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March 11, 2017

Mr. Robert Whritenour
Town Administrator
Oak Bluffs Board of Selectmen
P.O. Box 1327
Oak Bluffs, MA 02557

Dear Bob:

I write in response to your request for advice concerning Chapter XV(F) of the General By-laws, which is entitled "Mopeds/Motor Scooters" (the "Moped By-law"). Your request was prompted, in part, by a complaint (the "Complaint") filed with the Board of Selectmen (the "Board"), dated January 20, 2017, by a group known as "The Mopeds are Dangerous Action Committee" ("MADAC") under Paragraph 11 of the Moped By-law. This letter will: outline state law governing moped rentals; trace the legislative history of the Moped By-law; analyze specific provisions in the Moped By-law; and recommend a process to address the Complaint.

I. State Law Background.

Section 1B of G. L. c. 90 provides, in part, as follows:

"Every person operating a motorized bicycle upon a way shall have the right to use all public ways in the commonwealth"

Section 1 defines "a motorized bicycle" as "a pedal bicycle which has a helper motor, or a non-pedal bicycle which has a motor" (I will refer to "motorized bicycles hereafter as "mopeds".)

Towns may not *prohibit* the use of mopeds. In Rogers v. Town of Provincetown, 384 Mass. 179 (1981), the Supreme Judicial Court ("SJC") considered the legality of a town by-law providing:

"No person shall rent, hire or offer to rent or hire any motorcycle, motor bike, moped, motorized bicycle, motor scooter or similar transport in the Town of Provincetown."

The owner of a moped rental business brought an action to invalidate the by-law. The Court framed the legal question as "whether [the Provincetown] by-law . . . regulating the rental of mopeds, conflicts with G. L. c. 90, § 1B" Provincetown contended that "the purpose of [its by-law] is effectively to eliminate access of tourists to mopeds. . . and that [§ 1B] does not guarantee a right of access to mopeds . . ." Id. at 181.

The SJC rejected Provincetown's "narrow reading" of the statute. Id. The Court ruled (id. at 182) as follows:

"The Provincetown by-law . . . has burdened the right to operate a moped by adding the additional necessary, although indirect, requirement that one wishing to use a moped in the town must purchase one or rent it outside of Provincetown and transport it into the town. The right conferred by the Legislature has not been so conditioned in the statute, and we think that Provincetown cannot add these requirements by by-law any more than it could, for example, impose additional licensing requirements or prohibit the sale of fuel to mopeds within the town. The by-law frustrates the rights immanent in the statute and . . . effectively overrules Section 1B."

The SJC further noted that "[w]e do not doubt that Provincetown's problems . . . may be a unique hazard in a congested resort area¹. . . [but] [s]ince the by-law and statute are inconsistent, the by-law must yield." Id. at 182-183. See also American Motorcyclist Assn. v. Park Com'n of City of Brockton, 412 Mass. 753, 757 (1992) (invalidating a regulation prohibiting the operation of motorcycles on roadways under the commission's jurisdiction and noting the "the regulation's

¹ The SJC observed that "Provincetown has shown that it is not without means to deal effectively with such problems . . . [and cited to a special act of the Legislature] which enables [the Town] to regulate bicycle traffic in contradiction to State Law." Id. at 182. It is apparent that the SJC was suggesting that Provincetown could seek special legislation to ban moped rentals, which is an avenue also available to Oak Bluffs.

prohibition of motorcycles applies to mopeds as well" [because] "the power of the commissioners to proscribe mopeds is similarly constrained").²

In 1988, a judge sitting in Dukes Superior Court applied the Rogers case in Town of Tisbury v. T.P. Leasing, Inc. d/b/a Adventure Rentals (Dukes Superior Court No. 88-0043). There Tisbury sought to enjoin T.P. Leasing ("T.P.") from renting mopeds because, even though Tisbury had denied T.P.'s renewal application in May of 1988 for its moped rental business, T.P. continued to operate. (A copy of this order is attached as Exhibit "A".) The Superior Court Judge denied Tisbury's request for preliminary injunction, and ruled:

"[I]f [Tisbury] requires a license to rent mopeds but subsequently, without a hearing and a factual determination of regulatory violations warranting denial of a license, refuses to renew a license, ["Tisbury"] has crossed over the line between reasonable regulation and effective prohibition. . . . Once ["Tisbury"] saw fit to promulgate a by-law and regulations regarding moped rentals it was bound by them. . . . Unless and until [Tisbury] conducts a hearing in conformity with its promulgated regulations regarding licensure of moped rental businesses and determines that T.P. is in violation of those regulations, it is without discretion to simply refuse to issue T.P. a license."

