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OFFICE OF THE ATTORNEY GENERAL

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August 24, 2017

Andrew Churchill, Chair
Amherst Charter Commission
Amherst Town Hall
4 Boltwood Avenue
Amherst, MA 01002

**Re: Preliminary Report of the Amherst Charter Commission
Case # 8582**

Dear Mr. Churchill:

Pursuant to the provisions of General Laws Chapter 43B, Section 9, we have reviewed the Preliminary Report of the Amherst Charter Commission (“Commission”) received by this Office on July 27, 2017. Pursuant to Section 9, and within four weeks after receipt, the Attorney General is required to furnish the Commission with a written opinion setting forth any conflict between the proposed Charter (“Charter”) and the Constitution and laws of the Commonwealth.

We have determined that one section of the proposed Charter conflicts with state law in that it prohibits the description of the incumbent status of a candidate for town election. (See Section A. Conflict with State Law). We have also determined that the remaining portions of the proposed Charter do not conflict with the Constitution or laws of the Commonwealth.

In addition to the conflict with state law identified in Section A below, we offer the following comments for the Commission to consider when drafting its Final Report.

A. Conflict with State Law - Section 7-2 “Non-Partisan Elections; Ballot Designations.”

Section 7-2 pertains to town election ballots and provides as follows:

All elections for Town Offices shall be non-partisan and election ballots shall be printed without any party mark, emblem, **incumbent designation**, or other designation.

We conclude that the text “incumbent designation” is in conflict with state elections law. General Laws Chapter 54, Section 41, proscribes what statements must appear on the general election ballot for city elections,¹ as follows:

To the name of each candidate for a state or city office, except for city elections which are not preceded by primaries, shall be added in the same space his party or political designation. Failure to make a political designation shall result in the term “Unenrolled” being used. To the name of a candidate for a state or city office who is an elected incumbent thereof there shall be added in the same space the words “Candidate for Reelection”, except in the case of political party candidates for the offices of governor and lieutenant governor.

Pursuant to G.L. c. 54, § 41, the general election ballot must include the following designation where applicable: the phrase “Candidate for Re-election” (which only applies to an elected incumbent). See Galluccio v. Election Commissioners of Cambridge, 339 Mass. 587, 589 (1959) (requirements of G.L. c. 54, § 41, applicable to the City of Cambridge); see also Tsongas v. Secretary of Com. 362 Mass. 708, 718 (1972) (“Incumbents may be and ordinarily are identified as such on primary ballots . . . and elected incumbents of most offices must be identified as candidates for re-election on ballots in final elections.”) Thus, it is a conflict with G.L. c. 54, § 41, for Section 7-2 to prohibit the inclusion of an “incumbent designation” on a town election ballot. In addition, Section 7-2, cannot prohibit the inclusion of a candidate’s party or political designation when that party or political designation is required under Section 41. In order to avoid a conflict with G.L. c. 54, § 41, the Charter Commission may wish to consider amending this section in its Final Report to address instances in which state law requires certain information to be included on an election ballot.

B. Article 2 - “Legislative Branch.”

Section 2-3 (a) prohibits former Town Council members from holding any compensated appointed town position for eighteen months after the expiration of the Council member’s service on the Town Council. Section 2-3 (a) further provides that:

Notwithstanding the preceding sentence, this section shall not prevent a Town employee who vacated a position in order to serve as a member of the Town Council from returning to the same position upon the expiration of the term for which that person was elected.

Section 2-3 (a) of the Preliminary Charter allows Town Council members to resume the “same position” he or she held as a town employee once he or she is no longer on the Town Council. This section does not address instances where the “same position” is no longer available, including instances where another person filled the vacated position. In order to avoid potential issues if the “same position” is no longer available, the Charter Commission may wish to consider amending this section in its Final Report to address instances in which a person cannot resume the same position.

¹ Section 1-4, “Powers of the Town,” provides that “in those instances where the laws of the Commonwealth may distinguish between municipalities classified as ‘towns’ and those classified as ‘cities’” the Charter shall be construed as providing a city form of government in Amherst.

C. Article 3 - “Executive Branch.”

Section 3-1 pertains to the appointment, qualifications and term of office of the Town Manager and provides in pertinent part as follows:

The Town Manager shall devote full-time to the duties of the office and shall not hold any other elective or appointive office in the Town, nor shall the Town Manager engage in other business unless such business is approved in advance by 7 members of the Town Council.

Section 3-1 allows the Town Manger to engage in other business if approved in advance by seven members of the Town Council. The Town Council’s approval of the Town Manager engaging in other business must be consistent with state ethics and conflict of interest laws, including G.L. c. 268A. More specifically, the Town Council cannot approve the Town Manager engaging in business activities that would violate state ethics laws. The Charter Commission may wish to consider amending this text in its Final Report to acknowledge that “other business” and the approval of such must comply with state ethics and conflict of interest laws.

D. Article 6 - “Administrative Organization.”

Section 6-3 pertains to the Board of License Commissioners and provides in pertinent part as follows:

There shall be a Board of License Commissioners which shall have the power to grant and issue licenses and permits as delegated to the Board by the Town Council by bylaw.

Section 6-3 allows the Board of License Commissioners to grant any permits and licenses as delegated to it by the Town Council by by-law. There are instances where state law dictates what local official must grant a permit or license and such authority cannot be given to another local official or board. For example, the State Building Code not only authorizes, but requires, the Building Inspector (as Code Enforcement Officer under the State Building Code) to issue a building permit where the applicant has demonstrated compliance with the Code and the town’s zoning by-laws. 780 C.M.R. § 105.3.1; *see also* G.L. c. 40A, § 7. There is no provision in the State Building Code which authorizes another local official or board to issue a building permit. The Charter Commission may wish to consider amending this text in its Final Report to make it clear what permits and licenses shall be granted by the Board of License Commissioners or that such delegation must be consistent with state law.

E. Article 7 - “Elections.”

Section 7-6 provides that the Town Council shall establish a process for candidates whose names appear on an election ballot to post statements about their candidacy on the “Town’s bulletin board” (as that term is defined in Section 1-7 of the Charter.) The process established by the Town Council cannot conflict with state campaign and political finance laws. More specifically, the process established by the Town Council should ensure equal access and not involve substantial expenditures of public funds. *See Anderson v. City of Boston*, 376 Mass.

178 (1978). The Charter Commission may wish to consider amending this text in its Final Report to acknowledge that such process must comply with state campaign and political finance laws.

Very truly yours,
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