



Mayor Alex B. Morse  
City of Holyoke

Elizabeth Rodriguez-Ross City Solicitor  
Law Department

July 26, 2012

City Council  
City Hall  
536 Dwight Street  
Holyoke, MA 01040

RE: Needle Exchange Program

Dear City Council Members:

On July 9, 2012, the Board of Health, along with Mayor Alex B. Morse, approved the Department of Public Health's implementation of a needle exchange pilot program in the City of Holyoke. Prior to this decision, the Law Department was asked to research the definition of the term "local approval" in the context of G.L. c. 111 § 215. After review, the Law Department issued a statement that "local authority" in the context of G.L. c. 111 § 215 meant mayoral approval in conjunction with Board of Health approval. Last week, Council President Jourdain contacted me with concerns regarding the validity of such approval. In response, I wish to provide the Councilors with this formal legal opinion to clarify the issues at hand and address the concerns of Councilor Jourdain.

A. Principles of Statutory Construction

With the enactment of G.L. c. 111 §215, it is clear that the State Legislature intended to charge the Department Public Health ("Department") with the exclusive power to implement ten needle exchange pilot programs in the Commonwealth. Additionally, the language of this statute indicates that the Legislature intended that the Department receive "local approval" before implementing any pilot program. However, the language of the statute does not specifically define what "local approval" is necessary to meet this standard.

The plain language of G.L. c. 111 § 215 indicates that the Department has great authority over the operation of needle exchange pilot programs. Section 215 gives the Department the power to create these programs, including: the duty to nominate cities or towns as participants; the responsibility to create rules and regulations regarding implementation; and the obligation to update the Legislature on the results of the programs results after one year of operation.<sup>1</sup> Since the Department retains substantial control over the execution and operation of the programs, the Legislative intent can be inferred to reduce the role of the cities and towns participating in the pilot program, including the City of Holyoke.

Councilor Jourdain brought to my attention that, in 1996, the Law Department under Acting City Solicitor Daniel Glanville issued a legal opinion interpreting "local approval" under G.L. c. 111 § 215 to mean approval by the Mayor and the City Council.

<sup>1</sup> G.L. c. 111 § 215.



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The Law Department holds the opinions of previous Solicitors in high regard; however, if our research uncovers a contradiction or inaccuracy, it is my duty as an Attorney to inform the City of any errors in past interpretation and of the current state of the law.

Solicitor Glanville's opinion was drafted during the infancy of the Department's needle exchange pilot program. As such, he did not have the benefit of witnessing how "local approval" was interpreted by the Department and other municipalities. Since that time, the City of Northampton has agreed to participate in the needle exchange pilot program, providing Mayoral approval alone. The City of Springfield, has also assented to participation in the pilot program, but provided both Mayoral and City Council approval. The Department accepted both approaches as satisfactory "local approval."

Additionally, acting Solicitor Glanville cited two principles of statutory construction in his 1996 opinion, both of which are erroneously applied. First, Solicitor Glanville addressed the "whole act rule," arguing that the Act, as a whole, indicated that local approval should be construed to mean approval of both executive and legislative bodies. While it is true that the "courts also look to the broader context of the body of law into which the enactment fits,"<sup>2</sup> the context of Chapter 111 does not indicate a pattern of the Department requiring approval by both executive and legislative branches.<sup>3</sup>

Second, Solicitor Glanville's 1996 opinion explored the principle of "expresso unius," which he cited as standing for the proposition that "the enumeration of certain things in a statute suggests that the legislature had no intent of including things not listed or embraced."<sup>4</sup> As Solicitor Glanville observed, the term "local approval" does not appear in any other statute under Chapter 111; however, the term "city council" appears sixteen (16) times throughout Chapter 111.<sup>5</sup> Most notably is G.L. c. 111 § 62A, which

<sup>2</sup> *Green v. Bock Laundry Machine Co.* 490 U.S. 504, 528 (1990).

<sup>3</sup> In fact, a review of the Act indicates that the Department has broad authority to implement the health and sanitation law, often without seeking the approval of the legislative or executive branches of municipalities. See M.G.L. c. 111 §2 ("The Commissioner shall administer the laws relative to health and sanitation and the regulations of the department, and shall prepare rules and regulations for the consideration of the council." and "The Commissioner, subject to approval of the governor, may make such rules and regulations governing the conduct of written and oral examinations by the several boards of registration and examination...").