Id. at 2-3.

II. The Legislative History of the Moped By-law.

The Town first adopted a by-law regulating moped rentals - entitled "License-Motor Vehicles, Motor Cycles, Mopeds, etc." - at its October 1982 Special Town Meeting. That by-law provided, in part, that: "[N]o person . . . shall engage in the business of renting . . . motor vehicles, motorcycles, motor scooters or motorized bicycles." (Exhibit "B".) At a Special Town Meeting held on November 17, 1988, the Town amended the above provision by striking the words "motorized bicycles" from the by-law. (Id.)

² The holding in Rogers would likely govern a town's effort to prohibit moped rentals through zoning as well.

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At the Special Town Meeting held on April 9, 2002 (Article 10), the Town unanimously voted "to rescind its current existing general by-laws and to replace them in their entirety with the "Re-codified General By-laws of the Town of Oak Bluffs". The re-codified general by-laws contained - in Section XV(F) - a section entitled "Mopeds/Motor Scooters". A copy of this section is attached hereto as Exhibit "C", which I have referred to as the Moped By-law. On July 18, 2002, the municipal law division of the Attorney General's Office (the "Attorney General") approved the text of the Moped By-law in its entirety. (Exhibit "D".) Paragraph 4 of the Moped By-law adopted on April 9, 2002, provided as follows:

"The Board of Selectmen shall issue a maximum of eight (8) licenses per year. Licenses shall not be transferable, and licenses not used during one year's time shall be null and void."

Paragraph 10 provided that "[t]he Board shall issue no more than 600 vehicle registration decals in each year."

Shortly after adopting the re-codified by-laws in April of 2002, the Town, at the Special Town Meeting on June 18, 2002, approved amendments to both Paragraphs 4 and 10 of the Moped By-law. The amendment to Paragraph 4 provided:

"The Board of Selectmen shall issue a maximum of six (6) licenses per year. Licenses shall not be transferable, and *no legal or beneficial interest in any entity holding any license shall be transferable without the prior approval of the Board of Selectmen.* Licenses not used during one year's time shall be null and void, and any person . . . engaged in the business of renting, leasing or keeping for rent or lease any motor scooters or mopeds without first obtaining a new license shall be deemed to have forfeited its license. The maximum number of licenses that the Board of Selectmen may issue shall be reduced by one for each license that becomes null and void or forfeited under this provision."

(Emphasis added.) (A copy of the article, as adopted, is attached as Exhibit "E".) The Town adopted the following amendment to Paragraph 10 at the same meeting: "The Board of Selectmen shall issue not more than 388 vehicle registration decals in each year." (Id.)

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The Attorney General approved the June 18, 2002, amendments by letter to the Town Clerk dated September 17, 2002; however, the Attorney General's approval contained several cautionary observations on the amendments to Paragraph 4, focusing in particular on the language that "no legal or beneficial interest in any entity holding any license shall be transferable without the prior approval of the Board of Selectmen." (See Exhibit "F".) The Attorney General noted as follows:

"Taken in isolation from the entire context of the Section, the italicized text would seem to prohibit the sale or transfer of stock of a corporation, or of other indicia of ownership. If so construed, the clause would be a clear violation of the Home Rule Amendment as an impermissible regulation of civil relationships and as an impermissible impairment of private contract. However, construed in the total context of Section 4, I concur in Town Counsel's view that the clause merely means that any such unapproved transfer of legal or beneficial interest would result in a forfeiture of the license, as elsewhere provided in the Section."

With regard to the last sentence of Paragraph 4, which addresses forfeiture of licenses, the Attorney General noted as follows:

"As the Section elsewhere limits to the maximum number of licenses that the Board may issue 'per year,' one is left to wonder if the reduction mentioned in the final sentence is meant to be 'per year' or is rather meant to be cumulative over time, with the result that once six licenses have at any time been forfeited or otherwise shall have become null and void, then no licenses could be thereafter be issued; in short, an outright prohibition would then result."

