

CITY OF NEWTON

IN BOARD OF ALDERMEN

PROGRAMS AND SERVICES COMMITTEE REPORT

WEDNESDAY, NOVEMBER 17, 2004

Present: Ald. Johnson (Chair) Ald. Hess-Mahan (Vice Chair) Ald. Merrill, Fischman, Baker, Sangiolo, Parker

Absent: Ald. Coletti

Also Present: Associate City Solicitor Gayle Smalley, Kathleen Coll, Rodney Barker, Tom Sheff, David Guberman, Rudy Riedl, Tim Snyder, Keith Hatfield

**REFERRED TO PROGRAMS & SERVICES AND FINANCE COMMITTEES**

#450-04 HIS HONOR THE MAYOR requesting an appropriation in the amount of \$25,000 from Budget Reserve for the purpose of supplementing the Law Department legal assistance account. These funds are needed in order to pay legal fees for the outside counsel who is representing the City in the zoning appeal involving the Teddy Bear Club.

**ACTION:** **APPROVED 5-0 (Sangiolo, Parker not voting)**

**NOTE:** **Update on the Teddy Bear Club:** City Solicitor Dan Funk was present and explained that presently this case sits in a posture that is not very good for the City in that at the beginning of the case the Teddy Bear Club was successful in having the land court grant an injunction to reinstate the building permit that the ZBA had struck down allowing them to build. All through the process the injunction was upheld. The work that occurred after that involved clarification as to whether or not the order of the court included a final Certificate of Occupancy. A traffic expert had been hired to help the city's cause and eventually the court clarified its order indicating that they were issued a Certificate of Occupancy as long as it complied with the conditions of the building permit. In the meantime, the Teddy Bear Club received their license from the Office for Children and they opened this past fall. A summary judgment motion brought by the Teddy Bear Club that succeeded in essentially getting their rights adjudicated in their favor as a matter of law and basically the grant of the building permit could not be reversed by the ZBA as it was beyond their authority.

There is still a piece of the case alive in the trial court. They are challenging our ordinance. The case is not over. If an appeal were to be considered, one way would be to move for a partial final judgment on the issue already resolved giving the opportunity to appeal or wait until the entire case is over and then decide if there will be appeals to any issues at that time. At the moment, there has been no appeal and no one has moved forward seeking that opportunity to appeal at this time. So far, no problem has been seen but there are still questions regarding what the winter parking, etc. will bring.

Diane Tillotson, outside Counsel, has been paid \$30,000 over a year's worth of work, but we have received her bill of approximately \$11,000 - \$12,000 owed her for work done. Mr. Funk said that there was nothing in his budget because it was so uncertain as to how

much of the case would go forward. The figure of \$25,000 has been requested, about half has been essentially spent, the rest in reserve until we know how much of the case goes forward. Given the uncertainties and the present bill, Solicitor Funk was requesting this amount.

Chairman Johnson asked if the city did not appeal, could the neighbors appeal and would it go through the city. Dan Funk said the city could possibly get out of the case and the neighbors could decide to stay in.

The Committee approved this request and the vote was 5-0.

### PUBLIC HEARINGS

**Chairman Johnson explained that Programs and Services does not have to hold Public Hearings on the following three items. However, as Chair, Ald. Johnson believes that when there is a proposal to make some substantive changes to the City Charter, that it is only fair that citizens have input. She mentioned that the "TAB" had made an error in reporting that item #171-04 had been approved by the Programs and Services Committee. The wording of the ordinance had been approved but the item itself has not been approved by the Committee. The reason for the Public Hearing is to gather public input prior to a committee vote.**

#171-04      ALD. HESS-MAHAN requesting home rule legislation authorizing local voting rights for permanent resident aliens residing in Newton.

