

# MASSACHUSETTS

## CONSTITUTIONAL AND STATUTORY PROVISIONS

### **Massachusetts Constitution**

- MA. CONST. amend. art. LXXXIX. Amendment of Second Article of Amendment by Establishing Home Rule for Municipalities.

Article II of the Articles of the Amendment to the Constitution of the Commonwealth, as amended by Article LXX of said Articles of Amendment, is hereby annulled and the following is adopted in place thereof:- [See Amend. Art. 2, §§ 1 to 9, for text]

- MA. CONST. amend. art. II. Power of General Court to Erect and Constitute Municipal or City Governments; By-laws; Establishment of Limited Town Meeting Form of Government in Certain Towns. (the following provisions are often referred to as art. 89 in the case law as that is the amendment article that annulled the older version and adopted these in place thereof)

#### Section 1. Home Rule for Cities and Towns; Right of Local Self-Government.

It is the intention of this article to reaffirm the customary and traditional liberties of the people with respect to the conduct of their local government, and to grant and confirm to the people of every city and town the right of self-government in local matters, subject to the provisions of this article and to such standards and requirements as the general court may establish by law in accordance with the provisions of this article.

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#### Section 6. Governmental Powers of Cities and Towns.

Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, 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 in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter. This section shall apply to every city and town, whether or not it has adopted a charter pursuant to section three.

#### Section 7. Limitations on Local Powers.

Nothing in this article shall be deemed to grant to any city or town the power to (1) regulate elections other than those prescribed by sections three and four; (2) to levy, assess and collect taxes; (3) to borrow money or pledge the credit of the city or town; (4) to dispose of park land; (5) to enact private or civil law governing civil relationships

except as an incident to an exercise of an independent municipal power; or (6) to define and provide for the punishment of a felony or to impose imprisonment as a punishment for any violation of law; provided, however, that the foregoing enumerated powers may be granted by the general court in conformity with the constitution and with the powers reserved to the general court by section eight; nor shall the provisions of this article be deemed to diminish the powers of the judicial department of the commonwealth.

## Section 8. Powers of the General Court.

The general court shall have the power to act in relation to cities and towns, but only by general laws which apply alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two, and by special laws enacted (1) on petition filed or approved by the voters of a city or town, or the mayor and city council, or other legislative body, of a city, or the town meeting of a town, with respect to a law relating to that city or town; (2) by a two-thirds vote of each branch of the general court following a recommendation by the governor; (3) to erect and constitute metropolitan or regional entities, embracing any two or more cities or towns or cities and towns, or established with other than existing city or town boundaries, for any general or special public purpose or purposes, and to grant to these entities such powers, privileges and immunities as the general court shall deem necessary or expedient for the regulation and government thereof; or (4) solely for the incorporation or dissolution of cities or towns as corporate entities, alteration of city or town boundaries, and merger or consolidation of cities and towns, or any of these matters.

Subject to the foregoing requirements, the general court may provide optional plans of city or town organization and government under which an optional plan may be adopted or abandoned by majority vote of the voters of the city or town voting thereon at a city or town election; provided, that no town of fewer than twelve thousand inhabitants may be authorized to adopt a city form of government, and no town of fewer than six thousand inhabitants may be authorized to adopt a form of town government providing for a town meeting limited to such inhabitants of the town as may be elected to meet, deliberate, act and vote in the exercise of the corporate powers of the town.

### **Massachusetts Statutes**

- MASS. GEN. LAWS ch. 34A. County Charter Procedures.
- MASS. GEN. LAWS ch. 43B. Home Rule Procedures (for cities towns and districts).

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### HOME RULE STRUCTURE, INCLUDING LACK OF IMMUNITY FROM STATE PREEMPTION

The Massachusetts constitution's Home Rule Amendment, passed in 1966, establishes a system

of home rule modeled on “legislative supremacy.” Section 6 of Article 89 broadly grants powers to cities and towns, subject to the exceptions listed in Section 7.<sup>1</sup> As Section 8 explains, the state may overrule cities on any matter but must do so by “general laws.” If acting by special law that targets one or two cities, Section 8 outlines detailed procedures that the legislature must follow. Because compliance with these procedures is necessary for a special law to be valid, the Massachusetts Supreme Court has occasionally wrestled with the distinction between a special and general law.<sup>2</sup> As a matter of terminology, it should be noted that ordinances are often referred to as “by-laws” in Massachusetts.