The Attorney General's approval also added the following caution:

"An outright prohibition on the operation of motorized bicycles upon ways within the Commonwealth has been found by our Supreme Judicial Court to be in conflict with G. L. c. 90 § 1B". . . . In this light, we urge the Town to consult with Town Counsel if, at some future time, the number of issuable licenses is dropping to the point where an outright prohibition is likely to occur - an occurrence

which would be an -as applied' inconsistency with Chapter 90."

(Id.) (Emphasis added.)

Finally, the Town, at the April 13, 2004, Special Town Meeting, approved an amendment of Paragraph 4, reducing the total number of "issuable" licenses to five (5) and the total number of vehicle registration decals from 388 to 308. (Exhibit "G".) The Attorney General subsequently approved those amendments. (Exhibit "H".) A copy of the Moped By-law as it currently exists today is attached Exhibit "I".

III. Interpretation of Specific Sections of the Moped By-law in Light of Governing State Law and Prior Review by the Attorney General.

You have requested guidance on specific aspects of Paragraph 4, in particular the language prohibiting license transfers and the effect of certain types of transfers without the prior approval of the Board. My interpretation of these clauses is guided by general rules of statutory construction,³ and the mandate of G. L. c. 90, § 1B, as interpreted by the Attorney General's review of the June 18, 2002 amendments under the Rogers case.⁴

Paragraph 4 identifies two separate ways in which "the maximum number of licenses that the [Board] may issue shall be reduced by one for each license that becomes null and void or forfeited under this provision". (Emphasis added.) First, a license "not used during one year's time shall be null and void" This provision is straightforward: a license becomes "null and void" if the holder does not use it for one year.

Second, "any person, business or corporation who is a prior holder of a license and who engaged in the business of renting, leasing or keeping for rent or lease any mopeds without first obtaining a new license shall be deemed to have forfeited his

³ See the Addendum to this letter.

⁴ I also make the observation that the last three amendments to the Moped By-law, taken together, demonstrate the Town Meeting's intent, and prior Boards offering those amendments, to reduce the total number of licenses available for moped rental businesses, and the total number of mopeds available for rental, over time.

license". This mechanism is triggered by the clause prohibiting a transfer of a legal or beneficial interest in a moped rental business without prior approval of the Board; it would be superfluous were it simply to apply to a business which did not "use" its license for one year (which renders that license "null and void"). Thus, a licensed moped business which transfers some or all of its "beneficial or legal interest" in the licensed entity - without prior approval of the Board - will be deemed to have "forfeited" that license.

Viewing these provisions in the context of the entire Section - and mindful of the Attorney General's interpretation of the June 18, 2002 Amendments - the fact that a license is either a.) rendered null and void (by inactivity), or b.) forfeited (by failing to obtain approval to transfer) under Paragraph 4 does not mean that the deprived licensed holder is barred from re-applying and obtaining a new license. Rather, under the plain language of the Paragraph, when a license is rendered null and void or forfeited, the total number of licenses available to be issued by the Board is reduced by one, assuming the reduction does not reduce the total number of available licenses to a number which could be found to constitute an effective prohibition under the SJC's decision in Rogers.⁵

IV. The MADAC Complaint.

Paragraph 11 of the Moped By-law outlines a procedure by which complaints may "received" by the Board, and provides a process by which the Board may require the license holder to respond. The Paragraph outlines various escalating penalties for violations, ranging from fines to revocation of a license.

The Complaint addresses the three entities which the Board licensed to rent mopeds in 2016: Island Hoppers, LLC ("Island Hoppers"); King of Rentals of MV, LLC ("King of Rentals"); and

⁵ The prior holder of a "null and void" or "forfeited" license may not be eligible for a new license, however, if all available licenses under the Moped By-law are or have been secured by other vendors. The operative language of Paragraph 4 serves to reduce the total number of licenses available when one is not exercised or is transferred without Board review - not to "punish" a license holder or its owners. The "imperfection to be remedied" with this particular requirement is the the total number of mopeds available and the total number of businesses permitted to rent mopeds within the Town. See Addendum.

Ride on Mopeds, Inc. ("Ride On"). With respect to each business, the Complaint provides "timelines", generally dating back to 2006, seeking to identify whether and when the business filed a license application, when it was granted, and the name of the person signing the application. In some years, the Complaint alleges, MADAC could not locate any information in the Town's files.