**ACTION:      HELD 5-0 (Sangiolo, Parker not voting)**

**NOTE:      Background:** Ald. Hess-Mahan explained this is a proposal requesting Home Rule legislation authorizing local voting rights for permanent resident aliens residing in Newton and allowing the right to vote in local elections to people who are lawfully admitted to this country on a permanent basis but are not yet citizens. In order to be able to vote in the state of Massachusetts you need to be 18 years of age, a resident of the municipality in which you are seeking to vote and also a United States citizen. However, since this a home rule state, it is possible through home rule legislation to seek an exception for Newton to allow non-citizens to vote in local elections.

At the last meeting, the Programs and Services Committee came up with language that tried to effectuate what it was that Ald. Hess-Mahan was proposing and it was made very clear that what we were seeking was local voting rights for those who had been lawfully admitted for permanent residence in the United States and who meet all qualifications except for United States citizenship and those residents may have their names entered on a register of qualified permanent resident alien voters.

It seemed to Ald. Hess-Mahan that if a person owns property in Newton, lives here, works and pays income taxes and is affected in their every day lives by the decisions that local elected officials make, they would have a stake in how the community is run.

Newton is a community that is intentionally inclusive and prides itself on its diversity and it seems unfair as far as elections go. Ald. Hess-Mahan wanted to make perfectly clear that this would only be for **local voting rights** such as Board of Aldermen, Mayor's office election, School Committee and the Newton Highland Neighborhood Council. Ballot questions such as an override would be included. The number of people affected would be between 2500 and 3000. One out of five people living in Newton are immigrants from other countries. Most of them do become citizens, but it is a long and arduous process.

**Why is this being proposed?** Ald. Hess-Mahan said he proposed this item because when he was running for election last year, many of his friends who happened to be immigrants asked if they could vote for him. Some came back to him and said they found they could not vote because they were not United States citizens. In a number of other cities around the country, including municipalities in Maryland, New York and Chicago, non-citizens have been allowed to vote. They all had slightly different rules regarding residency, etc. but the bottom line was if you wanted to vote for the local School Board, School Committee, City Council, Board of Aldermen, Board of Selectmen, in those particular places you were able to vote.

**What is home rule legislation?** President Baker explained that the Massachusetts Constitution has a "home rule" provision that gives cities and towns independent authority over certain matters unless the state legislature has taken away that authority in a particular area. The legislature has passed election laws that apply to voting rights in local elections; however, a city or town can seek an exception through a home rule petition, which is a request to the legislature to pass a "special act." Ald. Parker added that a home rule petition is really "special legislation" asking for an exemption from what would ordinarily be allowed under state law.

**What is a permanent resident alien?** For these purposes, a permanent resident alien means the same thing as someone who is lawfully admitted for permanent residence in the United States. It is the understanding of Ald. Hess-Mahan that you can come to this country legally without being lawfully admitted for permanent residence. In order to become a permanent resident alien, a person would have to meet certain qualifications, including, among other things, being lawfully admitted and showing intent to stay. Immigration Attorney Rodney Barker addressed the question regarding the issuance of green cards. He said the only people who get green cards are permanent resident aliens and those who marry United States citizens.

### **Opinions of Members of the Public**

**Kathleen Coll, 20 Fairmont Ave. Cambridge** She is Director of Women Studies at Harvard, and the parent of two children in the Cambridge Public Schools. Ms. Coll has only lived in Cambridge for six years, but immediately after arriving in town was eligible to vote in local elections. Her daughters go to school in a city where one in three is from an immigrant home. She wanted to share the fact that Amherst was the first town to

introduce Home Rule Petitions similar to Newton. Cambridge introduced their bill two full legislative cycles ago and is now ready to enter their third. The election laws committee and the state house have passed almost no laws out of their committee. There presently is in the House Council's Office enabling legislation being drafted that would allow cities and towns to decide whether to permit non-citizens to vote in local elections. Greater Boston Legal Services compiled a list of the status of 22 different kinds of legal immigrants that are not legal permanent residency status. One reason that more than 22 states at one time or another allowed non-citizens to vote was they thought this was the best way to promote citizenship. If you get people who are immigrants engaged in local politics, that is the best way to make people feel like it actually matters to participate in local politics in this country. One thing to keep in mind, Ms. Coll said that historically there isn't a privileged link between citizenship and voting, not here and not in other liberal democratic societies. Ireland will let any immigrant who settles in their country vote as soon as they settle in the municipality regardless of whether they are citizen or not; the same is true in Australia and New Zealand. Ms. Koll noted that the first member of the U.S. military to die in Iraq in the line of duty was not a United States citizen. He was a Latin-American who had permanent residency but was not yet a United States citizen.