With respect to preemption by general or special law, as a general proposition municipal by-laws are presumed to be valid; the courts attempt to reconcile local regulations with state statutes.<sup>3</sup> The mere existence of a statutory provision for some matters within the purview of the by-law will not render it invalid as repugnant to law,<sup>4</sup> provided, however, that the municipality does not attempt to criminalize behavior legalized by the legislature.<sup>5</sup> Thus, municipalities can pass by-laws as an exercise of their police powers but these powers cannot be exercised in a manner that frustrates the purpose or implementation of a general or special law validly enacted.<sup>6</sup> The courts strike down by-laws that “sharply conflict” with state law, such as when the by-law is “facially inconsistent” with State law.<sup>7</sup> “Such a conflict ‘appears when either the legislative intent to

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<sup>1</sup> Board of Appeals of Hanover v. Housing Appeals Committee in Dept. of Community Affairs, 294 N.E.2d 393, 408 (Mass. 1973) (“Municipalities are now free to exercise any power or function, excepting those denied to them by their own charters or reserved to the State by s 7, which the Legislature has the power to confer on them, as long as the exercise of these powers is not inconsistent with the Constitution or laws enacted by the Legislature in accordance with s8.”).

<sup>2</sup> E.g., Mayor of Boston v. Treasurer & Receiver Gen., 429 N.E.2d 691, 694-95 (Mass. 1981) (holding that statute conditioning the distribution of state funds to Boston on the city's maintaining the same level of police and fire protective services as during the previous fiscal year amounted to unconstitutional special legislation because it was not enacted through the special procedures for such legislation).

<sup>3</sup> Marshfield Family Skateland, Inc. v. Marshfield, 450 N.E.2d 605, 608 (Mass. 1983) (holding that a Town by-law's prohibition of coin-activated, mechanical and electronic amusement devices was not in conflict with state statute which was enacted to remove coin-activated amusement devices from ambit of gambling laws and which was intended to allow localities to license games).

<sup>4</sup> John Donnelly & Sons v. Outdoor Advertising Board, 339 N.E.2d 709, 713 (Mass. 1975) (quoting Commonwealth v. Baronas, 189 N.E. 62, 63 (Mass. 1934)).

<sup>5</sup> See American Motorcyclist Ass'n v. Park Comm'n of Brockton, 592 N.E.2d 1314, 1316 (Mass. 1992) (holding that local park commission's ban on the use of motorcycles on certain roadways conflicted with a statutory right to operate motorized vehicles on public rights of way).

<sup>6</sup> Bloom v. City of Worcester, 293 N.E.2d 268, 280 (Mass. 1973); see also Amherst v. Attorney Gen., 502 N.E.2d 128, 130 (Mass. 1986) (noting that a town “exceeds its power only when it passes a by-law inconsistent with the Constitution or laws of the Commonwealth”); Mass. Gen Laws ch. 43B § 13 (2017) (“Any city or town may, by the adoption, amendment or repeal of local ordinances or by-laws, 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 in conformity with powers reserved to the general court by section 8 of Article LXXXIX of the Amendments to the Constitution and which is not denied, either expressly or by clear implication, to the city or town by its charter.”).

<sup>7</sup> See Del Duca v. Town Administrator of Methuen, 329 N.E.2d 748, 753 (Mass. 1975) (invalidating the portion of a town's ordinance restructuring the method of appointing planning board members because of conflict with state law).

preclude local action is clear, or, absent plain expression of such intent, the purpose of the statute cannot be achieved in the face of the local by-law.”<sup>8</sup> Legislative intent to supersede local regulations need not be expressly stated where state law deals with the subject comprehensively and may reasonably be inferred as intended to preclude exercise of any local power or function on the same subject.<sup>9</sup> Applying these tests, state courts frequently uphold local regulation that goes beyond that set by state law.<sup>10</sup>

If the legislature’s intent is sufficiently clear, state law will preempt local ordinances even when they regulate such seemingly “local” matters as the structure of a town’s planning board.<sup>11</sup>

