TOWN OF
AMHERST
MASSACHUSETTS

Memorandum

To: **Town Council Members**
From: **George Ryan, Chair, Governance, Organization and Legislation (GOL) Committee**
Date: **October 5, 2020**
Re: **Report by the Chair of GOL Committee to the Town Council**

Summary:

Since our last report of September 14, 2020 the GOL Committee has met once on September 30. The regularly scheduled meeting of September 16 was cancelled in order to give the sponsors of Wage Theft time to meet with KP Law to discuss their review of both the Wage and Tip Theft Bylaw and the Responsible Employer and Tax Relief Agreement Bylaw. On September 30 the Committee worked its way through the Responsible Employer and Tax Relief Agreement Bylaw but was not able to address the Wage and Tip Theft Bylaw. The Committee will take up that Bylaw at its next scheduled meeting on October 7.

Discussion:

Single-Use Plastic Bag Ban Bylaw: Update. After the first reading of this Bylaw on September 14 the Chair of GOL agreed to reach out to the Amherst Chamber of Commerce, the Amherst BID, and the Board of Health and to report back to the Council what was learned. Neither the Chamber nor the BID expressed any concerns about the contents of the Bylaw. After five years of a single-use plastic bag ban there seems a sense that most if not all businesses are aware of the ban and are compliant. No concern was expressed about the removal of the exemption clause for much the same reasons. What was requested -- given the "suspension" of the ban by the Governor due to COVID -- was that the Town give some time to local businesses to switch back over since many supplies are on back order.

The Board of Health was able to identify only one exemption that was granted over the past five years and was not aware of any enforcement actions undertaken by the BOH during that period. I have communicated to both the acting head of the Health Department and to the Chair of the Board of Health that as in the existing Bylaw the BOH has enforcement authority should it choose to exercise it. It does seem likely that any enforcement action would result from consumer complaints to the BOH and not from independent BOH action. I think the biggest challenge will be in communicating to those area businesses that are not aware of it that the ban is back in effect and that there are now no allowable exemptions. Both the Chamber and the BID expressed a willingness to help in that effort.

Wage Theft Bylaws. The Committee struggled with a number of procedural issues regarding the Bylaws apart from the specific charge of determining whether they met the standard of "clarity, consistency, and actionability". The first issue concerned what was perceived by some on the Committee as a possible conflict of interest. The question raised by one member was this: *Should Councilors who are sponsors of a Bylaw and who also serve on GOL be allowed to vote on the formal GOL recommendation to the Council that the Bylaw is "clear, consistent, and actionable"*? It was felt by two members of the Committee that asking sponsors of a measure to then cast a formal vote on the "clarity, consistency, and

actionability" of the very measure they are proposing created the appearance of a conflict and that in such a case the sponsor should not be allowed to cast a vote. It was agreed that as sponsors they should participate fully and actively in the Committee review process but that they should not be permitted to vote on the final product. It was pointed out by another member that in a previous instance on GOL where this apparent conflict arose the Councilor in question abstained but they were not denied the right to vote. A number of other members of the Committee did not feel that this apparent conflict met any legal definition of "conflict of interest" and argued that absent such a clear conflict a Councilor's right to vote on a matter that comes before them either on the Council or a committee should not be restricted in any way. This was not resolved and the Committee will return to this procedural issue before a formal vote is taken on the Bylaws.

The second issue concerned the challenge of avoiding matters of substance in its review since its charge is limited to declaring a measure "clear, consistent, and actionable". What complicates this in the case of the Wage Theft Bylaws is that the legal review requested from KP Law was long in coming and when it did come the Bylaws had already been reviewed by CRC, where matters of substance and policy are within their purview. It was difficult, frankly impossible, for the Chair to keep the discussion focused solely on the Committee charge since many of the comments and concerns expressed by KP Law involved matters of Council policy and the degree to which the Council was willing to take legal risks in the pursuit of specific policy goals. These are not questions that GOL is charged with resolving but at the same time proved difficult to avoid. At the very least it will be important in the final report to the Council on these two Bylaws, in whatever form that is presented, that the concerns of KP Law be communicated clearly to the Council. At the very least the Memo sent to the Committee by KP Law outlining their concerns should be shared with the entire Council for its review. In a number of cases the sponsors disputed or did not adopt changes recommended by KP Law and while these differences in most cases did not result in an issue involving "clarity, consistency, and actionability" they did raise important policy questions that the Council should ponder. In a nutshell the fact that GOL declares a Bylaw "clear, consistent, and actionable" should not be construed as approval of the Bylaw as a matter of sound policy or as something the Committee believes is in the best interests of the Town but rather that the Bylaw in question as presented meets the standard of "clarity, consistency, and actionability" as defined in the "GOL Guidelines for Review of Measures". To that end I am attaching both that document and the Memo sent to the Committee by KP Law summarizing its concerns with the Bylaws.

