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May 27, 2022

Mark Pacheco, Town Clerk
Town of Dighton
979 Somerset Avenue
Dighton, MA 02715

**Re: Dighton Special Town Meeting of November 1, 2021 -- Case # 10427
Warrant Articles # 5 and 33 (General) ¹**

Dear Mr. Pacheco:

Article 5 – By way of citizen petition, the Town voted under Article 5 to restrict the types of commemorative or organizational flags that can be displayed on a town flagpole at Town Hall and other town property. As drafted, the by-law constitutes an unlawful content-based restriction on private speech and we disapprove certain text in the by-law based on a U.S. Supreme Court decision issued after the Town’s vote on Article 5, Shurtleff v. City of Boston, 596 U.S. ____ (2022) (because Boston’s flag-raising program did not qualify as government speech the City’s refusal to allow petitioners’ flag was content-based discrimination in violation of the Free Speech Clause). With the disapproved text deleted from the by-law, the remaining by-law text qualifies as a permissible government speech program. See id. at ____ (slip op., at 11) (citing with approval the City of San Jose, California flag policy).

In this decision, we summarize the by-law amendments adopted under Article 5 and the Attorney General’s standard of review of town by-laws, and then explain why, based on our standard of review, we disapprove certain text in the by-law. ²

As with our review of all by-laws, we emphasize that our approval or disapproval does not imply any agreement or disagreement with the policy views that may have led to the passage of the by-law amendments. 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

¹ We issued our decision on Article 33 on May 20, 2022.

² We greatly appreciate the letters we received from: George Conti, a Town resident; Attorney Howard B. Lenow on behalf of Town resident Daniel Higgins; and Attorney Ruth A. Bourquin of the American Civil Liberties Union (ACLU) all opposing the by-law; and from Town Counsel David T. Gay in support of the by-law.

views she may have on the subject matter or wisdom of the by-law. Amherst v. Attorney General, 398 Mass. 793, 798-99 (1986).³

I. Summary of Article 5

The by-law adopted under Article 5 was proposed by a citizen and, as Town Counsel informed us during our review, was included on the Town Meeting warrant as drafted. Under Article 5 the Town voted to adopt a new (un-numbered) general by-law to restrict the display of flags on certain town properties as follows:

Flag Bylaw

No person shall fly or display a Commemorative or Organizational Flag other than:
a.) The United States flag; b.) The Massachusetts State flag; c.) The official Town of Dighton flag; d.) The official flags of all branches of the U.S. military and armed forces; and/or e.) The POW-MIA flag on a Town flagpole or any other such manner located at the Town Hall, or Town-owned land or Town-maintained facilities.

The by-law does not define the terms “Commemorative Flag” or “Organizational Flag,” “Town-owned land” or “Town-maintained facilities,” and these terms are not defined elsewhere in the Town’s by-laws.

II. Attorney General’s Standard of Review

Our review of Article 5 is governed by G.L. c. 40, § 32. 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, to disapprove a by-law (or any portion thereof), the Attorney General must cite an inconsistency between the by-law and the state Constitution or laws. 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).

³ One of the opposition letters refers to a potential motivation for the proposed by-law: a Town dispute over the flying of a LGBTQ pride flag at Town Hall. Just as with a court’s review of local by-laws, the Attorney General’s review of town by-laws does not consider policy arguments for or against the by-law or the potential motives for Town Meeting action. See Durand v. IDC Bellingham, LLC, 440 Mass. 45, 51 (2003) (court’s review of by-law’s legality “is not affected by consideration of the various possible motives that may have inspired legislative action.”).

III. Municipal Authority to Restrict Flags on Town Flagpoles at Town Hall

A governmental entity “has the right to speak for itself” and “is entitled to say what it wishes and to select the views that it wants to express.” Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 467-68 (2009) (citations and internal quotation marks omitted). When a governmental entity does so, it is engaging in government speech, to which “the Free Speech Clause has no application.” Id. at 467.

In Shurtleff v. City of Boston, 596 U.S. ____ (2022) the U.S. Supreme Court analyzed what qualifies as government speech in the context of flying flags at the center of municipal government – city or town hall. The City of Boston denied petitioners’ request to fly a flag on a flagpole on City Hall Plaza on the basis that it was a religious flag. Id. at ____, (slip op., at 12). The City contended that its flag-raising program was government speech unburdened by First Amendment restrictions. Id. at ____, (slip op., at 2). But because the City had historically allowed other private groups to fly flags on the flagpole it was necessary to determine whether the City had made the raising and flying of private groups’ flags a form of government speech. To answer the question, the Court analyzed three factors that had driven the analysis in previous cases: “the history of the expression at issue; the public’s likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression.” Id. at ____ (slip op., at 6) (citing Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U. S. 200, at 209–214 (2015)).

Applying these factors to the Boston program, the Court determined that the first factor weighed in favor of a government speech conclusion, because the flying of flags at the seat of government has historically been used to convey a governmental message. Id. at ____ (slip op., at 7-8). Regarding the second factor (public perception of who is speaking) the evidence did not weigh in favor of either conclusion because Boston had allowed its flag to be lowered, and the flags of private groups to be flown in its place, on several occasions. “Thus, even if the public would ordinarily associate a flag’s message with Boston, that is not necessarily true for the flags at issue” on City Hall Plaza. Id. at ____, (slip op., at 9).

