

TOWN OF TEMPLETON

TOWN CLERK

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DATE: November 20, 2023

TO: TOWN OF TEMPLETON CITIZENS

FROM: TOWN CLERK'S OFFICE

RE: Templeton Annual Town Meeting of May 10, 2023 – Case #10957 Warrant Articles # 5, 7, 8 and 9 (General)

Dear Ms. Harris:

Article 9 – The Town voted under Article 9 to adopt a new general by-law, Section 240-17, “Flags for Display on Town Owned Flagpoles.” We approve most of the by-law because it qualifies as a permissible government speech program. See Shurtleff v. City of Boston, 596 U.S. 243, 257-58 (2022) (citing with approval the City of San Jose, California flag policy). We disapprove a portion of the by-law because it is unconstitutionally vague and recommend several future clarifying amendments to the by-law regarding the application, review, and decision-making process.

In this decision, we summarize the by-law amendments adopted under Article 9 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.

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

I. Summary of Article 9

Under Article 9 the Town voted to adopt a new general by-law, Section 240-17, to restrict the display of flags on town-owned flagpoles as follows (emphasis added):

¹ We issued our decision on Articles 5, 7, and 8 on August 3, 2023, with a supplemental decision

on November 3, 2023.

Section 240-17, Flags for Display on Town Owned Flagpoles

This bylaw permits the following, but not limited to, town-owned flags to be flown on Town-owned flagpoles: the Flag of the United States of America, the flag of the Commonwealth of Massachusetts, the flag of the Prisoners of War/Missing In Action (POW/MIA), Fire-Fighter's flag, and the flags of the Departments of Defense. The Town may approve other flags to be flown on Town-owned flagpoles as an expression of the Town's official sentiments. Flagpoles are not intended to serve as a forum for free expression by the public. No more than two (2) flags may be flown on a single flagpole at a time.

Flags with the following characteristics will specifically not be accepted for display:

- (a) Flags that promote political fundraising within the meaning of Massachusetts General Laws Chapter 55;
- (b) Flags that promote or oppose a candidate, ballot question, political party, political committee, or any other matter placed, or to be placed, before the voters at the polls or that otherwise promotes a political campaign purpose within the meaning of Massachusetts General Laws Chapters 50 through 55;
- (c) Flags that endorse religion or any particular religion, or that endorse opposition to religion or any particular religion;
- (d) Flags that contain commercial advertising;
- (e) **Flags that are not appropriate for general audiences of all ages;**
- (f) Applications may also be denied if they do not comply with the requirements of this policy **or other relevant requirements, bylaws, regulations, or policies of the Town.**

Approval of the placement of flag on Town-owned flagpoles shall be the responsibility of the Select Board and selectively delegated to the Town Administrator. In cases where delegated responsibility causes a difference of approval or denial for any of the authorized approvers, the ultimate final decision authority resides with the Select Board. The approval of requests for placement of flags on Town-owned flagpoles shall be accomplished by making requests to the Select Board in accordance with established Select Board policy. A record of approvals and denials shall be kept in the Select Board and Town Administrator's municipal offices.

II. Attorney General's Standard of Review

Our review of Article 9 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).

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. 243 (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 250. The City contended that its flagraising program was government speech unburdened by First Amendment restrictions. Id. at 248. 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 252 (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 245-255. 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 255.

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 257. “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 248. “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 258 quoting Good News Club v. Milford Central School, 533 U. S. 98, 112 (2001).

IV. Part of the Templeton Dighton By-Law is Impermissibly Vague

Applying the government speech analysis to the Templeton by-law, we determine that the by-law restricts the types of flags that can be flown on a Town-owned flagpoles and creates a program of government speech. As the Shurtleff Court recognized, town flagpoles at the center of town government are historically used to convey government messages. 596 U.S. 243, 254-255. By taking control over what flags may be flown on Town-owned flagpoles, 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 257. 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 257-258. Here, to the extent the by-law identifies what flags are allowed (and not allowed) on a town-owned flagpole, the by-law creates a program of government speech. On this basis we approve most of the by-law.

However, we disapprove certain text in the by-law (as shown in underlined and bold, below) because it is unconstitutionally vague:

Flags with the following characteristics will specifically not be accepted for display:

- (g) Flags that promote political fundraising within the meaning of Massachusetts General Laws Chapter 55;
- (h) Flags that promote or oppose a candidate, ballot question, political party, political committee, or any other matter placed, or to be placed, before the voters at the polls or that otherwise promotes a political campaign purpose within the meaning of Massachusetts General Laws Chapters 50 through 55;
- (i) Flags that endorse religion or any particular religion, or that endorse opposition to religion or any particular religion;
- (j) Flags that contain commercial advertising;
- (k) **Flags that are not appropriate for general audiences of all ages;**
- (l) Applications may also be denied if they do not comply with the requirements of this policy **or other relevant requirements, bylaws, regulations, or policies of the Town.**

Under the “void for vagueness” doctrine, a law that “either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.” Commonwealth

v. Carpenter, 325 Mass. 519, 521 (1950) (citation and internal quotations omitted). Vague laws violate due process because individuals do not receive fair notice of the conduct proscribed by the law, *id.*, and because vague laws that do not limit the exercise of discretion by officials engender the possibility of arbitrary and discriminatory enforcement. Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 363-64 (1973).

Here the phrase “not appropriate for general audiences of all ages” lacks any objective definition or criteria and fails to give fair notice of what flags may be covered by this description. See, e.g., Flores v. Bennett, 2023 WL 4946605 (9th Cir. 2023) (college’s flyer policy prohibiting “inappropriate or offens[ive] language or themes” was unconstitutionally vague because it failed to give reasonable notice of what is prohibited). Moreover, the phrase “not appropriate for general audiences of all ages” invites arbitrary enforcement because it leaves it entirely to the decision - maker (the Select Board or the Town Administrator) to determine what is or is not appropriate.

Similarly, by authorizing disapproval of applications based on non-compliance with “other relevant requirements, bylaws, regulations, or policies of the Town,” the by-law fails to give adequate notice and fails to limit the discretion of the decision maker. The phrase allows the Select Board or the Town Administrator to determine what is a “relevant” bylaw or policy, violation of which could serve as a denial of the application.


Although the Town has created a program of government speech through its flag by-law, the by-law must still give clear notice of what will or will not be allowed. See Shurtleff, 596 Mass. at 257 (Boston failed to have “clear internal guidance about what flags groups could fly and what those flags would communicate.”) Because the phrases in underlined and bold above are unconstitutionally vague, we disapprove them. 2

V. Conclusion

Except for two phrases which are unconstitutionally vague, we approve the Town’s flag by-law because it qualifies as government speech and, as the Court in Shurtleff v. City of Boston, 596 U.S. 243 (2022) explained, when a municipality’s flag-raising program constitutes government speech, the municipality “may refuse flags based on viewpoint.” *Id.* at 251.

I have posted copies in each precinct; namely, at the Post Office in Templeton, the Post Office in E. Templeton, the Post Office in Baldwinville and at the Town Office Building at 160 Patriots Road in E. Templeton and on the Town’s website @ www.templetonma.gov
Pursuant to G.L. c. 40, sec. 32.

Sincerely,


Carol A. Harris, Templeton Town Clerk