Upcoming Items:

The Committee will be meeting again on October 7 to (hopefully) complete its review of the Wage Theft Bylaws. Also on the agenda are a review of a proposed Bylaw that would prohibit within Town limits the use of wild or exotic animals in travelling shows or circuses. At some point in the near future the Committee would also like to review the process the Council uses for evaluating the Town Manager's performance and for the setting of the Town Manager's yearly goals.

Committee Members:

Pat DeAngelis, Vice Chair,
Lynn Griesemer
Mandi Jo Hanneke
George Ryan, Chair
Andy Steinberg

TOWN OF AMHERST MASSACHUSETTS

Governance, Organization and Legislation Committee

Guidelines for Review of Bylaws, Resolutions, and other Measures

The GOL Committee adopts the following guidelines for its review of the content, form and organization of measures to ensure they are clear, consistent, and actionable. The GOL Committee hopes this helps provide a level of predictability.

Clear:

A measure will be found clear if it is understandable, comprehensible, and unambiguous. The GOL Committee will be the ultimate arbiter of whether a measure is clear. However, the GOL Committee will seek to collaborate with the sponsors and/or authors of a measure to refine the measure to meet the GOL Committee's guidelines. A sponsor will not be required to change language, but refusal to do so may result in a recommendation from the GOL Committee to the Town Council that the measure is not "clear", along with a recommendation for a change that would make the language "clear".

Consistent:

A measure will be found consistent if:

- The content does not contradict itself
- The form is consistent with the form and/or organization of other similar measures (i.e., template for charges, numbering system for bylaws, etc.)

Actionable:

A measure will be found actionable if it does not conflict with Massachusetts General Law, the Amherst Home Rule Charter, or any other law, bylaw, or resolution applicable to the Town of Amherst.

The GOL Committee agrees that any critiques it makes do not reflect opinions on the policy being reviewed. Policy reviews are not within the GOL Committee's purview at this time. Therefore recommendations for or against a measure referred to it reflect solely the GOL Committee's determination of the measure's clarity, consistency, and actionability, not a determination of the merits of the measure or the advisability of approving or disapproving the measure by the Town Council.

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TO: Governance, Organization and Legislation Committee (***By Electronic Mail Only)***

CC: Mr. Paul Bockleman, Town Manager

FROM: Lauren F. Goldberg, Esq.

RE: Wage and Tip Theft and Responsible Contractor Bylaws

DATE: September 14, 2020

Question

You have requested review of the above-referenced bylaws, and particularly, where the bylaws may create direct inconsistencies with state law. In this memo, it is my intention to summarize the standard that the courts, and the Attorney General, use when reviewing bylaws or ordinances for consistency with state law, apply that standard generally, and identify particular issues for your further consideration.

Summary Opinion

In my opinion, while the Town has the ability to adopt a local Responsible Employer Bylaw (it already has one) and a TIF and Wage and Tip Theft Bylaw, like any local law, these provisions must be carefully reviewed to avoid regulating an area "preempted" by state law. In my further opinion, attempting to implement a local bylaw addressing the same subject as state law, even where a "sharp conflict" can arguably be said not to exist, may prove challenging.

I understand that signficant work has been undertaken on these bylaws and that the matters they address are of critical importance to the Town. Ultimately, however, whether and in what form the GOL recommends these bylaws to the full Town Council for approval is a policy decision, balancing the harms to be prevented with the possible risk to be incurred. Further analysis is below.

Detailed Analysis

1. Municipal Home Rule Authority and "Sharp Conflicts" with State Law

Article 2, Section 6 of the Amendments to the Constitution of Massachusetts ("Home Rule Amendment"), as amended by Article 89, establishes a broad general grant of home rule powers to cities and towns.

> Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it,

which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter.

Thus, municipalities have the ability to regulate and prohibit such matters "as are of an inherently local nature, peculiarly affecting the public welfare of the particular community and so closely connected with the administration of local government as to become properly a part of it." G.L. c.40, §21; Commonwealth v. Wolbarst, 319 Mass. 291, 293 (1946). When a municipality enacts local legislation that affects the same issue as the state legislation, however, the local enactment will be subject to more scrutiny by a reviewing court.

