

MEMORANDUM

To: Virginia Carmany, Chairman  
Board of Finance, Town of Chester

From: Richard P. Roberts

Date: September 20, 2021

Re: Attorney-Client Privileged Communications re Board of Finance Issues  
Our File No. 26879.0001

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You have asked for a memorandum responding to several specific questions regarding the legal rights and obligations of the Board of Finance pertaining to appointment of alternates and the use of outside counsel. Those questions and my responses are set forth below.

- 1- How important is the 40 year history of the BoS filling alternate board vacancies now that it has been challenged?

Past practice is useful in situations where there is either an ambiguity in ordinances and statutes or the absence of guidance as to how a particular action should be taken. This is particularly the case if the past practice was based on some thoughtful analysis regarding the ambiguity or the lack of guidance or the treatment of analogous situations. If the past practice is based on an inappropriate analogy, e.g., an ordinance for a different board or commission contains different wording, or it is contrary to the reasonable interpretation of statutes and ordinances, there is no reason to continue to follow an erroneous past practice.

- 2- Have other boards of Finance retained an attorney? Is that even relevant?

Other towns' boards of finance have retained attorneys in various situations that I am aware of. Not surprisingly, this occurs most commonly when there is a difference in opinion or interpretation between the Board of Selectmen and the Board of Finance. It can also occur when the town attorney may not have specialized knowledge with respect to a particular issue.

- 3- Does the Town Attorney have an inherent primary relationship with the BoS?

In towns with charters, it is quite often explicitly stated that the town attorney is engaged to represent the municipal corporation, all of its boards and commissions

and officers, and to provide advice and to represent them all as necessary. Even in towns without charters, it is expected that as a general rule the town attorney represents the "town" and all of its boards and commissions. As a practical matter, it is likely that the most common point of contact between the attorney and the "town" will be the First Selectman (in the absence of a town manager or similar official) and that the selection of the town attorney will be made by the Board of Selectmen. Regardless of who the point of contact is, or which entity makes the selection, the town attorney has a professional responsibility to provide sound legal guidance even if that guidance is contrary to what the Board of Selectmen may be hoping for.

4- Can the Town Attorney represent both the BoS and BoF fairly regarding a difference of opinion?

As alluded to in question 1, there are often situations where either the statutes and ordinances are ambiguous or there is a "gap" in the statutes and ordinances that needs to be bridged through interpretation or analogy. In those situations, if the positions or interests of the Board of Selectmen and the Board of Finance differ, the town attorney should still be able to provide his or her opinion as to how the situation should be handled. If there is more than one reasonable interpretation or suggestion, that should be acknowledged and the two boards can be advised to attempt to reach an agreement on how to proceed. Because the ethical and professional standards pertaining to representation of an entity such as a town and all of its component parts, if there is truly a difference of opinion or interpretation and the positions of the two boards and legitimately adverse, subject to available appropriations and authority, separate counsel may be engaged to advise either or both of the entities.

5- Is the First Selectperson required to follow the opinion of the Town Attorney?

In reality, nobody is required to follow the opinion of the town attorney. If the advice is clear and the statute or case law is unambiguous, failure to do so may sometimes have significant consequences for the Town. Otherwise, as with any other entity or private individual, the First Selectperson may make a business or judgment decision to do or not do something that is contrary to the legal guidance that has been offered.

6- If it is not possible to find a diplomatic solution to the two opinions can the BoF move forward with filling 2 alternate vacancies after the Nov. election?

A diplomatic solution is always preferable. As noted in my earlier memorandum, I believe that the Board of Finance may appoint alternates to fill vacancies, at least during the first thirty (30) days after the creation of those vacancies. The Board of Selectmen has a contrary perspective. Alternates chosen by either of the entities may not be recognized as validly chosen by the other and there is a risk that any actions taken which involve the vote or participation of those alternates may be subject to challenge.

7- Can the BoF utilize an email/ad to DTC, RTC and the general public requesting candidates come forward to be considered? with the caveat that this issue is pending?

Broad solicitation of interest on the part of residents to fill any board or commission vacancy is always a good thing. If qualified candidates do come forward, they may be acceptable to both entities and the need for active disagreement may be delayed for the time being.

I have one final suggestion. Since the difference of opinion appears to be rooted in interpretation of the language in an ordinance and the relevant statutes, an amendment to the ordinance regarding board of finance alternates could be drafted which would clarify the situation, making it clear which entity has the authority to fill alternate vacancies. The decision could be assigned to either the Board of Finance or the Board of Selectmen and it could also be made subject to consultation with or consent by the other entity. If the Board of Selectmen refuses to entertain such a revision to the ordinance, it could be proposed for consideration and action at town meeting by a petition of a sufficient number of voters under CGS 7-1. That way, the issue is resolved by the voters of the town in an inexpensive manner without resorting to litigation or creating additional controversy.

Thanks very much and if you have any questions or concerns, please do not hesitate to contact me.