I have been requested to render an opinion to the Assembly of Delegates (Assembly) on the following two questions:

1. Given the Charter provision empowering the Assembly of delegates with the authority formerly vested in the Advisory Board on County Expenditures, does the Assembly of Delegates have authority to amend the Budget submitted by the County Commissioners to provide for programs that were not included in the Commissioners’ budget or is the Assembly’s authority limited to increasing or decreasing the budget proposed by the Commissioners for programs that are identified in the Commissioners’ budget?

2. Does the Charter permit the Assembly of Delegates to contract for and appoint Counsel to represent the Assembly in matters relating to policy disputes with the County Commissioners?

Please be advised that I have researched the law on these issues, including in particular the Home Rule Charter for the Cape Cod Regional Government Known as Barnstable County (Charter) and based on my research and analysis and for the reasons discussed more fully below, I answer the questions as follows:
1. With respect to the budget question, the Assembly does not have the authority to add to or create in the budget programs not included in the budget presented by the County Commissioners, and is limited to increasing, decreasing, altering or revising the line items. That said, there is nothing to prevent the Assembly to recommend to the County Commissioners that certain matters be included in the budget, such as programs that were not included.

2. With respect to the question regarding the authority of the Assembly to obtain its own legal counsel in matters of policy dispute with the County Commissioners, while the Charter is silent on this issue, the Administrative Code does appear to permit the Assembly to employ separate counsel, as well as use the services of the County Counsel. There are however certain practical issues that need to be considered in doing so, some of which are addressed in this communication.

I. The Assembly’s role and authority in the budgetary process

The Assembly derives its duties, responsibilities and authority from the Charter and any applicable general or special laws or ordinances. As the request for a legal opinion relates to budgetary matters, this opinion will focus on that subject and not (other than the second question asked) on other matters related to the authority of the Assembly.

Section 2-4 of the Charter, “Powers and Duties, In General” provides that all legislative powers for the County (other than that provided by law or the Charter) are vested in the Assembly. Of note, that Charter provision goes on to specifically vest in the Assembly the powers and duties of the “advisory board for county expenditures” (Advisory Board).

The term “advisory board for county expenditures” refers to a body in general county government that reviews county expenditures. It is generally derived from G.L. c. 35, sec. 28B, which provides in part “In every county other than Suffolk and Nantucket, there shall be an advisory board on county expenditures consisting of the city manager or his designee, who must be a member of the city council or board of alderman in a Plan D or Plan E city, or the mayor or his designee, who must be a member of the city council or board of alderman in each other city, or any member of the board of selectmen of each town or any member of the town council in a town which does not have selectmen.”

Thus, for towns, unless a law provides otherwise, each town board of selectmen selects from its a members the community’s representative to the Advisory Board.

However, as Barnstable County operates under a Home Rule Charter, the Charter addresses the creation and authority of the Advisory Board. It provides the language quoted above, designating for Barnstable County that the Assembly serves as the Advisory Board for county expenditures. Given that there are no specific references to the Advisory Board in the Charter other than designating the Assembly as the Advisory Board, it would appear that the Assembly when it acts as the Assembly also acts as an Advisory Board.
The next part of the analysis is to see what are the powers, duties and responsibilities of the Advisory Board as relates to budgets. This needs to be considered by what general or special laws provide and what the Charter provides.

The powers of an Advisory Board under state law (which by the Charter are vested in the Assembly) are found generally in G.L. c. 35, sections 28 and 28B. Those sections set forth the primary budget process for counties under state law. They are substantially similar to what is provided for in the Charter in terms of the budget process, namely Article 5 of the Charter. Reading those provisions and harmonizing same, the process under the Charter as guided by G.L. c. 35, sections 28 and 28B, is as follows:¹

- a. Department Heads provide budget information to County Administrator (Charter, Article 5, Section 5-2)
- b. County Administrator provides budget information to the County Commissioners (Charter, Article 5, Section 5-2)
- c. County Commissioners provide budget information to the Assembly, which as noted above, also serves as the Advisory Board) (Charter, Article 5, Section 5-2)
- d. The Assembly’s standing committee on finance “shall cause review by standing committees” of the Assembly (Charter, Article 5, Section 5-5(b)) (Emphasis supplied)
- e. As relates to that review, the Assembly notifies each board of selectmen that it has received the proposed budget from the County Commissioners and of the date and time of the meetings where the Assembly’s standing committees are going to review the budget (Charter, Article 5, Section 5-5(a), (b))
- f. The Assembly’s standing committee on finance receives the information from the review by the other standing committees (Charter, Article 5, Section 5-5(c))
- g. The Assembly’s standing committee on finance prepares and “file[s] a report with the assembly of delegates containing its recommendations with respect to each item contained in the proposed budget” (Charter, Article 5, Section 5-5(c)) (Emphasis supplied); any recommendation different than what the County Commissioners have requested must be explained in the report (Charter, Article 5, Section 5-5(c))
- h. The Assembly adopts the budget (Charter, Article 5, Section 5-5(d))

Noteworthy to this analysis is the fact that there is nothing in the Charter that states the Assembly, acting as such or as the Advisory Board, may create programs not included in the budget presented by the County Commissioners, or may delete programs included in the budget by the County Commissioners. The authority of the Assembly whether acting as such or as the Advisory Board or by its committees is to “review” the proposed budget and make its “recommendations” as to the proposed budget.

