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

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

RE: New Charter Transition Provisions

DATE: April 17, 2018

Question

You have requested an opinion concerning the proper interpretation of Article 10: Transition Provisions (“Transition Provisions”) of the new Amherst Home Rule Charter (“Charter”). In this memo, it is our intention to:

- A. Provide an interpretation of the Transition Provisions;
- B. Provide guidance for interpreting current and future issues under the terms of the Transition Provisions;
- C. Provide advice as to what entity is empowered to make determinations under the Transition Provisions; and,
- D. Provide an opinion, specifically, on the Special and Annual Town Meeting warrants under the Charter and the Transition Provisions.

Summary Opinion

In our opinion, the Transition Provisions must be read in accord with their plain meaning and consistent with the Charter as a whole to allow the Town to continue its daily operations and functions, continue important initiatives, and prepare appropriately for transition. In our further opinion, such interpretation requires that the Select Board, as the chief executive and policy maker of the Town, find an appropriate balance between avoiding entanglement in matters that reflect significant new policy positions or irrevocably change the Town’s position, and the need for the Town to avoid interruption in its regular operations and negatively influence the Town’s overall position. While daily operations should continue uninterrupted, in our opinion, the Select Board may need to make decisions on a case-by-case basis as to whether particular policy decisions are consistent with the Charter. Finally, the Town Manager, whose position is maintained under the new Charter and many of whose duties continue under the new Charter, will continue to carry out his daily functions and duties, and must also seek to ensure that the Town moves smoothly towards its new form of government. In our opinion, all of the articles on the Special and Annual Town Meeting warrants other than Articles 34 and 37 are appropriate for action under the analysis outlined herein; these two articles could instead be acted upon as non-binding recommendations to the Town Council. These matters are discussed in detail, below.

Detailed Analysis

A. Interpretation of Transition Provisions

1. General Context of Transition Provisions

In order to properly interpret the Transition Provisions, in our opinion, Article 10 must be reviewed in its entirety, and in the context of what it seeks to accomplish. It is our opinion that the Transition Provisions as a whole seek to ensure that there is a cohesive and appropriate transition from the current form of government – Select Board/Town Manager/Representative Town Meeting - to the new form of government - Town Council/Town Manager - with a focus on the continuation of government and administration, proper transfer of property, continuation of personnel, and a timeline and process for implementing the changes effected by the Charter.

2. Particular Sections of the Transition Provisions

Special attention should be paid to the following sections of the Transition Provisions:

Section 10.2: Continuation of Government and Administration:

All Town agencies and Town officials shall continue to perform their duties until reappointed, or until successors to their respective positions are duly appointed, or until their duties have been transferred and assumed by another agency. [Emphasis added].

Section 10.7, Time of Taking Effect, in relevant part:

(b) During the period between the adoption of the Charter and December 3, 2018...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 the 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.... [Emphasis added].

Section 10.13: Adoption of Measures to Assist with Transition

The Town Council and Select Board shall have the authority to adopt measures that clarify, confirm, or extend any of the transition provisions in order that the transition may be made in the most expeditious and least contentious manner possible.

3. Overall Intent of Charter

In interpreting the Charter, we must look to the rules of statutory construction. One such rule requires that we review the Charter as a “holistic whole” to ensure that the overall intent of the Charter be given proper effect. In other words, provisions that relate to a common subject matter “should be construed together so as to constitute a harmonious whole.” Commonwealth v. Smith, 431 Mass. 417, 424 (2000); quoting Board of Education v. Assessor of Worcester, 368 Mass. 511, 513-514 (1975). In this case, that means looking at the specific provisions of Section 10.7(b), addressing actions to be taken by the Select Board, Town Manager and Town Meeting, in particular that such actions must be “essential and necessary to the current operations of the Town”, and not “contrary to, or that frustrate the purpose of” the Charter, in the context of the Transition Provisions and the Charter generally.

4. Plain Meaning

Rules of statutory construction require further that we first look to the plain meaning of the words at issue. “The general and familiar rule is that a statute must be interpreted according to the intent of the legislature ascertained from all of its words construed by the ordinary and approved usage of the language, 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.” Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp., 418 Mass. 737, 744-745 (1994) (*internal citations omitted*). Further, Charter provisions “should not be so interpreted as to cause absurd or unreasonable results when the language is susceptible of a sensible meaning.” Green v. Board of Appeal of Norwood, 358 Mass. 253, 258 (1970).

