



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

May 22, 2018

Lori West, Town Clerk
Town of Hull
253 Atlantic Avenue
Hull, MA 02045

**Re: Hull Special Town Meeting of February 12, 2018 – Case # 8777
Warrant Article # 7 (Zoning)
Warrant Articles # 2, 5, 6, and 9 (General)**

Dear Ms. West:

Article 9 - We return the vote under Article 9 with no action by this Office because we have determined that it does not constitute a valid by-law subject to our review and approval pursuant to G.L. c. 40, § 32.¹

I. Description of Article 9.

Article 9 was a vote to:

- a. Amend the Town By-laws to use gender-neutral language in all new, amended, or revised By-laws, and all future Town documents and communications (for example, using “Chair” instead of “Chairman” or “Chairwoman”);
- b. Amend the Town By-laws to use the terms “Select Board”, “Select Board members”, or member of the Select Board” instead of “Board of Selectman, ‘selectman”, “selectmen”, “selectwoman”, or “selectwoman” in all new, amended, or revised By-laws, and all future Town documents and communications; and
- c: Implement these changes on or before March 1, 2019.

Article 9 is a citizen’s petition pertaining to the use of gender neutral terms in various Town documents. While Article 9 seeks to “[a]mend the Town By-laws,” for the reasons provided below, Article 9 was not a vote to amend the Town’s existing by-laws to delete gender specific terms and insert gender neutral terms, and therefore we take no action on the vote under Article 9.

¹ In a decision issued on March 23, 2018, we approved the by-laws adopted under Articles 2, 5, 6 and 7 from the February 12, 2018, Hull Special Town Meeting.

II. General Laws Chapter 40, Section 32.

Pursuant to G.L. c. 40, § 32, “. . . before a by-law takes effect it shall be approved by the attorney general. . . .” In performing this review, the Attorney General follows the same principles of statutory construction which guide a court. *See Amherst v. Attorney General*, 398 Mass. 793, 795 (1986) (“The Attorney General is guided in the exercise of his limited power of disapproval by the same principles that guide us.”) The first step in the Attorney General’s review is to determine whether a legislative enactment qualifies as a by-law because the Legislature has limited the Attorney General’s review power under G.L. c. 40, § 32 to the review of by-laws. To determine whether an enactment qualifies as a by-law, the Attorney General first looks to the plain language of the warrant article and the motion under the warrant article.

III. Article 9 Does Not Amend the Town’s Existing By-laws.

Neither the warrant article nor the motion under Article 9 refers to amending the *existing* text of the Town’s by-laws. In general, when a warrant article is proposed to adopt a new by-law or amend an existing by-law, the warrant article or the motion will so declare. For example, the warrant for the Hull February 2018 Special Town Meeting, included the following Articles that adopt a new by-law or amend the text of an existing by-law: Article 2, pertaining to marijuana establishments (“to amend the general by-laws of the Town by adding . . . the following: . . .”); Article 5, “Marijuana Establishments” (“[t]o amend the General By-laws by adding a new Chapter . . . in the wording of Article 5”); Article 6 “Retail Marijuana Establishments, Limits” (“[t]o amend the General By-laws by adding the following chapter. . . .”); and Article 7, “Marijuana Overlay District,” (“[t]o establish Zoning Bylaw Article III, Section 39C . . . as written in the Warrant”) These Articles clearly identify the proposed amendments as by-laws and provide the text of the by-laws being added to the Town’s existing by-laws. In contrast, there is nothing in the plain language of Article 9 that identifies the text being amended or changed, e.g., deleting the words “Board of Selectmen” and inserting the words “Selectboard” wherever they appear in the Town’s by-laws. Rather the vote directs the use of a list of gender neutral terms in “new, amended, or revised By-law[s]” and “all future Town documents and communications.” Article 9 is a directive for the Town to use gender neutral terms going forward in time. Therefore, we conclude that the vote under Article 9 is not a by-law and does not come within the scope of the Attorney General’s limited review authority under G.L. c. 40, § 32.²

IV. Other Comments on Article 9.

Should the Town wish to consider a future warrant article to amend its existing by-laws to make them gender neutral, we offer the following comments for the Town’s consideration.³

² There are other examples of town meeting votes which the Attorney General has no power to review and which we routinely return to towns with no action. Votes to accept local option statutes and votes to approve municipal budgets are but two examples of such town meeting votes which are outside the scope of the Attorney General’s review under G.L. c. 40, § 32.

