

March 24, 2017

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BY ELECTRONIC MAIL ([bockelmanp@amherstma.gov](mailto:bockelmanp@amherstma.gov))  
AND BY FIRST CLASS MAIL

Mr. Paul Bockelman  
Town Manager  
Amherst Town Hall  
4 Boltwood Avenue  
Amherst, MA 01002

Re: Town Government Act – Referendum Election

Dear Mr. Bockelman:

You have requested an opinion concerning calculation of the result of a referendum election held in accord with the provisions of Section 2.4 of the Amherst Town Government Act (“ATGA”). The relevant section, Section 2.43, provides in its entirety as follows:

Determination of result

A question put to the voters at large under the provisions of this section shall be determined by a vote of the same proportion of voters voting thereon as would have been required by law had the question been finally determined at a representative town meeting. No action of the representative town meeting shall be reversed unless a number of registered voters equal to at least 18 percent of all the active registered voters shall so vote. Otherwise the action shall take effect immediately upon the certification by the town clerk of the vote upon the referendum. [emphasis added].

In particular, you ask whether the second sentence of Section 2.43 requires 18% of the active voters to vote in the election or 18% of the active voters to vote in favor of “reversing” the action taken by Town Meeting. Additionally, you ask whether blanks are counted when determining a 2/3 vote or determining whether the number of voters voting in favor of reversing constitutes 18%.

In my opinion, while the language of Section 2.43 is susceptible to two reasonable competing interpretations, the legislative history and Town’s past practice concerning interpretation of Section 2.43 leads to the conclusion that it is best interpreted as requiring 18% of active registered voters to vote in favor of reversing a Town Meeting vote. I acknowledge, however, that the wording of the second sentence of Section 2.43 is somewhat ambiguous, and therefore this determination is a close call. In my further opinion, consistent with treatment of blank votes at elections generally, for purposes of a referendum, blanks would not be counted in determining either the 2/3 vote requirement or the 18% requirement.

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***Section 2.43 – 18% Requirement***

By way of background, as you are aware, on February 6, 2017, Attorney Brian W. Riley of this office provided opinions to you and Town Clerk Sandra Burgess as to various issues concerning the referendum election, one of which was the meaning of Section 2.43 of the ATGA. Attorney Riley, looking solely at the language of the second sentence, opined that in order for the results of the referendum to be binding, at least 18% of the Town's registered voters must cast a ballot at the special election. Since then, I understand that these conclusions have been the subject of debate. Where text in a statute or special act is ambiguous, it is appropriate to consider legislative history. Initial research by the Town thereafter suggested that our original interpretation may have differed from previous interpretations. We were informed that in previous referenda elections the sentence was interpreted to require at least 18% of the Town's active registered voters to vote in favor of reversing the vote of Town Meeting. Our review of these elections (February 20, 1967, February 3, 1998, and September 27, 2005) indicates the quantum of vote needed to reverse the action of Town Meeting was never reached, i.e., the "vote to reverse" never received the required majority. For that reason, in our opinion, it has never been the case that the interpretation of the words "shall so vote" in Section 2.43 was outcome determinative.

We were provided with a copy of a 2005 e-mail exchange with Town officials where the then-Town Counsel concluded in cursory fashion that the second sentence of Section 2.43 required at least 18% of active registered voters to vote to reverse. Recently, additional research produced motions submitted at the 2001 Town Meeting at which the Section 2.43 of the ATGA was amended, and, more importantly, the Special Acts Review Committee Final Report. The motions and report, particularly when read together, evidence that the voters at Town Meeting understood that the change proposed at that meeting with respect to Section 2.43 of the ATGA was twofold. The Final Report, attached, states, on page two, that the first change to Section 2.43 was intended to reduce the percentage of voters required to "overturn a vote of town meeting" from 20% to 18%. The second change was intended to measure the percentage of voters based upon active voters, rather than all voters. The summary portion of the report regarding this issue states, on page 4, "There is a change from 20% to 18% in the percentage of voters needed to overturn an action of town meeting, and it is now based upon the ACTIVE voters list (2.43). As a result, it becomes somewhat easier to achieve success in overturning an action of town meeting." The motions and supporting materials suggest further reducing the 20% to 18% or 10% was intended to make it easier to "overturn the action of the town meeting".

Joel Bard, Brian Riley, and I have all closely analyzed Section 2.43 and comparable laws. While similar language is found in G.L. c.43A, §10 and in various special acts, many address similar requirements, but none use the exact language or sentence structure found in Section 2.43. There are also many examples of special acts that very specifically address a minimum voter turnout requirement or a minimum percentage of voters that must vote to reverse a vote of Town Meeting. Unfortunately, however, the meaning of the second sentence of Section 2.43 remains ambiguous and grammatically confusing because the last phrase, "shall so vote", is a "dangling modifier", leaving it unclear what the phrase modifies.

