Nancy E. Glowa
City Solicitor

Arthur J. Goldberg
Deputy City Solicitor

Vali Buland
First Assistant City Solicitor

Assistant City Solicitors

Paul S. Kawai
Samuel A. Aylesworth
Keplin K. U. Allwaters
Anne Sterman
Sean M. McKendry

CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

November 24, 2014

Richard C. Rossi
City Manager
City Hall
795 Massachusetts Avenue
Cambridge, MA 02139

Re: Calendar Item #2 of June 16, 2014, Amended Order O-7 of June 9, 2014:Re: That the City Manager is requested to confer with the Law Department to determine the legality and if feasible, the institution of a fifteen dollar an hour minimum wage ordinance for the City of Cambridge, with special provisions for small businesses.

Dear Mr. Rossi:

In the above referenced June 16, 2014 Amended Order, the City Council asked the City Manager "to confer with the Law Department to determine the legality and if feasible, the institution of a fifteen dollar an hour minimum wage ordinance for the City of Cambridge, with special provisions for small businesses." This letter responds to said request. For the following reasons such a measure does not appear to be a valid exercise of the City's municipal power under the Massachusetts Constitution.

Under Mass. Const. Amend. Art. 2, § 7, (the "Massachusetts Constitution Home Rule Amendment") a city may "exercise any power or function which the general court [the Legislature] has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with the powers reserved to the general court." However, a city may not "enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power." The Supreme Judicial Court (the "SJC") has held that a local legislature enacts "private or civil law" when that legislation creates "new rights or obligations between persons" or if "existing rights or obligations between persons are modified or abolished." See Bloom v. City of Worcester, 363 Mass. 136, 146 (1973). A municipality may enact such legislation relating to these legal relationships only if it could be shown to be "incident to an exercise of an independent municipal power" and that exercise of such power is grounded in more

than a municipality's broad "police power." See Marshal House v. Brookline, 357 Mass. 709, 718 (1970).

The SJC first interpreted the meaning of the private or civil law clause in Marshal House, where the Court held that a by-law enacting a form of rent control was an impermissible private or civil law governing a civil relationship. The Marshal House Court acknowledged that "ambiguity exists...concerning the meaning of...§ 7(5)." Id. at 713. The Court was faced with interpreting novel and very general language concerning which there exist only inconclusive indications of the intentions of the Home Rule Amendment's draftsmen. Id. at 714. Nevertheless, the Court concluded that the term private or civil law governing civil relationships "is broad enough to include law controlling ordinary and usual relationships between landlords and tenants." Id. at 716. The Court noted that although the by-law contained some provisions for public enforcement (by the rent review and grievance board), the method adopted is primarily civil in that it affords to the board power in effect to remake, in important respects, the parties' contract creating a tenancy. Id. In contrast to, for example, the regulation of a temporary relationship between a taxi operator and his customer, the by-law more directly intervenes in the continuing landlord-tenant relationship. Id. at 715. It is now well-established that local enactments that affect the landlord-tenant relationship by, e.g., imposing rent control or regulating condominium conversions, are "private or civil law governing civil relationships." See Bannerman v. City of Fall River, 391 Mass. 328, 330-31 (1984) (citing Marshal House and CHR General, Inc. v. Newton, 387 Mass. 351, 354 (1982)).

In contrast, in Bloom, 363 Mass. 136, the Court held that an ordinance establishing a municipal human rights commission was not an enactment of private or civil law governing a civil relationship. The Court distinguished Marshal House on the grounds that no new rights or obligations between persons are created by the ordinance; no existing rights or obligations between persons are modified or abolished. See Bloom, 363 Mass. at 146. Together, Marshal House and Bloom identify certain distinguishing features of private or civil laws governing civil relationships. An enactment that remakes, in important respects, a private agreement governing a continuing...relationship, and which is enforced through means predominantly civil in character (i.e., through the parties' own enforcement of the agreement) is likely to be determined by a court to be a private or civil law governing a civil relationship. See Marshal House, 357 Mass. at 716-17. In contrast, an enactment in which [n]o new rights or obligations between persons are created [and] no existing rights or obligations between persons are modified or abolished, Bloom, 363 Mass. at 146, is likely not to be held by a court to be a private or civil law governing a civil relationship. The Court noted in the Bloom case that the employer-employee relationship would likely fall within the ambit of a civil relationship. ("the law governing civil relationships between persons, such as between landlords and present or prospective tenants and between employers and present or prospective employees....") Bloom, at 146.

