
TO: Ms. Beth Klein, Town Clerk (*By Electronic Mail Only*)

FROM: Lauren F. Goldberg, Esq.

RE: Holding Local Election on Same Date as State Election

DATE: July 3, 2018

Questions

You have requested an opinion as to whether the Town may place a G.L. c.94G, §3 question on the September 4, 2018 primary or the November 6, 2018 state election ballot regarding the adoption of a bylaw limiting or prohibiting marijuana establishments in Town. You have also inquired as to potential legal and practical issues should the Board instead vote to hold a special local election on the same date as the November 6, 2018 State Election.

Short Answer

In my opinion, where G.L. c.94G, §3 does not authorize placement of a local question on the state election ballot, no such question may so appear. While special legislation could authorize the same, the state has been consistent in disfavoring the same except under very limited circumstances. The Town may, in my further opinion, hold a special election on the same date as the primary or the biennial state election, but should be aware of the administrative challenges and burdens associated therewith.

Detailed Analysis

1. Access to the Ballot Generally

Similar to access to the ballot for candidates, access to the ballot for questions is strictly regulated by law. A question may be included on the ballot for a local or state election only if authority therefor is found in the General Laws, or a special act or charter. See, e.g., G.L. c.59, §21C (Proposition 2 ½ allows a municipality to place up to three questions on state ballot and unlimited number of questions on local ballot); G.L. c.43B, §11 (charter amendment question to be placed on regular election ballot at least two months after approval by Attorney General, with summary); G.L. c.44B, §3 (adoption of Community Preservation Act with question on Town election ballot more than 30 days after Town Meeting action or on state election ballot more than 60 days after Town Meeting action, whichever occurs first, with summary); G.L. 40, §6D (placement of question on annual town election ballot to allow plowing of private ways, provided that petition of 200 registered voters is received); G.L. c.53, §18A (nonbinding public opinion ballot question may be placed on annual town election ballot by vote of Board of Selectmen)

2. General Laws c.94G, §3 Authorizes Placement of Question on Local Ballot Only

At this time, G.L. c.94G, §3 requires communities that voted “yes” on Question 4 at the 2016 State election to approve bylaws and ordinances limiting or prohibiting non-medical marijuana establishments by a vote of the legislative body (i.e., Town Meeting or City Council) and the voters at an election. After December 2019, regardless of how a municipality voted at the 2016 State Election, they will be required to submit such a bylaw or ordinance to the voters at an election.

The relevant portion of G.L. c.94G, §3 provides:

A ballot question under this subsection may be placed on the ballot at regular or special election held by the city or town by a vote of the board of selectmen or by the city or town council, with the approval of the mayor or chief executive officer of a city that does not have a mayor, and subject to a municipal charter, if applicable. (Emphasis added).

There is nothing else in G.L. 94G or elsewhere in the General Laws that allows a municipality to place a question on the state election ballot. Accordingly, in our opinion, pursuant to G.L. c.94G, §3, the ballot question may appear only at a regular or special Town election.

As noted above, special legislation could be used to authorize/direct that the Secretary of the Commonwealth print a local question on the state ballot. In recent years, however, the office has strongly disfavored the same in light of the tight deadlines and enormous task of creating, proofing and printing ballots statewide, particularly in light of the number of overseas voters requiring ballots. In our experience, it is unlikely that any effort by the Town would be successful to have a G.L. c.94G question appear on the state ballot.

3. Holding Special Election on Date of Primary or State Election

There is nothing in state law that would prohibit a town from holding a special election on the same date as the state primary or election, although such simultaneous elections places significant additional administrative burdens on the Town Clerk, office staff, and poll workers. Thus, any decision as to how to proceed should take into consideration the following matters.

A. *Pre-election Issues*

i. Warrant—In accordance with G.L. c.39, §10, the warrant for the state election and special town election would be required to be posted no later than 7 days prior to the election. The Town’s by-laws, Section 36-1, require notice of the time and place of a special election to be posted on the Town sign boards at least two weeks prior to the election and remain posted until the election is held.

ii. Ballots; form. Separate ballots would be required for the local and state election. The Town would be responsible for the printing the special election ballots and the Secretary’s office would print the state election ballots. To minimize confusion, the special election ballots would need to be different colors than the state ballots. Note that this issue would be even more

complicated if the special election were scheduled for the date of the state primary where there are different colored ballots for each party primary.

iii. Ballots; testing. The printer pack for the voting machines would have to be programmed to accept both the state and local ballots. A separate “test deck” would be required to be created and tested for each ballot type to ensure that the computer program has been adequately tested and that ballots for each election are tabulating correctly.

iv. Absentee ballots. Printed applications for absentee ballots allow a voter to request a ballot for a single election or for all elections. Each such ballot will need to be mailed separately, with a white “outside envelope”, a ballot, and the “inside envelope”, the brown envelope that contains the voter affidavit. The inside envelopes must be pre-marked by the Clerk’s office to specify the appropriate election so that the ballots may be appropriately tracked and to ensure proper processing at the polls.