¹ This process is further impacted by County Ordinance 16-03, which is addressed in more detail below.
This is consistent with the role of an Advisory Board under the comparable state law. G.L. c. 35, section 28B provides that an Advisory Board “may increase, decrease, alter and revise the proposed budget, provided that” and then certain limitations and requirements are set forth. (G.L. c. 35, sec. 28B(b) (Emphasis supplied)) State law further provides that after the public hearing on the proposed budget, the Advisory Board “may further increase, decrease, alter and revise the proposed itemized budget” subject to certain limitations and requirements. (G.L. c. 35, sec. 28B((d) (Emphasis supplied).2

The adoption of the final budget is done under state law by the Advisory Board. (G.L. c. 35, sec. 28B) (d)- “The proposed itemized budget as increased, decreased, altered and revised shall be finally adopted by an expenditure resolution by a majority of the advisory board … and shall be the approved budget.”) Under the Charter, since the Assembly serves as the Advisory Board, the Assembly adopts the final budget. (Charter, Article 5, Section 5-5(d)- After receiving the report3 “[t]he assembly of delegates shall adopt a budget for the ensuring fiscal year”). This is consistent with the role of an Advisory Board under both the state law and the Charter.

While the Charter language is not as specific as the state law is in terms of referring to the “proposed budget” or “proposed itemized budget”, recognizing that for the County the Assembly is the Advisory Board, and the authority of the Advisory Board is found in part in the state law, and applying customary principles of statutory interpretations, this difference in the level of detail of the language is not viewed as meaningful or affecting the outcome of the analysis. A budget contains line items which are an itemization of parts of the budget. In other words, the authority of the Assembly in reviewing the budget and making recommendations is limited to increasing, decreasing, altering or revising the proposed itemized budget. The proposed itemized budget is the budget presented by the County Commissioners.4

The county budget process is further regulated by County Ordinance 16-03. The process under this ordinance, as seen by the above outline of the step of the process, supports the conclusion that the Assembly’s powers are limited as described above, namely to increasing, decreasing, altering or revising the itemized (i.e. line items) of the budget proposed by the County Commissioners and not adding programs not already including.

The preamble of that ordinance describes its purpose to “review and vote on the

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2 As relates to a proposed capital facility budget or a long term capital facilities development plan, the Advisory Board may “delete, add to, alter and revise any line item”. G.L. c. 35, sec. 28B(e).

3 The report is the report from the standing committee on finance containing the information from the other standing committees “containing the recommendations with respect to each item contained in the proposed budget”. G.L. c. 35, sec. 28(B)(c).

4 A similar restriction on the ability of the Assembly to amend a proposal from the County Commissioners is found in Article 4, Administrative Organization, Section (c) Administrative Organization(iii)3rd par., where in reference to an executive reorganization plan the Assembly “may act only to approve or disapprove of the plan and may not vote to amend it in any way.”
County Commissioners’ proposed fiscal budget”. (Emphasis supplied)

The Assembly’s Standing Committee on Finance meets with the chairs of the other standing committees for “discussion and verbal report on their review of the proposed fiscal year budget”. 16-03.2

As noted above, the Standing Committee on Finance reports to the Assembly its recommendations and that of others. The Assembly then “debates and votes on the annual budget as recommended” in that report. 16-03.3

If that budget so voted is different from what was proposed by the County Commissioners, it is sent to the County Commissioners which is to consider the budget as amended. The County Commissioners may adopt and sign as their proposed budget the amended budget as submitted to them by the Assembly. If so, that is the budget. Alternatively, the County Commissioners may decline to adopt the amended budget and request a Reconciliation Committee be established. 16.03.3, 16.03.4

If a Reconciliation Committee is requested, the Speaker of the Assembly and the County Commissioners set up the committee as specified in the ordinance. 16.03.5, 16.03.6, 16.03.7

The Reconciliation Committee meets “to facilitate the differences between the budget” proposed by the County Commissioners and budget ordinance voted by the Assembly. The members of the Reconciliation Committee “can make adjustments to the budget ordinance as necessary to recommend a compromise.” 16.03.8

