

Memo

TO: JANICE O'CONNELL, CLERK, ASSEMBLY OF DELEGATES

FROM: ROBERT S. TROY, COUNTY COUNSEL *RST*

DATE: SEPTEMBER 14, 2020

RE: PROPOSED RESOLUTION 20-XX – “DRAFT PUBLIC PARTICIPATION IN BARNSTABLE COUNTY ASSEMBLY OF DELEGATES MEETINGS AND HEARINGS”

The Clerk of the Assembly of Delegates has requested that I review Proposed Resolution 20-XX, titled “DRAFT Public Participation in Barnstable County Assembly of Delegates Meetings and Hearings.”

The Assembly has plenary authority to adopt Resolutions under the Barnstable County Charter (See Section 2-8 (b)) and I defer to the Assembly's Authority to act, particularly on matters relating to “The adoption of rules governing the conduct of its own business.” (See Section 2-8 (b) (iii)). Nonetheless, the exercise of this authority must be governed by the provisions of the Charter – a Special Act of the Legislature – and other state laws, particularly the Open Meeting Law. Analysis of these provisions is helpful in judging the Proposed Resolution inasmuch as Legislative Enactments of the Commonwealth cannot be altered by a Resolution adopted by a public body.

The Barnstable County Charter defines the ambit of authority of all of its principal officers, including the Speaker of the Assembly. Section 2-2 (b) delineates the powers assigned to the Speaker: "The Speaker shall preside at all meetings of the assembly of delegates, regulate the proceedings and decide all questions of order and shall have the right to vote on any matter coming before the assembly of delegates as any other member. The Speaker shall have such other powers, duties and responsibilities, as may be provided by this charter, by ordinance or by other vote of the assembly of delegates." I interpret – and have previously interpreted – this language as imbuing upon the Speaker broad powers to regulate the proceedings of the Assembly and decide all questions of order at Assembly Meetings. I respectfully suggest that the Proposed Resolution recognizes the Speaker's authority but that certain sections should be reviewed to insure that they do not intrude on the Charter's expansive delegation of authority to the Speaker to "regulate the proceedings" and "decide all questions of order" during Assembly Meetings.

Equally important is the Massachusetts Legislative Enactment governing conduct of public meetings that is applicable to all public bodies, including the Assembly of Delegates: The "Open Meeting Law (hereinafter "OML)." The Attorney General has interpreted this statute in its published "Open Meeting Law Guide" that describes the objectives of its provisions: "It also seeks to balance the public's interest in witnessing the deliberations of public officials with the government's need to manage its operations efficiently." The OML governs "deliberation of a public body" on any "matter within the body's jurisdiction." While the OML Guide notes that while the law does not specifically define the term "jurisdiction," "statements made for political purposes ... generally are not considered communications on public business within the jurisdiction of the public body." The Assembly of Delegates is vested with jurisdiction over issues related to Barnstable County. Here, the section of the Charter titled "Powers of the Cape Cod regional government, known as Barnstable County"

is helpful in ascertaining the “jurisdiction” of the Assembly: “ ...it is the intention and the purposes of the voters of Barnstable county in approving this charter to obtain for the regional government all of the powers it is possible for a county and/or regional government to have, to hold and to exercise under the constitution and laws of the commonwealth...” See Section 1-3 of the Charter. This Section continues: “It is the intent of this charter to encourage a continuing review to be made of the functions being performed by the Cape Cod regional government and to enable the regional government of Cape Cod to cause any duty...to be performed in the most efficient and expeditious manner possible...” The Preamble also includes language that is helpful in defining the sphere of “jurisdiction” in which the Assembly operates: “... a regional government providing extensive services to its region known as Barnstable County and being fiscally sound, do reestablish for ourselves and for our communities the means and the structure to deal with regional issues which transcend the existing boundaries of municipal governments.” The Charter explicates the jurisdictional boundaries for “deliberations” by the Assembly.

The OML also includes “exceptions” to its scope. One of these is pertinent to the objectives of the Resolution. A public body may convene – outside of public view and participation – in Executive Session to “discuss the reputation, character, physical condition or mental health, rather than the professional competence, of an individual or to discuss the discipline or dismissal of , or complaints or charges brought against, a public officer, employer, staff member of individual.” If a public body decides to have this type of discussion, the individual has the right to be notified of and the right to attend the Executive Session at least 48 hours in advance. The OML Guide describes this provision in these terms: “This purpose is designed to protect the rights and reputation of individuals.” This language in the OML suggests that the Assembly of Delegates “deliberations” on matters within its “jurisdiction” is limited to discussions about an individual’s “professional

competence” and does not invite discussions in public sessions about an individual’s “reputation, character, physical condition or mental health.”

“Deliberations” about matters within the Assembly’s “jurisdiction” are also governed by state law governing procedures. The OML requires that “meeting notices” include a “list” of “all topics that the chair reasonably anticipates, 48 hours in advance” that will be discussed at the meeting. If the “deliberations” veer into issues, subjects or topics that are not noticed to the public in its posted Agenda, “...the Attorney General strongly encourages public bodies to postpone discussion and action on topics that are controversial or may be of interest to the public if the topic was not listed in the meeting notice.” See OML Guide. An individual recognized by the Speaker to discuss a topic listed on the Agenda must limit his or her comments to the subject identified on the public posting.

The requirement to limit discussion and deliberation at Assembly meetings segues to the rights of the public to participate in posted public meetings. The OML Guide of the Attorney General addresses this subject: “Under the Open Meeting Law, the public is permitted to attend meetings of public bodies... While the public is permitted to attend an open meeting, an individual may not address the public body without the permission of the chair. An individual may not disrupt a meeting of a public body, and at the request of the chair, all members of the public shall be silent. If, after clear warning, a person continues to be disruptive, the chair may order the person to leave the meeting. If the person does not leave, the chair may authorize a constable or other officer to remove the person.” Here, it is clear that applicable state law mirrors the language in the Charter: the Chair has plenary authority to regulate all proceedings of the Assembly and decide all questions of order. It is respectfully suggested that the Proposed Ordinance might elect to include reference to the Attorney General’s interpretation of the Open Meeting Law in formulating standards of procedure for Assembly Meetings

inasmuch as provisions of State Law may not be waived or amended by a public body.

Analysis of the Proposed Resolution in the context of the body of law referenced herein, it appears that all of the "Whereas" paragraphs are consistent with the Charter and state law.

I respectfully suggest that paragraphs (f) (i) and (m) should be reviewed to confirm that they do not intrude upon or dilute the Speaker's authority under the Charter and the Open Meeting Law. Paragraph (f) appears to bestow on the Assembly powers that are reserved to the Speaker. Paragraph (i) might be amended to refer to the Open Meeting Law's guidance, to wit: "Comments in public session should be limited to discussion of the professional competence of an individual." Comments relating to the reputation, character, physical condition or mental health of an individual, or relating to discipline, dismissal or complaints brought against a public officer, employer, staff member of individual may be discussed in Executive Session after the requirements of the Open Meeting Law are observed. In the context of inclusion of paragraphs (n), (o) and (p), paragraph (m) could be deleted.

Notwithstanding these suggestions, I leave to the Assembly the ultimate decision as to the contents of the Proposed Resolution.

RST:geo