



CITY OF CAMBRIDGE

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September 14, 1989 ^{Diane Wynshaw-Boris}
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Mr. Robert W. Healy
City Manager
City Hall
Cambridge, MA 02139

Re: Proposition 1-2-3

Dear Mr. Healy:

I am writing in response to a request for a legal opinion made by Darleen G. Bonislowski and Sondra Scheir, members of the Cambridge Board of Election Commissioners, and received by your office on September 5, 1989. I am also responding to a vote taken at the July 24, 1989 meeting by the Board by which the Board unanimously voted to request assistance from the City Solicitor regarding the language for Proposition 1-2-3 in light of the 2-2 vote of the Board not to approve its language of July 6, 1989.

The issues raised by these requests for a legal opinion present complex questions and require a full statement of the facts, which I understand to be as follows:

FACTS

1. In August of 1987 Fred Meyer wrote the Initiative Petition for Proposition 1-2-3.
2. In October of 1987, to prepare for the November, 1987

ballot, the Board of Election Commissioners (hereinafter the "Board"), asked my office to draft the Ballot Question.

3. My office prepared such a Ballot Question in October of 1987 and forwarded the language to the Board.

4. The required number of signatures was not obtained in time for the question to be placed on the 1987 ballot.

5. Proponents of the Petition continued to obtain signatures during 1988 and submitted the required number to the Board in order to place the Petition on the ballot for the upcoming November, 1989 election.

6. In March of 1989 the Board approved Policy 89-1 to apply to the wording and placement on the municipal ballot of all initiative petitions and referenda. Policy 89-1 creates a procedure for determining the exact language summarizing the question to appear on the ballot. The steps of that procedure as set out in Policy 89-1 are as follows:

Proposed wording on all questions shall be submitted to the Election Commission, and shall be acted upon by the Commission who [sic] shall:

- a. Invite any duly organized sponsoring group to submit draft language summarizing the question.
- b. Invite any duly organized opposing group to submit draft language summarizing the question.
- c. Merge the versions.
- d. Submit to sponsoring and opposing groups for comment.
- e. Submit to the City Solicitor for review and sign off.

7. Beginning in early June of 1989 the Board followed the

steps set out in Policy 89-1 with regard to Proposition 1-2-3. The Board invited and received comments from sponsoring and opposing groups. The Board merged the versions and submitted the result to sponsoring and opposing groups.

8. On July 6, 1989 the Board voted 3-1 in favor of "final" language and referred that language to the City Solicitor.

9. My office reviewed the submitted language along with the submissions received by the Board. My office also received further submissions from sponsoring and opposing groups. One such submission included an opinion letter dated July 11, 1989, from Edward J. Collins, Jr., Deputy Commissioner of Revenue.

10. On July 26, 1989 I rendered an opinion regarding the Board's "final" wording of July 6, 1989. I found the Board's proposed language to be basically sound and made no changes in that language except to propose the inclusion of one additional sentence in paragraph 3. The sentence I proposed adding reads as follows:

None of these benefits would exist in any fiscal year, unless the City Manager recommended and the City Council approved an appropriation to pay for them in that fiscal year.

11. The Board met in regular session on July 13, 1989 and on July 20, 1989, at which meetings the question of the wording of the Ballot Question for Proposition 1-2-3 was not raised according to the Board's minutes.

12. No meeting of the Board was held on July 27, 1989 or August 3, 1989.

13. The Board met in regular session on August 10, 1989 at which time only three of the four Commissioners were in attendance. At the meeting it was moved, seconded, and voted 2-1 to reconsider the "most recently approved ballot summary of Proposition 1-2-3," (i.e., the "final" version of July 6, 1989), according to the minutes of the Board. There was a consensus of the three members present to delay the reconsideration until the next full regular Board meeting on August 24, 1989.

14. At the meeting of August 24, 1989 there was discussion of the ballot wording for Proposition 1-2-3 approved by the Board on July 6, 1989 and submitted to the City Solicitor. Commissioner Scheir took exception to the fact that "the Republican Commissioners took advantage of her absence from the August 10, 1989 meeting while she was on vacation to introduce and second a motion to reconsider the language approved and submitted to the City Solicitor on July 6, 1989 knowing that they would prevail in voting on an important issue in the absence of one Democrat," according to the minutes of the Board. Commissioner Scheir's exception was noted in the minutes at her request. The Board, after public comments, moved, seconded, and voted 2-2 on the motion "do you favor the wording on Proposition 1-2-3 to be placed on the Ballot as submitted to the City Solicitor." It was further moved, seconded, and voted 4-0 to request assistance from the City Solicitor regarding the language for Proposition 1-2-3 in light of the 2-2 vote of the Board not to approve its language of July 6, 1989.

