

May 19, 2008

Ms. Suzanne Kennedy
Town Administrator
Town of Medway
155 Village Street
Medway, MA 02053

Re: Annual Town Election Results

Dear Ms. Kennedy;

You have requested an opinion as to the validity of the recent annual town election, which was held on May 5, 2008. It was brought to the Board of Selectmen's attention on May 12, 2008 that the warrant for the annual town election had not been posted as required by General Laws chapter 39 section 10. As a consequence, the results of the election, including the election of town officers and the ratification of a new charter for the town, were cast into question.

In my opinion, the town election and the results of the town election are valid; although it is possible that someone could try to challenge the validity of the election due to the lack of posting, in my opinion any such challenge would be unlikely to succeed, as any person challenging the election would have to establish standing to object, and the courts would be unlikely to overturn the results of the annual election where it does not appear that the failure to post the election affected the outcome of the election, as it was widely publicized, the voter turnout was in line with voter turnout for other town elections, and none of the results of the election were by narrow margins. Nevertheless, in the exercise of caution and to avoid any chance that the outcome of the election could be doubted, I have recommended that the Town ask the Governor to file curative special legislation due to the lack of posting, and I understand that the Board of Selectmen has already made such a request in writing to the Governor.

Pursuant to General Laws chapter 39, section 10,

Every town meeting or town election...shall be called in pursuance of a warrant, under the hands of the selectmen, notice of which shall be given at least seven days before the annual meeting or an annual or special election and at least fourteen days before any special town meeting. The warrant shall be directed to the constables or to some other persons, who shall forthwith give notice of such meeting in the manner prescribed by the by-laws....

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See also G.L. c. 54, §63. The Town By-laws require the Town Constable to post the notice in at least two locations in each of the four precincts in town. Article I, Section 1.3. In order to meet the seven day notice requirement, this should have been done by April 28th. Although the postings did not take place, a number of measures were taken by the Town to publicize the annual town election. I am informed that on or about April 28th, notices were placed on signs in several locations around town, informing people of the election and the annual town meeting. Starting in March, as part of the Board of Selectmen meetings, which are televised live and rebroadcast for a period of weeks, mention of the upcoming election and the charter vote were made several times.

Further, it is my understanding that on April 23rd, the town finance committee mailed out 5,080 copies of their report to households in town, and the date and time for both the annual election and the annual town meeting were on the cover of the report. It is believed that all homes had them by April 28th. On April 24th, a copy of the report was placed on the town website, in the center of the site where all new announcements are placed. On April 25th, the Town Administrator's office requested notice be placed on local access cable, channels 8 and 11.

I am further informed that, in addition to the publicity by the Town, on April 26th, in the Saturday edition of the Milford Daily News, a local daily newspaper widely circulated in the Town, there was a front page story about the upcoming election and charter vote. There were also 100 bright yellow signs posted throughout the town starting two weeks before the election, asking people to support the charter vote and clearly showing the date of the election. Thus, although there was no constable posting, in my opinion, there was notice to the voters at least seven days in advance of the annual town election.

Based upon the turnout for the election, it seems clear that the residents were well informed of the date of the election. I am informed that a total of 1,044 residents voted, a little over 12% of the approximate 8300 registered voters. The only contested race was for Assessor, which featured two write-in candidates, and it was not a close vote, 432-281. The most publicized item on the ballot was the Town Charter ballot question, which won easily, Yes -- 787 No -- 221 Blanks -- 36. This followed a vote at Town Meeting on Dec 4th of 2007, where the vote on the Charter was 211 in favor, 16 opposed.

By way of comparison, for the annual town election in 2005, there was also only one contested race, for a two year seat on the Housing Authority. That year, only 3.7%, or about 400 voters, cast ballots. Last year, with contested races for both Selectman and School Committee, the turnout was only 1,670 or about 20%. Finally, I am not aware of any Medway voter, let alone large enough numbers of Medway voters that could have influenced the outcome of the election, who did not know that the election was being held on May 5th because the postings were not made. Thus, it does not appear that the lack of posting affected the outcome of the election.