The Reconciliation Committee submits its recommendations to the County Commissioners and the Assembly. 16.03.9

If the Reconciliation Committee submits a positive recommendation for the amendments, the Assembly is to vote on the recommended amendments. 16.03.10

If the Assembly votes in favor of the recommended amendments, the amended budget is sent to the County Commissioners for their signature. 16.03.11

If, however, there is no positive recommendation from the Reconciliation Committee or favorable vote by the Assembly, the budget as voted under 16.03.3 by the Assembly is the budget now under consideration by the County Commissioners. 16.03.12

The County Commissioners then either approve the budget as voted by the Assembly or veto it. If approved, that becomes the budget. If vetoed, the County Commissioners are to return the vetoed budget to the Assembly with the specific reasons for its veto. 16.03.14

If the County Commissioners vetoed the budget so voted by the Assembly, then the Assembly has the opportunity to override that veto. If, by a vote representing two-thirds
of the County’s population, the Assembly overrides the veto, then that budget becomes the budget. If the Assembly fails to so override the veto, then the budget as originally submitted by the County Commissioners becomes the budget. 16.03.15, 16.03.16

All of the foregoing process is predicated on the itemized budget as presented by the County Commissioners being the initial budget document used. The process indicates that it is the original budget that goes through the process. While provision is made for increasing, decreasing, altering or revising the itemized budget, nothing is provided that would enable the Assembly to unilaterally add programs that were not included in the original proposed budget.

There appears to be a very transparent and interactive process for the budget to be reviewed and recommendations to be made and those recommendations to be considered by the Assembly and the County Commissioners. If, however, the County Commissioners do not wish to add programs requested by the Assembly or others, it is not within the Assembly’s authority to add them.

The budgetary process, including the limitation on the authority of the Assembly to add to the budget programs not included by the County Commissioners is similar to the budgetary process in many cities. While individual charters of cities may change the process, the general process under state law provides a city council with even less authority that the Charter provides the Assembly.5 Under G.L. c. 43, sec. 32, captioned “Submission of city budget to city council; procedure for approval, rejection or alteration”, a city council, in reviewing the budget proposed by the mayor, “may reduce or reject any amount recommended in the annual budget. It shall not increase any amount in or the total of the annual budget nor add thereto any amount for a purpose not included therein except on recommendation of the mayor.”

The county’s Charter however is broader and gives authority to the Assembly to increase a line item.

This underscores the point being made s that in the organization of local government, it is not unusual for there to be limitations on what the legislative body may do on the budget proposed by the executive.

Thus, in applying customary principles of statutory interpretation and reviewing the pertinent documents, it is my opinion that the Assembly may not add programs that were not included in the budget as proposed by the County Commissioners, but may increase, decrease, amend or alter the line items in the process described above.

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5 By the Charter, the Assembly is the county’s legislative body. Charter, Article 2, Section 2-1. A city council is generally the legislative body of the city. G.L. c. 43; See also Daly v. Mayor of Medford, 241 Mass. 336, 338 (1922) (The mayor is the head of the executive department and the board of alderman is the legislative department. A city council is akin to a board of alderman.)
II. Assembly’s ability to utilize the services of the County Counsel or employ separate counsel

The second question asked seeks an opinion on whether under the Charter the Assembly may engage its own legal counsel in matters where there is a policy dispute with the County Commissioners.

There is nothing in the Charter that authorizes the Assembly to so engage counsel. However, this subject is addressed in the Administrative Code of Barnstable County (Administrative Code).

Part 2 of the Administrative Code, County Department and Offices, In Particular, Section 2.3, Office of Legal Services, provides generally for the County Commissioners coordinating legal services for the County government and to appoint a General Counsel. Subject to an exception noted below, the engaging of General or Special Counsel by any department or employee is specifically prohibited unless authorized by the County Commissioners or County Administrator. Section 2.3(a) Legal Services Generally.

By Administrative Code, as well as common and logical practice, the County Counsel is to, among other duties, “advise County officers and agencies”. Section 2.3(a), 2nd par.

That section goes on further to provide as relates to the Assembly having legal counsel as follows:

“(d) Counsel for the Assembly of Delegates- Nothing in this section shall limit the authority of the Assembly of Delegates from utilizing the services of the County Counsel or from employing separate counsel.”

There is no other provision in the Administrative Code addressing the Assembly’s use of legal counsel. While it might have been better by today’s standards to have more specific language (and this language was no doubt appropriately deemed sufficient in 1979 when it was added, Ordinance 97-9)), the ability of the Assembly to use the County Counsel or employ separate counsel is provided for.

