

Karis L. North
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September 21, 2023

VIA EMAIL ONLY

Linda Wollschlager, Chair Finance Committee
Natick Town Hall
13 E. Central Street
Natick, MA 01789

RE: Natick 2023 Fall Annual Town Meeting – Warrant Article 31

Dear Ms. Wollschlager:

Upon your request, I have reviewed Article 31 2023 Fall Annual Town Meeting. In reviewing these articles and accompanying motion and materials, I have relied upon the Natick Home Rule Charter (“Charter”), the Natick Town Bylaws (“Bylaws”) the Massachusetts General Laws (“General Laws”), and other legal sources.

Article 31: Safe & Fair Reproductive & Gender Affirming Care Access By-Law

The proposed motion is as follows:

Move that the town adopt the following by-law as Article 31 of the Natick town by-laws:

Article 31: Safe access to legally protected reproductive and gender-affirming health care services.

Section 1: Definitions

“Abusive litigation” means litigation or other action to deter, prevent, sanction or punish any person engaging in legally-protected health care activity that is: (i) filed or prosecuted in any state other than the commonwealth where liability, in whole or part, directly or indirectly, is based on legally-protected health care activity that occurred in the commonwealth, including any action in which liability is based on any theory of vicarious, joint or several liability derived therefrom; or (ii) an attempt to enforce any order or judgment issued in connection with any such action by any party to the action or any person acting on behalf of a party to the action; provided, however, that a lawsuit shall be considered to be based on conduct that occurred in the commonwealth if any part of any act or omission involved in the course of conduct that forms the basis for liability in the lawsuit occurs or is initiated in the commonwealth, whether or not such act or omission is alleged or included in any pleading or other filing in the lawsuit

“Town agent” means any employee of the town of Natick, whether full time or part time, regular or seasonal, any intern or volunteer when acting on behalf of the Town of Natick, any contractor for the Town of Natick while a contract between the Town of Natick and said contractor is in effect, and any recipient of Town funding, grants, awards, or appropriations.

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“Gender-affirming health care services” means all supplies, care and services of a medical, behavioral health, mental health, surgical, psychiatric, therapeutic, diagnostic, preventative, rehabilitative or supportive nature relating to the treatment of gender dysphoria.

“Legally-protected health care activity” means (i) the exercise and enjoyment, or attempted exercise and enjoyment, by any person of rights to reproductive health care services or gender affirming health care services secured by the constitution or laws of the commonwealth; or (ii) any act or omission undertaken to aid or encourage, or attempt to aid or encourage, any person in the exercise and enjoyment, or attempted exercise and enjoyment, of rights to reproductive health care services or gender-affirming health care services secured by the constitution or laws of the commonwealth, or to provide insurance coverage for such services; provided, however, that the provision of such a health care service by a person duly licensed under the laws of the commonwealth and physically present in the commonwealth, and the provision of insurance coverage for such services, shall be legally protected if the service is permitted under the laws of the commonwealth, regardless of the patient’s location.

“Reproductive health care services” mean, all supplies, care and services of a medical, behavioral health, mental health, surgical, psychiatric, therapeutic, diagnostic, preventative, rehabilitative or supportive nature relating to pregnancy, contraception, assisted reproduction, miscarriage management or the termination of a pregnancy.

Section 2: Safe Access

A. Consistent with G.L. Ch. 4 § 7(26)(c), personnel and medical files or information and any other materials or data related to the provision of reproductive health care services or gender-affirming health care services for any person, including individuals who are not residents of the Town of Natick or the Commonwealth of Massachusetts, held by any town agent in their capacity as a town agent shall be kept confidential and shall not be disclosed in response to a public records request.

B. Acting in their capacity as a town agent, no town agent may furnish information, assistance, or aid to any person or jurisdiction when such information, assistance, or aid is knowingly intended for use in abusive litigation as defined in this article, except as so ordered by a court in the Commonwealth. Additionally, no town resources, materials, or funds shall be so used.

C. Acting in their capacity as a town agent, no town agent may furnish information, assistance, or aid to any person or jurisdiction when such information, assistance, or aid is knowingly intended for the purposes of prohibiting, criminalizing, sanctioning, authorizing a person to bring a civil action against, or otherwise interfering with a person, entity or carrier that seeks, receives, causes, aids in access to, aids or abets or provides, or attempts or intends to seek, receive, cause, aid in access to, aid or abet, or provide reproductive health care services or gender-affirming health care services, if such services are legally-protected health care activities. Additionally, no town resources, materials, or funds shall be so used.

D. Pursuant to G.L. Ch. 147, § 63 no person, regardless of residency or citizenship status, shall be held in custody by the Natick Police Department for seeking, receiving, causing, aiding in access to, aiding or abetting or providing, or attempting or intending to seek, receive, cause, aid in access to, aid or abet, or provide reproductive health care services or gender-affirming health care services, if such services are legally-protected health care activities, except as required by the order of a court of competent jurisdiction. This restriction shall not

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apply to any investigation or proceeding where the conduct that is subject to potential liability under the investigation or proceeding initiated in or by the other State would be subject to civil or criminal liability or professional sanction under the laws of the Commonwealth if committed in this Commonwealth. Notwithstanding the general prohibition of this section, agencies and individuals acting on their behalf may provide information or assistance in connection with such an investigation or proceeding in response to the written request of a person who is the subject of such an investigation or proceeding.

