

COMMONWEALTH



“Home Rule” – the Breadth
and Limits of Local Authority

10.29.24

OF MASSACHUSETTS

Outline

- What can Andover regulate by bylaw, zoning or otherwise?
- What do the current *zoning* bylaws provide relative to environmental protection?
- What can Andover do to further regulate pollution sources by zoning or town bylaws?

The State & Regulatory Authority Historically

- Article IV of the Massachusetts Constitution: Police Power
 - Full power and authority are hereby granted to the sage *general court*...to make... all manner of wholesome and reasonable orders, laws, statutes and ordinances... so as not to be repugnant or contrary to this constitution.
- Articles of Amendment, Article II: Establish Local Governments
 - The general court shall have full power and authority to erect and constitute municipal or city governments, in any corporate town or towns in this commonwealth, and to grant to the inhabitants thereof such powers, privileges, and immunities, not repugnant to the constitution as the general court shall deem necessary.
 - *NB: c. 40A the “Zoning Act” or Zoning Enabling Act conferred the power to zone to municipalities.
- *Dillon’s Rule* & Municipalities as Subdivisions of the State
 - *"A municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words (from the state); second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable; and fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation."*

The Home Rule Amendment

Articles of Amendment LXXXIX, the “Home Rule Amendment” or “Article 89”

- 1) Affirmed right to local self-government;
- 2) Provided a process for adopting and amending city and town charters (*NB – Andover’s Charter pre-dates the Home Rule Amendment)
- 3) Outlines the regulatory powers of cities and towns which may “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 ...”
- 4) But also expressly forbids local bylaws:
 - regulating elections;
 - levying, assessing and collecting taxes;
 - Borrowing money;
 - disposing of park land;
 - governing civil relationships except as an incident to an exercise of an independent municipal power; or
 - Punishing to the magnitude of a felony or imposing imprisonment as a punishment for any violation of law

Trinity of Home Rule

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Attorney General Review

Under Home Rule and c. 40 sec. 32, the Town must submit all bylaw amendments to the AG's Municipal Law Unit for review and approval after Town Meeting.

*NB – Does not generally apply to cities.

The AG will begin its review of any new or amended bylaw by looking to:

Sections 6 and 7 of Article 89

Does a bylaw present issues of:

1. Preemption (inconsistent with the [state] constitution or the general laws)*

- Section 6

or attempt to...

2. regulate elections;

3. levy, assess and collect taxes;

4. borrow money or pledge the credit of the city or town;

5. dispose of park land;

6. enact private or civil law governing civil relationship except as an incident to an exercise of an independent municipal power; or

7. define and provide for the punishment of a felony or to impose imprisonment as a punishment for any violation of law

- Section 7

***Special Enumerated Exemptions – i.e. Earth Removal G.L. c. 40, § 21 (17)**

What is “not inconsistent” with State Law?

Two principal lenses utilized by the AG and Courts deciding whether a municipal bylaw is "not inconsistent with the constitution or laws enacted by the general court."

- 1) Clear legislative intent to preclude local action; or
- 2) Inferred legislative intent to pre-empt local action, typically evidenced by:
 - a) comprehensive nature of a regulatory scheme; or
 - b) innate frustration of the State law by virtue of varied local regulations.

Examples:

- Wetlands Bylaws may be more strict than Wetlands Protection Act without being inconsistent with the State Law because the underlying statute authorized local action. *See Lovequist v. Conservation Comm'n of Dennis*, 379 Mass. 7, 15 (1979).
- But local ordinances could not regulate natural gas utility facilities, which were expressly governed by the Department of Public Utilities *See New England LNG Co. v. Fall River*, 368 Mass. 259, 267 (1975).
- Both Town Bylaw and Board of Health regulations of pesticides at a local level preempted because State pesticides laws prioritized a centralized, Statewide determination of the reasonableness and safety of pesticides and permitting municipalities to second-guess such determinations would frustrate State law. *See Wendell v. Attorney General*, 394 Mass. 518, 529, 476 N.E.2d 585, 592 (1985)

Current Zoning Bylaw

- Primarily regulates environmental concerns through establishment and siting of districts such as the industrial districts and further controlling uses in overlay districts: Flood Hazard Overlay, Groundwater Protection Overlay & Watershed Protection Overlay both through standards and siting controls.
- Provides, broad special permit criteria and conditions:

“Impacts on the natural environment, including, but not limited to, air and water pollution, noise, stormwater runoff, and aesthetics.”

-Andover Zoning Bylaw Section 9.4.2(5)

- But not anchored to a more specific State standard such as a state “Pollution Control District” like heavily industrial communities.
- Exercise caution about vague, *ultra vires*, or *ex post facto* standards and conditions.

Use of Zoning Bylaws for Environmental Conditions

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Spectrum of Conditions & Considerations

- Conditions regarding waste storage and disposal – *safe*
- Conditions regarding emission of visible smoke *with a bylaw and State Air Pollution scheme – safe*
- Conditions on reporting pesticide usage – *moderate risk, lowered by a supporting bylaw*
- Conditions on reporting PFAS usage near wellhead protection zone – *safe with a bylaw, but... (See MLU Decision 22-10462, Marshfield)*
- Conditions on regulating PFAS emissions, BACT, etc. without a bylaw – *high risk*
- **NB – Middleborough attempt to regulate contaminated soils. Bylaw approved but not able to be applied to prohibit a hazardous waste facility as defined in G.L. c. 21D, § 2, because state law provides that such facilities are allowed by right in any industrial zone so long as the requirements of G.L. c. 40A, § 9, are satisfied.*

Avenues for Further Authority

- Incremental Adjustments to Existing Zoning
 - i.e. Local Registration & Reporting
- Requires Town Meeting & AG Approval
- Board of Health Regulations... with Hearing
- Robust Zoning or Town Bylaws (or local regulations of BOH)
 - i.e. prohibitions on PFAS chemicals, level limits, or BACT.
- Requires, Town Meeting, Special Act of the Legislature, and AG Approval