

## Public Notice

Citizens of the Town of Harvard, Massachusetts

This is to inform you in accordance with the provisions of Chapter 40, Section 32 of the General Laws of the Commonwealth of Massachusetts, that the amendments to the Town's general by-laws, Chapter 39, "Firearms and Explosives", pertaining to Article 24 of the warrant for the Spring Annual Town Meeting first convened on April 29<sup>th</sup>, 2023, were APPROVED with the attached modified language by the Attorney General's Office on September 27<sup>th</sup>, 2023. This By-Law will be in effect on March 11<sup>th</sup>, 2024.

Claims of invalidity by reason of any defect in the procedure of adoption or amendment may only be made within 90 days of this posting. Copies of the by-laws may be obtained at the Town Clerk's Office, Town Hall, 13 Ayer Road, Harvard, MA.

Rose M. Miranda  
Town Clerk

Posted this 11th day of December, 2023, at the following locations within Precinct 1:

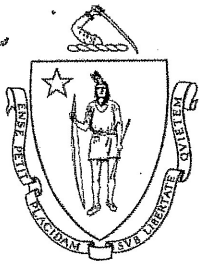
Town Hall - 13 Ayer Road  
Harvard Post Office - 215 Ayer Road  
Harvard Public Library - 4 Pond Road  
Harvard Senior Center - 16 Lancaster County Road  
Harvard Unitarian Universalist Church - 9 Ayer Road

By:

Assistant Town Clerk

True Copy

Attest



THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

CENTRAL MASSACHUSETTS DIVISION  
10 MECHANIC STREET, SUITE 301  
WORCESTER, MA 01608

ANDREA JOY CAMPBELL  
ATTORNEY GENERAL

(508) 792-7600  
(508) 795-1991 fax  
www.mass.gov/ago

September 27, 2023

Rose Miranda, Town Clerk  
Town of Harvard  
13 Ayer Road  
Harvard, MA 01451

RECEIVED  
HARVARD TOWN CLERK  
2023 OCT -2 PM 2:46

**Re: Harvard Annual Town Meeting of April 29, 2023 -- Case # 11028  
Warrant Articles # 22 and 24 (General) <sup>1</sup>**

Dear Ms. Miranda:

**Article 24** - Under Article 24 the Town voted to amend its general by-laws, Chapter 39, "Firearms and Explosives," by making certain revisions "as printed on the green handout made available at the Annual Town Meeting on April 29, 2023."

We approve Article 24 except for the text in Section 39-1 (B) providing that a regulation promulgated by a state agency shall constitute "written consent" to hunt or fish on property within the jurisdiction of the state agency. This text conflicts with G.L. c. 131, § 59, as further explained below. We also disapprove certain text in Section 39-3 (B) that fails to establish a specific penalty (because it conflicts with G.L. c. 40, § 21D that requires a specific penalty for non-criminal disposition) and text that authorizes a penalty up to the amount of \$500 because it conflicts with G.L. c. 40, § 21 that imposes a \$300.00 cap on a by-law violation penalty, as explained below.

In our decision below, we summarize the by-law adopted under Article 24, the Attorney General's standard of review of by-laws under G.L. c. 40, § 21, and then explain why, based on that standard of review, we partially approve the by-law.

**I. Summary of Article 24**

Under Article 24 the Town voted to amend Chapter 39, "Firearms and Explosives," regarding hunting and trapping. As amended, Section 39-1, "Hunting, Trapping, Firearms and Explosives," requires consent to hunt, trap, or discharge firearms or explosives on "public property." In addition, Section 39-1 provides that a person shall not fish, hunt or trap on private

<sup>1</sup> In a decision issued August 28 we approved Article 22 and by agreement with Town Counsel under G.L. c. 40, § 32, we extended the deadline for our review of Article 24 for an additional 30 days until September 28, 2023.

land without permission of the owner or tenant “after such owner or tenant has conspicuously posted thereon notices which bear the name of such owner or tenant and which state that fishing, hunting or trapping on such land, as the case may be, is prohibited.”