One might argue that this section does not by itself authorize the Assembly to have separate counsel but rather means that if the Assembly is authorized elsewhere in the law (Charter, Administrative Code, general or special laws or ordinances) this section shall not preclude that use of separate counsel. However, the engagement by the Assembly of separate legal counsel is not addressed elsewhere and it would be unlikely that this specific provision was added if it was not intended that the Assembly have the authority to engage separate counsel. A review of the minutes of the Assembly and County Commissioners’ meeting might shed additional light on this.

It is important for the Assembly to keep in mind that in engaging the services of a separate counsel there needs to be sufficient and available funds to pay for same. No
part of the County can enter into contracts unless it has the authority to do so and there are available funds.

The need for an appropriation for special counsel is recognized in the Administrative Code. Section 2.3(c), captioned Special Counsel, Coordination of Legal Services, recognizes that the various “County departments, offices and agencies may have different and unique needs for legal services and, thus, appropriations for special legal services or special counsel are expected.” The section goes on to further make clear that the County Commissioners may employ special counsel and in “special circumstances” authorize department heads to engage special counsel.

The Administrative Code specifically references legal counsel for the Assembly. This can be the County Counsel or special counsel engaged by the Assembly. Section 2.3(d), quoted above.

Reading the various provisions of Section 2.3 together and in a harmonious manner to effectuate the apparent goal of providing legal services to the County government, it is necessary (both as implied under the Administrative Code and under governmental finance law) that there be an appropriation from which special counsel for the Assembly (or for any other part of the County government) may be paid from. If there is not an available account funded for this purpose, it would be necessary, following the appropriate County process, for such an account to be created and funded.

All of that said, I would offer that it is not unusual for there to be disagreements on occasion among the various parts of a governmental entity, such as a county. However, it is not good policy or practice to engage separate counsel whenever there is a dispute. The more generally accepted practice, consistent with the orderly and effective administration of local government, is for the entity’s regular legal counsel to opine on all legal matters. In some instances, there could be a conflict (which would be rare) or other circumstances where a separate legal opinion or representation is warranted. Those instances however should be the exception, not the norm or frequent occurrence.6

A small but notable body of law has developed over the years on the subject of various parts of a governmental entity engaging its own legal counsel. The widely recognized principle is that in the absence of a specific law or authorization, a department has no authority to engage legal counsel. Board of Public Works of Wellesley v. Board of Selectmen of Wellesley, 377 Mass. 621, 624 (1979). In the absence of a law providing otherwise, the engaging of legal counsel is left to the Chief Executive Officers of the government. Here, that would be the County Commissioners.

6 The Superior Court, in Boston City Council v Menino, Suffolk Superior Court, No. 00-1267-H, p. 16 (May 9, 2000), citing Board of Public Works of Wellesley v. Board of Selectmen of Wellesley, 377 Mass. 632, 624 (1979) observed that the creation of a separate legal counsel potion for the Boston City Council “creates a serious potential for confusion and contradiction in the direction of the City’s litigation, as well as the potential for disruption of the City’s business in the event that the advice rendered differs between each attorney.”
Barnstable County does however have specific laws which clearly authorizes the Assembly to use the General Counsel, and impliedly authorizes the Assembly to engage special counsel.\(^7\)

The level of specificity in local governments as to the process for engaging separate counsel varies from slight to varying degrees of detail. Sometimes the approval of the executive branch is required. Sometimes the legislative branch is specifically authorized to do so when it appears the interests of the legislative branch and the executive branch are in such a degree of conflict that it is appropriate for the legislative branch to have its own legal advice.

Thus, it is my opinion that the Assembly does have the authority under Administrative Code 2.3(d) to engage separate counsel, subject to the funding qualification discussed above.

I trust that this opinion letter addresses your inquiry. If you have further questions or wish to discuss this further, please do not hesitate to contact me.

Thank you for your courtesy and cooperation in this matter and for the opportunity to be of service.

Very truly yours,

James B. Lampke

JAMES B. LAMPKE

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\(^7\) The Charter in Section 2-8 provides that the Assembly may take certain actions by resolution. Among these actions are “(vi) The election, appointment and removal of such officers and employees as the assembly of delegates is permitted by this charter, or otherwise;”\(^8\). An attorney can be hired as an officer (if the position is created as such) or an employee. However, the occasional engaging of separate counsel would normally not constitute the appointment of officers or employees under this provision. However, read in conjunction with Administrative Code 2.3(d), this language would add further support to the authority of the Assembly to engage from time to time separate counsel. Again, it would be preferable by today’s standards to have clearer affirmative action authorizing the Assembly to hire separate counsel. However, I believe that reading the Charter and the Administrative Code together, the Assembly does have at least the implied authority to engage separate counsel, subject to the funding of same.