The Complaint's allegations may be summarized as follows:

Island Hoppers

1. Island Hoppers Certificate of Organization filed with the Secretary of State, April 3, 2006, and was licensed May of 2006, after bylaw prohibited new licenses from being issued. Not a valid issuance.
2. Jason Leone was added to the license in 2008 with no approval of Selectmen. Previous license was to John Leone.
3. Copies of Island Hoppers licenses for 2010, 2011 and 2013 were not found in the files. This means they were not licensed for those years and their license should be forfeited.
4. Island Hoppers Licenses have shown different addresses over the years, i.e. Circuit Ave. Ext., 15 Circuit Ave. Ext., 23 Lake Ave., 28 Lake Ave. Original paperwork was for 15 Circuit Ave Ext. Moving the license is illegal under the bylaw.

King of Rentals

1. In 2008, Jason Leone, DBA King of Rentals MV was granted a license by the Selectmen. Former business was Cheryl King, DBA King's Rentals. Alleged that the license was transferred without prior approval of the Board of Selectmen.
2. King of Rentals has listed several different locations on their licenses, i.e. 11 Oak Bluffs Ave., 1 Circuit Ave. Ext., 11 Circuit Ave. Ext., 15 Circuit Ave. Ext. Moving the license is illegal under the Bylaw.
3. Copies of King of Rentals licenses were not found in the file for the years, 2011 and 2015. Licenses were issued in

July in 2009 and in June in 2012. Payments were received after the date of issuance three times, therefore licenses should be forfeited.

Ride on

1. In 2004 when the Bylaw was adopted, the Licensee was Mark Wallace. License was transferred to Aguimar Carlos on April 25, 2004 without prior approval of the Board of Selectmen.

Research furnished by your office reveals that, in 1998, there were seven active licenses in Town. At the time of the 2004 amendment to Paragraph 4, there were, presumably, a maximum of five active licenses. In 2016, as the Complaint recognizes, the Board issued only three licenses. Accordingly, under the null and void or forfeiture language of Paragraph 4, the maximum number of licenses available is now three, as all other licenses have either been rendered null and void, forfeited, or lost to attrition.

The central question raised by the Complaint is whether the inactivity of the existing license holders - or the transfers of interests in entities holding licenses without prior approvals - have rendered additional licenses "null and void" or has caused one or more to be forfeited. Indeed, the Complaint requests that the Board "deem the licenses of Island Hoppers, [King of Rentals], and [Ride on] to be null and void under Paragraph 4, and that you do not issue further licenses to these entities."

In order to address the Complaint - and in order to adhere to the procedural protections granted to licensees under the Moped By-law - the record must be further developed, and the license holders must be given a hearing and an opportunity to present evidence.⁶ The Board should follow the process set out in Paragraph 11 of the Moped By-law by furnishing a copy of the Complaint to each of the named license holders, and by giving them an opportunity to be heard at separate public hearings.

⁶ That a copy of a physical license is not now located in a particular file is not conclusive that one or more of the existing licenses were not issued. And, while it appears that all three of the existing dealerships most likely engaged in some transfers of legal or beneficial interests in the entities holding the licenses, the Board approved all three businesses in 2016.

Based on a complete record, the Board will then be in a position to address whether any of the existing three licenses have been forfeited or rendered null and void, whether the total number of available licenses has been further decreased and, if so, whether the resulting number constitutes an effective prohibition under the Rogers case. Following this process will also ensure that the rights of the moped dealers are observed.

V. Other issues.

i. Location changes.

MADAC contends that the three license holders have moved the physical locations of their operations on various occasions in violation of the provision in Paragraph 4 stating that "[l]icenses shall not be transferable." The Moped By-law requires the Board to issue a license for a particular location in a given year, which is important because Paragraph 2(b) of the Moped By-law requires each applicant to provide "a detailed plan including building dimensions and training track location . . ." The language noted above in Paragraph 4 bars a transfer of the license itself as an asset - an act which could lead to an increase in the total number of rental businesses without town oversight - but does not preclude the Board from issuing a license for a new location in any particular year. Simply stated, the Board's decision to authorize a licensee to change locations in successive years does not render a license null and void or cause it to be forfeited.

ii. Training track areas.

