TOWN OF SMITHSBURG

21 West Water Street
Smithsburg, MD 21783

Phone: (301) 824 – 7234
Fax: (301) 824 – 6219

September 6, 2021

Honorable Brian A. Frosh
Maryland Attorney General
Attorney General's Office
200 St. Paul Place
Baltimore, MD 21202

RE: Charter Amendment Procedure

Dear Attorney General Frosh:

On behalf of the Town of Smithsburg, Maryland, I seek an Attorney General's opinion with respect to the following related issues:

1. Is compliance with MD Code Ann., Local Government, §4-304(a)(2) a condition precedent which must be strictly adhered to in order that a proposed and passed resolution as to charter amendments may become effective? Copies of the four amendments are enclosed for your reference.
2. If said charter amendments are not effective, then was each official appointed to serve based on the authority to appoint granted through the invalid charter amendments serving as *de facto* officer (if not *de jure* officer) such that any legal actions taken by him or her which serving are considered valid?

I believe that this request involves substantial questions of State law and has ramifications beyond the specific local facts given rise to the request.

I have enclosed the opinion and legal analysis of the Town Attorney as to these issues.

Thank you for your consideration in this matter.

Very Truly Yours,

Donald L. Souders
Mayor

Enclosures (5)

Cc: Town Council
Jason Morton, Esquire
Chief Council, Opinions and Advice

LAW OFFICES OF
SALVATORE & MORTON, LLC
82 WEST WASHINGTON STREET
HAGERSTOWN, MARYLAND 21740

(301) 739-3600
(301) 797-6065 FAX
www.salvatoremorton.com

John R. Salvatore
Jason Morton
Brian M. Kurtyka

August 20, 2021

Hon. Donald L. Souders
Town of Smithsburg, Maryland
Town Hall
21 West Water Street
Smithsburg, Maryland 21783

RE: Charter Amendment Procedure

Dear Mr. Mayor:

In connection with certain charter amendments which were presented via resolution in October 2019, you have requested a legal opinion on the following issues:

1. Is compliance with MD Code Ann., Local Government, § 4-304(a)(2) a condition precedent which must be strictly adhered to in order that a proposed and passed resolution as to charter amendments may become effective?
2. If said charter amendments are not effective, then was each official appointed serve based on the authority to appoint granted through the invalid charter amendments serving as a *de facto* officer (if not a *de jure* officer) such that any legal actions taken by him or her while serving are considered valid?

My opinion is that, while strict compliance is desired, the Maryland Courts have provided interpretation and guidance that the lack of full compliance does not always make the action taken by a municipality fatally flawed, and where the facts and circumstances support that the electorate has been sufficiently afforded its opportunity to exercise its rights, then it is reasonable to conclude that the action taken to amend the charter under Local Gov't § 4-304 is valid. It is further my opinion that the voters were sufficiently notice of the proposed charter amendments, as well as several opportunities to provide comment to the elected body to enable a conclusion that the adoption of the charter amendments was valid.

As to the second question, it is my opinion that, should the charter amendments be declared invalid, a court would conclude that the actions taken in reliance on those charter amendments would be declared the valid and legitimate acts of *de facto* officers filling a *de jure* office. The officers acting in reliance upon the charter amendments had no knowledge that the amendments may not have been validly adopted, there is no allegation of misconduct or wrongful motives, and public policy supports recognizing the acts of *de facto* officers as valid.

QUESTION 1: COMPLIANCE WITH § 4-304

The Maryland Annotated Code, Local Government Article, § 4-304 governs the process for amending the charter of municipalities. A resolution must be passed by a majority of the persons elected to the legislative body. *Local Gov't. § 4-304(a)(1).* "The contents of the resolution 'shall contain the complete and exact wording of the proposed amendment,' prepared so that the sections amended are set forth as they would read in their future enacted form." *Blackwell v. City Council for City of Seat Pleasant*, 94 Md. App. 393, 398 (1993). "Sections [4-304(b)-(d)] require that before the resolution becomes effective it must be posted in the main municipal building and published in a newspaper of general circulation in order to give the electorate notice of its statutory right to petition for referendum. The proposed amendment becomes effective on the fiftieth day after being passed, unless a petition for referendum signed by 20% or more of the persons qualified to vote in the general elections of the municipal corporation is received by the legislative body on or before the fortieth day after the resolution is passed." *Id.* (citations omitted.)

In 2018, the General Assembly passed an amendment to Local Gov't, § 4-304, to add the following: "Before adopting a resolution initiated by the legislative body of a municipality that proposes an amendment to the municipal charter, the legislative body shall: (i) hold a public hearing on the proposed amendment; and (ii) give at least 21 days' advance notice of the public hearing." *Local Gov't § 4-304(a)(2).* This amendment became effective on July 1, 2018.

