
MIRICK O'CONNELL

A T T O R N E Y S A T L A W

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March 12, 2015

VIA EMAIL AND FIRST CLASS MAIL

Charter Review Committee
Attn: Robert Deysher, Chairman
Town of Westborough
131 Oak Street
Westborough, MA 01581

Re: **Questions Concerning Town Charter Review**

Dear Mr. Deysher:

As part of the Charter Review Committee's work to review and suggest amendments to the Town Charter, this Firm was asked by the Town Manager to address specific questions raised by the Charter Review Committee,¹ and to comment on proposed amendments to the Town Charter suggested by the Town Manager.

We understand that the Charter Review Committee's charge from the Board of Selectmen is "[t]o improve the Town's organizational structure to provide improved accountability appropriate authority for day to day management through a Town Manager to allow Boards and Committees to focus on policy setting, statutory, planning and regulatory responsibilities while maintaining the current form of government." Our comments in this memorandum and our suggested amendments to the Town Charter are intended to be consistent with that charge.

Enclosed is a redline reflecting our preliminary suggested amendments to the Town Charter, imposed over the redline previously submitted by the Town Manager. We will forward any additional recommended amendments to the Town Charter that result from our continued review. In the comments that follow, we address the specific questions raised by the Charter Review Committee, and explain our suggested amendments to the Town Charter shown on the redline.

¹ We understand that the Charter Review Committee has not been elected as a charter review commission pursuant to M.G.L. c. 43B. As a result, any changes recommended by the Charter Review Committee that the Board of Selectmen wishes to implement will require special legislation.

MIRICK, O'CONNELL, DEMALLIE & LOUGEE, LLP

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A. Answers to Questions from the Charter Review Committee:

1. ***General Request:*** Review the current Town of Westborough charter and identify elements that can lead to inconsistencies with M.G.L. or other future legal conflicts.

Answer: Our suggested amendments respond to this request, as described below.

2. ***Specific Requests:***
Section 7.8 (Removal & Suspensions); does this need changing

Answer: Yes, see below.

3. *Sections 5.2 to 5.6; Are there conflicts; committee is considering eliminating these sections since they appear to be redundant*

Answer: We noted several redundancies among these sections. We agree, however, with the Town Manager's suggested amendments to the Charter's provisions on appointing authorities, which eliminate these sections.

4. *Should references to Housing Authority be eliminated?*

Answer: Yes, as noted in the memo provided by Marilyn Contreas of DHCD, the Housing Authority is a separate body politic from the Town, and should not be referenced in the Charter.

5. *Are there sections that can be eliminated since they are covered by M.G.L.?*

Answer: Yes, see below.

6. ***Definitions/Questions:*** Please provide the legal definitions with examples.
Appointing Authority
Should an appointed board have appointing authority? What are good practices? What are legal considerations?

Answer: In terms of a legal definition for the term "appointing authority," as the name implies, an appointing authority is any board, commission, committee, office, or position empowered by statute, charter, or by-law who has the power to select (i.e., appoint) and discharge (i.e., remove) an employee in any non-elective position.

In terms of whether an appointed board should have appointing authority, because of the need for uniform application and administration of numerous state and federal laws, such as the Massachusetts Open Meeting Law and the Family and Medical Leave Act, and the difficulties

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associated with administering collective bargaining agreements, we strongly recommend that the Town have a centralized appointing authority in the Town Manager, as is consistent with the Town's intent. In the context of appointed boards which do not meet frequently enough to tend to the day-to-day administrative requirements called for by many state and federal laws and which must comply with the Open Meeting Law, we do not recommend that such boards have appointing authority.

7. *Concurrence*

Does concurrence mean that an appointing authority CAN NOT hire or fire if someone is identified to having concurrence for that appointee?

Answer: As an initial matter, the term "concurrence" means that an appointing authority cannot consummate the appointment or removal of an employee without the confirmation of a board or other position identified as having such approval power. To the extent the Town wishes to have strong Town Manager, we strongly would not recommend building in concurrence as to the Town Manager's removal authority because of the problems under the Open Meeting Law (which applies to public bodies such as the Board of Selectmen) associated with providing at least 48 hours' advanced written notice to the effected employee and convening meetings in executive session (unless the employee requests that it be held in open session) and because of certain due process requirements under the United States Constitution and Massachusetts law.