For example, in the realm of diseases dangerous to the public health, the District Health Officer is not required to obtain any form of "local approval" in order to work with local authorities for the eradication of certain diseases. M.G.L. c. 111 § 18; See e.g. M. G.L. c. 111 §§ 25F, 26E, 50, 57, 81.

<sup>4</sup> William N. Eskridge, Jr. and Philip P. Frickey, *Legislation, Statutes and the Creation of Public Policy*, 638 (2d. ed. 1995).

<sup>5</sup> M.G.L. c. 111 § 26, Local Boards of Health; Appointment. (No one of them shall be a member of the city council. Members of the board shall receive such compensation as the city council may determine.)

M.G.L. c. 111 § 26A, Health Departments May Replace Boards of Health. (By vote of the city council and approval of mayor, may create a health department to replace the board of health therein.)

M.G.L. c. 111 § 26B, Local Commissioner of Health; Qualifications; Appointment. (Appointed by mayor with approval of city council.)

M.G.L. c. 111 § 26C, Advisory Council on Health; Qualifications; Appointment. (No member of said council shall be a member of the city council.)

M.G.L. c. 111 § 26G, Septic Tank Installation. (Section must be accepted by mayor and city council.)



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explicitly states that a vote by the city council is required to approve the establishment of children health camps.<sup>6</sup>

It is a principle of common law that “a provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear.”<sup>7</sup> A review of the statutory scheme of Chapter 111 indicates that, where the State Legislature intended to require city council approval, it expressly included the words “city council.”

Although the Legislature required the Department to obtain “local approval” before implementing needle exchange pilot programs, G.L. c. 111 § 215 fails to specify or explain what “local approval” means. Based on a review of how other cities have provided “local approval” in this context, the term has been broadly interpreted. Applying basic principles of statutory construction, a review of Chapter 111 shows that approval of both executive and legislative bodies of municipalities is not a typical requirement of the Department. Additionally, where city council approval is required, Chapter 111 uses specific, express, and precise language. For the foregoing reasons, it is my opinion that “local approval” as used in G.L. c. 111 § 215 does not require City Council approval.

#### B. The Power to Legislate and the Home Rule Amendment

Councilor Jourdain inquired as to whether local approval under section 215 implicates the Home Rule Amendment, as set forth in Article II of the Articles of Amendment to the Constitution of the Commonwealth. As you are likely aware, the Home Rule Amendment generally defines the power of the General Court to enact *legislation* in relation to cities and towns, as well as the powers of city and towns to enact *legislation* to govern themselves. It is my opinion that “local approval” under Section 215

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M.G.L. c. 111 § 27B, Regional Health Districts; Organization; Management (Cannot be created without mayor and city council approval.)

M.G.L. c. 111 § 28, Annual Reports. (Board to provide annual reports to city council.)

M.G.L. c. 111 § 31C, Regulation of Atmospheric Pollution. (Board of Health can regulate if approved by city council.)

M.G.L. c. 111 § 91, Exemptions; Certain Cities and Towns to Become Members of Hospital Districts, When; Proportionate Payments of Cost of Hospitals Required. (City council must agree on proportionate payments of cost.)

M.G.L. c. 111 § 126, Location of Privy Vaults Regulated, (only if city council accepts.)

M.G.L. c. 111 § 142H, Ceremonial Bonfires; Permits. (City council with approval of mayor may authorize fire department to issue permits.)

M.G.L. c. 111 § 151, Slaughter House. (Written consent of mayor and city council.)

M.G.L. c. 111 § 154, Killing and Rendering of Horses or Other Animals Regulated; Penalty. (City council may establish permit fees if not otherwise stated.)

M.G.L. c. 111 § 155, Licenses for Stables in Cities and Certain Towns. (Fee to be established by city council.)

M.G.L. c. 111 § 162, Removal of Causes of Pollution; Damages; Penalty for Violation of Order. (Deals with Board of Water Commissioners ability to file a complaint unless approved by city council.)

<sup>6</sup> M.G.L. c. 111 § 62A, Establishment of Children’s Health Camps in Cities or Towns

<sup>7</sup> *United Savings Ass’n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988).

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*Birthplace of Volleyball*



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is not an exercise of legislation by a city or town and, therefore, the Home Rule Amendment is not involved.

In accordance with Section 8 of Article II of the Amendments, the State Legislature is specifically authorized to act in relation to cities and towns 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.” By authorizing the Department to create needle exchange pilot programs in ten municipalities, the Legislature adopted G.L. c. 111 § 215 as a general law applying to a class of not fewer than two.