**Rodney Barker of 49 Woodcliff Road.** He said he was interested in this for many years as he was a lawful permanent resident but not a citizen. He lived in Newton for many years paying taxes, sending his children to Newton Schools, etc. but couldn't vote. He felt he was basically disenfranchised. Eventually he became a citizen. The nature of the lawful permanent resident is partly intent. You have to show when you get the card or visa that you **intend** to remain and live in the United States. If you leave the United States for more than six years, you have to prove that you are still permanent. If you leave for twelve months, the government can take your card away. If someone is a lawful, permanent resident, they are by their nature and by law a resident and permanent. He stressed that this bill before the board is only for lawful permanent residents. Usually it is a five year wait to become a citizen unless you marry a U.S. citizen. To become a citizen, there is a simple test consisting of ten questions and six must be answered correctly. Ald. Fischman questioned if it would be easy for the Election Commission to recognize an eligible person. Mr. Barker explained it would be quite clear. President Baker asked about the percentage of permanent resident aliens and Ald. Hess-Mahan responded that there are between 2500 and 3000 Newton residents who are permanent resident aliens who are otherwise eligible.

**Tom Sheff, 454 Dudley Road.** Mr. Sheff read the first eight words of the 15th, 19th and 25<sup>th</sup> amendment, "The right of citizens of the United States." He continued to say that it specifies citizens of the United States and also says a right which is a privilege, a privilege that the American citizens have that others do not have. In his opinion, we lose that right if we let this go. If this passes he feels that possibly in 30 years, it could be agreed to make non-citizens vote in national elections. He said he does have sympathy for the immigrants, but when voting rights are considered, he felt we have to take a look at the ramifications of our decisions. In his opinion non-citizen voting is a bad concept

because it would remove an incentive for becoming a U.S. citizen. He continued to say that the essence of citizenship is the right to vote and extending voting rights to non-citizens eliminates the last distinction between people who have accepted permanent citizenship and those who haven't.

**David Guberman, 185 Oliver Road.** Mr. Guberman said he was broadly sympathetic to the proposal. He felt that an oath of allegiance to the United States really doesn't speak to whether someone does or doesn't have a stake in what happens in Newton and perhaps an interest in the common welfare of the community. With respect to the specific proposal that in one sense it is too restrictive and in another sense felt it was not restrictive enough. Simply by right of citizenship, Mr. Guberman said he could move to another community and in a few weeks be entitled to vote without having any particular stake even if he knew he would be leaving shortly. It seemed with respect to non-citizens that are not able to enjoy that right to vote that it is legitimate to limit an imposition of one or two year residency requirement so that would be clear that we are talking about people who have a stake in the community on a continuing basis. Mr. Guberman felt the proposal in its current formulation is not restrictive enough. On the other hand, it is too restrictive in requiring that the non-citizen be a permanent lawful resident alien.

Ald. Hess-Mahan asked for clarification if his suggestion was for two-year residency for all registered voters; citizen or non-citizen or just for non-citizens. Mr. Guberman responded that the constitution doesn't allow the imposition of a residency requirement of that length for citizens, but where we are talking about people who don't have a constitutional right to vote, they don't have a constitutional right to vote in the same terms as citizens who may be transiently in the city.

**Rudy Riedl, 34 Waterston Road.** He had concern that if this passes, the same would apply to national elections.

**Tim Snyder, 25 Alden Place.** Mr. Snyder wanted to speak in favor of the proposal. He noted that when he tried to encourage people to register to vote, they couldn't register because they were not citizens. It is very difficult to build the fabric of a democratic community if large portions have no stake in participating in that process.

