

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

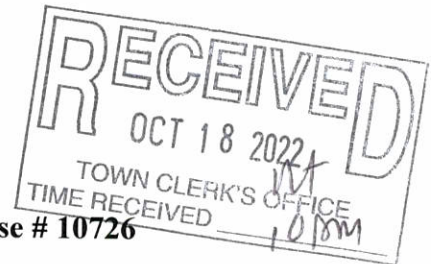
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October 17, 2022

Ware Select Board
126 Main Street
Ware, MA 01082



**Re: Ware Annual Town Meeting of May 9, 2022 – Case # 10726
Warrant Article # 23 (Charter)**

Dear Select Board Members:

Under Article 23 the Town voted to amend its Home Rule Charter (Charter) to change the Ware Housing Authority (Housing Authority) from an elected board to an appointed board. Pursuant to G.L. c. 43B, § 10 (c), the Attorney General is required to furnish “a written opinion setting forth any conflict between the proposed amendment and the constitution and laws of the commonwealth.” As explained below, we have reviewed the vote taken under Article 23 and conclude that it conflicts with G.L. c. 121B, § 5’s requirements regarding the composition and election of housing authority members.

In this decision, we summarize the proposed charter amendments; explain the Attorney General’s standard of review and the charter amendment process; and then explain why, based on that standard of review, we determine that Article 23 conflicts with state law.

I. Summary of Article 23

Under Article 23, a citizen petition article, the Town voted to amend Section 5-10 of its Charter to change the Housing Authority from an elected board to an appointed board. As voted under Article 23 the Housing Authority will consist of five members with four members appointed by the Town Manager and one member appointed by the State as follows:

5-10 Housing Authority. The Ware Housing Authority will consist of five (5) members, and they shall serve for five (5) year staggered terms. Four (4) members shall be appointed by the Town Manager. One (1) member shall be appointed by the Commonwealth of Massachusetts. The Ware Housing Authority shall have all the powers that are conferred upon a housing authority by state law, and such additional duties and powers as may be provided by Charter, by-law, or otherwise, and not inconsistent with said grant of powers conferred by state law.

The vote under Article 23 also deletes Section 7-6, "Housing Authority" from Article 7 of the Charter, "Elected Offices."

II. Attorney General's Standard of Review of Charter Amendments

Pursuant to G.L. c. 43B, § 10 (c) the Attorney General must provide a written opinion to the Town regarding whether the proposed charter amendment conflicts with the Constitution or laws of the Commonwealth. If the Attorney General determines that no such conflict exists, the proposed charter amendment may then be placed on the ballot for vote by the voters of the Town.¹ If the Attorney General determines that there is a conflict between the charter amendment and the Constitution or laws of the Commonwealth, then the charter amendment cannot move forward to a ballot vote as originally drafted, but the Town may cure any deficiencies by revising the text and starting the charter amendment process again by following the steps outlined in G.L. c. 43B, § 10 (a).²

In our review of the proposed charter amendment, we are guided by the same principles that govern our review of proposed by-law amendments. The Attorney General's limited standard of review requires her to review proposed charter amendments solely for their conflict with state law, regardless of any policy views she may have on the subject matter or the overall wisdom of the charter amendments. See Amherst v. Attorney General, 398 Mass. 793, 795-96, 798-99 (1986) (analyzing Attorney General's by-law review role). The state constitution's Home Rule Amendment, as ratified by the voters themselves in 1966, and the Home Rule Procedures Act (G.L. c. 43B) both confer broad powers on cities and towns to adopt and amend charters to establish municipal government as they see fit. "By the Legislature's delegation to municipalities through G.L. c. 43B of greater power in managing their affairs, municipalities [can], within certain broad limitations, choose for themselves the forms of local government they f[ind] best suited to their own needs..." Town Council of Agawam v. Town Manager of Agawam, 20 Mass. App. Ct. 100, 103 (1985) (citing Opinion of the Justices, 368 Mass. 849, 855 (1975)).

III. Article 23 Conflicts with G.L. c. 121B, §Section 5's Requirements for the Composition and Election of Town Housing Authority Members

General Laws Chapter 121B, Section 5 requires a town with a housing authority to have five members appointed or elected as detailed in the statute. Section 5 requires that the housing authority have three elected members; one member appointed by the Board of Selectmen from the housing authority tenants; and one member appointed by the state Department of Housing and Community Development as follows:

¹ G.L. c. 43B, § 11 ("A proposed charter amendment shall be similarly submitted to the voters at the first such election or meeting held at least two months after the order proposing such charter amendment becomes effective under section ten.")

² G.L. c. 43B, § 10 (c) ("If the attorney general reports that the proposed amendment conflicts with the constitution or laws of the commonwealth, the order proposing such amendment shall not take effect except as may be specified by further proceedings of the mayor and city council or town meeting under subsection (a).")

Every housing and redevelopment authority shall be managed, controlled and governed by five members, appointed or elected as provided in this section, of whom three shall constitute a quorum. Every member of a housing or redevelopment authority shall be a fiduciary of the housing or redevelopment authority.

* * *

Notwithstanding section 20 of chapter 43B or any other general or special law to the contrary, in a town, 1 member of a housing authority shall be a tenant member appointed by the board of selectmen and 3 members shall be elected by the town; provided, however, that of the members originally elected at an annual town meeting, the candidate who received the highest number of votes shall serve for 5 years, the candidate who received the next highest number of votes shall serve for 4 years and the candidate who received the next highest number of votes shall serve for 2 years. Notwithstanding the preceding sentence, upon the initial organization of a housing authority, if a town so votes at an annual or special town meeting called for the purpose of organizing a housing authority, 3 members of the authority shall be appointed immediately by the board of selectmen to serve only until the qualification of their successors; provided, however, that the successors shall be elected at the next annual town meeting as provided in this paragraph.

* * *

In a . . . town, one member of a housing or redevelopment authority shall be appointed by the department for an initial term of three years. If the department does not fill a vacancy in the position of that member within 120 days from the date that the vacancy is created, the board of selectmen shall appoint, in writing, a person by a majority vote to fill such vacancy for the unexpired term. . . .

Ware has a Town form of government with an executive branch headed by the Select Board along with a Town Manager who is appointed by and responsible to the Select Board, and with an Open Town Meeting as its legislative branch. See Section 1-3 of the Town's Charter, "Division of Powers." Because Ware is a town, members of Ware's Housing Authority must be elected or appointed pursuant to G.L. c. 121B § 5. We acknowledge that towns have considerable authority pursuant to G.L. c. 43B, to regulate the structure of its government and to determine whether a local office is elected or appointed. See G.L. c. 43B, § 20; see, also, Town Council of Agawam, 20 Mass. App. Ct. at 103 (because the Town's charter was effectively adopted pursuant G.L. c. 43B, its provision for appointment of local officials by the Town Manager without confirmation by the Town Council was consistent with state law). However, by using the phrase "[n]otwithstanding section 20 of chapter 43B," Section 5 makes it clear that a town cannot use the charter amendment process under G.L. c. 43B, to alter the appointment/election requirements in G.L. c. 121B § 5. In addition, Article 23 does not provide for the appointment of a tenant member, which is required by Section 5. For these reasons, we conclude that the amendments proposed under Article 23 conflict with state law.

Very truly yours,
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ATTORNEY GENERAL

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