

MEMORANDUM

TO: The Honorable Barrington Town Council; Philip Hervey, Town Manager

FROM: Michael Ursillo, Town Solicitor; Peter Skwirz, Assistant Solicitor

DATE: September 27, 2022

SUBJECT: Potential amendments to the Financial Town Meeting

I. Introduction –

At the September 12, 2022, meeting of the Town Council, there was a discussion about the Town Manager forming a committee to study whether the budget process should be amended to amend or replace the Financial Town Meeting (FTM). A question also came up about whether the FTM study committee would be subject to the Open Meetings Act (OMA). The purpose of this memorandum is to, first, address the OMA question. Second, the memorandum will quickly discuss the process for amending or replacing the FTM. Finally, the memorandum will discuss potential alternatives to the FTM based on how other Rhode Island cities and towns approach the budget process.

II. The FTM study committee would likely be subject to the OMA.

“In order for the OMA to apply, a ‘quorum’ of a ‘public body’ must convene for a ‘meeting’ as these terms are defined by the OMA.” Salvatore v. Town of Cumberland, OM 18-03 (citing Fischer v. Zoning Board of the Town of Charlestown, 723 A.2d 294 (R.I. 1999)). Here, there is no question that the FTM study committee would be meeting with more than a quorum when discussing alternatives to the FTM. Accordingly, the only question as to whether the FTM study committee would be subject to the OMA is whether it qualifies as a “public body” under that statute. The OMA, RIGL 42-46-2(5), defines a “public body” broadly, as “any department, agency, commission, committee, board, council, bureau, or authority, or any subdivision thereof, of state or municipal government or the board of directors of any library that funded at least twenty-five percent (25%) of its operational budget in the prior budget year with public funds, and shall include all authorities defined in § 42-35-1.”

The Rhode Island Attorney General (RIAG) has held that “determining whether a particular entity is a ‘public body’ is ‘a fact intensive question not subject to bright-line rules.’”

Salvatore, supra (quoting Oliveira v. Independent Review Committee, OM 04-10). The RIAG has looked to at two Rhode Island Supreme Court cases to glean the sort of facts that are relevant in determining whether an entity is a public body under the OMA. These cases are Solas v. Emergency Hiring Council, 774 A.2d 820 (R.I. 2001) and Pontarelli v. Rhode Island Board Council on Elementary and Secondary Education, 151 A.3d 301 (R.I. 2016).

In Solas, the Court considered the application of the OMA to the state Emergency Hiring Council (EHC), an entity formed by two executive orders of then-Governor Lincoln Almond to manage and control the state's hiring practices and its fiscal resources. The EHC consisted of five senior executive branch staff members who met on a biweekly basis to determine whether creating a new position in state government or filling a vacancy was necessary. It was the Governor's intent that no person or persons other than the EHC would have the authority to make any determinations in this regard. The Court concluded that "the EHC possesses significant supervisory and executive veto power over creating or filling state employment positions." Id. But, the Court concluded that, even if the EHC had no supervisory or executive power, "exercise of advisory power is enough to bring it under the act's umbrella," given the formality of the EHC's creation and its important role in the hiring process. Id. Accordingly, the Court concluded that the EHC was a public body under the OMA and was required to comply with the requirements of the OMA.

In Pontarelli, the Rhode Island Council on Elementary and Secondary Education created a Compensation Review Committee (CRC), which was tasked with reviewing requested and proposed salary adjustments to RIDE employees. The CRC was described as an informal, *ad hoc* working group with a strictly advisory role and with no legal status or authority, and which did not have regular meetings. The Court concluded that the CRC was not a public body governed by the OMA. The Court distinguished the CRC from the EHC considered in Solas, because "the CRC . . . does not meet on a regular basis, nor was the CRC created by an executive order. . . . [T]he CRC's sole function is to advise the commissioner of RIDE, who in turn has to make a recommendation to the council." Pontarelli, supra. Accordingly, based on the informal nature of the CRC, and given that its sole function was to advise the commissioner, who in turn advised the Council, the Court concluded that the CRC was not a public body.

These cases make clear that there is no hard-and-fast rule for determining whether a particular entity is required to comply with the OMA. However, there are a list of factors that can be gleaned from these cases to consider, on a case-by-case basis, in deciding whether an entity is required to comply with the OMA. The relevant factors are as follows:

- If the committee is created by a formal vote or resolution, with its parameters formally defined therein, then the committee is likely governed by the OMA. Alternatively, if the committee is simply an informal collection of people who are asked to give input into a matter, it is likely not governed by the OMA.
- If the committee has regularly scheduled meetings with certain members expected or required to attend, then it is likely governed by the OMA. If, alternatively, the committee meets on an irregular *ad hoc* basis, with no formal attendance requirement, then it is likely not governed by the OMA.
- If the committee follows formal procedures, such as requiring a vote and second, passed by a majority of the committee members, in order to take action or make a recommendation, then it is likely governed by the OMA. If not, and it instead operates by means of informal consensus, then it is likely not governed by the OMA.

- If the committee is requested to provide advice to the Town Council directly on what actions should be taken, then it is more likely to be governed by the OMA. If the committee, instead, only helps the Town Manager develop a recommendation, who in turn is responsible for providing a recommendation for the Council, it is less likely that the FTM study committee is governed by the OMA.

Since there is no clear rule, there is no clear guidance that can be given on this issue with absolute certainty. Instead, the above-referenced factors can only be applied on a case-by-case basis to develop an informed prediction of whether a court or the RIAG would consider the entity a public body subject to the OMA.