**Keith Hatfield, 29 Allen Avenue.** Mr. Hatfield wanted to clarify that permanent resident aliens over 18 have to register for selective service and that they would be subject to a draft.

#### PUBLIC HEARING

#214-04      ALD. JOHNSON requesting that the City Charter relative to the schedule for Preliminary Municipal Elections be amended in order to make the Charter consistent with state election statutes.

**ACTION:**      **HELD 5-0 (Sangiolo, Parker not voting)**

**NOTE:**

**Background:** Gayle Smalley said the Charter describes the city election as being the first Tuesday following the first Monday. This preliminary election will be held in the city on the fourth Tuesday before the City Election. If we were to follow this charter provision the preliminary election would be held in early October. It was her understanding that this provision has not been followed for a long time. In fact what has happened is the Board of Aldermen has set an election date for mid-September of every year. This is necessary because it is not physically possible to have ballots printed and absentee ballots processed to fairly carry out the election in November unless the preliminary was back in September. It now says four weeks prior and it could be changed and say six, seven weeks (some sort of defined date) or we could establish a provision that authorizes the Board and the Mayor to set the date. This would be a charter amendment that would proceed by seeking home rule legislation.

Chairman Johnson noted that Peter Karg, Secretary of the Elections Commission, recommends a proposed calendar counting back from the general election which the board approves. Mr. Karg is also behind the change in the Charter so that Newton is consistent with the state election laws.

No citizens spoke on behalf or against the item.

**PUBLIC HEARING**

#215-04

**ALD. JOHNSON** requesting that the City Charter be amended to allow more flexibility when filling a vacancy for Mayor, Board of Aldermen, and School Committee.

**ACTION:**

**HELD 6-0 (Parker not voting)**

**NOTE:**

**Background:** In December of 2003, a newly elected alderman resigned. There was a vacancy early on in the term and at that time there was a fair amount of discussion on the board on setting the date to have the election to fill that vacancy. The way that the Charter is currently written states the election will be held “forthwith”. This gets translated to as soon as possible to immediately which does not give the Board of Aldermen much flexibility if there is another election such as a state election, primary election, federal election, that is close to when that vacancy needs to be filled so that we could piggy back and save the money. (This most recent Special Election cost approximately \$60,000)

**Wording Options:** When working with the Law Department and Election Commission, wording was discussed to take the place of “forthwith”. The most favorable response in this committee is “the Board of Aldermen without unreasonable delay and no later than six months of the date of the vacancy shall call a Special Election to fill such a vacancy.” This way we are bounding the authority that the Board of Authority has so we can’t push it way out. The focus for this change is **only** on the Board of Aldermen; the Mayor and the School Committee are not being considered.

The option of “the Board of Aldermen without reasonable delay shall call a special election to fill such vacancies” did not receive any support.

The third option of the Board of Aldermen shall forthwith call a special election to fill such vacancy. If another election is scheduled or expected to take place within eleven months of the date of the vacancy, the Board may call the election to take place on the same date. That choice put some parameters on it and had some favorable reaction from members of this Committee.

**Use of “forthwith” as currently in our charter:** Ms. Smalley explained that the word “forthwith” appears in all three of the vacancy provisions. In 1994, the City had experience with Middlesex Superior Court interpreting that word in the context of the Mayoral vacancy. After the death of Mayor Mann, the Board sought to schedule the elections for the death in April. The Board sought to schedule the elections in autumn for better turnout and sought special legislation all the while holding the election forthwith as the Charter would have otherwise required, instead of asking the legislature to excuse the City from the Charter provision. A lawsuit arose, and the court issued a memorandum and ordered exactly one month following the date of the death. To be sure the word “forthwith” has some flexibility and does not require action within seconds or even hours from the time the vacancy occurs. The word cannot be stretched to mean as soon as it becomes clear that other approaches will not work. “Forthwith” certainly is within 30 days. (“Forthwith” - as soon as possible and without any delay)

### **Opinions of Members of the Public**

**Tom Sheff** said he hoped an effort would be made to save the taxpayers money and put it in with other elections.

### **DISCUSSION BY THE COMMITTEE FOLLOWING THE CLOSE OF THE PUBLIC HEARING**

#171-04 ALD. HESS-MAHAN requesting home rule legislation authorizing local voting rights for permanent resident aliens residing in Newton.