While the mere existence of a statute addressing a matter addressed by a local law is not enough to invalidate a local law, such local regulation is prohibited when either the legislative intent to preclude local regulation is clear, or the purpose of the statute cannot be achieved with the local by-law in place. There is extensive case law on these matters. For example, in Boston Gas Co. v. City of Somerville, 420 Mass. 702, 703 (1995), the court held that a local law regulating street excavation by public utilities was invalid because the application of G.L. c.164, was so extensive and comprehensive that it intended to preempt local legislation, relying in part on the conclusion that the legislative intent of statute was to ensure uniform and efficient utility services. Further examples include: Town of Wendell v. Attorney General, 394 Mass. 518, 526-7)(1985), overturning a local pesticide law and reasoning, that the state law on the topic already addressed the municipal role; Connors v. City of Boston, 430 Mass. 31, 37 (1999), overturning an executive order extending health insurance benefits to all registered domestic partners of city employees because it was inconsistent with the provisions of G.L. c.32B which law dictated all options with respect to municipal health plans and defined "dependents" differently; and Rogers v. Provincetown, 384 Mass. 179, 182 (1981), where the Court found that a local bylaw prohibiting the use of motorized bicycles inconsistent with a state statute allowing "every person operating a motorized bicycle upon a way shall have the right to use any public ways in the commonwealth".

2. Responsible Employer Bylaws

The constitutionality of certain portions of these bylaws has been directly addressed in several local cases. In UCANE v. City of Worcester, 236 F. Supp. 2d 113, (D. Mass. 2002) and Utility Contractors Association of New England, Inc. ("UCANE") v. City of Fall River, 2011 WL 4710875 (D. Mass. 2011) (Not Reported), the District Court found "Responsible Employer Ordinances" unconstitutional. Both ordinances required local residency of 50% of those employed by the bidder, and the Fall River ordinance also contained a requirement that bidders have an apprenticeship program and provide health and pension benefits to employees. Both residency requirements were struck down as unconstitutional infringements on employees' rights under the Privileges and Immunities Clauses. The municipality would have had to present a "substantial reason" why the requirement was necessary, and neither could do so; merely mitigating unemployment is insufficient, and instead, the municipality would have had to show why non-residents present a "peculiar source of evil" to the community.

Separately, the apprenticeship program and health and pension benefits provisions of the Fall River Responsible Employer Ordinance was deemed preempted by ERISA, which expressly preempts any state or local law, "insofar as they may now or hereafter "relate to" any "employee benefit plan." Where an employee benefit plan is any employer provided "disability, death or unemployment, or vacation benefits, apprenticeship or other training programs," and the apprenticeship and benefits provisions of the bylaw were mandatory, the court found the REO clearly preempted. A more nuanced analysis is used when the requirement of such a local law is a "guiding principal" as opposed to a mandate, but nevertheless any bylaw deemed to relate to employee benefits are preempted by ERISA.

It is true that while Fall River had mandatory requirements for City residents to be hired, even a preference may be problematic from a legal perspective. Note that the Worcester ordinance struck down by the court in 2002 stated that Worcester could "waive" the residency requirement if a contractor demonstrated that compliance with the residency requirement is not feasible, despite the contractor's bona fide efforts to comply. City of Worcester, 236 F. Supp. 2d at 115. Similarly, a Camden, New Jersey ordinance was struck down despite the language in the ordinance stating a goal that contractors were to use "every good faith effort" to meet the residency preferences. Mayor & Council of the City of Camden, 465 U.S. at 214. Based upon these cases and the analysis used, it is my opinion that even a preference provision for local residents may still be found by a reviewing court to violate the Privileges and Immunities Clause of the Constitution.

It is difficult to predict what a court would do in the future, and these cases are technically limited to their particular facts. However, in my opinion, these decisions in these cases indicate similarly styled bylaws containing mandatory or "recommended" residency requirements or other types of quotas and employee benefits could be subject to successful legal challenges were a Responsible Contractor Bylaw implemented that requires that, or even favors, a certain portion of a bidders employees be local residents and that the bidder provide certain benefits to employees. I note that a number of communities have previously adopted a similar bylaw; following the UCANE cases, however, in my opinion, there are significant concerns as to enforceability.