The Complaint also alleges that the Board has not properly enforced compliance with the training track requirement contained in Paragraph 7, which states:

"Each licensee shall be responsible for instructing every operator in the proper method of operation of the vehicle including providing a supervised test drive on the licensee's on -premises unobstructed training track which shall be at least 50 feet long and 25 feet wide. The Board of Selectmen may waive the training track requirement upon written petition by the licensee setting forth the spatial limitations and a proposal for an alternative training program."

(Emphasis added.)

Paragraph 7 *does* not permit the Board to "waive" compliance with this requirement in its entirety. Rather, Paragraph 7 affords the Board discretion to permit a licensee, on "written petition," to provide an "alternative training program". It is reasonable to conclude that a licensee's proposal could include either an off-site training track or a modified on-site one. In either case, the Board should be satisfied that a licensee's alternative proposal satisfies the purpose of the provision, which is public safety.

The Board should keep in mind the Superior Court's admonition in the Tisbury case: while state law prohibits a town from effectively prohibiting moped rentals, a local licensing authority, once it adopts a by-law with procedures, it is bound by those procedures. Given the obvious public safety concerns stemming from rental of a moped to an unsafe or an inexperienced operator, and given that the Board is bound by the strictures of Paragraph 7, the Board should review any petition for an alternative training program carefully.⁷

VI. Summary/Recommendations.

I recommend that the Board conduct the hearings on MADAC's complaint before issuing licenses for the 2017 season. The decision you reach may affect the total number of available licenses for the upcoming summer.

The following is a summary of the key points in his letter and our recommendations:

1. The Town does not have the legal authority to prohibit the leasing or renting of mopeds through a local by-law (either general or zoning).
2. The Attorney General has determined that the Town's existing Moped By-law is valid, and that the mechanism established in Paragraph 4 to reduce the number of available licenses based on either lack of use or transferring interests without prior approval is legal, provided that any resulting reduction in total available licenses does not amount to an outright prohibition.

⁷ I express no view as to whether any particular applicant should be referred to the Martha's Vineyard Commission as a DRI, and suggest that any person wishing to do so could contact the MVC.

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3. The Board should notify each entity granted a license in 2016 of the Complaint as provided in Paragraph 11(a) of the Moped By-law, and schedule separate hearings for each to have an opportunity to respond.
4. Once the Board has a complete record concerning the allegations set out in the Complaint, the Board should decide whether any of the existing licenses has been rendered null and void or forfeited.
5. If any of the three current licenses has been rendered null and void or forfeited, the Board would then have to determine whether the resulting reduction "is dropping to the point where an outright prohibition is likely to occur," as the Attorney General cautioned.
6. The Board should complete the process outlined in points 3-5 before deciding on license applications for the 2017 season.
7. For license applications for the 2017 season, the Board should insist on strict adherence with Paragraph 7 that modification of the on-site training track requirement can only be issued "upon written petition by the licensee setting forth spatial limitations and a proposal for an alternative training program." The Board should not approve an alternative training program without full consideration of the safety implications in light of the purpose of the on-site training track requirement.

Please do not hesitate to call with any further questions. We of course are ready to assist you further in interpreting the Moped By-law in light of a more developed factual record.

Very truly yours,



Michael A. Goldsmith

MAG/ad
Enclosures

Cc: Ronald H. Rappaport, Esq.

ADDENDUM

Rules Governing statutory construction:

Massachusetts courts use traditional rules of statutory construction when interpreting town by-laws. See Cohen v. Board of Water Commissioners, Fire District No. 1, South Hadley, 411 Mass. 744, 748 (1992). First, a by-law must be read in its complete context and be given a sensible meaning within that context. See Selectmen of Hatfield v. Garvey, 362 Mass. 821, 826 (1973). The intent of the by-law is to be ascertained from all of its terms and parts as well as the subject matter to which it relates. See Tilton v. Haverhill, 311 Mass. 572, 577-578 (1942). Reviewing courts "endeavor to interpret a statute to give effect to all its provisions, so that no part will be inoperative or superfluous." Connors v. Annino, 460 Mass. 790, 796 (2011) (citations omitted). Finally, courts will look to the "cause of [a by-law's] enactment, the mischief or imperfection to be remedied and the main object to be accomplished" Danusis v. Longo, 48 Mass. App. Ct. 254, 262 (1999).