



MAURA HEALEY
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

December 6, 2022

Nancy L. Holmes, Town Clerk
Town of Nantucket
16 Broad Street
Nantucket, MA 02554

Re: Nantucket Annual Town Meeting of May 2, 2022 – Case # 10641
Warrant Articles # 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 58, 60, and 61 (Zoning)
Warrant Articles # 39, 40, 64, 65, 67, 69, 71, 73, and 75 (General)

Dear Ms. Holmes:

Article 71 - Under Article 71 the Town voted to allow any person to go topless on any public or private beach in Nantucket. The Town has the authority to adopt any by-law that does not conflict with the laws or Constitution of the Commonwealth, and if the by-law poses no such conflict, the Attorney General must approve it. Amherst v. Attorney General, 398 Mass. 793, 795-96, 798-99 (1986). Based on this standard of review, we approve the by-law because it poses no conflict with the Constitution or laws of the Commonwealth.¹

We have received numerous communications from citizens raising various challenges to Article 71, primarily on policy grounds. While we cannot base our decision on the policy arguments they raise, the letters have helped inform our understanding of the issue and its importance to the Town.² We emphasize that our approval in no way implies any agreement or disagreement with any policy views that may have led to the passage of the by-law. The Attorney General's limited standard of review requires her to approve or disapprove by-laws based solely on their consistency with state law, not on any policy views she may have on the subject matter or wisdom of the by-law. Id. The Attorney General thus has no power to disapprove a by-law merely because a town, in comparison to the rest of the state, has chosen a novel approach.³

¹ We have acted on all other Articles in Case # 10641 in decisions issued September 8, 2022, October 31, 2022, and November 3, 2022.

² We also appreciate the letter from ACLU of Massachusetts offering legal arguments in support of the by-law.

³ The citizens opposing the by-law raise the argument that the by-law unduly interferes with Town residents' and visitors' access to town beaches. It is suggested that those persons who are not

We briefly describe the by-law amendments adopted under Article 71; discuss the Attorney General's limited standard of review of town by-laws under G.L. c. 40, § 32; and then explain why, based on that standard, we approve Article 71.

I. Description of Article 71

The motion under Article 71 was to amend the existing Chapter 66, (Coastal Areas and Open Spaces, Protection of) in the Town's general by-laws, to add the following text (in an un-numbered section):

In order to promote equality for all persons, any person shall be allowed to go topless on any public or private beach within the Town of Nantucket.

Article 71 did not include a definition of the phrase "public or private beach" and this phrase is not defined in the existing Chapter 66, to which the new text is added. However, Chapter 66 includes the following description of its purpose:

The purpose of this chapter is to protect the beaches, coastal areas and other open unimproved spaces of Nantucket by regulating activities within or upon these areas by persons whose activities are deemed to have a significant effect on the environment, including but not limited to wildlife and recreation; on scenic views; on excessive noise; on the natural, scenic, historic and aesthetic qualities of the beach environment or other open spaces on Nantucket; on the public safety and welfare; and on the preservation of peace and good order. Such protection is extended to private as well as to public open space areas as a correlate to owners giving express or implied consent to the use of their private property for any lawful purpose thereon.

Section 66-1, Purpose.

Based on this language in Section 66-1, we construe the by-law to apply to private beaches to the extent owners of private beaches give "express or implied consent to the use of their private property for any lawful purpose thereon." *Id.*

comfortable sharing a beach with topless women will now have no beach access. But those citizens have not tied this argument to a specific state law or constitutional provision that affords them the right to access and use public beaches or private beaches (subject to the by-law) free from topless persons. Moreover, the decision *not* to access and use a public or private beach *because* topless persons may be present is a personal choice, not one dictated by the by-law. For these reasons, we determine that the access argument raised by the opponents does not provide grounds for us to disapprove the by-law.

II. Attorney General's Standard of Review of General By-Laws

Pursuant to G.L. c. 40, § 32, the Attorney General has a “limited power of disapproval,” and “[i]t is fundamental that every presumption is to be made in favor of the validity of municipal by-laws.” Amherst, 398 Mass. at 795-96. The Attorney General does not review the policy arguments for or against the enactment. Id. at 798-99 (“Neither we nor the Attorney General may comment on the wisdom of the town’s by-law.”). Rather, in order to disapprove a by-law (or any portion thereof), the Attorney General must cite an inconsistency between the by-law and the Constitution or laws of the Commonwealth. Id. at 796. “As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid.” Bloom v. Worcester, 363 Mass. 136, 154 (1973) (emphasis added). “The legislative intent to preclude local action must be clear.” Id. at 155.

III. The Town Has Authority to Regulate Activities on Public and Private Beaches

Article 71 is but the most recent example of Nantucket deciding what is and what is not permissible on public and private beaches in the Town. Like all towns in Massachusetts, Nantucket has long held the authority to so decide, and has exercised it on numerous occasions.

A. Source of town authority to regulate beaches.

“In determining whether a local ordinance or bylaw is inconsistent with a State statute, the question is not whether the Legislature intended to grant authority to municipalities to act . . . , but rather whether the Legislature intended to deny a municipality the right to legislate on the subject in question.” Easthampton Sav. Bank v. City of Springfield, 470 Mass. 284, 288 (2014) (quoting Wendell v. Att’y Gen., 394 Mass. 518, 524 (1985)). Nothing in the Constitution or laws of the Commonwealth forbids a town from regulating the activity or dress code on beaches. On the contrary, both G.L. c. 40, § 21 and the Home Rule Amendment authorize the Town’s by-law.