If the voter does not select “all elections” on the pre-printed form, or provides a handwritten request, the Town Clerk may wish to include an informational insert indicating that the voter selected “an election” on their application, that there are two elections taking place that day so that the voter will be receiving one ballot for each such election, and that such ballots must be returned separately in the envelope provided for such purposes.

It is imperative to have a good system in place to accurately track all absentee ballots for both elections.

v. Voter Registration. In accordance with G.L. c. 51, §26, the last day to register to vote is 20 days prior to any election. Thus, the voter registration deadlines will be the same.

vi. Early Voting. At this time, it does not appear as if there will be early voting in connection with the state primary in September. G.L. c.54, §25B. However, beginning 11 days prior to the state election and until the close of business on the business day preceding the business day before the election, voters may cast ballots in the state election. Note that early voting is made applicable to a local election held on the same date as the state election. This, of course, will require meticulous tracking, use of two voter lists and the like. See below.

B. Election Day Procedures

i. Voters Lists. Two voters lists will be required, one for the state election and one for the local election, unless the Town prints an extra column on a single voters list. If a separate list is used, an extra set of poll workers will be required at both the check-in and check-out tables. Otherwise, workers for the special Town election may be shared with those working the state election. It is essential that poll workers properly check in and check out voters; this issue can be significant in the event a recount is required.

i. Voter Eligibility. Different rules apply to voter eligibility at a state and local election. At the state election, voters who have moved from the Town but who have not registered to vote

in any other city or town are eligible to vote in the state election. No similar rule applies to local elections, however, and if a person has removed from the Town they are not eligible to vote in the local election. Thus, it will be essential for poll workers to be trained on this distinction.

ii. Casting Ballots. A voter is not required to complete and deposit the ballot for one election prior to checking in and receiving a ballot for the second election, in my opinion. However, in order to vote in both elections, a voter must separately check-in and check-out for each election. The poll workers must be diligent in carefully checking people in and out for each election.

iii. Counting Absentee Ballots. Pursuant to G.L. c.54, §99, absentee ballots mailed from outside the U.S and postmarked on or before election day may be counted if received within 10 days of the election. Absentee ballots for the local election must be received by the close of polls on the day of the election or they cannot be counted.

C. Post-Election and Recount Issues

i. Closing Procedures. Following the close of the polls, ballots from the two elections must be carefully segregated. They must then be reviewed in detail, and be separately secured. This is essential so as to avoid complicating a recount.

ii. Ballot Retention Requirements. Ballots containing a federal office must be securely maintained without review for a period of 23 months. Local election ballots can be destroyed after 30 days. As such, separate storage containers will be required. In addition, I recommend using numbered tags with such containers to ensure integrity of the ballots and reduce concerns about the same. Consideration will also need to be given as to where such materials will be securely stored.

iii. Recounts. Where these are separate elections, a petition for a recount may be filed with respect to either election within 10 days of the election pursuant to G.L. c.54, §135. At a recount, the parties review the election with a microscope. Any state election is complicated, and it is easy to omit what appears at the time to be administratively burdensome obligations, such as, for example, checking in persons on both lists or ensuring that inactive voters sign affirmations of current and continuous residency and show identification or be challenged, etc. Such issues can, however, be critical in the event of a recount.

Summary,

While there are additional obligations imposed by holding a special Town election on the same date as the state election, the two can be conducted simultaneously. While a special election can be held on the date of the state primary, the nature of the primary itself is complicated, and there is more room for administrative error, in our opinion. If the decision is made, therefore, to instead hold a special election on the date of the State election in November, consideration may be given to the following: (1) issuing a formal press release notifying voters

of relevant information such as the check-in and check-out process, absentee ballot procedures, early voting and directing voters to the website or the Clerk's office for additional information such as sample ballots; (2) reviewing and updating poll worker manuals and policies to ensure compliance with current law and to enhance their usability; and (3) requiring mandatory training for all poll workers, provided on several dates, to ensure their familiarity with all election laws applicable to their responsibilities.

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