Section 39-1 (A) prohibits a person from: (1) hunting, trapping or snaring game; or (2) firing or discharging any firearms or explosives “within the limits of any highway, park, or other public property or Bare Hill Pond without the permission of the Select Board.” Section 39-1 (B) provides, with emphasis added:

**For the purposes of this bylaw, regulations promulgated by state agencies having jurisdiction over public property within the Town specifically authorizing hunting and/or fishing thereon shall constitute written consent.**

The by-law exempts from its provisions the lawful defense of life or property and any law enforcement officer acting in the discharge of their duties. Section 39-2 (B). In addition, the by-law exempts people that are licensed under G.L. c. 131 to hunt on public land owned or maintained by the Town provided that the Town has granted written permission. Section 39-2 (B). The by-law also requires that the written permission be carried with the person hunting and that it be shown upon request to “any police officer, game warden, or to any other local or state law enforcement official or Town official.”

Section 39-3, “Violations and Penalties,” authorizes any police officer of the Town to enforce the by-law. Section 39-3 (A). Section 39-3 (B) authorizes penalties for a violation of the by-law as follows, with emphasis added:

As an alternative to criminal fines imposed under M.G.L. Chapter 131, Section 90, Violators of this bylaw shall be punished by a civil fine of **not less than \$250 nor more than \$500**, for each offense.

## **II. Attorney General’s Standard of Review and General Preemption Principles**

Our review of Article 24 is governed by G.L. c. 40, § 32. Under 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.”) To disapprove a by-law (or any portion thereof), the Attorney General must cite to an inconsistency between the by-law and the state Constitution or laws. Id. at 796. “This is because a municipality has no power to adopt a by-law that is “inconsistent with the constitution or laws enacted by the [Legislature].” Home Rule Amendment, Mass. Const. amend. art. 2, § 6.

In determining whether a by-law 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].” Town of Wendell, 394 Mass. at 524 (1985). “This intent can be either express or inferred.” St. George Greek Orthodox Cathedral of Western Mass. v. Springfield, 462 Mass. 120, 125-26 (2012). Local action is precluded in three instances: (1) where the “Legislature has made an explicit indication of its intention in this respect”; (2) where “the State legislative purpose can[not] be achieved in the face of a local by-law on the same subject”; and (3) where “legislation on a subject is so comprehensive that an inference would be justified that the Legislature intended to preempt the field.” Town of Wendell, 394 Mass. at 524. “The existence of legislation on a subject, however, is not necessarily a bar to the enactment of local ordinances and by-laws exercising powers or functions with respect to the same subject[, if] the State legislative purpose can be achieved in the face of a local ordinance or by-law on the same subject[.]” Bloom v. Worcester, 363 Mass. 136, 156 (1973); see Town of Wendell, 394 Mass. at 527-28 (“It is not the comprehensiveness of legislation alone that makes local regulation inconsistent with a statute. . . . The question . . . is whether the local enactment will clearly frustrate a statutory purpose.”).

### III. Municipal Power to Regulate Hunting and the Discharge of Firearms

Article 24 prohibits hunting, trapping, or discharging firearms or explosives on “public property” without the Town’s consent. Because a municipality’s power to regulate hunting differs from its power to regulate the discharge of firearms, it is important to distinguish between the two.

#### A. Towns Cannot Regulate Hunting Except as Provided in Chapter 131

The activity of hunting is comprehensively regulated by General Laws Chapter 131 and related statutes and regulations that preempt the field. Chapter 131 imposes “carefully guarded conditions by which one may hunt in the Commonwealth safely, provisions by which one is licensed, and provisions designed to preserve and maintain the wildlife and natural resources of the Commonwealth.” Amherst, 398 Mass. at 797. Chapter 131 grants the Director of the Department of Fish and Game/Division of Fisheries and Wildlife (DFW Director) wide-ranging authority over hunting and trapping in the Commonwealth (see generally G.L. c. 131, § 4, and 321 CMR 3.01 *et seq.*), and further grants the DFW authority to adopt comprehensive regulations governing hunting and trapping, which are embodied in 321 CMR 3.00 *et seq.* Under G.L. c. 131, § 5, “Except as provided in rules and regulations made under authority of this section, and except as otherwise provided in [Chapter 131], a person shall not fish, hunt or trap . . .”.