The Town of Smithsburg ("the Town") undertook consideration of several amendments to the Town Charter, including revising the procedure for filling a permanent vacancy in the position of Mayor, beginning with a work session on September 24, 2019. The Town held a work session on September 24, 2019, at which it considered and discussed the proposed charter amendments. As is customary at all council meetings, the Town permitted interested individuals to provide comment at that time, and, in fact, interested citizen David Dan provided comment.[1] The *Herald Mail* newspaper published an article regarding the proposed charter amendments on September 25, 2019, in which it quoted then-Mayor Kesselring, Councilmembers Souder and Weaver, and interested citizen David Dan. The article further stated that Councilmember Hetherington said they would take [Dan's] comments into consideration. The Town held a Regular Session on October 1, 2019, at which time they heard citizen comments prior to undertaking any new business. Mr. Dan spoke again during citizen comments and addressed the proposed charter amendments. The Town also heard comments from one other citizen regarding the proposed charter amendments. The Town subsequently voted on, and approved, the charter amendments. In accordance with State Law, the amendments stated that they would become effective on the 50th day after adoption. The Town did not advertise for, nor did it hold, a public hearing.

[1] At the time, David Dan was a resident and interested citizen. Mr. Dan was subsequently elected to serve on the Town Council in 2020, and he is serving in that capacity at the time of this letter.

The Maryland Courts and the Attorney General have previously provided guidance concerning the validity of charter amendments when the public body has failed to comply fully with enabling legislation. In 2009, the Attorney General undertook analysis of the validity of two charter amendments "when the County failed to comply fully with publication notice requirements." 94 Op. Att'y Gen. 111 (2009). In that instance, the County failed to publish notice in advance of a referendum election for the five weeks required by the State Constitution and County Charter, instead publishing notice for only three and one-half weeks. There, the Attorney General agreed with the County Attorney's conclusion that, "in light of the publicity that the referendum otherwise received, and the distinction made by voters in rejecting one of the proposed amendments and adopting the other by very different margins, a court would likely apply the more lenient standard of review that is used in some post-election challenges. Under that standard, a reviewing court would not disturb the results of the election." *Id.*

The Court of Appeals, in *Dutton v. Tawes*, 225 Md. 484 (1961), considered the validity of a referendum vote when the publications requirements were not strictly met. In *Dutton*, the statute required publication "by at least one insertion in two or more newspapers within the several counties of the State and all of the daily newspapers published in Baltimore City." *Id.* at 490. The notice was only published one time in the *Baltimore Sun*, instead of in fifty-six papers state-wide. *Id.* The Court held that:

> We think, however, that the record shows there was substantial, if not full, achievement of the *purposes of the statute to acquaint the electorate fully with the law involved, and nothing to show that the deviation from the prescribed mode of acquainting, misled the voters or prevented, frustrated or interfered with a free, full and intelligent expression of the popular will.*

Id. at 493. [emphasis added].

The cases cited thus far have addressed compliance versus substantial achievement of the purpose with respect to publishing notice in advance of an election. The Court of Special Appeals extended this analysis to the statutory requirements for amending a municipal charter in *Blackwell v. City Council for City of Seat Pleasant*, 94 Md. App. 393 (1993). In *Blackwell*, the Court considered the validity of charter amendments adopted via resolutions "which purported to be effective on [the same date that they were] adopted by city council[,] mislead[ing] voters to believe that the resolutions were no longer subject to referendum[.]"[2] *Id.* at 393. While ultimately determining that an acceptable degree of compliance was not achieved under the set of facts in *Blackwell*, the Court held that, "We agree that while compliance is desired, it is not

[2] As noted above, Maryland Annotated Code, Local Government, § 4-304 requires that a proposed charter amendment becomes effective on the fiftieth day after being passed, unless a valid petition for referendum is received by the legislative body on or before the fortieth day after the resolution is passed.

always mandatory. Substantial compliance, however, that sufficiently affords the electorate an opportunity to exercise its rights, is required." *Id.* at 405.

The purpose of a public hearing is to afford interested citizens an opportunity to provide and receive information associated with the decisions to be made by the elected body. The purpose of providing notice to the public is to ensure that interested citizens are aware of issues being considered reasonably enough in advance such that the individual can either make plans to attend or otherwise provide comment to the elected body.