8. *Reporting/Organizational Structure*

Does an appointee have to report to the appointing authority? Does the appointing authority have the legal right to assign the appointee to another manager/supervisor?

Answer: In terms of whether an appointee has to report to the appointing authority, the answer is yes. As for whether an appointing authority has the legal right to assign the appointee to another manager/supervisor, the answer is generally yes, but subject to any collective bargaining obligations and any requirements under M.G.L. c. 31, the Commonwealth's civil service law, if applicable.

B. Suggested Amendments to the Town Charter:

1. **Various Articles and Sections:**

a. **Capitalized Terms:** Throughout the Charter, we capitalized the terms "Town", "Charter", "Bylaw" and "Town Meeting" in any places where those terms were not capitalized. This provides consistency, and avoids any confusion over the meaning of defined terms.

b. **Footnotes:** We agree with the Town Manager that the Charter's various footnotes may be deleted. The Charter Change Log in the Appendix provides sufficient detail regarding the history of Charter amendments.

2. **Article 1:**

Section 1-3: We agree with the Town Manager's suggested amendments.

3. **Article 2:**

Section 2-1: We consolidated Section 2-7 with this section to avoid any confusion associated with having Town Meeting's powers set forth in separate sections. In doing so, we recommend that the Town Meeting have all of the powers and duties provided for a Town Meeting by Constitution, statute, or the Charter.

Section 2-3: Along with the Town Manager's edits, our suggested amendments are designed to give the Town flexibility with respect to the times and dates of Town Meetings, both annual and special, by addressing these matters through the Town Bylaws. We also recommend moving the phrase "for the transaction of business relating to the prudential affairs of the Town" to the end of the sentence.

Section 2-7: We added a paraphrase of this section to Section 2-1. We agree with the Town Manager that the second sentence is a power that should be handled administratively, not by Town Meeting.

Section 2-8: We agree with the Town Manager's recommendation to adhere to the warrant drafting and posting procedures provided by statute. Our further suggested amendments are intended to clarify the Selectmen's role in setting the warrant.

4. **Article 3:**

Section 3-1(a): We agree that reference to the Town Clerk should be removed from this section, but do not recommend deleting reference to the Housing Authority as its members are elected.

Section 3-1(c): To avoid confusion, we suggest removing the phrase in the last sentence regarding the Town Manager's role with respect to the Board of Selectmen. The Town Manager's powers and duties are well-established in Article 4.

Section 3-2(c): Consistent with our understanding of the Board of Selectmen's charge to the Charter Review Committee, we recommend that certain executive powers and duties be vested in the Town Manager under Section 4-2 of the Charter (discussed below). As a result, we suggest that an introductory clause be inserted at the beginning of Section 3-2(c) that states, "Except for those executive powers and duties that are vested in the Town Manager under Section 4-2 of this Charter,".

Section 3-2(d): We agree with the Town Manager that references to personnel appointed pursuant to Section 5-2 be deleted (discussed below) and that the Board of Selectmen should be the appointing authority for the positions of Town Manager, Special Legal Counsel, and Registrar of Voters. We also recommend that the Board of Selectmen be the appointing authority for the Fire Chief and Police Chief positions (although we recommend that the Town Manager have removal authority for these positions).

Although the Town Manager has proposed that the Board of Selectmen be the appointing authority for a number of permanent committees, boards and commissions for three year terms, we recommend that the Town Manager have the appointing authority for such committees, boards and commissions. With this in mind, we have deleted reference to the Board having appointing authority for such boards, commissions and committees and the Town Manager's proposed edits to insert reference to such committees, boards and commissions in Section 3-2(d), and instead recommend that such committees, boards and commissions be appointed by the Town Manager in Section 4-2(a). With respect to the Board of Assessors, Board of Health, Historical Commission, and the Zoning Board of Appeals, however, because such boards have statutory policy making authority, we recommend that appointments made by the Town Manager be subject to confirmation by the Board of Selectmen.

Section 3-2(e): We agree with the Town Manager that the introductory sentence should be revised to state that the Board of Selectmen may request the Town Manager to investigate or the Town Manager may on his/her own investigate the affairs of the Town. We also recommend deleting the word "doubtful" from that sentence. We also agree with the Town Manager that the last sentence of this section be deleted relative to the filing of a report of the results of any investigations in the office of the Board of Selectmen and a report summarizing the results of such investigations printed in the next annual town report.