When applying these factors to the FTM study committee, it is likely that the FTM study committee would be found to be subject to the OMA. The committee will likely be created by a formal vote of the Council. It will have a task to complete for the Council in a limited timeframe, so will likely need to meet regularly with required, or at least expected, attendance by the members appointed. Developing a recommendation within this timeframe will likely require the committee to make formal motions and take votes to complete its task for the Council, rather than simply relying on informal consensus. Most importantly, the role of the committee will be to advise the Council directly on whether to amend or replace the FTM, rather than merely providing guidance to the Town Manager who will be responsible for advising the Council.

Finally, to the extent that there is the potential for an entity to be subject to the OMA, it is always best to err on the side of caution, and post meeting agendas and allow the public to view the meeting as if the entity is subject to the OMA, simply to avoid the potential for an OMA violation. Accordingly, it is the advice of this office that the FTM study committee should be treated as if it is a public body governed by the OMA.

III. The process for changing the FTM would require a vote of the Council to submit a Charter amendment to the local voters, approval of the amendment by the voters, and ratification of the approved amendment by the General Assembly.

The Barrington FTM is governed by Title 7 of the Town Charter. Therefore, in order to replace the FTM, Title 7 of the Charter would need to be removed or amended. “[T]he people of a city or town who wish to propose modifications to an existing charter can act only indirectly, through their elected representatives.” Viveiros v. Town of Middletown, 973 A.2d 607, 613 (R.I. 2009). Art. XIII, § 8 of the R.I. Constitution provides that amendments to a home rule charter must be proposed by “[t]he legislative body of any city or town.” Accordingly, amendments to the Barrington Charter may only be proposed by the Barrington Town Council. Once the Council adopts a proposed amendment to the Charter, Art. XIII, § 8 of the R.I. Constitution provides that the Charter amendment will not become effective until approved by local voters at either a general or special election. Finally, if the voters approve the Charter amendment, the amendment should be sent to the General Assembly for ratification. This is because “the provisions of [a] legislatively ratified charter take precedence over inconsistent provisions of general state law.” Foster Gloucester Reg'l Sch. Bldg. Comm. v. Sette, 996 A.2d 1120, 1125 (R.I. 2010) (citing Local No. 799, International Association of Firefighters AFL–CIO v. Napolitano, 516 A.2d 1347, 1349 (R.I.1986)). There are provisions in the Rhode Island General Laws that govern the conduct of town meetings, which predate the home rule amendment to the Rhode Island Constitution. See

RIGL 45-3-1, *et seq.* Much of these provisions would potentially be inconsistent with an alternative to the FTM that Barrington voters enacted through a Charter amendment. Therefore, in order to avoid any ambiguities resulting from a potential conflict between a locally approved Charter amendment and the General Laws, it is important to have the General Assembly ratify the Charter amendment after it is passed by the voters.

IV. Alternatives to the FTM –

Other R.I. municipalities present alternatives to the FTM as the process for approving the Barrington Town budget. First, the Town budget process could simply conclude with Town Council approval of the final budget. This is the most widely used form of approving a budget in the various Rhode Island municipalities.¹ One potential criticism of this budget process is that it limits direct democratic participation in the budget process. However, as the Rhode Island Supreme Court has noted, “[t]he Town Council still remains answerable to the public . . . through a variety of forums. The people of the Town are able to voice their questions and concerns by petitioning the Town Council for grievances and/or attending public hearings on town matters. Most importantly, the people of the Town retain the power to take to the ballot boxes” to elect their Council members based upon their budget priorities. See Viveiros, 973 A.2d at 613 (quoting Newport Court Club Associates v. Town Council of Middletown, 800 A.2d 405, 417 (R.I. 2002)).

In addition to these avenues for democratic participation, many municipalities that have Council approval of the final budget have a process where a certain number of electors may petition for an amendment to the budget approved by the Council, which will be voted on at a special referendum or special town meeting. For instance, in the Town of Bristol, an elector may circulate a petition in the weeks following approval of the Council budget seeking to have the budget amended. If four hundred qualified electors sign the petition, then the budget amendment will be sent to a special town meeting, where it will either be rejected or adopted. See Bristol Town Charter § 407 & 408. Similarly, in South Kingstown, amendments to the Council approved budget may be sent to a special referendum if a petition signed by two hundred electors is submitted. See South Kingstown Town Charter § 4222(E). While the exact process and number of elector signatures required for amendment of the Council budget varies from town to town, most towns that historically had a financial town meeting, but then switched to a Council budget approval process, include some form of petition process as a direct democratic safety valve on the Council’s approved budget. In contrast, Rhode Island cities – Providence, East Providence, Cranston, Woonsocket, Central Falls, Newport, Warwick, and Pawtucket – lack such post-budget adoption elector petition processes.

Finally, three Rhode Island municipalities, Tiverton, Hopkinton, and West Warwick, have replaced the traditional FTM with an all-day referendum as the final step in the budget approval

¹ The following municipalities have the municipal council approve the final budget: Bristol, Burrillville, Central Falls, Cranston, Coventry, East Providence, East Greenwich, Cumberland, Johnston, Middletown, Narragansett, Newport, North Kingstown, North Providence, North Smithfield, Pawtucket, Portsmouth, Providence, Smithfield, South Kingstown, Warwick, Westerly, and Woonsocket.

process. The rationale for the change appears to be an attempt to counteract the low voter turnout at a traditional FTM, by allowing voters to vote on the budget throughout the day. However, considering that the referendum will necessarily take place during a special election – not a general election – in order to fit into the yearly budget schedule, the effect of this revision on voter turnout may be limited.

The discussion of the budget process in other municipalities is not intended to advocate for or recommend a particular budget procedure to the Council. Instead, this discussion is intended to provide a framework for the FTM study committee to consider its recommendations to the Council in potentially amending or replacing the FTM.

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