#### EXCEPTIONS TO HOME-RULE POWERS

Section 7 of the Home Rule Amendment limits local authority in six areas without further action by the legislature: (1) regulation of elections other than amending or revising a charter; (2) the levy of taxes; (3) extension of local debt; (4) disposal of park land; (5) enactment of private or civil law governing civil relationships; (6) definition of felonies. Exceptions (2) and (3) deprive Massachusetts municipalities of meaningful fiscal home rule.<sup>12</sup>

In a well-known case interpreting exception (5), *Marshal House, Inc. v. Rent Review and Grievance Board of Brookline*, the Massachusetts Supreme Judicial Court held that the city’s rent control laws were invalid because they governed “civil relationships” between landlords and tenants.<sup>13</sup> The court found that even though the goal of the ordinance may be “public,” the chosen methods gave it a “civil” character.<sup>14</sup> Read broadly, the civil and private law exception threatens to swallow the regulatory authority granted by home rule.<sup>15</sup> The Massachusetts high court’s decisions after *Marshal House*, however, have taken a narrower view of the exception, holding that it did not prevent a city from adopting a local antidiscrimination or condominium conversion ordinance.<sup>16</sup>

In sum, Massachusetts provides some home rule to cities and towns, but it is riddled with

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<sup>8</sup> *Take Five Vending, Ltd. v. Provincetown*, 615 N.E.2d 576, 579 (Mass. 1993) (quoting *Bloom*, 293 N.E.2d at 281).

<sup>9</sup> *School Committee of Boston v. City of Boston*, 421 N.E.2d 1187 (Mass. 1981) (quoting *Bloom*, 293 N.E.2d at 280.)

<sup>10</sup> *E.g.*, *Tri-Nel Mgt., Inc. v. Board of Health of Barnstable*, 741 N.E.2d 37 (Mass. 2001) (upholding local restriction on smoking in bars and restaurants that was more stringent than state law).

<sup>11</sup> *See Del Duca*, 329 N.E.2d at 753-55.

<sup>12</sup> *Accord* GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND* 76-77 (2008) (noting that “Boston’s taxing powers are unusually limited . . .”).

<sup>13</sup> *Marshal House, Inc. v. Rent Review and Grievance Board of Brookline*, 260 N.E.2d 200, 206-07 (Mass. 1970).

<sup>14</sup> *Id.*

<sup>15</sup> *See generally* Paul A. Diller, *The City and the Private Right of Action*, 64 *STAN. L. REV.* 1109 (2012).

<sup>16</sup> *Flynn v. City of Cambridge*, 418 N.E.2d 335 (Mass. 1981) (upholding local condominium conversion ordinance despite interference with private law because it was passed pursuant to “independent power” delegated by legislature); *Bloom*, 293 N.E.2d at 168 (upholding local antidiscrimination ordinance despite allegation that it interfered with private law).

significant exceptions and subject to state override on every topic, even if procedural restrictions apply to the enactment of special laws.

## COUNTIES

Massachusetts traditionally provided limited authority to counties. Since the late 1990's, the state has allowed counties the option of voting to abolish themselves, thereby transferring traditional county functions to the state.<sup>17</sup> Eight counties have opted for abolition.<sup>18</sup> Previously, in 1985, Massachusetts adopted the County Charter Procedures Act, which allowed counties to adopt something like a "home-rule charter" establishing their own form of government.<sup>19</sup> To date, only Barnstable (Cape Cod) and Dukes (Martha's Vineyard) Counties have availed themselves of this process.<sup>20</sup>

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<sup>17</sup> 1999 Mass. Legis. Serv. Ch. 127 § 53 (HB 4900) (West) (codified at MASS. GEN. LAWS ANN. ch. 34B (Abolition of County Government) (2017)).

<sup>18</sup> See Brendan Concannon, *Massachusetts County Government: A Viable Institution?*, 10 BRIDGEWATER ST. UNDERGRAD. REV. 55, 57 (2014).

<sup>19</sup> 1985 Mass. Acts ch. 807 (codified at MASS. GEN. LAWS ANN. ch. 34A (County Charter Procedures Act) (2017)).

<sup>20</sup> Concannon, *supra* note 18, at 59-60; see also Barnstable County, The Regional Government of Cape Cod, Home Rule Charter, available at <http://www.barnstablecounty.org/regional-government/assembly-of-delegates/home-rule-charter/>.