The third factor proved most important to the Court’s conclusion: the extent to which Boston actively controlled these flag raisings and shaped the messages the flags sent. Because Boston “had nothing—no written policies or clear internal guidance—about what flags groups could fly and what those flags would communicate” the Court found that Boston did not make the raising and flying of private groups’ flags a form of government speech. Id. at ____, (slip op., at 11, 12). “That means, in turn, that Boston’s refusal to let Shurtleff and Camp Constitution raise their flag based on its religious viewpoint “abridg[ed]” their “freedom of speech.” Id. at ____, (slip op., at 2). “When a government does not speak for itself, it may not exclude speech based on ‘religious viewpoint’; doing so ‘constitutes impermissible viewpoint discrimination.’” Id. at ____, (slip op., at 12). Id. quoting Good News Club v. Milford Central School, 533 U. S. 98, 112 (2001).

III. Part of the Dighton By-Law is Permissible Government Speech Because It Restricts the Type of Flags That May be Flown on Town Flagpoles at Town Hall.

Applying the government speech analysis to the Dighton by-law, we determine that the by-law text that restricts the types of flags that can be flown on a town flagpole at Town Hall creates a program of government speech. As the Shurtleff Court recognized, town flagpoles at the center of town government (here Town Hall) are historically used to convey government messages. 596 U.S. ___, ___ (slip op., at 7-8). By taking control over what flags may be flown on town flagpoles at Town Hall, the Town has taken an active role “in the selection of flags or the crafting of their messages” that is essential to a program of government speech. Id. at ___ (slip op., at 12). As the Court highlighted,

Boston could easily have done more to make clear it wished to speak for itself by raising flags. Other cities’ flagflying policies support our conclusion. The City of San Jose, California, for example, provides in writing that its “flagpoles are not intended to serve as a forum for free expression by the public,” and lists approved flags that may be flown “as an expression of the City’s official sentiments.”

Id. at ___ (slip op., at 11). Here, to the extent the by-law identifies what flags are allowed on a town flagpole at Town Hall, the by-law creates a program of government speech. On this basis we approve this text in the by-law. However, we disapprove the remaining text (shown in underlined and bold, below) because it conflicts with the First Amendment and the free speech provision of Article 16 of the Declaration of Rights of Massachusetts, as amended:

Flag Bylaw

No person shall fly or display a Commemorative or Organizational Flag other than: a.) The United States flag; b.) The Massachusetts State flag; c.) The official Town of Dighton flag; d.) The official flags of all branches of the U.S. military and armed forces; and/or e.) The POW-MIA flag on a Town flagpole **or any other such manner** located at the Town Hall, **or Town-owned land or Town-maintained facilities**.

If the by-law were allowed to stand as adopted by Town Meeting, the by-law would not be limited to defining parameters for government speech but would instead encompass content-based restrictions on private speech in a public forum. For example, as the ACLU pointed out in a letter to us during our review of Article 5, the by-law as originally adopted would:

prohibit anyone from wearing on any Town owned property an article of clothing displaying another flag, such as a T-shirt displaying the flag of another country or a flag expressing the view that “Black Lives Matter” or “Blue Lives Matter”, or a flag expressing the view that the United States invests too much in the military, or the Town of Dighton flag with words super-imposed saying “Dighton restricts free speech.” It would prohibit someone from carrying another flag or a depiction of it

on any Town-owned land, including presumably public parks, streets and sidewalks—which are traditional public forums where protection for speech is at its highest—or a polling place on Town-owned property.

We agree with the ACLU’s contention that the by-law as originally adopted would likely not survive strict scrutiny. Much of the problem comes from the failure to define the words “Town-owned land” or “Town-maintained facilities,” in the original by-law. As drafted the by-law could apply to a broad range of public forums. As the Massachusetts Supreme Judicial Court concluded in Massachusetts Coalition for the Homeless v. City of Fall River, 486 Mass. 437, 441, 442-443 (2020), the streets, public ways and public areas are quintessential public forums. Content-based restrictions on speech in such forums are subject to strict scrutiny and must be narrowly tailored to serve a compelling governmental interest; we think it unlikely that the by-law as originally drafted could survive this test. See also Minnesota Voters Alliance v. Mansky, 138 S.Ct. 1876, 1885 (2019) (“[i]n a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited.”).

Because certain text in the by-law amounts to an unlawful content-based restriction on speech, we disapprove and delete this text as depicted in underlined and bold above. Stripped of the unlawful text what remains is a by-law that reflects Dighton’s lawful announcement that “it wishe[s] to speak for itself” when it comes to the raising of flags on the town flagpole at Town Hall. Shurtleff, 596 U.S. at ___ (slip op., at 11).

IV. Conclusion

The by-law as originally adopted amounts to an impermissible content-based restriction on speech in violation of the First Amendment and the free speech provision of Article 16 of the Declaration of Rights of Massachusetts, as amended, and we disapprove and delete certain words from the by-law on this basis. We approve the remaining by-law text because it qualifies as government speech and, as the Court in Shurtleff v. City of Boston, 596 U.S. ___ (2022) explained, a municipality may “make clear it wishe[s] to speak for itself by raising flags.” Id. at ___ (slip op., at 11).

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,

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