

MEMO

TO: William Chapman, Chair, Select Board

FROM: William L. Plouffe, Esq.

DATE: July 23, 2014

SUBJECT: Proposed Advisory Referendum

My understanding is that the Library Committee or some number of the Committee came to the Select Board's meeting on July 14 and requested that the Select Board place before the voters the following non-binding referendum question: "Do you agree that the Town of Rockport should develop a plan for a new library on the RES site, provided that the current ball fields are preserved and pending community input on design and budget?"<sup>1</sup> They asked that this placed before the voters by secret ballot at a Special Town meeting to be held in conjunction with the November State election.

This Memorandum responds to the questions that you posed in your e-mail to me of July 22, 2014. I have paraphrased your questions in what follows.

*Question 1: Is the Select Board required by law to hold a public hearing before voting to place an article on the Town Meeting warrant?*

In Rockport, there are three ways in which an article or question can make its way onto the Town Meeting warrant or referendum ballot.<sup>2</sup>

- (a) The Select Board *may* on its own initiative place on the warrant any article relating to the welfare of the municipality. Charter Art. II, Sec. 13.
- (b) The Select Board *may* at the request of any qualified voter who presents a written proposal for a warrant article place that article on the warrant. Charter Art. II, Sec. 14.
- (c) The Select Board *shall* place an article on the warrant when the Select Board is presented with a written petition signed by a number of voters equal to at least 10% of the votes cast in Rockport at the last gubernatorial election. Charter Art. II, Sec. 13; 30-A M.R.S. §§ 2522 and 2528(5).<sup>3</sup>

Nowhere in the cited Charter provisions or in the cited statutory provisions do I find a requirement that the Select Board hold a public hearing on the question of whether to place the article on the warrant. Of course, any discussion and vote by the Select Board on the question must be held at a public meeting.

<sup>1</sup> I offer no opinion on the wording of the proposed question.

<sup>2</sup> I note that the proposal is for an advisory referendum. Neither the Charter nor the State statutes speak to advisory referenda in the context presented by the facts here. See Charter Art. VIII, Sec. 1, where definitions of "initiative" and "referendum" speak to proposals for a "law," a "public measure" or "statute." However, municipalities do place advisory referenda on ballots and I believe that it is within the power of the Select Board to do so here. It does raise a question, however, as to whether all of the provisions relating to referenda on ordinances pertain here. In this memorandum, I shall assume that the provisions pertain to ordinances apply here.

<sup>3</sup> There are situations where the select board of a town may reasonable to refuse to place a petitioned measure before the voters.

I have reviewed the Bylaws of the Select Board (adopted 6-23-14). In Section 4 of the Bylaws I find the following: “Public hearings of the Board shall be called as required by law or on such other occasions, as a majority of the Board may deem appropriate.”

Since I find no law requiring a public hearing in these circumstances, my advice is that the Select Board may hold a public hearing if it chooses to do so but that it is not required to hold a public hearing before deciding whether to place the proposed question on the warrant/printed ballot.

You note in your e-mail and I repeat here that we are not discussing in this Memorandum the public hearing that the Select Board must hold on all referendum questions at least 10 days before voting takes place. 30-A M.R.S. § 2528(5). The proposed question on the Library has not yet reached that stage in the process.

*Question 2: If the Select Board holds a public hearing on the question of whether to place the advisory referendum on the ballot, what rules of procedure may the Select Board impose on person wishing to testify at the hearing? What about Board questions?*

The Bylaws of the Select Board provide, in Section 4, the following relevant guidance:

- (a) “The Board may receive any oral or documentary evidence but shall exclude irrelevant, immaterial or unduly repetitious evidence . . . .”
- (b) “[T]he Chairman may impose such reasonable time limits as may be necessary to ensure that all parties have an adequate opportunity to be heard.”

Based upon this guidance and general principles of conducting public hearings, I can respond to your specific questions as follows:

- The Chairman may impose reasonable time limits on speakers if he deems it necessary in order for all parties to be heard during the time allotted for the hearing. I am aware of 3 and 5 minute limits being imposed at, for example, legislative hearings. It is worth noting here that the hearing to be held is not a quasi-judicial proceeding and, so, the process due participants is not the same as in a quasi-judicial hearing.
- The Chairman may limit each individual to one opportunity to speak if he deems it necessary in order for all parties to be heard or because he wants to avoid repetitious and argumentative testimony. I note that committees of the Maine Legislature generally have such a restriction at their public hearings.
- The Chairman may require speakers to “sign in” and to indicate if they wish to testify “for,” “against” or “neither for nor against.” Again, this is a device used by the Maine Legislature to impose some order on public hearings and to ensure that “both side” get a fair opportunity to speak.
- The Bylaws provide that the Board may exclude irrelevant or immaterial evidence. While one can take the position that any testimony that does not speak directly to whether the proposed

language should go to the voters is irrelevant and immaterial, that is probably too narrow a view and unrealistic. Persons who come to testify will want to say that they, for example, oppose the question going to the voters because it is obvious in their opinion that the library should stay where it is and sending the proposed language to the voters is a waste of money and time. I suggest that the Board open the hearing with a request that speakers keep to the issue at hand and then “reign in” speakers as needed.

Members of the Board certainly can ask questions of speakers. If speakers are operating under time limits, then I would not include the question/answer time under the time limit. Board members should be cautious not to enter into a give-and-take with speakers. The purpose of the hearing is gather public input not to debate the issue with members of the public.

*Question 3: Does the Select Board have to include with its announcement of a public hearing an announcement of the date on which it will vote on the issue of whether to place the proposed advisory question on the ballot?*

The answer is “no.” The Board should follow its normal procedures for notifying the public of the Board’s agendas. So, if the Board plans to vote on the issue at the same meeting that it holds a public hearing, then it should include an agenda item relating to the vote. If it plans to hold a hearing and then take up the matter at another meeting, then it need only include the notice of the public hearing. Separate notice of the Board meeting at which a vote will be taken would be given later. (No further public hearing before the vote would be required.) Further, just because there is an agenda item calling for deliberation and vote by the Board, that does not prevent the Board from deferring the vote to a subsequent meeting.

*Conclusion*

The Select Board is not required to hold a public hearing before voting on whether to place the proposed advisory referendum before the voters. If the Select Board chooses to hold such a public hearing, the Chairman/Board has considerable latitude in setting establishing the procedures that will be followed at the hearing.

cc: Richard C. Bates, Town Manager