

Memo

To: Janice O'Connell, Clerk, Assembly of Delegates
From: Robert S. Troy, County Counsel
Date: March 1, 2019
Re: Proposed Resolution 19-01

This will respond to your request for my Opinion as to whether the Assembly of Delegates may lawfully adopt Proposed Resolution 19-01 submitted by Delegate O'Malley. My Opinion is limited to examination of the text of the Resolution viewed in the context of the Barnstable County Charter, a theoretical legal analysis to assist public officials in applying the policy to appropriate factual situations.

Section 2-8 (b) of the Charter permits certain matters to be addressed by the Assembly "...by resolution and shall not be deemed to require an ordinance." Two of the criteria are pertinent to the contents of Resolution 19-01. The Assembly of Delegates may utilize the "resolution" process for "Actions specified as resolution," Section 2-8 (b) (viii), as well as for "The expression of such policies or opinions as requires no formal action" Section 2-8 (b) (ix).

Analysis of Proposed Resolution 19-01 requires the conclusion that it falls within the ambit of either or both of these categories. The content of the Resolution confirms that the Assembly of Delegates is being asked to resolve that the Assembly affirm the County's policies of non-discrimination regarding County services and "strongly condemns and censures any form of hate speech" particularly from County employees.

The language of the Proposed Resolution needs to be reviewed in the context of the authority bestowed on the County by the Legislature and the Governor through its Charter. Section 1-6 of the Charter delegates "specific powers" to the Cape Cod Regional Government, including the authority to "organize and regulate its internal affairs" as well as to "define the powers, duties, responsibilities and function thereof."

The scope of the Proposed Resolution, in my Opinion, is well within the contours of the authority delegated to the County in the Charter to regulate the internal affairs of Barnstable County as well as to define the responsibilities of County employees and articulate the County's policies. Here, the County has already promulgated policies of non-discrimination regarding delivery of County Services. It is within the ambit of discretion of the Assembly of Delegates to resolve that "hate speech" is antithetical to its promulgated policies and to condemn "any form of hate speech" from its employees.

Nonetheless, is important to observe that the United States Supreme Court has consistently ruled that there is no exception denying protection under the First Amendment for "hate speech,"

except in exigent, volatile or violent circumstances. Justice Oliver Wendell Holmes described this protection succinctly: "...if there is any principle of the Constitution that more imperatively calls for attachment than any other is the principle of free thought - not free thought for those who agree with us but freedom for the thought that we hate." United States vs. Schwimmer, 279 US 644, 655 (1929). Although characterized in recent years as a divided Court, the Supreme Court unanimously restated the broad protection afforded free speech under the First Amendment in its Decision in Matal vs. Tam, 137 S. CT. 1744 (2017).

Although the United States Supreme Court has consistently ruled that there is no exception to First Amendment protection for "hate speech" and invalidated enactments of governmental bodies prohibiting it, the Proposed Resolution does not amount to a prohibition of free speech. On the contrary, the Proposed Resolution articulates an opinion about "hate speech" that the Assembly of Delegates is free to adopt or reject. However, consistent with the Supreme Court's jurisprudence, the resolution should not be amended to restrain the speech of County employees. The Assembly may express its opinion that "hate speech" should be condemned, but the Assembly may not prohibit "hate speech" inasmuch as this action could be adjudicated as an infringement upon the free speech rights of Barnstable County employees.

The Resolution process included in the Charter provides a mechanism for "The expression of such policies or opinions as requires no formal action." See, Section 2-8 (b) (ix) of the Charter.

The Special Act creating the Cape Cod Regional Government has thus empowered the Assembly of Delegates to express policies or opinions that do not require formal action through the Resolution process. It is therefore my Opinion as County Counsel that the Assembly of Delegates may lawfully adopt Proposed Resolution 19-01.

Notwithstanding this conclusion, I respectfully recommend that the Assembly of Delegates delete the term “censure” from Proposed Resolution 19-01. While the Proposed Resolution’s utilization of the term “censure” is intended to reinforce the previous term “condemn” (“Express complete disapproval of, typically in public; censure”), “censure” also refers to a legal process that some federal and state governmental entities are empowered to utilize. As an example, the Congress is authorized by constitutional and statutory authority to “impeach” and “censure” certain governmental officials. The Barnstable County Home Rule Charter, however, contains no such grant of authority. Utilization of the term “censure” could create confusion and convey to the public that the Assembly of Delegates is exercising authority that is not delegated to it in the Charter.

RST:geo