15. At the August 31, 1989 meeting of the Board it was moved, seconded, and voted 2-2 to accept the language of July 6, 1989. It was moved, seconded, and voted 2-2 to accept the language of July 6, 1989 to include the language of the City Solicitor offered in his letter of July 26, 1989. It was moved, seconded, and voted 2-2 to approve the language of 1987 adopted by the City Solicitor. It was moved, seconded, and voted 2-2 to accept the language of 1987 from the City Solicitor to include the third paragraph of the City Solicitor offered in his letter of July 26, 1989.

16. On September 5, 1989 Commissioners Scheir and Bonislowski wrote to the City Manager requesting a legal opinion from my office asking whether the motion of August 10, 1989 to reconsider the July 6, 1989 language was in order, and whether the 2-1 vote in favor of that motion to reconsider was a majority vote of the Board.

17. While my office has not been able in the time available for this opinion to determine conclusively whether or not the Board has ever formally adopted Robert's Rules of Order or any other formal rules of parliamentary procedure, the Executive Director of the Board could find no evidence of such a formal adoption nor does the current Chairman of the Board, who has been a member of the Board since 1960, recall that any such formal rules have ever been adopted. The current Chairman has indicated that the Board's practice has been to "loosely" follow Robert's Rules.

OPINION

Massachusetts General Laws, c. 43, ss. 39, 40, and 41 generally govern the process required for an Initiative Petition such as Proposition 1-2-3 to be submitted to a vote of the registered voters of the City. Those sections provide that the "City Clerk" shall, in the appropriate circumstances, submit the petition to the voters. By virtue of Chapter 239 of the Acts of 1921 in Cambridge the Board of Election Commissioners is given "all the powers, rights, privileges, liabilities and duties relating to primaries or elections by law vested in and imposed upon the ... city clerk" Therefore, the responsibility for submitting an initiative petition to the voters falls to the Board.

Massachusetts General Laws, c. 43, s. 41 provides in relevant part that:

The ballots used when voting upon a proposed measure under section thirty-nine or forty, ... shall state the nature of the measure in terms sufficient to show the substance thereof.

The statutes are silent regarding any further guidance on the manner in which the ballot language shall be determined.

In an analogous area the state legislature has provided that in a state-wide referendum question, in certain circumstances, a "statement of the general purport thereof, which statement shall be prepared by the city solicitor ..." may be mailed to voters in place of mailing a complete copy of the petition. General Laws,

c. 54, ss. 53-56. In addition, whenever any provision of the General Laws, submitted for acceptance to the voters of a city, is to be placed on the ballot a "fair, concise summary and purpose of the law to be acted upon, as determined by the city solicitor" may appear on the ballot. General Laws, c. 54, s. 58A.

In contrast to these sections, G.L. c. 43, s. 41, as quoted above, does not expressly confer the right or responsibility for determining a statement of the "nature of the measure in terms sufficient to show the substance thereof" on the City Solicitor, or any other person or entity.

It is a settled principle of law that when interpreting a statute the plain meaning of the language is to be employed. Nationwide Mutual Insurance Co. v. Comm'r of Insurance, 397 Mass. 416, 420 (1986). Words not appearing in the statute cannot be read into it. Boylston Water Dist. v. Tahanto Regional School Dist. 353 Mass. 81, 84 (1967) ("if the omission was intentional, no court can supply it. If the omission was due to inadvertence, an attempt to supply it ... would be tantamount to adding to a statute a meaning not intended by the Legislature").

The legislature has on two occasions in statutes dealing with petitions submitted to voters, originating at the state level, expressly designated the City Solicitor as the official responsible for summarizing the language of the petition. It is clear that if the legislature intended to confer that responsibility on the City Solicitor with respect to G.L. c. 43,

s. 41, it knew how to do so. The fact that such a designation is absent suggests that the legislature intended on a local referendum question not to confer the responsibility for summarizing the petition on the City Solicitor.

Since s. 41 is silent as to who should determine the ballot language, it is necessary to look to ss. 39 and 40 where the legislature has said that the "city clerk" [read "Board of Election Commissioners" by virtue of the Special Act, Ch. 239, Acts of 1921] shall submit the measure to the voters. I conclude that it is the responsibility of the Board to determine a statement of the "nature of the measure in terms sufficient to show the substance thereof."

Given the above analysis, I believe that the Board acted within its authority in approving Policy 89-1. I find the submission to the City Solicitor for "review and sign off" to be a permissible, though not required, step in an appropriate procedure duly adopted by the Board.