Chapter 131 does not expressly preempt local regulation of hunting. However, the broad scope of Chapter 131, and the extensive powers granted to the DFW Director to regulate hunting, indicate a legislative intent that Chapter 131 occupies the field of hunting regulation. Towns are therefore preempted from regulating hunting except as expressly provided in Chapter 131. See Boston Edison Co. v. Town of Bedford, 444 Mass. 775 (2005) (town by-law imposing fines for failure to remove utility poles preempted by the comprehensive, uniform state regulation of utilities in G.L. c. 164); Wendell, 394 Mass. at 518 (town by-law regulating the use of pesticides in town frustrates the statutory purpose of centralized regulation of pesticide use).

Because of the Legislature’s comprehensive grant of authority to the DFW to be the

exclusive, state-wide regulator of hunting in the Commonwealth, towns are preempted from imposing by-law requirements which are inconsistent with G.L. c. 131 and related statutes and regulations. Therefore, towns may only impose local hunting requirements in those two categories expressly provided in Chapter 131: municipally owned lands (see G.L. c. 131, § 59); and Great Ponds not exceeding 500 acres in size (see G.L. c. 131, § 45).

B. Towns May Regulate the Discharge of Firearms Within Their Borders

By contrast, towns are authorized to regulate the discharge of firearms within their borders. See Brown v. Carlisle, 336 Mass. 147, 150-151 (1957) (upholding a firearm discharge by-law because “[t]he enumeration of [Chapter 131 and other] statutes demonstrates that the State has not excluded the type of legislation here undertaken by the defendant town...*We are not confronted with an attempt to regulate hunting....*” (emphasis supplied). See also Amherst, 398 Mass. at 797-798 (rejecting argument that Amherst’s firearm discharge by-law is preempted by Chapter 131 because “the Amherst by-law in no way frustrates those sections” of Chapter 131 which “concern the safe use of certain firearms.”).

IV. **Disapproved Text**

A. Section 39-1 (B)

Section 39-1 (B) of the by-law provides that if a state agency with jurisdiction over public property in the town has promulgated regulations authorizing hunting or fishing, such regulations “shall constitute written consent,” as follows (with emphasis added):

**For the purposes of this bylaw, regulations promulgated by state agencies having jurisdiction over public property within the Town specifically authorizing hunting and/or fishing thereon shall constitute written consent.**

We disapprove and delete Section 39-1 (B), shown above in bold and underline, because this provision conflicts with G.L. c. 131, § 59. Under G.L. c. 131, § 59, the Town can only regulate hunting on land over which it has “control and charge.” The Town does not have authority to regulate land within the jurisdiction of a state agency. For this reason, a town by-law cannot establish that a state agency regulation allowing hunting constitutes the state agency’s “written consent” to allow hunting or fishing on a particular property in the town. The Town should consult with Town Counsel with any questions on this issue.

B. Section 39-3 (B)

Section 39-3 (B) authorizes penalties for a violation of the by-law and provides that as an alternative to criminal fines, a violator shall be subject to a civil fine as follows, with emphasis added:

As an alternative to criminal fines imposed under M.G.L. Chapter 131, Section 90, Violators of this bylaw shall be punished by a civil fine of **not less than \$250 nor more than \$500**, for each offense.

We disapprove and delete the text “not less than” because this text conflicts with G.L. c. 40, § 21D (requiring a specific fine amount for non-criminal disposition) and the text “nor more than \$500” because this text conflicts with G.L. c. 40, § 21, that limits the fine amount for a by-law violation to \$300, as explained below.

The by-law authorizes a civil fine as an alternative to criminal fines. In order for a by-law violation to be enforced by way of non-criminal disposition (G.L. c. 40, § 21D), the by-law must meet several requirements, including the requirement that the violation be subject to a specific penalty. See G.L. c. 40, § 21D (“Any...town may by...by-law not inconsistent with this section provide for non-criminal disposition of violations of any...by-law or any rule or regulation of any municipal officer, board or department the violation of which is subject to a specific penalty.”) Section 39-3 (B) does not contain a specific penalty amount but rather provides a range of potential penalty amounts. Because G.L. c. 40, § 21D requires that the by-law provide for a specific penalty rather than a fine “of not less than” or “of not more than” a dollar figure, we disapprove the text shown above in bold and underline.

