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October 11, 2022

Kathleen A. Gardner
Town Clerk
Town of Scituate
600 Chief Justice Cushing Way
Scituate, MA 02066

Re: Scituate Annual Town Meeting of April 11, 2022 -- Case # 10483
Warrant Articles # 17, 18 and 19 (Zoning) ¹
Warrant Article # 26 (General)

Dear Ms. Gardner:

Under Article 26 the Town adopted a “Tenting, Camping, Sleeping in Public” by-law that bans tenting, camping or sleeping on public property in the Town or on private property without the permission of the owner between 8:00 p.m. and 8:00 a.m. The Town reports to us that the by-law was intended to target overnight sleeping in recreational vehicles at the parking lot at Cole Parkway during the summer season,² and was intended to be enforced by civil fine and not criminal prosecution.³ However, the by-law does not include a specific penalty amount as required for civil enforcement under G.L. c. 40, § 21D, and the only remaining enforcement method is criminal prosecution. This results in a by-law that, as drafted, violates the Eighth Amendment as interpreted by relevant federal caselaw, including Martin v. City of Boise, 920 F.3d 584, 604 (2019) cert den’d 140 S.Ct. 674 (2019) (“an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against unhoused individuals for sleeping outdoors, on public property, when no alternative shelter is available to them.”)

¹ We issued our decision approving Articles 17, 18 and 19 on October 5, 2022.

² According to the Town’s website “Cole Parkway is the primary parking area for the Scituate Harbor Marina, the business and cultural district, and the Harbormaster and Coast Guard buildings. It is also an important link in the Scituate Harborwalk as well as the site of several Town events such as Heritage Days and First Fridays in the Harbor.” https://www.scituatema.gov/sites/g/files/vyhlf3781/f/pages/cole_parkway_redevelopment_committee_revised_charge_092222.pdf (last visited October 7, 2022).

³ News reports of the town meeting discussion also reflect this by-law purpose. See, e.g. <https://www.wickedlocal.com/story/scituate-mariner/2022/04/13/marijuana-articles-scituate-town-meeting-debated/7308102001/> (last viewed October 7, 2022).

In this decision we briefly summarize the Attorney General’s standard of review of town by-laws, and the mechanisms available for enforcement of town by-laws. Then we explain the basis for our conclusion that the by-law is unconstitutional based on relevant federal caselaw, including Martin.

I. Attorney General’s Standard of Review

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 v. Attorney General, 398 Mass. 793, 795-96 (1986). 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 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).

II. Criminal and Non-Criminal Disposition Enforcement of Town By-laws

There are two available methods for towns to enforce violation of town by-laws: criminal prosecution under G. L. c. 40, § 21 that authorizes towns to enforce by-law violations “by indictment or [criminal] complaint before a district court;” and non-criminal disposition pursuant to G.L. c. 40, § 21D.

Pursuant to G.L. c. 40, § 21D, “[a]ny town may by ordinance or by-law not inconsistent with this section provide for non-criminal disposition of violations of any ordinance or by-lawthe violation of which is subject to a specific penalty.” The statute describes certain requirements for the content of such by-laws, including the requirement that the by-law specify whether non-criminal disposition is mandatory or at the option of the enforcing officer. G.L. c. 40, § 21D, ¶ 2. The by-law must also identify the specific penalty (not exceeding three hundred dollars) for violation of the by-law. G.L. c. 40, § 21D, ¶ 5.

Chapter 40, Section 21D also provides details of the non-criminal disposition enforcement process. In sum, the statute establishes a non-criminal citation scheme, but if the civil citation is not timely paid the enforcing officer retains the discretion to apply for a criminal complaint (pursuant to G.L. c. 40, § 21).

III. Article 26

The amendments adopted under Article 26 prohibit tenting, camping, or sleeping in public on Town-owned or private land during certain hours:

Section 30125 -Tenting, Camping, Sleeping in Public. No person shall between the hours of 8:00 P.M. and 8:00 A.M. on private property without the written permission of the landowner or on Town-owned property without the permission of the Select Board set up a tent, camp, sleep in a vehicle, or sleep in the open within the limits of

the Town of Scituate. Any person violating this bylaw may be punished by a fine of not more than two hundred (\$200,00) dollars; or take any other action relative thereto. ⁴

The new “Tenting, Camping, Sleeping in Public” by-law does not comply with the requirements for non-criminal disposition enforcement. The by-law does not include a specific penalty amount. G.L. c. 40, § 21D, ¶ 5. The phrase “a fine of not more than two hundred dollars (\$200.00) dollars” does not qualify as a specific penalty amount because it leaves the penalty amount entirely to the discretion of the enforcing authority. ⁵ To comply with the requirements for non-criminal disposition under G.L. c. 40, § 21 the by-law must include a defined penalty amount (for example, \$200.00).