³ This Office approved warrant articles that amend Towns’ existing Charter provisions and by-laws to make them gender neutral. *See* our decision dated February 28, 2018, on Article 18 from the Brookline November 14, 2017, Special Town Meeting (Case # 8735) and our decision dated February 5, 2018, on Article 5 from the Wakefield November 6, 2017, Fall Annual Town Meeting (Case # 8751).

A. General Laws Chapter 40A, Section 5's Requirements.

If Article 9 sought to amend the Town's zoning by-laws, then the Town would have to comply with the procedural requirements of G.L. c. 40A, § 5, that includes a properly posted planning board hearing. The Town did not provide this Office with any documentation showing that it had a Planning Board hearing on Article 9 with the intent that it was amending the Town's zoning by-laws. If the Town intends to amend its existing zoning by-laws at a future Town Meeting to make them gender neutral it will have to comply with the procedures in G.L. c. 40A, § 5.

B. General Laws Chapter 39, Section 10's Requirements.

General Laws Chapter 39, Section 10, provides citizens with the right to require subjects be included in a Town Meeting Warrant. If a warrant article is properly petitioned under G.L. c. 39, § 10, the article must be placed on the Warrant. Thus, Article 9 cannot require a citizen's petition article to include certain terms or language.

C. Separation of Powers.

Article 9 could be construed as an invalid directive from the legislative branch (Town Meeting) to the executive branch (the Board of Selectmen) on matters within the exclusive authority of the executive branch: the authority of the Board to draft its own documents and communications. Town Meeting serves as "the legislative body for the town." Conroy v. Conservation Commission of Lexington, 73 Mass.App.Ct. 552, 558 (2009). As such, Town Meeting is "vested the traditional powers of the legislative branch of any level of government, i.e. the power to make laws (by-laws) and the power of the purse." Wright v. Town of Bellingham, 2007 WL 1884657 (Mass.LandCt.), quoting *Town Meeting Time*, 2d Ed. 1984. However, there are restrictions placed on the legislative power of Town Meeting. A legislative body cannot interfere with the executive branch on a matter which is in the exclusive authority of the executive branch. See Anderson v. Board of Selectmen of Wrentham, 406 Mass. 508 (1990) (Selectmen not bound by Town Meeting vote purporting to establish the Town's rate of contribution for group insurance benefits); Russell v. Canton, 361 Mass. 727 (1972) (Town Meeting could authorize the Board of Selectmen to take land by eminent domain, but could not direct how much land was to be taken); Breault v. Auburn, 303 Mass. 424 (1939) (Town Meeting vote directing board of health to hire an employee was ineffective because hiring power was solely conferred on board); Lead Lined Iron Pipe v. Wakefield, 223 Mass. 485 (1916) (Town Meeting vote directing the board of selectmen to hire an engineer was void). Massachusetts courts have long recognized that "when a board of selectmen is acting in furtherance of a statutory duty, the town meeting may not command or control the board in the exercise of that duty." Anderson v. Board of Selectmen of Wrentham, 406 Mass. 508, 512 (1990). The Town may wish to consult with Town Counsel with any questions on this issue.

D. Consistency with Other Local Laws.

Chapter 8 of the Acts of 1989, "An Act Providing for a Selectmen, Town Manager, Open Town Meeting Form of Government for the Town of Hull," provides that the Town's executive powers shall be with the Board of Selectmen, who shall have all the powers given to Boards of Selectmen by the General Laws. See Chapter 8, Section 3 of the Acts of 1989. The Town should

discuss with Town Counsel whether changing the name of the Town's Executive Branch is consistent with Section 3 of Chapter 8 of the Acts of 1989.

V. Conclusion.

We recognize that the intent of Article 9 is to make Town documents gender neutral. However, because Article 9 did not amend the Town's existing by-laws, we take no action on it. If the Town intends to amend its existing by-laws at a future Town Meeting to make them gender neutral, the Town should confer with Town Counsel to ensure such amendments are consistent with state law and local 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 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,
MAURA HEALEY
ATTORNEY GENERAL

Kelli E. Gunagan

by: Kelli E. Gunagan, Assistant Attorney General
Municipal Law Unit
Office of the Attorney General
Ten Mechanic Street, Suite 301
Worcester, MA 01608
508-792-7600

cc: Town Counsel James B. Lampke