Section 3-2(f): We recommend deleting the introductory phrase "Notwithstanding any general or special law to the contrary," as it is unnecessary for the purposes of this section.

Section 3-3(e): We agree with the Town Manager that the Moderator should not be the appointing authority for two members of the Capital Expenditure Planning Committee.

Section 3-4(b): We agree with the Town Manager that a prohibition on salaries for School Committee members does not belong in the Charter.

Section 3-5: We agree that the Housing Authority should not be in the Charter, as it is a separate body politic.

Section 3-6(c): We agree with the Town Manager's suggested changes to the Planning Board's appointees.

Section 3-7: Switching from an elected to an appointed Town Clerk may be handled through the amendments proposed by the Town Manager. However, many communities provide a formal transition between an elected and an appointed office, to address the elected incumbent.

For example, the elected incumbent may be allowed to finish their current elected term or serve for the duration of the calendar year before the position becomes appointed. Or, the elected incumbent may be designated as the first appointee, with subsequent appointments to be handled in the manner specified in the Charter.

We recommend that the Charter provide some transitional procedures to avoid any confusion or uncertainty regarding the switch from an elected to an appointed Town Clerk.

Section 3-8: We agree with the Town Manager that this section may be eliminated.

Section 3-9(c): We agree with the Town Manager's suggested changes to the Library Trustees' appointees.

5. **Article 4:**

Section 4-1: We agree with the Town Manager's recommendation that the following sentence be added at the end of the second paragraph of Section 4-1:

"The Board of Selectmen may waive this requirement by majority vote."

We also recommend that the last sentence of the third paragraph of Section 4-1 be revised to state, "The Board of Selectmen may from time to time establish such additional qualifications as it deems necessary and appropriate." The current language in that sentence provides that the Town may establish additional qualifications by Bylaw. Requiring a Town Meeting vote to enact a bylaw to establish additional qualifications for the Town Manager is very cumbersome.

Section 4-2(a):

(i) In an effort to improve the Town's organizational structure and day-to-day management, we recommend that appointing authority be centralized under the Town Manager. With this in mind, we recommend that the Town Manager be the appointing authority and removal authority for the following:

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(A) Members of the following permanent Town boards, commissions, and committees, and such appointments shall be for overlapping three year terms:

- 1.) Capital Expenditure Planning Committee;
- 2.) Central MA Regional Planning Commission – Westborough Members;
- 3.) Conservation Commission;
- 4.) Council on Aging;
- 5.) Country Club Operating Committee;
- 6.) Cultural Council;
- 7.) Housing Partnership Committee;
- 8.) Insurance Advisory Committee (Retiree member);
- 9.) Local Emergency Planning Committee;
- 10.) MBTA Advisory Board Representative;
- 11.) Municipal Building Committee;
- 12.) Open Space Preservation Committee;
- 13.) Recreation Commission;
- 14.) Sandra Pond Conservation Area Wardens;
- 15.) Trust Fund Commissioners;
- 16.) Trustees of Soldiers' Memorials;
- 17.) Walkup Robinson Fund Committee Representative;
- 18.) Westborough/Shrewsbury Wastewater Treatment Plant Board – Westborough Representatives;
- 19.) Youth Commission (known as Westborough Youth and Family Services); and
- 20.) Westborough TV, Inc. independent non-profit Town representatives.

(B) Members of the Board of Assessors, Board of Health, Historical Commission, and the Zoning Board of Appeals, but that such appointments be subject to confirmation by the Board of Selectmen.

(C) Members of other Town boards, commissions or committees for which no other method of appointment is set forth in the Charter, with such appointments fixed for overlapping terms.

(ii) We also recommend that the Town Manager be the appointing and removal authority for the DPW Director, a Town Counsel, a Treasurer/Collector, a Town Accountant, a Town Clerk and all other department heads, except for the Police Chief and the Fire Chief, and for all officers, subordinates and employees of the Town for whom no other method of selection is provided in this Charter, except employees of the school department. (See proposed subsection 4-2(a)(1)(D).)

(iii) Although the Town Manager has proposed to add a provision relative to a search committee for vacancies in the Police Chief, Fire Chief, and DPW Director positions, we do not recommend including such a provision in the Charter as a search committee is an administrative process to be utilized by the Town that need not be set forth in the Charter.