In addition, the by-law proposes to authorize a penalty of up to \$500 for each offense. We disapprove and delete this text because it conflicts with G.L. c. 40, § 21 that limits the fine amount for a by-law violation to \$300. See G.L. c. 40, § 21 (“Towns may...except as herein provided, affix penalties for breaches thereof not exceeding three hundred dollars for each offense...”). The Town should consult with Town Counsel with any questions on this matter.

#### **V. Additional Comments on the Remainder of Article 24**

As amended, Section 39-1, “Hunting, Trapping, Firearms and Explosives,” requires consent to hunt, trap, or discharge firearms or explosives on “public property.” In addition, Section 39-1 (A) prohibits a person from: (1) hunting, trapping or snaring game; or (2) firing or discharging any firearms or explosives “within the limits of any highway, park, or other public property or Bare Hill Pond without the permission of the Select Board.” Section 39-1 (B). By using the broad term “public property” without defining it or limiting it to “town-owned” public property or public property “under the control of the town,” Section 39-1 of the by-law could be misconstrued to include state owned property.

General Laws Chapter 131, Section 59 provides that a person shall not hunt on “any land owned or leased by the commonwealth or any political subdivision thereof,” except that the persons having control and charge of such lands may “permit the hunting, within said boundaries during the applicable open season of any birds or mammals,” as follows (with emphasis added):

A person shall not hunt, or in any manner molest or destroy, any bird or mammal within the boundaries of any reservation, park or common, or any land owned or leased by the commonwealth or any political subdivision thereof, or any land held in trust for public use; except that the authorities or persons having the control and charge of such reservations, parks, commons or other lands, may, with such limitations as they deem

advisable, permit the hunting, within said boundaries during the applicable open season of any birds or mammals. The authorities or persons having the control and charge of such reservations, parks, commons or land owned or leased or held for public use, the director of law enforcement, his deputy directors of enforcement, chiefs of enforcement, deputy chiefs of enforcement, environmental police officers, deputy environmental police officers, wardens and members of the state police in areas over which they have jurisdiction and all officers qualified to serve criminal process shall enforce this section.

This section shall not apply to state forests acquired under section thirty or section thirty-three of chapter one hundred and thirty-two or any other provision of law, or to state parks and reservations under the control of the division of forests and parks of the department of environmental management. Nothing in this section shall be deemed to prohibit any agency of the commonwealth or any political subdivision of the commonwealth from permitting the hunting, during the applicable open season, in any area owned or leased by it, of any bird or mammal, or from entering into agreements with the director for the establishment of wildlife management areas.

By not defining the broad term “public property” or limiting it to “town-owned” public property or public property “under the control of the town,” Section 39-1 could be misconstrued to include state owned property. Although we approve this text, the Town may only apply the by-law to town-owned property because the Town does not have the authority to regulate state owned property. The Town should consult with Town Counsel to determine if a future amendment to the by-law is needed to address this issue. In the interim, the Town should consult with Town Counsel to ensure the proper application of Section 39-1.

In addition, the by-law provision authorizing hunting on Bare Hill Pond with the permission of the Select Board must be approved by the Director of DFW under G.L. c. 131, § 45. Section 45 requires that a Great Pond “shall be public for the purpose of hunting or boating thereon” and that “[a]ll persons shall be allowed reasonable means of access to such ponds for [those] purposes,” as follows, with emphasis added:

Except as otherwise provided in this section and elsewhere in this chapter, every great pond not actively being used as a source of water supply of any town, water supply or fire district or public institution, and not subject to the provisions of section one hundred and sixty of chapter one hundred and eleven, shall be public for the purpose of hunting or boating thereon and shall, notwithstanding the provisions of any special law relating to fisheries in any particular place, be open to all inhabitants of the commonwealth for fishing purposes; provided that any city or town in which the whole or any portion of any great pond not exceeding five hundred acres in extent is situated may, as to so much thereof, as is located within its boundaries, make and enforce rules and regulations relative to hunting, fishing and boating thereon....Any such rules or regulations shall, to the extent that they authorize hunting or fishing or, both, be subject to the approval of the director, and to the extent that they authorize any other use thereof, be subject to the approval of the commissioner of environmental protection or to the extent that they impose restrictions upon the speed limit, a limitation on engine horsepower, a prohibition of the use of internal combustion engines, a ban on water skiing and other high speed uses, and a limitation of such uses to certain areas and certain times, be subject to the approval of the director of law enforcement. All persons

shall be allowed reasonable means of access to such ponds for the purposes aforesaid.