It is without question that the Town did not strictly comply with Local Gov't § 4-304 either by providing notice of a public hearing at least 21 days in advance of the hearing, or by holding a public hearing. However, there is evidence to show that the Town did substantially comply with the purpose of the statute by posting the agenda in advance of the September 24, 2019 work session, as well as posting the agenda in advance of the October 1, 2019 regular session. The Town shares its agenda by the Friday immediately preceding the meeting, meaning that an interested citizen could have had knowledge that the charter amendments were up for consideration as much as four (4) days in advance of the work session and eleven (11) days in advance of the October 1 regular session. Sharing these agenda items in advance of both meetings would enable any interested citizen to be aware of the items up for discussion and either attend the meeting(s) or otherwise reach out to the elected body. Additionally, the Town provides opportunities for citizens to comment at both work sessions and regular sessions, and so any interested citizen had the opportunity to observe his elected officials, receive information about the proposed changes, and provide information or commentary at both the September 24 meeting and the October 1 meeting. Citizens did, in fact, appear and provide comment at both the September 24 meeting and the October 1 meeting, prior to council undertaking a vote on the resolutions to amend the charter.

Additionally, the *Herald Mail*, the general circulation newspaper serving Washington County, published an article on September 25, 2019 entitled *Smithsburg mayor says he's not resigning, despite proposed charter change*. This article not only included comments from Mr. Dan, but also stated that the council had scheduled a vote on the amendments for Tuesday, October 1. "A number of courts have held that achievement of the result intended by the requirement of statutes as to notice or publication – that is, the apprising of the voters of the issue to be voted on – by nonstatutory methods, such as newspaper, radio and television discussions or private advertisements or circulars, will be enough to uphold an election where there was a full and apparently free vote." *Dutton* at 495. While not likely sufficient in and of itself, the newspaper article assisted in apprising the public about the proposed charter amendments.

Finally, there is no indication that a petition for referendum was initiated or circulated, much less presented to the legislative body on or before the fortieth day after the body adopted the charter amendments. This supports that the lack of a public hearing (and corresponding

notice) is more akin to "an irregularity which do[es] not...invalidate [the result]" versus a fatal flaw that nullifies the adoption of the charter amendment. *Id.* at 495 (citing 3 McQuillin, Municipal Corporations (3rd Ed.), Sec. 12:12, p. 94)

I conclude that there was substantial compliance with the purpose of the public hearing such that the adoption of the charter amendments should not be declared invalid. The public had advance notice of the proposed amendments, as well as an opportunity to comment at two public meetings. The amendments were the topic of an article published in the newspaper of general circulation for the county in which the Town is located. The process for voters to exercise their right to petition for a referendum was not disturbed, nor was it acted upon, and so there does not appear to be any interference with the full and free will of the voters.

QUESTION 2: RESULT OF INVALID CHARTER AMENDMENTS

> An officer *de facto* is one whose acts, though not those of a lawful officer, the law upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised...under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.

Buckler v. Bowen 198 Md. 357, 369 (1951) (quoting *State v. Carroll* 38 Conn. 449, 471).

It is well-settled that the courts have recognized the validity of *de facto* officers. There are strong publicly policy and necessity grounds for recognizing the validity and binding nature of the actions taken by *de facto* officers. If the Attorney General opines, in response to Question 1, that the charter amendments purported to be adopted on October 1, 2019 are not now effective, then there remains the question of whether the actions taken by Town actors in reliance upon those charter amendments were valid. I submit that those actors (whether he or she be the Vice President having been appointed Mayor in response to the resignation of the previously-elected or -appointed Mayor or the councilmember having been appointed to fill the vacancy created by the elevation of the Vice President) are *de facto* officers who were acting under color of appointment.

"A *de facto* officer may be defined as one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper." *Buckler* at 370 (quoting *Waite v. Santa Cruz* 184 U.S. 302, 323 (1902)).

It seems clear that the actors appointed in reliance upon the October 1, 2019 charter amendments qualify as *de facto* officers. They were appointed and have served openly and in full view of the public, and, immediately upon it being brought to the attention of the Town that the charter amendments were adopted without holding a public hearing, the Town sought advice from its legal counsel and likewise an opinion from the Attorney General. There has been no assertion that the actors possess any wrongful motives or have discharged their offices in secret, nor has there been a claim that the actors are mere usurpers. Public policy leans strongly in favor of recognizing the legitimacy and validity of their official acts.

CONCLUSION

The facts support that the Town substantially complied with the requirements of Local Gov't § 4-304, and that the electorate was afforded an opportunity to exercise its rights. For the reasons cited in this letter, the Town believes that the charter amendments were validly adopted. However, if not, then the Town believes that the facts clearly support that the Town officials appointed in reliance upon the charter amendments were acting as *de facto* officers, and that their actions were valid and binding.

You intend to ask that the Attorney General review this matter and provide an opinion concerning both questions.

Very truly yours,

Jason Morton