
TO: Mr. Leon Goodwin, Town Manager (*By Electronic Mail Only*)
CC: Board of Selectmen; Ms. Nancy Baker, Assistant Town Manager
FROM: Lauren F. Goldberg, Esq.
RE: Vote under Article 6 of the November 25, 2019 Fall Annual Town Meeting
DATE: November 26, 2019

Question

I am aware that questions have been raised concerning the vote taken under Article 6 at the November 25, 2019 Fall Annual Town Meeting, and particularly whether the required two-thirds majority approved the vote.

Short Answer

Where the Town Moderator declared last night that Town Meeting had approved Article 6 by a two-thirds vote, the question turns to whether bond counsel would agree with the same and authorize the issuance of bonds under such a vote. It appears that bond counsel is comfortable with the Moderator's calculation and that, as such, bond counsel would issue the necessary approvals to allow borrowing to go forward (assuming the voters at the Annual Town Election concur).

Facts

Article 6 of the November 25, 2019 Fall Annual Town Meeting sought an appropriation and borrowing authorization for the so-called Manor Fields project. Whereas a borrowing is required to fund this project, pursuant to G.L. c.44, §2, a two-thirds vote of Town Meeting is required for such purposes. See also G.L. c.44, §7 (borrowing purposes).

As you know, the voice vote on the article was very close, and the Moderator called for a standing vote. The result of that vote was also very close, and 15 people rose for a roll call vote. A total of 223 people voted in the roll call. The Clerk, Assistant Town Clerk and Deputy Moderator each kept a tally. The Clerk also requested that the Assistant Town Manager and Town Counsel each kept an independent tally. All agreed that 148 votes were cast in favor of the project and 75 votes were cast in opposition. The Moderator, consistent with his past practice, multiplied the total number of votes, 223, by .66 and declared a two-thirds vote, noting that a minimum of 147 votes were required.

Shortly thereafter, questions were raised about the calculation, with some indicating that the number .667 should have been used to calculate two-thirds of the total number of voters, or that the total number of voters should have been divided by three and then multiplied by two to find two-thirds. Under either of these scenarios, approval of two-thirds of the voters would be

149 voters (both results were slightly higher than 148, but since there can be no “partial” persons, and therefore, we must round up to 149 persons).

To approve a bond issue, bond counsel must provide an opinion. The standards for approving a borrowing are, of course, rigorous, and bond counsel is therefore, in my experience, typically conservative. I indicated the same last night, as did the Moderator, to ensure that people knew of the possibility that bond counsel could decide not to accept the Moderator’s calculation.

To that end, I contacted bond counsel immediately to gauge his likely action on such a vote. Bond counsel indicated informally that he would accept the Moderator’s calculation for purposes of authorizing a bond issue.

Relevant Law

There is a significant history of case law upholding Town Moderators’ decisions on questions of order. The powers of the moderator are set forth in G.L. c. 39, § 15, which provides in pertinent part:

The moderator shall preside and regulate the proceedings, decide all questions of order, and make public declaration of all votes, and may administer in open meeting the oath of office to any town officer chosen thereat.

As a general principle, a moderator’s good faith determination of questions of order is not reviewable by a court. Ellis v. Board of Selectmen of Barnstable, 361 Mass. 794, 799-800 (1972). The courts have routinely held that where the moderator is empowered by statute to decide questions of order, and since the Legislature entrusted such determinations solely to the moderator, where the action is neither malicious nor dishonest, the courts cannot substitute their judgment for that of the moderator. Doggett, 306 Mass. at 133; See Kingman v. County Commissioners, 6 Cushing 306 (1850) (irregularity of proceedings is not a reason for issuing a writ of certiorari to quash them); Filoon v. City Council of Brockton, 252 Mass. 218 (1925); Morley v. Police Commissioner of Boston, 261 Mass. 269 (1927); Stockus v. Boston Housing Authority, 304 Mass. 507 (1939) (matters of a legislative nature are not open to judicial inquiry or review).

While the question of the legal effect of a vote may be outside of the Moderator’s jurisdiction, the manner used by the Moderator to calculate a two-thirds vote, may, in my opinion, falls within the jurisdiction of the Moderator to preside and regulate the proceedings of Town Meeting. Therefore, in relying on the Moderator’s declaration of a two-thirds vote approving the Manor Fields project, bond counsel may find support in the long history of cases confirming the Moderator’s unreviewable authority to decide questions of order.

Possible Next Steps

Please be aware that even if bond counsel were to refuse to approve the issuance of bonds for the Manor Fields project, the law imposes no barrier to having the matter brought forward to Town Meeting again, whether by vote of the Board of Park and Recreation Commissioners or the Board of Selectmen, or by petition of the appropriate number of registered voters. Note further that there is no requirement that a debt exclusion vote occur prior to action by the legislative body, i.e., Town Meeting. For that reason, in my opinion, even if the funding for the Manor Fields project was not approved at last night's meeting, or in the event that bond counsel's final opinion were to differ from the initial response provided, in accord with the provisions of G.L. c.59, §21C, a debt-exclusion question may, at the Board's sole discretion, be placed on the 2020 Annual Election ballot.

Please let me know if you would like me to perform additional research on this issue or if there are any further questions.