(iv) We agree with the Town Manager's recommendation that the Town Manager appoint, based upon merit and qualifications, a Town Planner which shall be subject to the confirmation vote of the majority of the Planning Board, and that the Town Manager appoint, based upon merit and qualifications, a Library Director which shall be subject to the confirmation vote of the Board of Library Trustees. We further agree with the Town Manager that these appointments shall take effect 15 days after the day that notice of the appointment was filed with the Planning Board or Library Board of Trustees unless the appropriate board shall, within that period by a majority of all of its members, vote to reject the appointment. (See proposed subsection 4-2(a)(2).)

(v) Next, we recommend that the Town Manager have the authority to remove the Police Chief, the Fire Chief, the DPW Director, Town Counsel, the Treasurer/Collector, the Town Accountant, the Town Clerk, the Town Planner, the Library Director, and all other department heads, officers, subordinates and employees for whom no other method of removal is provided in the charter, except employees of the school department. (See proposed new subsection 4-2(b).)

(vi) We also agree with the Town Manager's recommendation that the Town Manager be authorized to create advisory committees to assist him in any aspect of the Town Manager's responsibilities. (See proposed subsection 4-2(c).)

(vii) Furthermore, we agree with the Town Manager's recommendation to add a new subsection pertaining to the filling of vacancies in Department Head positions (to be filled in the manner prescribed for its initial appointment) and providing that the Town Manager may appoint an interim Department Head for not more than four (4) three-month periods for a maximum of 1 year. Although we recommend that the Board of Selectmen be the appointing authority (not the removal authority) for the Fire Chief and the Police Chief, we have no objection to the Town Manager having the authority to appoint an interim Police Chief or Fire Chief, subject to the Board of Selectmen's confirmation of the interim appointment. We agree with the Town Manager that any such temporary appointment by the Town Manager shall cease upon the filling of the vacancy by the prescribed method. (See proposed subsection 4-2(d).)

(viii) Lastly, we recommend that Section 4-2(a)(5) relative to the effective date of appointments and the Board of Selectmen's rejection of such appointments be deleted as it would no longer be necessary if our suggested edits are implemented.

Proposed Section 4-2(e) (former Section 4-2(b)): Under Section 4-2(e) we recommend adding the following Town Manager authority and responsibility:

- responsibility over all administrative, procurement, and personnel matters of the Town (new subsection 4-2(e)(3));
- serve as the Chief Procurement Officer and have the authority to delegate such responsibility to another Town employee (new subsection 4-2(e)(4));
- authority to supervise all Town departments, other than the school department (new subsection 4-2(e)(5));
- serve as the Chief Human Resource Officer for the Town (new subsection 4-2(e)(6));
- authority to issue administrative orders, rules and regulations, which orders, rules and regulations shall apply to all Town departments except for the school department (new subsection 4-2(e)(7));
- administer rules and regulations of the Town (new subsection 4-2(e)(8)); and
- along with the Board of Selectmen, review and approve the rules and regulations of the Police Department and Fire Department (new subsection 4-2(e)(9)).

We also agree with the Town Manager's recommendation to add the phrase "including appointing an independent auditor as required by law and furnishing an annual audit to the Board of Selectmen and Advisory Finance Committee" to new subsection 4-2(e)(15).

As an alternative to the Town Manager's proposal to add language at the end of proposed Section 4-2(e) relative to preparing a plan establishing staffing requirements, we recommend that the Town Manager have the authority to reorganize Town government administration, subject to the approval of the Board of Selectmen and the Charter. This approach would be consistent with similar approaches taken under recent charters.

Section 4-3: We agree with the Town Manager's recommendation to put the existing language in Section 4-3 under a new subsection (a) entitled, "Temporary Absence" and to add a new subsection (b) that states as follows:

- “(b) Vacancy due to Resignation, Dismissal or otherwise – A vacancy in the Office of the Town Manager shall be filled as soon as practicable by the Board of Selectmen. When a vacancy exists, the Board of Selectmen may appoint by a

majority vote of the entire Board, a suitable person as Interim Town Manager during the period of the vacancy. Such an appointment shall be effective for sixty (60) days with no more than two sixty (60) day extensions.”

6. **Article 5:**

Section 5-1: We recommend that the Town Manager have the authority to propose to reorganize Town government administration, subject to the approval of the Board of Selectmen and the Charter.

Section 5-2: We have no objections to the amendments to Section 5-2 proposed by the Town Manager, subject to our recommended edits (in redline).