The term “essential” is defined by the on-line Merriam Webster’s Dictionary as, “of, relating to, or constituting essence: inherent” and “of the utmost importance: basic, indispensable, necessary”. The term “necessary” is defined as, “absolutely needed: required”. The term “contrary” is defined as, “fact or condition incompatible with another: opposite”, and the term “frustrate” is defined as, “to balk or defeat in an endeavor...to make ineffectual: bring to nothing...impede, obstruct...to make invalid or of no effect”.

Thus, this portion of the transition language, in our opinion, imports a direction that matters that are, in our common understanding of the words, necessary to current operations of the Town, consistent with the positions the Town has taken in the past, and critical to the Town’s future positions, should be undertaken during the transition period.

5. Role of Legislative and Executive Branches

Also important in analyzing the intent of the Transition Provisions is the respective roles of the executive and legislative branches of government. There is a long line of case law holding, as a general principle, that a legislative body has no ability to exercise direction or control over a board or officer whose duties are defined by state and local law. See, e.g., Anderson v. Board of Selectmen of Wrentham, et al, 406 Mass. 508 (1990); Russell v. Canton, 361 Mass. 727 (1972); and Breault v. Auburn, 303 Mass. 424 (1939). The distinction between executive and legislative action is important for many reasons, including that interference by the legislative body in executive matters would result in significant negative impacts on the “efficiency and economy in the business administration” of a municipality. See Dooling v. City Council of Fitchburg, 242 Mass. 599, 602 (1922) (considering whether the action of authorizing the execution of a contract was subject to a referendum).

In short, in our opinion, applying these rules of statutory construction and bearing in mind the distinction between the legislative and executive branches of government, the Transition Provisions cannot and should not be read as intended to interfere with the operations of Town government. A commonsense approach must be utilized to allow the Town to continue to function during this important time while being respectful of the limitation in the Charter that matters that are “unnecessary” or that would frustrate the purposes of the Charter must be avoided.

B. Guidance for Current and Future Issues

1. Current Issues

i. *Day-to-Day Operations.* With these understandings, in our opinion, the Transition Provisions of the new Charter contemplate that the Town will carry out its day-to-day obligations and responsibilities unhindered. It is not possible to present a comprehensive or exhaustive list of the Town’s daily operations, nor, in keeping with the above rules of statutory interpretation, would one imagine that Town Meeting or the voters of the Town at the election would have anticipated that any part of the daily operations of the Town were other than fundamental, unavoidable, and critical to the Town’s continued operation. Interpreting the Transition Provisions otherwise would interfere with or inhibit and impede the daily operations of the Town, an absurd result that cannot have been intended. The exact process by which such operational decisions are made are organizational, and inherent, and the manner in which they are exercised must be left to the executive, here the Town Manager, and through him, the employees of the Town. Such a result is consistent with the case law cited above applicable to the executive branch, and, importantly, with the authority of the Town Manager under both the current Act and the new Charter.

Thus, in our opinion, the Town need not examine day-to-day matters on a case-by-case basis, and may presume that all such functions are “essential and necessary” to the current operations of the Town. For purpose of example only, therefore, in our opinion, the Town may, consistent with the Transition Provisions of the Charter, engage in day-to-day operational activities without interruption including but not limited to the following: all aspects of personnel matters (except as otherwise specifically addressed in the Charter with respect to appointments); soliciting and entering into contracts for goods and services regularly utilized by the Town; undertaking of obligations already required under existing contracts or by bylaw; providing programs and services for and to residents and engaging in all actions necessary and appropriate in connection therewith; undertaking regular construction and maintenance operations, including for roads, water, sewer, buildings, etc.; enforcing existing bylaws; replacing needed equipment and supplies; defending the position of the Town in ongoing or new litigation; and undertaking public health and safety efforts of all kinds.

ii. *Carrying Out Policy Positions Previously Taken or Acting on “New” but Related Matters.* There is another category of matters that are also likely to be essential and necessary to the current operations of the Town, in our opinion, but that would require case-by-case analysis by the Select Board. Such matters would include those relating to broader policy positions, rather than regular day-to-day operations, of the Town. In those instances, in our opinion, there is no single “bright line” test that can be applied, as the circumstances for each scenario will bear review. Instead, questions that might be asked include, but are not limited to:

- (a) Is this something that the Town received guidance on from Town Meeting, either through the appropriation of funds or the adoption of local legislation;
- (b) Is this something that, if not undertaken, will negatively affect the position of the Town today or in the future;
- (c) If this is something where “inaction” will negatively change the position of the Town, will such change be irrevocable;

- (d) Can this matter wait until the Town Council is ready to review and act, taking into account that the Town Council will have a significant workload when it takes office and will have to address competing priorities; and
- (e) Will this matter take some time to accomplish, leaving opportunity for the Town Council to weigh in at a critical juncture, or is this something that requires immediate action and cannot admit of delay.