Because the Town cannot use the non-criminal disposition method of enforcement for violations of Section 30125 -Tenting, Camping, Sleeping in Public the only available enforcement mechanism is “by indictment or [criminal] complaint before a district court.” G. L. c. 40, § 21. ⁶

IV. The By-law Violates the Eighth Amendments’ Prohibition Against Cruel and Unusual Punishment

With criminal prosecution being the only available enforcement, the by-law comes squarely within the Martin holding: “an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them.” Martin, 920 F.3d at 604. The Martin court construed two Boise ordinances that were very similar to the proposed by-law here: the first, a “Camping Ordinance,” made it a misdemeanor to use “any of the streets, sidewalks, parks, or public places as a camping place at any time.” Id. at 603-604. The Camping Ordinance defined “camping” as “the use of public property as a temporary or permanent place of dwelling, lodging, or residence.” Id. at 604. The second, a “Disorderly Conduct Ordinance,” banned “[o]ccupying, lodging, or sleeping in any building, structure, or public place, whether public or private ... without the permission of the owner or person entitled to possession or in control thereof.” Id. The court determined that the Cruel and Unusual Punishments Clause of the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter. The Martin court emphasized that criminalization is not appropriate if an impacted individual has no shelter space “practically available” to them. Id. at 618.

⁴ The phrase “or take any action relative thereto” is an apparent scrivener’s error. This phrase is routinely included in the text of warrant articles to authorize broad town meeting action on a warrant article. See, e.g., Johnson v. Town of Framingham, 354 Mass. 750, 753 (1968) (the phrase “take any action relative thereto” was a broad statement of town meeting voters’ authority to act).

⁵ See e.g., our decisions issued to Southamptton (Case #10637) on September 7, 2022; Dalton (Case # 10597) on August 24, 2022; and Chester (Case # 9953) on February 3, 2021.

⁶ The Town has an existing enforcement by-law Section 10230, “Criminal and Non-Criminal Disposition of By-Law Violations” but this Section 10230 also lacks a specific penalty for violations of the new “Tenting, Camping, Sleeping in Public” by-law and so it does not cure the deficiency in the new by-law.

More recently in Johnson v. Grants Pass, 2022 WL 4492090 (9th Cir. September 28, 2022) the Court affirmed the district court’s ruling that “the City of Grants Pass cannot, consistent with the Eighth Amendment, enforce its anti-camping ordinances against homeless persons for the mere act of sleeping outside with rudimentary protection from the elements, or for sleeping in their car at night, when there is no other place in the City for them to go.” Id. at *21. ⁷

Similarly, in Pottinger v. City of Miami, the district court held that “[a]s long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the eighth amendment — sleeping, eating and other innocent conduct.” 810 F. Supp. 1551, 1565 (S.D. Fla. 1992). The court observed that “resisting the need to eat, sleep or engage in other life-sustaining activities is impossible. Avoiding public places when engaging in this otherwise innocent conduct is also impossible.” Id.

The Supreme Judicial Court has repeatedly affirmed that the law of Massachusetts “does not permit punishment of the homeless simply for being homeless.” Commonwealth v. Magadini, 474 Mass. 593, 601-02 (2016) (citing Commonwealth v. Canadyan, 458 Mass. 574, 579 (2010) ((setting aside finding that defendant violated condition of probation where homeless shelters did not have technology required for compliance)). The Scituate by-law, in its current form, does just that. Because the by-law imposes criminal punishment for sleeping in public spaces, with no required assessment of whether an unhoused person subject to the by-law has adequate alternative shelter, it violates the Eighth Amendment, and we disapprove it on this basis. ⁸

V. Other Comments for the Town’s Consideration.

If the Town pursues a future by-law amendment to achieve its intended goal, we are happy to work with Town Counsel to review proposed text. In that case, the Town should also consider the argument raised by the ACLU that, by prohibiting sleeping in cars but not sitting, standing, or merely lying down awake in a car during the same hours, the current version of the by-law poses serious

⁷ Notably, the Johnson Court explained that the Cruel and Unusual Punishment Clause of the Eighth Amendment also applies where a by-law or ordinance provides for initial civil enforcement but carries potential criminal penalties for continued non-compliance, as does the non-criminal disposition mechanism of G.L. c. 40, § 21D. See Johnson, 2022 WL 4492090 at *15-16 (“Imposing a few extra steps before criminalizing the very acts Martin explicitly says cannot be criminalized does not cure the anti-camping ordinances’ Eighth Amendment infirmity.”) Merely amending the Scituate by-law to properly authorize the non-criminal method of enforcement will thus not cure its constitutional deficiencies.

⁸ The First Circuit and Massachusetts appellate courts have not yet adopted the reasoning of the Martin decision. However, in Geddes v. City of Boston, 2021 WL 5441085 (2021), Justice Gaziano of the Supreme Judicial Court remanded the matter to the Superior Court for development of a complete factual record for ultimate resolution of several legal issues, including “whether to adopt Martin or a similar interpretation, and, if so, the meaning of “practically available [alternate shelter]”; [and] whether art. 26 of the Massachusetts Declaration of Rights is more expansive in this area than the Eighth Amendment.” The Geddes case resolved by stipulation of dismissal before the factual record could be developed.

equal protection and due process concerns.⁹

VI. Conclusion

In sum, we recognize that the Town has the authority to adopt by-laws “(1) [f]or directing and managing their prudential affairs, preserving peace and good order, and maintaining their internal police...” G.L. c. 40, § 21, and likely adopted the by-law for that purpose. However, as drafted, the by-law criminalizes public sleeping during the overnight hours in the Town in violation of the Eighth Amendment rights of the unhoused population, and we must disapprove it on that basis.

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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⁹ See ACLU letter to Assistant Attorney General Kelli Gunagan dated May 31, 2022.