



THE COMMONWEALTH OF MASSACHUSETTS
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August 18, 2022

Ellen Agro, Town Clerk
Town of Mendon
20 Main Street
Mendon, MA 01756

**Re: Mendon Annual Town Meeting of May 6, 2022 -- Case # 10544
Warrant Articles # 20, 21, and 32 (General)**

Dear Ms. Agro:

Articles 20, 21, and 32 - We approve Articles 20, 21, and 32 from the May 6, 2022, Mendon Annual Town Meeting. Our comments on Article 21 are detailed below.

Article 21 - Under Article 21 the Town voted to amend its general by-laws to require all public meetings to be video and audio recorded. We approve Article 21. See Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986) (requiring inconsistency with state law or the Constitution for the Attorney General to disapprove a by-law). However, the Town may only apply the by-law consistent with G.L. c. 30A, §§ 18-25, the State's Open Meeting Law and G.L. c. 66, § 10, the State's Public Records Law, as detailed below.

In this decision we briefly describe the by-law; discuss the Attorney General's limited standard of review of town by-laws under G.L. c. 40, § 32; and then explain why, governed as we are by that standard, we approve Article 21.

I. Summary of Article 21

Under Article 21 the Town voted amend Chapter VII, "Records, Reports, and Meetings," to add a new Section 4 that requires all public meetings to be video and audio recorded. The recording requirements applies to in-person, hybrid, and fully remote meetings as follows:

Section 4 All public meetings (in-person, hybrid or full remote) will be recorded, both audio and visual, by the public meeting entity. If a public meeting is held fully remote (as provided by law), requirements for audio/visual recording remain.

Town Meetings are exempt from Open Meeting Law requirements under Massachusetts General Law.

II. The Attorney General’s Standard of Review of General By-laws

Our review of Article 21 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. Rather, in order 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). “The legislative intent to preclude local action must be clear.” Id. at 155. Massachusetts has the “strongest type of home rule and municipal action is presumed to be valid.” Connors v. City of Boston, 430 Mass. 31, 35 (1999) (internal quotations and citations omitted).

III. Article 21 Must Be Applied Consistent with the Recording Provisions of G.L. c. 30A, § 20

The Open Meeting Law allows a citizen to make a video or audio recording of an open session (not executive session of a public meeting after notifying the chair of the public body.) G.L. c. 30A, § 20 (f). The video or audio recording is subject to “reasonable requirements of the chair as to the number, placement and operation of equipment used so as not to interfere with the conduct of the meeting.” G.L. c. 30A, § 20 (f). The Open Meeting Law does not require that a public body video or audio record its meetings. See OML 2022-140 (finding that an allegation that a video recording of a meeting was deleted, even if true, does not constitute a violation of the Open Meeting Law). Because the Open Meeting Law does not govern whether a public body records its meetings, we cannot conclude that Article 21’s video and audio requirements conflict with the Open Meeting Law. However, the Town must ensure that it does not apply Article 21 in a manner that interferes with a citizen’s ability to record a public meeting pursuant to G.L. c. 30A, § 20 (f). The Town should consult with Town Counsel with any questions on this issue. ¹

IV. Article 21’s Video and Audio Recordings Requirements Cannot be Applied to Meetings Held in Executive Session

The Open Meeting Law defines “Meeting” as “a deliberation by a public body with respect to any matter within the body’s jurisdiction.” See G.L. c. 30A, § 18. The Open Meeting Law requires that meetings of a public body be open to the public, unless an “executive session” is convened for any of the reasons allowed under the Law. G.L. c. 30A, §§ 20 (a) and 21. By

¹ Open Meeting Law determinations may be found at the Attorney General's website: [OML Determination Lookup \(hylandcloud.com\)](https://www.mass.gov/info-details/oml-determination-lookup)

allowing a public body to enter into executive session, the Legislature recognized that “not everything done by public officials and employees can or should occur in a public meeting.” McCrea v. Flaherty, 71 Mass.App.Ct. 637, 640-41 (2008) (deliberations over urban renewal plan by the Boston City Council must be conducted in an open meeting). Before a public body can enter into executive session the chair must make certain declarations in open session and the public body must vote by roll call vote to go into executive session. G.L. c. 30A, § 21 (b). The Open Meeting Law also imposes requirements on a public body while in executive session: (1) it must keep accurate records; (2) all votes taken must be recorded by roll call; and (3) the public body may only discuss matters for which the executive session was called. See G.L. c. 30A, § 21 (b) (3) and § 23. The statutory requirements for conducting a meeting in executive session do not include a requirement that an executive session be audio or video recorded. Moreover, while the public can video and audio record an open public meeting, the Open Meeting Law does not allow the public to record an executive session.

Article 21 does not define “public meeting.” The Town cannot apply Article 21 to executive sessions because such application would conflict with the Open Meeting Law. The Town should consult closely with Town Counsel when applying Article 21’s video and audio recording requirements to ensure it complies with the Open Meeting Law.

V. Article 21’s Video and Audio Recordings Must be Applied Consistent with G.L. c. 66, § 10, the State’s Public Records Law

General Laws Chapter 4, Section 7 (26) define a “public record” to include, among other things, “recorded tapes” and “other documentary materials or data, regardless of physical form or characteristics,” made or received by a municipality. General Laws Chapter 66, Section 10, the State’s Public Records Law, governs whether a “public record” is subject to disclosure under the Public Records Law. The authority to determine the public records status of information held by a municipality is given to the Supervisor of Public Records. See G.L. c. 66 § 10. The Town must ensure that its treatment of any video or audio recording of a public meeting is consistent with G.L. c. 66, § 10. The Town may wish to discuss this issue with Town Counsel.

VI. Conclusion

We approve Article 21. However, we encourage the Town to consult closely with Town Counsel to ensure that the by-law amendments are applied consistent with the State’s Open Meeting Law and Public Records Law.

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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cc: Town Counsel Cynthia L. Amara