However, Section 215 does not require a city or town to adopt an ordinance or by-law in order for the Department to implement a pilot program for needle exchange; it simply requires “local approval.” Under Section 6 of the Home Rule Amendment, powers or functions that the general court has conferred upon a city or town may be exercised by the adoption, amendment, or repeal of local ordinances or by-laws. However, local approval under Section 215 is not a power or function which may be exercised by the adoption of an ordinance. Section 215 clearly allows for local approval of a pilot program without any reference to an ordinance. A court will construe a statute according to the plain and ordinary meaning of its language and will not read into the plain words of a statute “a legislative intent that is not express by those words.”<sup>8</sup> “If the Legislature had intended to require the town to adopt [ordinances]...the Legislature certainly would have included such a provision.”<sup>9</sup>

In fact, if a city or town were to adopt an ordinance or by-law establishing a needle exchange program outside of the provisions of Section 215 and without nomination and approval of the Department, such an action would be in violation of the Home Rule Amendment because it would be inconsistent with state law. In 2006, the state legislature enacted G.L. c. 94C § 27 to allow adults over the age of 18 to purchase needles, syringes, and other sharps from licensed pharmacies throughout the Commonwealth. A needle exchange program would be in direct violation of this law by allowing needles to be distributed at a location other than a licensed pharmacy.

Thus, while the City Council is authorized under the Home Rule Amendment and Section 17 of the City of Holyoke Charter to “make and establish ordinances,” it is my opinion that Section 215 does not require the City to adopt an ordinance in order for a needle exchange pilot program to be implemented by the Department of Public Health and the Home Rule Amendment is not implicated in local approval of the same.

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Additionally, Massachusetts case law supports the position that an administrative agency, such as the Department, should interpret the statutes within its control and that

<sup>8</sup> *Civitarese, v. Town of Middleborough*, 412 Mass. 695, 701 (1992) (internal citations omitted)

<sup>9</sup> *Id.*, at 702.



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the decision of such an agency should be afforded deference.<sup>10</sup> In Barnhart v. Walton, the court considered the Social Security Administration's interpretation of an agency rule.<sup>11</sup> The court explained that "[i]f a statute speaks clearly to the precise question at issue, courts must give effect to the unambiguously expressed intent of Congress. If, however, the statute is silent or ambiguous with respect to the specific issue, courts must sustain an agency's interpretation if it is based on a permissible construction of the act."<sup>12</sup>

As noted above, Section 215 is silent on the meaning of "local approval." Because Section 215 addresses a public health issue and does not specifically require any legislative action on the part of a municipality, it is permissible to construct the section to mean that approval of the Mayor and Board of Health is sufficient local approval. Furthermore, the Department cannot legally approve the implementation of a needle exchange pilot program in Holyoke unless the City fulfills the "local approval" requirement to the satisfaction of the Department. Therefore, based on the conduct of the Department, the approval of the Mayor and Board of Health satisfies the Department's local approval requirement. Any further inquiry into whether or not the City has met this requirement should be directed to the Department.

As discussed above, G.L. c. 111 § 215 is silent on the meaning of "local approval." This is troublesome because, under Section 215, the Department is prohibited from establishing a needle exchange pilot program, unless the "local approval" requirement is satisfied. It is my opinion that the well established principles of statutory construction support the conclusion that "local approval" within the meaning of G.L. c. 111 § 215 does not require the approval of the City Council. The term "city council" is not expressly included within the statute, though it has been expressly included in other sections under the same chapter. Furthermore, the nature of Section 215 neither implicates the Home Rule Amendment nor permits the City to pass legislation in this area. Lastly, as with the city of Northampton, the Department has accepted the approval of Mayor Alex B. Morse and a vote of the Holyoke Board of Health Commissioners as satisfaction of the "local approval" requirement, further validating the Law Department's opinion on this matter.

Sincerely,

Elizabeth Rodriguez-Ross  
City Solicitor

<sup>10</sup> "In general, the court grants substantial deference to an interpretation of a statute by the administrative agency charged with its administration." *Protective Life Insurance v. Dennis J. Sullivan*, 425 Mass. 615, 618 (1997).

<sup>11</sup> *Barnhart v. Walton*, 535 U.S. 212 (2002).

<sup>12</sup> *Id.*, at 217-218.