As a hypothetical example, consider the application of these questions in the context of whether to submit a grant application for affordable housing. The support of affordable housing is a policy Town Meeting has consistently supported over time through both legislative enactments and appropriations. The grant application process is time limited. If an application is not submitted, there will be no later opportunity for this particular grant, thereby foreclosing the Town Council’s opportunity to consider whether to accept the grant. If the Town receives the grant, it will be up to the Town Council to decide whether to accept it. This is a “new” matter in that it was not “underway” at the time the Charter was approved, but it is related to the Town’s existing and established goals and positions as evidenced by the work of staff, various boards and committees, and legislative enactments and appropriations. In our opinion, this factual scenario supports submission of the application.

In contrast, consider the following. A hypothetical grant application is available for funding the construction of a cell tower with enhanced technological capacity, but the grant will only be available if the community commits to allowing a giant advertising billboard related to the new technology. The Town Meeting has previously approved zoning bylaw amendments allowing the locating of cell towers because of the overall coverage benefits and various federal laws, but has disfavored giant billboards on several occasions and erection of such billboards would not be consistent with the Town’s master plan. The grant is available only for two months, and the billboard would be erected within two months thereafter. Here, the factual circumstances do require immediate action and cannot admit of delay, however, the Town has previously signaled its disfavor of the matter at issue, and the position of the Town will be changed irrevocably if the grant application were submitted and the Town were to receive and accept the grant. Although the Town has been supportive of cell towers generally making this a “new” but related matter, but, in this particular case, submission of the grant application and acceptance of the grant would be something that would irrevocably change the Town’s position and would likely be viewed as contentious. In our opinion, therefore, this factual scenario does not support submission of the grant application.

Essentially, this category of actions must be tested against the proposition of whether the proposed action will support the status quo, move the Town forward on matters that are not “contentious”, in that the Town has previously approved or supported the same, and where such action will not negatively impact the Town’s future position.

iii. *Other Future Matters.* As indicated above, the Transition Provisions will prevent the Town from taking action on matters that are not routine, related to day-to-day operations, or that would frustrate or be inconsistent with the Charter and the Transition Provisions generally. Such matters would include action with respect to “new” matters unrelated to ongoing matters supported in the past by Town Meeting, that would not be critical to current or future operations, are not time-sensitive, and/or that would impact the Town’s future position in a serious or

irrevocable manner. Such matters might include a petition for a special town meeting for an amendment to the Zoning Bylaw for a new overlay district, a brand new proposal for funding for the design and construction of a new building, sale of Town property not previously considered or authorized, and the like. In other words, in our opinion, there will be a high bar to undertake something that is “new”, in that it is unrelated to existing matters, and that can otherwise wait until the Town Council is available to act.

C. Authority to Interpret the Transition Provisions

As discussed, Section 10.7(b) imposes limits on the extent of Town action, including by the Select Board, Town Manager and Town Meeting, over the next several months, to those matters that are necessary to current operations. Section 10.13 of the Charter provides further that, “The Town Council and Select Board shall have authority to adopt measures that clarify, confirm, or extend any of the transition provisions in order that the transition may be made in the most expeditious and least contentious manner possible.”

The authorization in Section 10.3 for the Board to adopt measures clarifying the Transition Provisions, in our opinion, vests in the Select Board ultimate authority to determine whether particular actions of the Select Board, Town Manager and Town Meeting are consistent with the Transition Provisions. In turn, the section further requires that such measures be calculated to ensure transition is efficient and, according to Merriam Webster, the least “likely to cause disagreement or argument”.