In Marshal House, the SJC held that enacting a civil law under the general municipal police power to protect the "general welfare" was not a sufficient enough basis for demonstrating that Brookline had an "independent municipal power" to enact this right to below-market rents. The SJC held that Brookline failed to show a specific power to base its authority on in order to claim that the ordinance was enacted "incident to an exercise of

an independent municipal power" and thus excepted from the prohibition on enacting a law that related to a civil relationship.[1] See also Bannerman v. City of Fall River, 391 Mass. 328, 332 (1984). ("Furtherance of the general public welfare is insufficient justification for an ordinance which otherwise violates § 7(5) because such an ordinance would not be based on an "individual component of the [city's] police power." Id. at 332. See also CHR General, Inc., 387 Mass. 351 (1982) (SJC struck down Newton's ordinance which also sought to regulate conversion of residential rental units to condominiums on similar grounds).[2]

Although no Massachusetts court has analyzed the legality of a minimum wage ordinance, based on cases that have analyzed local legislation of the landlord-tenant "civil relationship," it appears that a minimum wage ordinance would lie outside of the City's authority under the Massachusetts Constitution.[3] Like the landlord-tenant relationship, the employer-employee relationship would likely be deemed by a court, consistent with the SJC's holding in the Bloom decision, to be a "civil relationship." A minimum wage ordinance would create "new rights or obligations" and/or it might be held by a court that by such an ordinance "existing rights or obligations between persons" would be "modified or abolished," specifically modifying the minimum wage already established by M.G.L. c. 151 that currently governs the wages paid to employees in Cambridge and the rest of Massachusetts. See Bloom at 146. It does not appear that the City has an "independent

---

[1] General rent control enabling provisions were contained in St.1970, c. 842, which was enacted in August, 1970 and terminated on April 1, 1976. This special enabling act passed by the Legislature allowed municipalities the power to adopt specific rent control ordinances. See the following: City of Boston, St.1969, c. 797 as amended; Brookline, St.1970, c. 843; Cambridge, St.1976, c. 36; and Somerville, St.1976, c. 37. At the state election held on November 8, 1994, however, the people of the Commonwealth adopted an initiative measure which prohibited rent control in Massachusetts. See M.G.L. c. 40P.

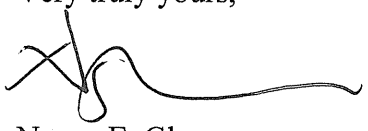
[2] The SJC noted that the City of Newton would likely have the authority to regulate the conversion of residential rental units if the Legislature granted the special act which had been filed during the pendency of that lawsuit. See CHR General, at 358, fn. 8.

[3] In addition, a court might rule that a minimum wage ordinance is "pre-empted" by operation of the Massachusetts minimum wage statute. M.G.L. Chapter 151 establishes the state's minimum wage requirements—a regulatory regime for the administration and enforcement of the statute by the Attorney General. A municipality cannot enact an ordinance or by-law if it conflicts with state law. See Amherst v. Attorney General, 398 Mass. 793, 796 (1986). However, the legislative intent to preclude local action must be clear. Bloom, at 155. This intent can be either express or inferred. See St. George Greek Orthodox Cathedral of Western Massachusetts, Inc. v. Fire Dept. of Springfield, 462 Mass. 120, 125-26 (2012). Local action is precluded in essentially three instances, paralleling the three categories of federal preemption: (1) where the Legislature has made an explicit indication of its intention in this respect; (2) where the State legislative purpose cannot be achieved in the face of a local by-law on the same subject; or (3) where legislation on a subject is so comprehensive that an inference would be justified that the Legislature intended to preempt the field. See Wendell v. Attorney General, 394 Mass. 518, 524 (1985). The existence of legislation on a subject, however, is not necessarily a bar to the enactment of local ordinances and by-laws exercising powers or functions with respect to the same subject, if the State legislative purpose can be achieved in the face of a local ordinance or by-law on the same subject. Bloom, 363 Mass. at 156; see also Wendell, 394 Mass. at 527-28 ("It is not the comprehensiveness of legislation alone that makes local regulation inconsistent with a statute.... The question...is whether the local enactment will clearly frustrate a statutory purpose.").

municipal power" that would enable it to enact a minimum wage ordinance; and therefore such legislation would appear to be prohibited by the Home Rule Amendment.[4]

Based upon the above analysis it is my opinion that enactment of such an ordinance would likely be determined by a reviewing court to be an invalid exercise of the City's municipal power under the Massachusetts Constitution.[5]

Very truly yours,



Nancy E. Glowa
City Solicitor

[4] By way of comparison, the City's enactment of Cambridge Municipal Code Chapter 2.121 the "Living Wage Ordinance," is justified under the City's power to enter into contracts, and therefore the power to define the terms of those contracts, including the right to mandate that vendors pay a living wage to its employees who perform work on behalf of the City.

[5] Even if the City had authority to enact a local minimum wage, an ordinance that distinguishes businesses to be regulated based on the size of a business may present federal constitutional issues. The City of Seattle's minimum wage ordinance was challenged by the International Franchise Association in a lawsuit filed in the Federal District Court for the Western District of Washington on June 11, 2014. That lawsuit alleges that the challenged ordinance is biased against franchisees under the Commerce Clause of the Fifth Amendment to the United States Constitution as well as the Equal Protection Clause. The primary basis of that challenge is that the Seattle ordinance places an improper burden on "franchises," (and thus interstate commerce) by defining them as large businesses even though they might otherwise qualify as small businesses because they have a small number of workers present in the Seattle-based franchise (and thus would not be required to pay a higher minimum wage sooner).