Section 5-3 (formerly 5-2(a)): We have no objections to the amendments to former Section 5-2(a) (proposed Section 5-3).

Former Sections 5-2(b), 5-2(c), 5-2(d), 5-2(e), 5-3, 5-4, 5-5, 5-6: We have no objections to the amendments suggested by the Town Manager.

7. **Article 6:**

Sections 6-5 and 6-6: We have no objections to the amendments suggested by the Town Manager.

Sections 6-7: We agree with the Town Manager that the Town remains subject to the timeframes set forth in the Public Records Law, notwithstanding this Charter provision, in accordance with M.G.L. c. 43B, § 20.

8. **Article 7:**

Section 7-2: We agree with the Town Manager that the current version of this section is not necessary, and agree that a recurring Charter review process is a good idea.

Section 7-5: We agree with the Town Manager's suggested amendments to this section. In its current form, this section misconstrues M.G.L. c. 40, § 33.

Section 7-6: We suggest amending the heading of this section, to avoid any confusion with M.G.L. c. 40, § 32, governing publication of bylaw amendments.

Section 7-7: We have no objections to the amendments suggested by the Town Manager to Section 7-7(a), although we believe the Town may eliminate this section altogether.

Regarding Sections 7-7(b) through 7-7(e), we agree with the Town Manager that these sections should be eliminated from the Charter for several reasons. First, the Charter may not prevail over contrary provisions set forth in the Open Meeting Law, per M.G.L. c. 43B, § 20². Several provisions in these sections are not consistent with the current version of the Open Meeting Law (effective in 2010) and the Attorney General's regulations and administrative decisions. Second, to the extent that these provisions create additional requirements beyond those of the Open Meeting Law, the Town is best served without these requirements. Volunteer boards and committees are already subject to the complexities of the Open Meeting Law and other legal requirements; adding additional mandates in the Charter only complicates matters. In addition, it is unclear how a board's failure to comply with a meeting requirement in the Charter affects the validity of the board's votes.

Section 7-8: In the first paragraph of Section 7-8, we recommend that only permanent employees be subject to good cause protection. We do not recommend that probationary employees enjoy such protection. With this in mind, we recommend that language be added providing that during the probationary period, an employee may be suspended or removed for any reason or no reason, with or without good cause. (Probationary periods for non-bargaining unit employees should be determined by Bylaw or regulations.)

We also recommend deleting the last sentence of the first paragraph of Section 7-8 that provides good cause protection to appointed members of Town boards, commissions and committees as individuals in such policy-making positions should not be afforded just cause or good cause protection.

Next, in the second paragraph of Section 7-8, we recommend deleting the second sentence that limits suspensions to 15 days as such a period is too short.

We do not recommend that suspensions be coterminous with removals as such an approach raises legal questions pertaining to double jeopardy.

We recommend that the third paragraph of the Section 7-8 be revised to state as follows:

"The appointing authority, when removing any such officer or employee, shall act in accordance with policies established by the Town. This section shall not apply to any member of a collective bargaining unit."

² Section 20 of M.G.L. c. 43B (the Home Rule Procedures Act) provides that the provisions of the Charter "shall be deemed consistent with the provisions of any law relating to the structure of city and town government, the creation of local offices, the term of office or mode of selection of local offices, and the distribution of powers, duties and responsibilities among local offices." Provisions of the Charter not pertaining to any of these specific areas are subject to state law.

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We agree with the Town Manager's recommendation to delete subsections 7-8(a) – (c) as the procedures for removal should not be set forth in the Charter but instead should be laid out in a Bylaw or regulation.

Lastly, we suggest deleting the word "original" in the last paragraph of Section 7-8 as we do not recommend limiting that paragraph's application to only original terms.

Section 7-12: We have no objections to the amendments suggested by the Town Manager.

9. **Article 11:**

Section 11: We agree with the Town Manager that this transitional section is necessary. We suggest, however, that it may be more appropriate to insert this new section at the end of Article 7 (General Provisions) rather than creating a new Article 11.

We are happy to answer any additional questions the Committee may have. We look forward to working with you on this important project.

Very truly yours,

A handwritten signature in black ink, appearing to read "Stephen Madaus", written in a cursive style.

Stephen F. Madaus

SFM/
Enclosure

cc: James Malloy, Town Manager
D. M. Moschos, Esq.
Corey F. Higgins, Esq.