E. Pursuant to G.L. Ch. 147, § 63, any person held in custody by the Natick Police Department shall not be remanded, transferred, or extradited to another jurisdiction for having sought, received, caused, aided in accessing, aided or abetted or provided, or attempted or intended to seek, receive, cause, aid in access to, aid or abet, or provide reproductive health care services or gender-affirming health care services, if such services are legally-protected health care activities, except as required by the order of a court of competent jurisdiction. This restriction shall not apply to any investigation or proceeding where the conduct that is subject to potential liability under the investigation or proceeding initiated in or by the other State would be subject to civil or criminal liability or professional sanction under the laws of the Commonwealth if committed in this Commonwealth. Notwithstanding the general prohibition of this section, agencies and individuals acting on their behalf may provide information or assistance in connection with such an investigation or proceeding in response to the written request of a person who is the subject of such an investigation or proceeding.

Section 3: Severability

The sections, paragraphs, sentences, clauses, and phrases of this article are severable, and if any phrase, clause, sentence, paragraph, or section of this article shall be declared unconstitutional by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs, and sections of this article.

As an initial matter, the General Court passed Chapter 127 of the Acts of 2022 which provides and protects access to reproductive and gender affirming care. The law uses the same definitions as the proposed bylaw, except the proposed bylaw includes a new definition, for “Town Agent.”

The proposed definition of “Town Agent” includes the following: “any contractor for the Town of Natick while a contract between the Town of Natick and said contractor is in effect, and any recipient of Town funding, grants, awards, or appropriations.” Section 2.B and 2.C of the proposed bylaw then purports to restrict communications between the Town Agent and others. I am concerned that application of a Natick Town Bylaw to contractors outside of Natick is not enforceable, and will impact the ability of the Town to contract for services. In addition, I am concerned that the provision is not enforceable against any contractor, to the extent that enforcement would require the contractor share information with the Town which is protected by HIPAA or other privacy laws.

The law includes the following provision:

Section 11I³/₄. Notwithstanding any general or special law or common law conflict of law rule to the contrary, the laws of the commonwealth shall govern in any case or controversy heard in

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the commonwealth related to reproductive health care services or gender-affirming health care services, as those terms are defined in section 11I½, except as may be required by federal law.

It is my opinion that this provision preempts local laws which attempt to provide the same or similar protections as the state law. I note that I am unaware of any towns within the Commonwealth which have adopted similar laws; only a few cities have done so. City ordinances are not subject to review by the Attorney General, as a Town of Natick bylaw is. If this bylaw is preempted by state law, then it would not be able to be approved by the Attorney General.

Section 2.A. of the proposed bylaw states:

Consistent with G.L. Ch. 4 § 7(26)(c), personnel and medical files or information and any other materials or data related to the provision of reproductive health care services or gender-affirming health care services for any person, including individuals who are not residents of the Town of Natick or the Commonwealth of Massachusetts, held by any town agent in their capacity as a town agent shall be kept confidential and shall not be disclosed in response to a public records request.

The ability to determine which records are public, and which are exceptions to that rule rests with the Supervisor of Public Records, not a municipality. The Attorney General has opined on local bylaws which purport to make certain records confidential and has stated:

...[W] remind the town that the disclosure of public records is governed by G.L. c. 66, § 10 (the Public Records Law), which declares all government records to be subject to disclosure unless specifically exempted. The legislative intent of the Public Records Law is to provide broad public access to government documents subject only to the limited exceptions found in G.L. c. 4, § 7 (26). Hull Municipal Lighting Plant v. Massachusetts Municipal Wholesale Electric Co., 414 Mass. 609, 614 (1993). Moreover, the authority to determine the public records status of information held by municipalities is vested in the Supervisor of Public Records. G.L. c. 66 § 10 (b). Although the text of Section 9 (1) provides that “[e]xcept as otherwise required by law” the requirement of confidentiality may not affect the status of such information under the Public Records Law and does not exempt such information from disclosure.

Decision of the Attorney General, Case No. 6492 (April 30, 2013). Given this decision, it is my opinion that the Attorney General would find similarly on the language in Section 2.A, and the section would not be effective or enforceable.

Finally, with respect to sections 2D and 2E, the provisions may be construed as interfering with the operations of the Natick Police Department, and its ability to enforce state and local laws. While the provisions do not create new criminal penalties, which would be beyond the authority of a municipality,¹ these provisions are not consistent with the state’s preemption of criminal prosecution, and the deference and discretion awarded to local police departments and district attorneys offices in making decisions concerning prosecution of crimes.

¹ See G.L. c. 40, § 21 and the Home Rule Amendment, Article LXXXIX, Art. 2, Sec. 7.

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In summary, I find that this bylaw is likely to be preempted by state law, on a variety of grounds. In my opinion, the potential, but limited methods whereby Natick could take an official position on the provision of reproductive and gender affirming case could be to amend the Personnel Bylaw with a policy statement concerning reproductive and gender affirming case, and such statement should be limited to affirming the protections provided under Chapter 127 of the Acts of 2022. Such an action would not be within the scope of this Article, however.

I hope this opinion is useful. Please contact me with any questions or concerns.

Sincerely,

Karis L. North /s/

Karis L. North

cc: Jamie Errickson, Town Administrator