D. Special and Annual Town Meeting Warrant Articles

On April 30, 2018, the Town will hold a special town meeting and begin the Annual Town Meeting. Many articles appearing on any warrant for an annual or special town meeting are financial in nature, required to allow for continued operation of government and provision of services and benefits to the Town’s residents and visitors (budgetary articles, appropriation of monies from and authorization of special accounts, acceptance and authorization of expenditure of certain grant funds and other state funds, and articles for special appropriations and borrowing authorizations). Others articles relate to regulation of certain activities in Town, whether in connection with the Town’s authority over the use of public ways, preservation of peace and good order, preservation of natural resources, setting of fines for violations and of fees for services, and of certain business activities (general bylaws and amendments thereto, local acceptance statutes, petitions for special legislation and the like). Still others relate to land use matters (zoning bylaws and amendments thereto). It is typically the case that the decision of the Select Board as to whether to include on the warrant articles requested by the Town’s boards, committees and officers is dictated by the conclusion that such matters are important to Town operations and that timely action on the same is either preferable or necessary. With this general concept in mind, we reviewed each article on the Annual and Special Town Meeting warrants and have provided an opinion as to whether such matters are appropriate for action under the Transition Provisions.

Articles 1 and 2 of the Special Town Meeting warrant (“STM”) relate to the recently approved Charter. STM Article 1, proposing special legislation, relates to a matter specifically authorized by the Charter. STM Article 2 is the rescission of a recently enacted bylaw

establishing a Town Meeting Advisory Committee, which bylaw is, under the new form of government, no longer relevant, and therefore rescission of the bylaw constitutes a basic, merely ministerial matter. In our opinion, action on both articles is appropriate.

Articles 1-11, 19, 25 and 26 of the Annual Town Meeting (“ATM”) warrant relate to regularly recurring basic and necessary matters critical to the current operations of the Town, including but not limited to Fiscal Year 2019 basic budgeting, revolving funds, tax exemptions, and payment of bills, as well as balancing the budget for Fiscal Year 2018 and rescission of unneeded borrowing authority. Similarly, ATM Articles 13-18 relate to the annual capital budget, including projects for buildings and facilities, parking, water main and system replacements, and gravity belt thickener for the sewer system, and certain audiovisual equipment for the Town’s cable access station. In our opinion, such matters are also necessary to current operations, basic in nature and routine, and are time sensitive, bearing in mind that under municipal finance law, if funds are not appropriated for such purposes prior to the setting of the tax rate, the Town will not be able to later raise by taxation funds for such purposes, even if the Town Council were to desire to do so.

ATM Article 12 relates to the Community Preservation Act annual budget, including funding for several proposed projects. Under state law, the Community Preservation Act Committee is required to recommend the appropriation or reservation of not less than 10% of the estimated annual revenues for each of the three major purposes of the Community Preservation Act. The Town voted to adopt the Act, and to fund similar project related matters in the past, and the proposed expenditures relate generally to matters that Town Meeting has supported consistently through legislative enactment and appropriation. Further, the specific project-related recommendations have been the subject of formal applications, review, and discussion in open meetings throughout the period leading up to Town Meeting. The Community Preservation Act Committee’s April 4, 2018 Report to Town Meeting contains multiple findings that the proposed expenditures are consistent with the Town’s goals in approving the Act, and further of the importance of such projects to the Town. The proposed expenditures have been recommended by the Community Preservation Committee in accordance with law, and, in our opinion, such matters are therefore properly characterized as necessary to current operations and appropriate for action.

ATM Articles 20-23 address the acquisition of certain interests in land, including for access to Town properties, ongoing roadway projects, and compliance with grant conditions. Such matters are critical to current Town operations and are appropriate for action, in our opinion. ATM Article 24 relates to release of a waterline easement that Town administration has determined is no longer needed, and, in our opinion, is a basic matter upon which Town Meeting may act.

ATM Article 27 addresses a proposed transfer of land to the Affordable Housing Trust. While an actual transfer of land to the Trust would be “irrevocable”, and therefore potentially problematic under the above analysis of the Transition Provisions, it contains a caveat that the property cannot be finally transferred without action by the Town Council. For this reason, in our opinion, Town Meeting action is appropriate at this time.

ATM Article 28 proposes a bylaw amendment reducing the size of the Agricultural Commission. It is our understanding that the Commission has had difficulties obtaining a quorum to act, and that there is concern that significant delay in reducing the quorum will make it difficult for the Commission to carry out its duties and responsibilities. Where this bylaw is already in place, revision of the same to facilitate its more effective operation is, in our opinion, consistent with the Transition Provisions and the article appropriate for action.

ATM Article 29 proposes replacement of the Town of Amherst Zero Energy Town Buildings Bylaw. Although the proposed amendment addresses matters that are more broad ranging than that proposed in Article 28, the intent of this amendment is similarly to ensure that the goals of the Town in developing and enacting the current version can be appropriately implemented. For the same reasons provided with respect to Article 28, therefore, in our opinion, this article is appropriate for action by Town Meeting.