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Compare, for example, G.L. c.43A, §10, the standard form of representative town government used by only Arlington and Brookline, stating, “The questions so submitted shall be determined by a majority vote of the registered voters of the town voting thereon, *but* no action of the representative town meeting shall be reversed unless at least twenty per cent of the registered voters shall so vote.” [emphasis added]. A 2013 amendment to the City of Pittsfield Charter revised the referendum provision to provide, “For any measure to be...declared null and void under a referendum procedure and for any recall election, at least 20 percent of the voters as of the most recent regular city election must vote....” [emphasis added]. A 2004 revision to the Plymouth Town Charter recall provision provided, “The action of the voters [on a recall question] shall require a majority vote, but shall not be effective unless the total of those voting for and against recall exceeds twenty (20) percent of the registered voters of the town.” [emphasis added]. A 1993 revision to the Acushnet Charter revised the recall provision to provide, “If a majority of the votes cast upon the question of recall is in the affirmative, and if at least twenty percent of the total number of registered voters duly recorded on the registration list of the town clerk as of the preceding town election casts ballots at said special election, the candidate receiving the highest number of votes shall be declared elected.” [emphasis added]. A 1955 amendment to the Fairhaven Charter revised the referendum provision to provide, “The questions so submitted shall be determined by a majority vote of the registered voters of the town voting thereon, but no action of the representative town meeting shall be reversed unless at least twenty per cent of the registered voters shall vote to disapprove such action.” [emphasis added]. Finally, a 1953 amendment to the Dartmouth Charter provided: “The questions so submitted shall be determined by a majority vote of the registered voters of the town voting thereon, but no action of the representative town meeting shall be reversed unless at least twenty per cent of the registered voters shall vote to disapprove such action. [emphasis added]. In comparison to the language in G.L. c.43A and the above-referenced special acts, it is evident that Section 2.43 of the ATGA could be written to more clearly address the intention of the voters with respect to the 18% requirement.

In this case, in summary, contemporaneous submissions to the 2001 Town Meeting by voters, as well as the report of the Special Acts Review Committee, and considering the weight accorded by Town Meeting to reports from the Special Acts Review Committee, demonstrate that Town Meeting apparently understood that the proposed revision to the ATGA was intended to establish that 18% of the active registered voters must vote to reverse a vote of Town Meeting in order for such vote to be binding. Therefore, in light of the ambiguous manner in which the second sentence of Section 2.43 was drafted, and where such language is based upon the state model and many other municipalities have similar provisions requiring a certain percentage of voters to vote to reverse a vote of town meeting, in our opinion, and under these particular circumstances, it is reasonable to so interpret the language.

Where this issue has engendered questions for over a decade, however, we suggest that consideration be given to proposing an amendment to the text of Section 2.43 of the ATGA to specifically resolve this issue by eliminating the ambiguity. You asked how to effect this change, if the Town wished to pursue the same. One option would be to include such a revision in the recommendations to the voters from the Charter Commission. In the alternative, the ATGA may be revised either by approval by a 2/3 vote of Town Meeting and then approval by the voters at an election

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in accordance with G.L. c.43B, §10(a), or pursuant to special legislation by a majority vote at Town Meeting and then submission to the General Court. Note that there is no requirement in state law for a “local acceptance” by the voters at an election, although such a provision is typically favored by the General Court.

***Calculation of 18% of Active Registered Voters and Treatment of Blank Ballots***

You also ask how to calculate the 18% of active registered voters and address whether blank ballots count towards the 18% or 2/3 requirements. Section 2.44 of the ATGA addresses the process for calculating the number of active registered voters for purposes of Section 2.43. That section provides as follows:

To determine the total number of active voters of the town in making calculations required by this section, the town clerk shall use the number of active voters as of the dissolution of the town meeting at which the question proposed to be submitted to voters of the town at large was voted upon by town meeting members. The number of inactive voters at the dissolution of said town meeting shall be excluded from the calculations.

Thus, 18% of those persons listed as active as of the date on which the Town Meeting at which the matter was voted was dissolved, in this case, 2,983 of the 16,569 active registered voters of the Town, will be required to vote to reverse the vote of January 30, 2017 action of Town Meeting, in my opinion.

With respect to blank ballots, common law establishes the general principle that, provided that a quorum is present, a vote is deemed approved by a positive vote of a majority of those voting. See Clark v. City of Waltham, 328 Mass. 40, 41 (1951) (finding that where 10 members of an 11-member council were present, and five abstained, only three votes were required for positive action); see also G.L. c.50, §2 (stating, “In elections, the person receiving the highest number of votes for an office shall be deemed and declared to be elected to such office...”) [emphasis supplied]. If a voter chooses not to cast a vote for or against a question by submitting a blank ballot, such action, in my opinion, is not a “vote” and would not count towards the 18% or 2/3 vote requirements established by Section 2.43.

Please contact me or Joel Bard with any further questions concerning this issue.

Very truly yours,



Lauren F. Goldberg