

January 3, 2018

Lauren F. Goldberg
lgoldberg@k-plaw.com

Mr. David Panagore
Town Manager
Provincetown Town Hall
260 Commercial Street
Provincetown, MA 02657

Re: Charter Revision Process – Next Steps

Dear Mr. Panagore:

You have requested guidance on behalf of the Board of Selectmen and the Town Clerk as to the remainder of the Charter revision process pursuant to the provisions of G.L. c.43B. I understand that the Charter Commission submitted its final report to the Board of Selectmen, in accordance with G.L. c.43B, §9, recommending a revised Town Charter. I have outlined the applicable statutory process, as well as the role of the various Town officials with respect thereto.

A. Charter Revision Process

1. *2018 Annual Town Election*

In accordance with the provisions of G.L. c.43B, §11, a question seeking approval of the proposed charter must be placed on the ballot at the first annual Town election occurring at least two months after the report is submitted. Pursuant to the provisions of Section 2-4-2 of the Town Charter, the Annual Town Election must be held on the first Tuesday in May, which, this year, is May 1, 2018. Where the 2018 Annual Town Election will be held more than two months following the date the final report was submitted to the Board, the question of whether to adopt the proposed Charter revision must appear on the ballot at that election.

2. *Form of Question*

General Laws c.43B, §11, sets forth the form of the ballot question, as follows, “Shall this Town approve the charter revision recommended by the Charter Commission summarized below?” The law provides further, in relevant part:

Where a new charter or single charter revision is being submitted at an election, set forth here a brief summary of its basic provisions (composition and mode of selection of the legislative and executive branches and school committee or, if a change of none of these is involved, the most significant proposed change)...The charter commission shall prepare the summaries of its own proposals and the city solicitor or town counsel shall prepare the description of proposed amendments. [emphasis added].

Mr. David Panagore
Town Manager
January 3, 2018
Page 2

Thus, where the Charter revision is being proposed by the Charter Commission, the Charter Commission's summary will appear on the ballot.

3. Timing for Board's Action on Form of Question and Summary

In accordance with G.L. c.54, §35, the proposed summary, in its entirety, and ballot question must be filed with the Town Clerk no later than Tuesday, March 27, or 35 days prior to the May 1, 2018 election, or.

Where G.L. c.43B, §11, provides that the Board of Selectmen must "order the charter revision to be submitted to the voters", the Board may therefore, at any time prior to March 27, vote to place the question on the ballot at the 2018 Annual Town Election and forward to the Town Clerk the ballot question and summary. To facilitate this process, I would suggest that the Board or its designee coordinate with the Commission to ensure that the Board receives the summary timely.

4. Effective Date of Charter

If the voters approve the Charter revision by a majority vote, the Charter revision will take effect immediately, or at such later time as the revised Charter may specify (i.e., transitional provisions may provide for the Charter to be implemented over time).

Be further aware that if the Charter revision fails, but receives the affirmative vote of at least 35% of those voting on the question, a petition process may be initiated to again submit the proposed Charter revision to the voters.

5. Distribution of Charter Commission Final Report

General Laws c.43B, §11 mandates that the Board of Selectmen cause a copy of the final report of the Commission to be distributed to each residence of one or more registered voters in the Town. The distribution must occur no later than two weeks prior to the May 1, 2018 election. In my experience, in other towns this responsibility is often delegated to the Town Clerk. Often the Clerk will be able to utilize a bulk mailing rate if voter registration materials are included with the final report. Note further that the Town Clerk must retain copies of the report for distribution upon request, and a copy must be posted in the Town Clerk's office.

6. Filing Requirements if Charter Revision is Approved by the Voters

If the voters at the 2018 Annual Town Election approve the proposed Charter revision, copies of the Charter revision, and the Town Clerk's certification of its approval, must be maintained

Mr. David Panagore
Town Manager
January 3, 2018
Page 3

as a permanent record of the Town, and be sent to the Department of Housing and Community Development, the State Archivist, and the Office of the Attorney General.

B. Application of the Campaign Finance and Conflict of Interest Laws to Municipal Activities in Connection with Ballot Question

The Campaign Finance Law, G.L. c.55, prohibits the expenditure of public funds to promote or oppose the Charter ballot question, or any other ballot question. Similarly, G.L. c.268A, Conflict of Interest Law, also prohibits the use of public resources (including employee time) to “campaign” in connection with the ballot question. I have addressed these issues in further detail, below. Please be aware, however, these restrictions do not apply to the mailing of the Charter Commission’s final report, as such mailing is specifically authorized by the provisions of G.L. c.43B, §11. See OCPF AO-96-03.