**ACTION:** **HELD (6-0) (Parker not voting)**  
**NOTE:** **Committee Members’ Comments:**

Ald. Fischman said permanent status seemed the way to go. The green card sounds like it would do the job. He felt the key was to have the simplest approach. He also felt the residency requirement was attractive.

Ald. Merrill said he was inclined to give the benefit of doubt to individuals who come into the country and are issued a card that states they intend to be permanent resident.

Chairman Johnson mentioned her heritage. She added that she is very fortunate as she is also a descendent of people who founded or came over, not on the Mayflower but one of the ships afterwards, and fought in the Revolution, (fought because of taxation without

representation) She is also a descendent of an American Indian. The people being considered to have the right to vote in Newton local elections are paying taxes, go to war and are not able to have representation here in Newton. She felt it was important to go back to the roots and why we all are here; what we cherish so much about this country. However, the length of time to become a citizen can be much longer and it is more challenging as resources to the process of applications for citizenship become shorter and as funds for this sort of thing get reallocated elsewhere and post September 11<sup>th</sup>. It is not just five years, but can be a long and discouraging process.

Chairman Johnson did raise the question of what type of feedback has been received from the Election Commission on this. Ald. Hess-Mahan has not heard from the Election Commission. One issue that Mr. Karg had mentioned in the past was to give the Election Commission the appropriate flexibility so that they could work out whatever rules that needed to be worked out. One reason Mr. Rodney Barker was invited was to help answer questions about administration and enforcement on the other side. Mr. Karg has indicated concern over the ability to prove that you are permanent resident alien. Ald. Hess-Mahan said there would need to be a separate list because they would only be eligible to vote in local elections. If you were not entitled, it would be a felony to vote in an election. Chairman Johnson would like to hear from the Election Commission. President Baker questioned if we said this would be for a permanent resident, it would be one thing to be qualified and then if you lose your permanent resident status, it would be automatic to be un-enrolled. An important issue raised was could these same people run for office and it was decided this needed more discussion.

The Committee voted 6-0 (Parker not voting) to hold.

#214-04 ALD. JOHNSON requesting that the City Charter relative to the schedule for Preliminary Municipal Elections be amended in order to make the Charter consistent with state election statutes.

**ACTION:** **HELD 5-0 (Sangiolo, Parker not voting)**

**NOTE:** This was held in order to allow Ms. Smalley to prepare some draft language for the committee to review.

#215-04 ALD. JOHNSON requesting that the City Charter be amended to allow more flexibility when filling a vacancy for Mayor, Board of Aldermen, and School Committee.

**ACTION:** **HELD 6-0 (Parker not voting)**

**NOTE:** Ald. Linsky does feel the “forthwith” has to be replaced because there is very little sense in holding special elections at times when there would be very little voter participation that warrants it.

Ald. Hess-Mahan said that if the election had been called “forthwith” after the untimely demise of Ted Mann in April, four months later would have been August. He felt it



would be unfortunate if an election would have to be scheduled in a time when many people are on vacation in August; it would deprive many people the right to vote.

In his view, President Baker would like some flexibility to avoid the problem just described as well as having an unintended gap in the system for a long time. Chairman Johnson suggested that President Baker come up with some suggestions to solve that issue by working with Ms. Smalley to craft some language that will allow some piggybacking where possible, but not free range to just push off an election indefinitely. The Committee voted to hold.

Respectfully submitted,

Marcia Johnson, Chair