ATM Articles 30-32 relate to medical and adult use marijuana. These articles propose amendments to existing bylaws addressing regulation of marijuana facilities. Further, to the extent that one could argue that these bylaws involve somewhat broad ranging policy issues, the Town has already approved regulation of these entities, and the amendments are time sensitive and critical to Town operations. As you are aware, applications may now be submitted to the Cannabis Control Commission (“CCC”) for adult use marijuana establishments and the transfer of authority from the Department of Public Health to the CCC for regulation of medical marijuana will occur prior to December 31, 2018. Moreover, failure to have appropriate bylaws in place concerning such establishments could negatively, and permanently, affect the Town’s zoning goals with respect thereto. Further, the Planning Board has held hearings and received community input concerning these proposed amendments. Note that the Planning Board has recommended these articles and Articles 33 and 35, and, further that the new Charter (see Section 9.8, and in particular 9.8(g)) retains and even expands the Planning Board’s role with respect to review and recommendations on adoption and amendment of Zoning Bylaws. For these reasons, in our opinion, these articles are appropriate for action by Town Meeting.

ATM Articles 33 and 35, and the petitioned Article 36, propose amendments to existing Zoning Bylaws and raise similar issues. Articles 33 and 35 propose to allow the Town to better implement existing bylaws intended to encourage affordable housing. The subject matter of these bylaws has been discussed for several years. These amendments have been proposed and vetted by the Planning Board through work by staff and the public hearing process, and approval thereof will allow the Town to more easily facilitate the creation of affordable housing and to enforce the existing bylaws. Failure to take action on these bylaws now will mean that the Town will continue to face challenges in implementing the current bylaws and, in light of the number of months before such matter can be addressed by the Town Council, may well result in the loss of potential units in the meantime, frustrating a long-recognized goal of the Town. For these reasons, in my opinion, ATM Articles 33 and 35 are appropriate for action by Town Meeting. The petitioned Article 36 covers the same issues as Article 35, and I understand that the petitioners will move to take no action on this article in favor of action under of Article 35.

ATM Articles 34 and 37 are petitioned articles. Article 34 proposes to change the Zoning Map with respect to “all areas of Town neither served by public water nor sewer.” It is our opinion that the proposed amendment involves a new, major policy change that has not been fully studied by the Planning Board and is likely to be contentious. Further, the proposed changes to the Zoning Map and Bylaw would have significant, possible irreversible, consequences. Article 37 proposes a new General Bylaw amendment to limit the hours, on a seasonable basis, of firing range gunfire. General Laws c.214, §7B applies to noise created at a gun range and essentially provides that no owner of a gun range will face any liability or be enjoined from operations for noise-related complaints if the range complies with any noise bylaw that existed at the time of the construction of the range. The law also prohibits operation between 10:00 p.m. and 8:00 a.m., “unless otherwise allowed by the local governing body”. Based upon the statutory language, even if the bylaw was amended, we would anticipate that an existing gun range would argue that it was not obligated to comply with the bylaw. Thus, it appears that there is very little risk in delaying action on this matter, and further, that approval of such a bylaw could expose the Town to a legal challenge. For these reasons, in our opinion, action on these articles would be inconsistent with the limitations imposed by the Transition Provisions and neither is appropriate for action by Town Meeting. In our further opinion, however, to the extent that the Moderator will permit the same, Town Meeting could provide non-binding recommendations to the Select Board and future Town Council on the subjects raised.

ATM Articles 38 and 39 are non-binding resolutions. In our opinion, whether the Town takes action on these articles is ultimately of no legal consequence and therefore whether to permit action thereunder is within the discretion of the Moderator.

Conclusion

For all the reasons set forth above, in our opinion, the Transition Provisions of the Charter must be read to allow the Town to function in an efficient, consistent and productive manner. The intent of the Transition Provisions is, in our further opinion, to ensure that the Town moves to diligently prepare for the upcoming transition and avoids commitments that would undermine the Town Council, or commit the Town Council in ways that are unnecessary or inappropriate. This commonsense approach should allow the Town, with the guidance of the Town Manager, whose job function carries through from the current to the new Charter, to smoothly transition to a new form of government in the limited time period available.

We are available to provide whatever assistance may be necessary throughout this challenging, and exciting, time.

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