Although G.L. c. 131, § 45 grants to certain cities and town the right to make rules and regulations regarding hunting on Great Ponds not exceeding five hundred acres, the statute requires that such rules and regulations be approved by the Director of DFW. See Pearson v. Plymouth, 44 Mass. App. Ct. 741, 744 (1998) (“All such [great pond] rules and regulations are subject to the approvals of various State administrative agencies having special competence and responsibility in the particular subject, e.g., ...rules and regulations authorizing hunting and fishing are subject to the approval of the director of fisheries and wildlife.”) According to the Massachusetts Department of Environmental Protection, Bare Hill Pond is a Great Pond located in the Town. See <https://www.mass.gov/doc/massachusetts-great-ponds-list/download>.<sup>2</sup> The by-law provision authorizing hunting on Bare Hill Pond with the permission of the Select Board must therefore be approved by the Director of DFW under G.L. c. 131, § 45. The Town should consult with Town Counsel with any questions on this issue.

## VI. Conclusion

Except for the disapproved text in Section 39-1 (B) and Section 39-3 (B), shown above in bold and underline, we approve the by-law adopted under Article 24 because it is consistent with G.L. c. 131, §§ 36 and 59. The Town should consult with Town Counsel with any questions about the proper application of the approved text.

**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,

ANDREA JOY CAMPBELL  
ATTORNEY GENERAL

*Nicole B. Caprioli*

By: Nicole B. Caprioli  
Assistant Attorney General  
Municipal Law Unit  
10 Mechanic Street, Suite 301  
Worcester, MA 01608  
(508) 792-7600 ext. 4418

cc: Town Counsel Mark J. Lanza

---

<sup>2</sup>See also DEP Great Pond Information regarding Bare Hill Pond at: <https://www.mass.gov/doc/final-tmdl-for-bare-hill-pond/download>



Article 24, as listed on the Warrant for the Annual Town Meeting of April 29<sup>th</sup>, 2023:

**ARTICLE 24: AMEND CHAPTER 39, FIREARMS and EXPLOSIVES, of the CODE of HARVARD**

To see if the Town will vote to amend Chapter 39, Firearms and Explosives, of the Town Code by making the following revisions or take any vote or votes in relation thereto.

[key to revisions: underlining = additions; strikethrough = deletions]

Hunting, Trapping, Firearms, and Explosives

§ 39-1 ~~Discharge prohibited; exceptions.~~ Consent required for hunting, trapping or discharge of firearms or explosives on public or private property. It is expressly understood that hunting, trapping or the discharge of firearms or explosives on public or private property is not allowed without written consent and having that consent on one's person at all times during any of these activities.

A. No person shall hunt, trap, or snare game, fire or discharge any firearms or explosives of any kind within the limits of any highway, park or other public property, or Bare Hill Pond, ~~except~~ without the permission of the Select Board; or on any private property, ~~except without~~ the written a consent of the owner or legal occupant thereof; ~~provided, however, that this bylaw shall not apply to the lawful defense of life or property nor to any law enforcement office acting in the discharge of their duties.~~ And such consent shall be carried at all times by such person and, upon request, it shall be shown to any police officer, game warden, or to any other local or state law enforcement official or to the property owner, legal occupant, or his/her agent.

B. For the purposes of this bylaw, regulations promulgated by state agencies having jurisdiction over public property within the Town specifically authorizing hunting and/or fishing thereon shall constitute written consent.

§ 39-2 Exceptions

A. This bylaw shall not apply to the lawful defense of life or property nor to any law enforcement office acting in the discharge of their duties.

B. Person(s) legally licensed under M.G.L. Chapter 131 hunting on public land owned or maintained by the Town, so long as written permission of the Town is granted; said written permission shall be carried with the person hunting at all times and, upon request, it shall be shown to any police officer, game warden, or to any other local or state law enforcement official or Town official.

§ 39-3 Violations and penalties.

A. Any police officer of the Town may enforce the provisions of this section.

B. As an alternative to criminal fines imposed under M.G.L. Chapter 131, Section 90, Violations Violators of this bylaw shall be punishable by a civil fine of not to exceed less than \$250 nor more than \$500, \$50.00 for each offense.

(Inserted by Police Chief)