466, 473-478 (1982) (the Commonwealth resident preference in G.L. c. 149, § 26 conflicted with the Privileges and Immunities Clause) (rev’d on other grounds White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204, 206, (1983); United Bldg. and Construction Trades Council of Camden County v. Mayor and Council of City of Camden, 465 U.S. 208 (1984) (ordinance requiring at least 40% of employees working on City projects be City residents discriminated against protected privilege under Privileges and Immunities Clause); Quincy, 2012 WL 1357656 (residency requirement violated Clause because it gave competitive advantage to contractors who employed Quincy residents with no substantial justification); Fall River, 2011 WL 4710875 (same); Utility Contractors Ass’n of New England, Inc. v. City of Worcester, 236 F.Supp. 2d 113 (2002) (same). The Privileges and Immunities Clause “is designed to prevent the discriminatory treatment of citizens from other states... [to avoid] economic Balkanization... [by keeping] states from adopting highly protectionist economic policies. The Constitution protects nonresidents from economic discrimination so that the nation may function as a single economic union.” Fall River, 2011 WL 4710875 at *4 (quoting A.L. Blades & Sons, Inc. v. Yerusalim, 121 F.3d 865, 869-870 (3d Cir. 1997)). The Clause prohibits discriminatory acts that 1) impair one of the privileges protected under the Clause and 2) are unsupported by governmental proof that there was a substantial reason for the difference in treatment and that the discrimination bore a substantial relationship to the government’s objectives. Id. at *4.

This two-step analysis requires a complete factual record which is beyond the scope of this Office’s review of municipal by-laws pursuant to G.L. c. 40, § 32. Therefore we are unable to conclude that the by-law text in Chapter 32 violates the Clause. However, we recommend that the Town consult with Town Counsel to consider amending the text of Chapter 32 at a future town meeting to minimize the potential for such a challenge.

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 that 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 voted by Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,
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