1. *Campaign Finance Law*

In Anderson v. City of Boston, 376 Mass. 178 (1978), the Court identified a dividing line between permissible and impermissible expenditures of municipal resources in connection with ballot questions. In that case, the court held that the Campaign Finance Law prohibits municipalities, including municipal officials, committees and employees, from expending public funds or resources to influence the outcome of an election. Anderson, 376 Mass at 187. Although the holding of the case, and the manner in which it has been implemented by the Office of Campaign and Political Finance, is nuanced, in general the Town may not utilize public funds to influence the outcome of elections. The prohibition includes activities that are traditionally associated with “campaigning” such as using photocopiers, paper and/or postage to leaflet, pamphlet, or the sending of other types of unsolicited information concerning a ballot question, even if such information is neutral or “informational” in nature, whether using the United States Postal Service, e-mail, reverse 9-1-1 call systems or similar media.

The Town is not, however, prohibited by Anderson from using municipal resources to analyze a ballot question, including a question related to revising the Town’s Charter, and its effect on the Town and its operations. Thus, the Town could prepare analysis of the impact of a ballot question on physical infrastructure, human resources and financial obligations, identify key issues in implementation, and address the relationship of the Charter revision proposed by the ballot question to overall capital, master, or budget planning issues. The Town may also, in response to a request for public records, send a copy of any analysis it has prepared of the issues. The Town could also make that analysis available at a meeting or forum about the issues, and could post the analysis on its website. While the Town could not, for example, have 500 copies of materials available for a meeting at which it expects only 20 people will attend, it could prepare a smaller number of copies for that meeting.

Mr. David Panagore
Town Manager
January 3, 2018
Page 4

Office of Campaign and Political Finance guidance provides further that an elected official may take positions on any ballot question that may be presented to the voters, regardless of whether the ballot question relates to a matter within that official's jurisdiction. Thus, elected officials, elected multiple-member bodies, and members of such bodies may talk about any ballot question at meetings, issue press releases, hold informational forums, write letters to the editor, or make individual and group statements about their position on any ballot question.

In contrast, the restrictions on the use of public resources imposed by the Campaign Finance Law apply more strictly to appointed officials and employees. The Office of Campaign and Political Finance advises that policy-making appointed officials and multiple member bodies may only act or speak with respect to a ballot question if it is relevant to their position with the Town, while non-policy making officials are prohibited from taking any position with respect thereto. An example would be that the Head Librarian could comment on, provide analysis of, and seek support for, a debt exclusion question to borrow for the construction a new Library, but could not be involved in a similar effort for a new fire station. In contrast, a Library employee could not independently be involved in such efforts for a new Library, unless providing support for the Head Librarian at the direction of the Head Librarian.

Therefore, in my opinion, the individual members of the Board of Selectmen, as elected officials, may talk about and take positions on the charter revision at meetings, issue press releases, hold informational forums, write letters to the editor, or make public statements about their position on the question in compliance with the Campaign Finance Law. Similarly, in my opinion, the Board of Selectmen could use municipal resources to analyze the effect of the Charter revision on the Town and its operations and subject to the provisions related to distribution of the information, outlined above, make that information available at a meeting or forum on the issue. The Town Manager, as a policy-making official, would have similar discretion to make statements and take positions about the Charter revision, and to use public resources to analyze the impacts of the Charter on Town government. The Town Manager and/or Board of Selectmen would also be permitted to post a link on the Town's website to its analysis of the Charter and its impacts on the Town.

Enclosed herewith please find two detailed memoranda prepared by the Office of Campaign and Political Finance outlining in detail the restrictions on the use of municipal resources and the degree to which elected and appointed officials may act and speak in connection with ballot questions.

2. Conflict of Interest Law

The Conflict of Interest Law is also implicated with respect to expenditure or use of municipal resources, financial or otherwise, in connection with a Town election, depending on the circumstances. General Laws c.268A, §23(b)(2)(ii) prohibits the use of one's public position to

Mr. David Panagore
Town Manager
January 3, 2018
Page 5

engage in so-called “political activity”, because a public employee who does so is using his official position to secure for herself or others unwarranted privileges of substantial value that are not properly available to similarly situated persons. Typically, action taken in violation of the Campaign Finance Law will also constitute a violation of the Conflict of Interest Law. For these reasons, elected and appointed public officials and employees must proceed carefully in connection with any election-related activities.

In Advisory 11-1 Public Employee Political Activity (attached), the State Ethic Commission analyzes the application of the law to various activities by elected and appointed officials with respect to political activity. Similar to the conclusions reached by the Office of Campaign and Political Finance, the Commission’s analysis suggest that unilateral distribution by a public official or employee of information concerning a ballot question in their official capacity constitutes an unwarranted privilege or benefit not available to similarly situated individuals. Similarly, the Conflict of Interest Law may be implicated by a member of an appointed multiple member body using an official title in connection with a matter not within that body’s jurisdiction or with a matter upon which such body has not taken an official position. Elected officials are not subject to limitations of this nature in connection with use of their official titles, however.

It is important to note that while the Conflict of Interest Law restrictions would apply to members of the Board of Selectmen and other municipal officials and employees, the definition of municipal employee for purposes of the Conflict of Interest Law excludes members of a charter commission.

Please contact me with any further questions concerning these issues.

Very truly yours,



Lauren F. Goldberg

LFG/KRG/bp

Enc.

cc: Board of Selectmen
Charter Commission

599127/PROV/0404