G.L. c. 40, § 21 lists a number of subjects on which municipalities may enact ordinances and by-laws, in some cases subject to certain express limitations. The statute pre-dates the 1966 adoption of the Home Rule Amendment. See, e.g., G.L. c. 40, § 21 (Ter. Ed. 1932). Among other things, G.L. c. 40, § 21 authorizes municipalities to adopt ordinances and by-laws “[f]or directing and managing their prudential affairs, preserving peace and good order, and maintaining their internal police.” The phrase “internal police” refers not to municipal police departments but is, instead, “a term sometimes applied to the police power, or power to enact laws in the interest of the public safety, health, and morality[.]” Black’s Law Dictionary 732 (5th ed. 1979).

In addition, the state constitution’s Home Rule Amendment, as ratified by the voters themselves in 1966, confers broad powers on individual cities and towns to legislate in areas that previously were under the Legislature’s exclusive control. Home Rule Amendment, Mass. Const. amend. art. 2 (as amended by amend. art. 89). Subject to certain limitations not applicable here, “[a]ny 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[.]” Id. § 6.

Towns have used their Home Rule power and the authority granted by G.L. c. 40, § 21 to adopt by-laws regulating conduct on town beaches and waterways and courts have upheld those by-laws unless there is a sharp conflict with state law. See e.g., Mad Maxine's Watersports, Inc. v. Harbormaster of Provincetown, 67 Mass. App. Ct. (2006) (upholding town authority to restrict the use of jet skis or other personal watercraft in Provincetown Harbor); Town of Sharon v. Segal, 6 Mass. App. Ct. 853 (1978) (upholding town by-law prohibiting operation of certain motorboats on Lake Massapoag).

B. Nantucket's prior regulation of beach activities.

The Town has previously exercised its authority to regulate activities or conduct on beaches by adopting by-laws (approved by this Office) for the purpose of: regulating the use of motor vehicles on town beaches (Chapter 56); prohibiting the drinking of alcohol on town beaches (Section 54-1); prohibiting overnight camping on beaches (Section 64-1); prohibiting campfires and drinking of alcohol by groups of 10 or more persons at night on beaches (Section 66-3); and prohibiting the consumption of marijuana on town beaches (Section 95-2), among other things. The Selectboard has also adopted a separate set of regulations regarding permissible and prohibited activities on town beaches. (Chapter 216). The fact that the by-law adopted under Article 71 is permissive rather than restrictive does not affect its legality. So long as the by-law presents no conflict with state law, the Town may adopt it. Amherst, 398 Mass. at 795-96.⁴

IV. Other Comments

We offer the following additional comments for the Town's consideration. Article 71 does not define the term "public or private beach." The Town may wish to consult with Town Counsel regarding a future amendment to the by-law to define this term. For example, the terms "beach" and "coastal area" are defined in other sections of the Town's by-laws. The term "beach" is defined in Chapter 56, Beaches, Regulation of Motor Vehicles On" as:

All land situated between Nantucket Sound and the Atlantic Ocean, on one side, and the primary coastal bank, the line of upland vegetation, on the other side, except that such term shall include all dunes, whether or not between such perimeters.

⁴ It has been suggested that the by-law may create a conflict with two state laws purporting to regulate conduct that can under certain circumstances involve the exposure of breasts: G.L. c. 272, § 16, which addresses open and gross lewdness and lascivious behavior, and G.L. c. 272, § 53(a), which prohibits indecent exposure. But neither statute makes toplessness at a beach, without more, a violation of state law. Instead, for the exposure of breasts to violate § 16 or § 53(a), it would have to be accompanied by additional conduct. Moreover, a conviction under the indecent exposure statute, § 53, "requires an intentional act of lewd exposure, offensive to one or more persons." Swan, 73 Mass. App. Ct. at 261 (quoting Commonwealth v. Broadland, 315 Mass. 20, 21-22 (1943)). And the Massachusetts Supreme Judicial Court has recognized that there is ambiguity as to whether the intentional exposure of "female breasts" is covered by § 53. Commonwealth v. Arthur, 420 Mass. 535, 539 (1995) (citing opposite interpretations in two jurisdictions). For these reasons we determine that this argument does not provide grounds for us to disapprove the by-law.

Section 56-2, Definitions.

In addition, Chapter 66 defines the term “coastal area” as follows:

Refers to all unimproved land situated between Nantucket Sound and the Atlantic Ocean, on one side, and the primary coastal bank, the line of upland vegetation, on the other side, except that such term shall include all dunes, whether or not between such perimeters.

Section 66-2, Definitions.

And the Selectboard beach regulations (Chapter 216, Beaches) describe that they apply to the following areas:

- 1) These regulations shall apply to all properties adjacent to these ponds that are owned by the Town of Nantucket and to properties adjacent to these ponds where the property owner has given the Town permission to apply these regulations to his or her property.
- 2) These rules and regulations apply to beaches owned by the Town of Nantucket or those beaches managed by the Town or on beaches where the property owner has given the Town the owner's permission to apply these rules and regulations.

Section 216-1 (C)

The Town may wish to consider a future clarifying amendment so that the by-law has a more definite scope.

V. Conclusion

We approve the Town's vote authorizing any person to go topless on any public or private beach in Nantucket because we discern no conflict between the vote and the Constitution or laws of the Commonwealth. The Town has the authority to choose what activities it will allow on town beaches, and we must approve any by-law reflecting such choice unless the by-law poses a clear conflict with the Constitution or laws of the Commonwealth, which Article 71 does not.

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,

MAURA HEALEY
ATTORNEY GENERAL

Margaret J. Hurley

By: Margaret J. Hurley
Chief, Central Massachusetts Division
Director, Municipal Law Unit
10 Mechanic Street, Suite 301
Worcester, MA 01608
(508) 792-7600 ext. 4402

cc: Town Counsel John W. Giorgio