There have been numerous cases in which persons have challenged the outcome of elections on various procedural grounds. These have involved either alleged defects in the procedure of the election itself, such as the case here, or alleged defects in individual ballots (e.g. challenges to absentee ballots or to the counting of certain ballots for or against a certain candidate). “Irregularities in the conduct of an election, not shown to violate the substantive end for which the election was held, do not invalidate the result.” Swift v. Registrars of Voters of Quincy, 281 Mass. 271, 276 (1932). The courts have uniformly held that the overriding concern is to give effect to the will of the voters, and the courts have therefore often upheld elections that were not procedurally perfect where the will of the voters was clear.

The purpose of the election laws is to afford opportunity for the orderly expression of preferences by the voters for those to be elected to public office, and not to thwart or suppress such orderly expression. The election laws of this Commonwealth providing for official ballots have uniformly been interpreted to the end that the will of the voter if ascertainable is to be given effect even though there may have been omission to observe some subsidiary and directory provisions of the law....The right to vote is a sacred privilege. Every rational intendment is to be made in favor of its rightful exercise. Unless in contravention of some positive and essential mandate of the statute or of the law, the intention of the voter must be given effect. That principle runs through our decisions from the first to last.

Parrott v. Plunkett, 268 Mass. 202, 205-207 (1929) (court upheld town election despite clerical error in printing of ballot, since invalidating the election would “annul the intention of all the voters on account of a clerical error for which they were in no degree responsible”). The court in the Parrott case also summarizes numerous other election cases in which errors in election procedures or printing of ballots was determined not to invalidate an election.

In a more recent case, Citizens for a Referendum Vote v. Worcester, 375 Mass. 218 (1978), a special election held in Worcester to approve an appropriation for a new civic center was challenged where seven of the City’s 79 precincts failed to open for voting at 8:00 a.m. as scheduled. Ballots were delayed in arriving at these precincts due to various factors, including an accident of one delivery truck and breakdown of another. The last precinct to receive ballots did not open until 9:20 a.m. The margin of victory of the ballot question, after a recount, was 119 votes. The court re-iterated that not every deviation from a requirement for an election will automatically upset the results. The court noted that the case was a close one, because the election was close. “But in the absence of official misconduct, we think some showing is required that enough votes were involved to affect the outcome.” Id. at 219. The facts as presented to the court did not indicate that any voter was prevented from voting by the delay in opening the precincts, and the court upheld the election.

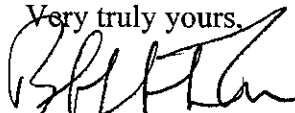
In the rare cases where the courts have invalidated elections and ordered new ones, the reason for such action was that the alleged procedural deficiency could have affected the

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outcome of the election. In Rizzo v. Board of Election Commissioners of Revere, 403 Mass. 20 (1988), the court invalidated an election where the ballot failed to designate the plaintiff as an incumbent, and he lost the election by less than one per cent of the total votes cast for school committee candidates. The court found that, where the margin of victory was so small, it could not be said with confidence that the failure to designate the plaintiff as an incumbent, as required by state law, did not effect the outcome, particularly where the other three incumbents, who were properly designated as such, topped the ticket and were re-elected. See also McCavitt v. Registrars of Voters of Brockton, 385 Mass. 833 (1982) (annulling election where margin of victory was 6 votes and 7 absentee ballots should not have been counted due to material defects in how the ballots were cast, thereby calling the election into question).

In Medway's case, although there was a procedural irregularity in that the warrant for the election was not posted as required, it seems unlikely that this lack of posting affected the outcome of the election. Under the case law, the courts will not invalidate an election due to procedural irregularities where the will of the voters is clear and there is no showing that the failure to post disenfranchised voters.

If you have further questions in this regard, do not hesitate to contact me.

Very truly yours,

Barbara J. Saint André

cc: Mary Jane White, Town Clerk