This same type and level of analysis would apply to a comparison between the complicated and exhaustive contracting laws of the Commonwealth, and the rules sought to be imposed in the Responsible Employer Bylaw proposed by the Town. See G.L. c.30B, G.L. c.30, §39M; G.L. c.149; G.L. c. 7C, §§44-58. As noted above, in my opinion, if challenged any such bylaw would be subject to a more rigorous review by a court based upon the detailed, specific requirements applicable to public bidding and public construction projects in the Commonwealth. While portions of the bylaw may not evidence a "sharp conflict" with state law so as to be facially invalid, individual provisions could be challenged on an as applied basis as in the UCANE cases cited above.

3. Tax Relief

Tax exemptions, abatements and credits are strictly regulated by state law and regulation. For that reason, in my opinion, any local legislative scheme that differs from the state scheme would be likely to be found in "sharp conflict" with state law. G.L. c. 59; G.L. c.60.

Tax Increment Financing (TIF) involves a tax "credit" in the form of an exemption from taxation for the incremental increase in the value of real property over its existing or "baseline" value as a company or owner invests capital into the property. G.L. c.40, §59; G.L. c.23A, §3B; and 760 CMR 22.01.

The process to execute a TIF agreement involves production of an involved TIF plan, and state and local approval. The town must prepare a TIF Plan consistent with 760 CMR 22.05, meaning it must include the project(s) contemplated, financing proposals, local approvals, and other specifications of the project. The town must execute individual TIF agreements with each property, which become part of the TIF Plan. The Select Board must approve the certain elements of the TIF Plan. Further, once all those plans and agreements are executed, Town Meeting must approve the TIF Plan and then the Economic Assistance Coordinating Council ("EACC") must approve the agreement. The EACC meets quarterly to review and consider applications for TIF agreement approval.

All aspects of the preparation and approval of the plan are addressed in these provisions. Where this is a state established scheme, with very particular requirements for local and state approvals, in my opinion, the above-referenced cases suggest that any attempt to change the application of the law at the local level could be problematic. For example, the only way to terminate a TIF is to petition the Mass Office of Business Development for the same. Similarly, there does not appear to be a mechanism in state law to have the beneficiary of the TIF "pay back" any tax advantage they may have received on a failed TIF.

4. Wage/Tip Theft Bylaw

Several local governments have passed wage theft ordinances in the last few years, including Cambridge, Chelsea, Boston and Northampton locally, and Cook County (Chicago), San Francisco, Seattle, and Philadelphia. Please note that at least in Massachusetts, none of the communities with such a bylaw/ordinance are "towns" for purposes of G.L. c.40, §32, and therefore, I am not aware of any bylaw that has been reviewed and approved by the Attorney General concerning this topic. In my opinion, the primary reason such a bylaw may be susceptible to legal challenge is, again, that there is a comprehensive state scheme to regulate and prevent wage and tip theft that addresses the role of municipalities, provides for enforcement by the Attorney General and does not provide any enforcement authority to municipalities.

As you know, the state has a comprehensive wage or tip theft prevention scheme enforced by the Attorney General. Specifically, G.L. c. 149, s.150 provides the Attorney General with authority to prosecute wage theft by civil complaint or indictment, and requires an employee harmed by wage theft first file a complaint with the Attorney General's office. G.L. c.149, §152A provides similar protection against tip theft, and requires employees harmed by tip theft to follow the same complaint and enforcement process contained in G.L. c. 149, §150

150. Where there is an administrative complaint process that must be followed, as set forth in said Section 150, and a regulatory scheme (454 CMR), as referenced above, courts frequently determine the state has "occupied the field" and preempted a subject from local regulation.

Note that I have reviewed the Attorney General's Fair Labor Division Chief's letter describing the scope of the AGO's work on this issue and robust enforcement scheme, including a description of the AGO as the "primary enforcer of Massachusetts' wage and hour… labor law". In my opinion, this letter, while emphasizing the importance of the issue to the Attorney General, provides further support for the conclusion that the Attorney General's enforcement program is the type of comprehensive, state-run program that would preempt a local bylaw.

Conclusion

I have provided red-lined copies of both proposed bylaws; note, however, that such red-lining is not exhaustive, and I would likely suggest additional changes based upon the response of the GOL. In short, where these bylaws seek to address areas already the subject of strict state statutory schemes, in my opinion, it may be appropriate to consider whether to instead address matters other than those covered by law. To the extent that the GOL and the Town Counsel nevertheless wish to pursue these matters in a form similar to that already proposed, please also be aware that there are times when even if a bylaw is not invalid on its face, its implementation is highly susceptible to challenge.

I look forward to our further discussion of these issues tomorrow.