HON. DANIEL J. SZOSTKIEWICZ  
MAYOR, CITY OF HOLYOKE



LAW DEPARTMENT  
DANIEL M. GLANVILLE, Esquire  
ACTING CITY SOLICITOR  
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STEPHEN P. FITZGIBBONS, Esquire

July 10, 1996

Honorable Kevin Jourdain  
Honorable City Councilors  
City of Holyoke  
City Hall  
Holyoke, MA 01040

RE: Pilot Program for Exchange of Needles  
Opinion No. 96-23

Dear Councilor Jourdain and Honorable City Councilors:

At your regularly scheduled meeting of June 18, 1996, you requested an opinion as to the meaning of the language "local approval" as outlined in G.L. c. 111 § 215, the Pilot Program for Exchange of Needles. After considerable research I have uncovered the following.

This is clearly a matter for statutory interpretation, therefore, listed below you will find two methods of statutory interpretation that I have used to come to my conclusions:

1. WHOLE ACT RULE

In the case of Kokoszka v. Belford, 417 U.S. 642, 650 (1974), the United States Supreme Court held that when interpreting a statute, the court will not look merely to a particular clause in which the general words may be used, but will take in connection with it the whole statute, and the objects and policy of the law as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the legislature.



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2. EXPRESSIO UNIUS

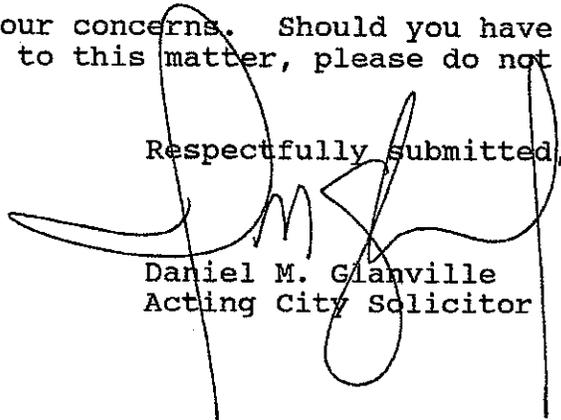
The phrase stated above stands for the proposition that words omitted may be just as significant as words set forth. "Expressio (or inclusio) unius est exclusio alterius" is a maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another. Burgin v. Forbes, 293 Ky 456, 169 S.W.2d 321, 325; Newblock v. Bowles, 170 Okl 487, 40 P,2d 1097, 1100 (1935). The notion is one of negative implication; the enumeration of certain things in a statute suggests that the legislature had no intent of including things not listed or embraced William N. Eskridge, Jr. and Philip P. Frickey, Legislation, Statutes and the Creation of Public Policy 638 (2d ed. 1995).

Considering the two propositions listed above, it is my opinion that local approval shall mean the mayor, and the city council of the city of Holyoke. I come to this conclusion based upon consideration of G.L. c. 111 as a whole. As can be seen from this chapter, the legislature chose specifically to empower local boards of health with specific powers throughout this statute.

In section 215, the Pilot Program for the Exchange of Needles, there is no specific mention of the board of health or any local board of health. The only language is "local approval". Considering the whole act rule, and the notion of expressio unius, it can be inferred that the legislature did not intend to give the power of local approval to a local board of health.

I trust this answers your concerns. Should you have any further questions in regard to this matter, please do not hesitate to contact me.

Respectfully submitted,



Daniel M. Glanville  
Acting City Solicitor

DMG:ch

cc: City Clerk



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\*\*\* Current through Act 127 of the 2012 Legislative Session \*\*\*

PART I ADMINISTRATION OF THE GOVERNMENT  
TITLE XVI PUBLIC HEALTH  
Chapter 111 Public Health

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*ALM GL ch. 111, § 215 (2012)*

**§ 215. Needle Exchange Pilot Program; Report.**

The department of public health is hereby authorized to promulgate rules and regulations for the implementation of not more than ten pilot programs for the exchange of needles in cities and towns within the commonwealth upon nomination by the department. Local approval shall be obtained prior to implementation of each pilot program in any city or town.

Not later than one year after the implementation of each pilot program said department shall report the results of said program and any recommendations by filing the same with the joint legislative committees on health care and public safety.

**HISTORY:** 1993, 110, § 148; 1995, 38, § 128.

**NOTES: Editorial Note**

The 1995 amendment rewrote this section, changing the authorization from implementation of a pilot needle exchange program to the implementation of not more than ten pilot programs.

**Cross References**

Cambridge Public Health Commission (Acts 1996, 147, § 1), see ALM Spec L c S70A.

**Code of Massachusetts Regulations**

Massachusetts contingency plan. 310 CMR 40.0001 et seq.