Having determined that the Board is responsible for drafting the ballot language, it is necessary to determine what constitutes a valid vote by the Board to take action in determining the language.

The common law rule regarding a quorum is stated in Merrill v. Lowell, 236 Mass. 467:

In the absence of statutory restriction the general rule is that a majority of a council or board is a quorum and a majority of a quorum can act.

General Laws, c. 4, s. 6, Fifth provides that:

Words purporting to give a joint authority to, or to direct any act by, three or more public officers or other persons shall be construed as giving such authority to, or directing such act by, a majority of such officers or persons.

A close reading of G.L. c. 4, s. 6, Fifth and a review of the decided cases reveals a possible conflict between the statute and the common law rule. See generally, 37 Massachusetts Law Quarterly, No. 1. p. 27.

The Supreme Judicial Court has stated with regard to the Transit Commission that as an administrative board of public officers:

Such a board may act by a majority of its members, if all have had notice and an opportunity to act, and the determination of a majority of a quorum under such circumstances is binding.

Codman v. Crocker, 203 Mass. 146, 154 (1909). The court in Codman noted that the statute creating the Transit Commission did not contain a provision relative to a quorum. Likewise, the special act establishing the Board of Election Commissioners, as amended, contains no provision relative to a quorum.

Unfortunately, the Codman case makes no reference to G.L. c. 4, s. 6, Fifth.

In Real Property, Inc. v. Board of Appeal of Boston, 311 Mass. 430, 434 (1942) the court in fact does mention G.L. c. 4, s. 6, Fifth, after stating the common law rule, saying:

To what extent the principle that a

majority of a quorum consisting of only a majority of a board may act is applicable to cases within the scope of G.L. c. 4, s. 6, Fifth, need not be considered, since in the present case the subject is covered by specific statutory provisions.

In an opinion from the Attorney General dated July 22, 1946 to the Massachusetts Aeronautics Commission (MAC) the Attorney General answered a question from the MAC as to whether G.L. c. 4, s. 6, Fifth required "... that official acts of the Commission shall be based upon a majority vote of the full commission or may its statutory authority be exercised by the vote of a majority of a quorum which would be less than a majority of the entire Commission of five members." The Attorney General said:

I answer your question to the effect that official acts of the commission are required to be based upon a majority vote of the full commission. Although a majority of the commission constitutes a quorum which may transact necessary business, a vote by a majority of such quorum, when it is less than a majority of the entire commission, does not constitute action by the commission as such. [quoting G.L. c. 4, s. 6, Fifth]

1947 A.G. 13.

The Attorney General's opinion with regard to the MAC is contrary to the decision of the Supreme Judicial Court in Codman v. Crocker, supra. As noted by the author of a thoroughly researched article entitled "When Can or Should a Majority of a Majority of a Public Board Act?", the courts simply have not

resolved the possible conflict between G.L. c. 4, s. 6, Fifth, and the common law rule regarding a quorum. 37 Massachusetts Law Quarterly, No. 1, p. 27 et seq. The author of that article in fact recommended an amendment to c. 4, s. 6, Fifth which would have added the following language:

and if at least a quorum is present
the vote of a majority of those
present and voting shall be a valid
exercise of the authority of the
board.

37 Massachusetts Law Quarterly, No. 1, at p. 37. Unfortunately, the legislature has not amended the statute to incorporate the suggested language. In addition, our research has found no cases decided since the referenced article was written that resolve the question.

While it appears that the weight of authority supports the common law rule that a majority of a quorum can act, the courts and the legislature have not resolved the possible conflict with G.L. c. 4, s. 6, Fifth. The issue is particularly cogent in the case of the Board, since by statute the Board is comprised of two Republicans and two Democrats. Application of the common law rule to the Board could lead to circumstances in which the absence of one Commissioner might enable two members of one party to take action on any area of disagreement, only to have that action reversed at a later meeting when a member of the other political party is absent.

It is my considered advice that this question of a majority vote of the Board should be settled by seeking a declaratory

judgment from the courts. The importance of the issues raised in the current controversy dictates the need for a conclusive opinion which I am unable to render in the current unsettled state of the law in this area.

I will address the remaining question regarding the validity of the motion to reconsider voted by the Board on August 10, 1989.

As a general rule deliberative assemblies must be governed by rules of procedure to which each member must conform. 59 Am. Jur. 2d, Parliamentary Law, s. 2 (1987). Each such body, when it meets, is without rules of procedure and may make its own rules without reference to the action of preceding bodies. Id. It is within the power of all such bodies to abolish, modify, or waive their own rules of procedure at any time by a majority vote. Id. In the absence of the adoption of specific rules of procedure and in the absence of statutory regulation, generally accepted rules of parliamentary procedure control. Id.

