
TO: Mr. Paul Bockelman, Town Manager (*By Electronic Mail Only*)

FROM: Joel B. Bard, Esq.
Lauren F. Goldberg, Esq.

RE: Special Legislation for Special Election for Town Council

DATE: April 28, 2018

Question

You have requested an opinion as whether the April 30, 2018 Special Town Meeting must act on the proposed legislation to establish a schedule for election of the Town Council in the exact form in which it appears said Section 10.8 of the Town Charter, or whether the text may be varied. The issue arises, in large part, because the special act election calendar set forth in Section 10.8 is inconsistent with the requirements of state law in light of the early January change to the date of the State primary. Depending on the answer, you have also requested that we prepare a main motion for action under Article 1.

Short Answer

In our opinion, the plain text of the Charter allows for minor changes to the act consistent with the overall intent of the transition provisions to act quickly to provide for the election of the Town Council. Moreover, where the Section 10.8 special act includes dates for certain actions that would be inconsistent with state election law, in our further opinion, the special act included in the main motion to be acted upon under Article 1 of the April 30, 2018 Special Town Meeting should include dates acceptable to the State Elections Division.

Detailed Analysis

A. Interpretation of Charter as to Election Schedule

Section 10.7 of the new Town Charter establishes a detailed schedule for its implementation, including reference to a September preliminary election for the Town Council. The first sentence of Section 10.8 provides, “As soon as practicable after the passage of this Charter, the Select Board shall submit to the Town Meeting the following proposed act or one with similar intent to be submitted to the State Legislature to allow for the initial election to take place on the above schedule.” [emphasis added]. The proposed special act includes the following statement, “Whereas, The city known as the Town of Amherst has changed its form of government and desires to elect its first Town Council as soon as practicable.” As you are also aware, Section 10.9 provides for a later election of the Town Council if, “the act outlined in Section 10.8 or a similar act not be enacted”.

Note, further, that Section 10.7(b) imposes certain limitations on the actions of the Select Board, Town Manager and Town Meeting in the period between the approval by the voters of the Charter and the date on which the Town Council takes office. Specifically, Section 10.7(b) provides:

During the period between the adoption of the Charter and December 3, 2018 (or February 4, 2019 under Section 10.9), the Select Board, Town Manager, and Town Meeting shall limit their respective actions during this transition period to those matters essential and necessary to the current operations of the Town, such as the annual budget, taking no actions contrary to, or that frustrate the purpose of, this Charter. Special Town Meetings shall be held only to address matters not admitting of delay, of which the Select Board shall be the sole judge. The Select Board shall maintain sufficient multiple-member body memberships as defined by this Charter to assure a quorum for the conduct of business plus 1 member. No appointments shall be made that do not meet this criterion after the Charter is adopted unless necessary for matters not admitting of delay. The Select Board shall provide a list of vacancies on multiple-member bodies to the Town Council President and the Town Manager.

Thus, as discussed in detail in a memorandum dated April 17, 2018, this language constrains the powers and duties of the Select Board, Town Manager and Town Meeting during this time period.

Consistent with established rules of statutory construction, it is clear, reviewing the Charter as a whole, that the clear intent of the framers was for the Town Council election process to be accomplished as soon as possible. See Commonwealth v. Smith, 431 Mass. 417, 424 (2000) (stating, “provisions that relate to a common subject matter “should be construed together so as to constitute a harmonious whole”) (*internal citations omitted*); see also, Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp., 418 Mass. 737, 744-745 (1994) (providing that the language of a legislative enactment must be given its “ordinary and approved” meaning, “considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.”) (*internal citations omitted*). Any delay in the date of the special election will extend the period during which the Town is limited to engaging in daily operations and important ongoing initiatives, while avoiding entanglement with actions that reflect significant new policy positions or that otherwise irrevocably change the Town’s position.

B. The Section 10.8 Special Act

When the special act language was drafted, it is highly likely that the drafters believed that the State primary would be held on September 18, the seventh Tuesday before the state election. See G.L. c.53, §28. However, in 2018, that date coincides with the Jewish holiday of Yom Kippur. Under such circumstances, the law allows the Secretary of the Commonwealth to change the date of the primary to a date within seven days of the second Tuesday in September. This year, the second Tuesday in September is September 11, also a Jewish holiday. After seeking public input, the Secretary set September 4, 2018 as the date of the State primary.

As you may be aware, state law relative to elections establishes various deadlines in connection with ballot access. See, e.g., G.L. c.53, §§7, 10, 11, and 13; G.L. c.54, §42C. Such deadlines are essential to allow, among other things, for the circulation, filing and certification of nomination papers, preparation of absentee and general election ballots, and leaving a sufficient time for persons to request, receive and return absentee ballots. The dates listed in the special act assumed the preliminary election would be held later in September. However, where the primary will be held on September 4, the special act does not leave sufficient time for these actions, in our opinion. As a result, in our further opinion, the General Court would be highly unlikely to approve the legislation in the form set forth in the Charter.

C. Proposed Revisions to Special Act

1. Election Schedule

Consistent with standard practice, it is anticipated that once the Town’s bill is filed with the General Court the Joint Committee on Election Laws, House and Senate Counsel, and ultimately, the Governor’s Offices of Legislative Affairs and Legal Counsel, will consult with Director and Legal Counsel to of the Secretary of the Commonwealth’s Elections Division Michelle K. Tassinari to confirm that the election calendar set forth in the bill is acceptable. For that reason, we consulted with Director Tassinari concerning the election schedule and, confirming the concerns raised above, she recommended a new schedule by suggesting insertion of different dates in Sections 2 through 5 of the special act. We strongly recommend that the main motion presented to the April 30, 2018 Special Town Meeting under Article 1 include the recommended revisions provided by Director Tassinari.

2. Provision Ratifying Issuance and Filing of Nomination Papers

We also recommend inclusion of a new section in the special act to facilitate the newly applicable schedule required by the change in the date of the State primary and the intent of the Charter with respect to coordination of the preliminary election for Town Council with the State primary. In short, to best provide for a significant period during which voters may circulate nomination papers for the office of Town Council member, it would be ideal for nomination papers to be made available as soon after Town Meeting as possible. Typically, however, the Town Clerk would not issue nomination papers before the special election had been called and the statutory deadlines applied. Here, even if the General Court acts swiftly, there would likely be only a limited period when such papers could be circulated and signed. Therefore, to enable the participation of as many voters as possible in the process for the election of the Town Council, in our opinion, the special act can ratify the issuance and filing of nomination papers occurring prior to the effective date of the special act.

D. Summary

For all the reasons set forth above, in our opinion, the main motion under Article 1 of the April 30, 2018 Special Town Meeting should include the special act revised with the new election calendar dates recommended by the Director of the State Elections Division. Further, to ensure the greatest level of participation possible in the election, such act should include a provision ratifying the issuance and filing of any nomination papers prior to the effective date of the act. Moreover, to ensure that any other matters raised by the General Court may be addressed, the main motion should include authorization for the Select Board to approve such

revisions to the act as may be requested by the General Court and consistent with the public purposes of the Town Meeting vote and the intent of the Town Charter.

Finally, this is to raise a caution with respect to possible amendment on the floor of Town Meeting of the special act election calendar. As indicated above, there are several deadlines set forth in the special act, all of which are related. Any change in the date of the election would require adjustment of all of those dates and there would be no way to confirm that such dates would be acceptable to the Director of the State Elections Division and the General Court. Moreover, such a change could have far-reaching practical implications, including, for example, conflicts based upon the possibility of a recount of any primary, preliminary or election results.

Please see attached a proposed main motion addressing the issues outlined herein.