It is also a recognized principle that courts generally do not concern themselves with violations of parliamentary rules in deliberative proceedings, whether such rules are formally adopted, or whether they consist of a body of unwritten customs or usages. Id. at s. 4. "Since parliamentary rules are merely procedural and not substantive, the courts have no concern with their observance. Hence, they may be waived or disregarded by the legislative body." Id. The only concern the courts have expressed with regard to procedural rules is whether notice of

meetings has been given and whether it was reasonable. Id.

The courts in Massachusetts have followed these general principles specifically in the context of a procedural rule as to reconsideration. For example, in Semas v. Mayor of Taunton, 388 N.E. 2d 326 (Mass.App.Ct., 1979) the court states:

The procedure as to motions to table and to reconsider ... of the rules and orders of the municipal council could be waived or suspended because it was governed by rules and not by ordinance. Coleman v. Louison, 296 Mass. 210, 213 (1936) The fact that there was no motion to reconsider or notice that such a motion would be made at this meeting is not controlling. The ultimate eight-to-one vote to accept the committee's recommendation was the equivalent of a vote by the council to waive its own procedural rule as to reconsideration and a vote on a question pertaining to a matter properly before it.

Semas v. Mayor of Taunton, at p. 328. The Semas case demonstrates that as to a procedural rule regarding reconsideration the courts will infer that a rule has been waived even if no formal motion to waive or suspend that rule has been made.

It is necessary to point out that the 2-1 vote on reconsideration made on August 10, 1989 may well be viewed as irrelevant if this matter is brought before the courts. As indicated in Paragraph 14 of the Facts stated above, at the Board meeting of August 24, 1989 the Board, after public comment, moved, seconded, and voted 2-2 on the motion "do you favor the

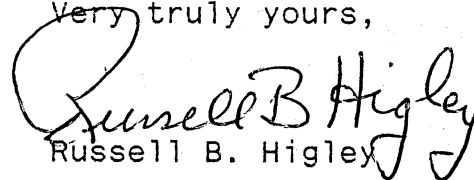
wording on Proposition 1-2-3 to be placed on the Ballot as submitted to the city Solicitor." Again, at the Board meeting of August 31, 1989, after public comment, it was moved, seconded, and voted 2-2 to "accept the language of July 6, 1989."

As demonstrated in the Semas case cited above, the courts have shown little concern with the procedure followed by legislative or administrative bodies. And, as in the Semas case, I think a court would find that by virtue of the votes on August 24, 1989 and August 31, 1989 the Board, with all members present, in fact did reconsider the language of July 6, 1989. As in the Semas case I think the court will find that the fact "... that there was no motion to reconsider or notice that such a motion would be made at this meeting is not controlling." Semas, supra, at p. 328. I think a court will be most interested in whether there is a current majority of the board favoring a particular summary. I also think it is likely that a court in these circumstances would remand this matter back to the Board for current action to resolve the question, rather than attempting to compel the board to employ language that it voted to approve two months ago, but has in fact reconsidered on two occasions since without obtaining a majority vote.

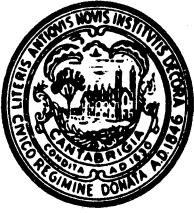
I conclude that it is the responsibility of the board to adopt language that states the nature of the measure in terms sufficient to show the substance of the proposition. I reviewed the language submitted to me on July 6, 1989 and recommended one additional sentence. While my approval of that language has not

changed, it is the Board's responsibility to select the ballot language. The full membership of the board has in fact reconsidered that language and there is no majority of the Board currently in favor of it. If the Board wishes to adopt different language I will be happy to review that new language with reference to the standard of G.L. c. 43, s. 41.

Very truly yours,


Russell B. Higley

RBH/jab



CITY OF CAMBRIDGE

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EXECUTIVE DEPARTMENT

ROBERT W. HEALY

City Manager

RICHARD C. ROSSI

Deputy City Manager

September 18, 1989

To the Honorable, the City Council:

For your information, I am enclosing a copy of a legal opinion submitted by Russell Higley, City Solicitor, in response to a request by Darleen G. Bonislowski and Sondra Scheir, members of the Cambridge Board of Election Commissioners, relative to Proposition 1-2-3.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Robert W. Healy", is written over a horizontal line.

Robert W. Healy
City Manager

RWH/dls
enclosure

S-790
Agenda Item # 5

Legal opinion on Proposition 1-2-3.

In City Council,

Sept. 18, 1989

Charter Righted by
Councillor Walsh.
9/25/89. Tabled by
Mayor Vellucci
11/20/89 Placed on file