



**Town of Arlington
Legal Department**

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To: Arlington Select Board

Cc: Adam Chapdelaine, Town Manager

From: Douglas W. Heim, Town Counsel

Date: March 18, 2021

Re: Annual Town Meeting Warrant Articles ## 11, 19, 20, 24, and 26

I write to provide the Board a summary of the above-referenced warrant articles to assist in the Board's consideration of these articles at its upcoming hearing on March 22, 2021. In the interests of clarity, articles are presented in the order in which they appear on the Warrant. Please note that warrant article numbers have been revised following re-ordering of articles in the final warrant.

ARTICLE 11

BYLAW AMENDMENT/STORMWATER MANAGEMENT

To see if the Town will vote to amend Title V, Article 15 of the Town Bylaws ("Stormwater Mitigation") to update such bylaw so as to add, remove or amend definitions, clarify the bylaw's procedures and applicability to certain projects, and adjust fees; or take any action related thereto.

(Inserted by the Select Board)

This Article returns from the truncated 2020 Annual Town Meeting, following positive recommendation by the Select Board. As members of the Board may recall, the purpose of this Article, jointly sought by the Town Engineer and the Environmental Planner, is to update the Town's "Stormwater Mitigation" bylaw to clarify the purpose and goals of the ordinance, and provide for a suite of changes to improve coordinated administration between departments in administration of same. The changes contemplated in a draft motion provided below include, but are not limited to:

- Providing clear goals of the bylaw (including rebranding the bylaw) and specific objectives as well as statutory bases for authority;
- Improving definitions;
- Clarifying applicability within the context of different kinds of projects;
- Explicitly allowing for the promulgation of detailed rules and regulations consistent with the bylaw; and
- Ensuring compatibility with EPA permitting.

There are further modest updates to the 2020 proposal, adding language mandated by the so-called "MS4" permits required by the EPA and revising definitions for consistency with Conservation Commission regulations. Should the Board be inclined to endorse this article, appropriate revised language has been provided by Emily Sullivan, Environmental Planner in your reference materials.

ARTICLE 19 VOTE/ESTABLISHMENT OF TOWN COMMITTEE ON AUTO AND PROPERTY INSURANCE CLAIMS AND LOSSES

To see if the Town will vote to establish a committee to learn the annual cost of auto and property insurance premiums and insurance claims in the Town of Arlington; or take any action related thereto.

(Inserted by the Select Board at the request of Andrew Fischer and ten registered voters)

This article returns to Town Meeting following its postponement from further discussion on the 2020 Annual Town Meeting Warrant (the Board conducted a warrant article hearing, but substantively tabled the matter thereafter). While I expect Mr. Fischer will again provide further

detail on his proposal, to my understanding, this article seeks to create a committee of Town Meeting to canvass residents about costs of their auto insurance and claims. Mr. Fischer is not necessarily proposing to start a Town automotive insurance program for residents, but would like to report findings to Town Meeting.

At the 2009 Annual Town Meeting, both the Select Board and the Town Meeting voted to support Article 68 – a resolution to support the creation of a Task Force for of the Attorney General’s Office to study the issue of municipalities as auto-insurers , following a bill submitted to the Legislature on the same score.

At that time, support was afforded to exploring whether or not a municipal auto-insurance operation could serve a source of revenue for the Town as well as providing an alternative to private insurance carriers. Among the myriad issues the Committee would need to assess should the Board be inclined towards favorable action, is how the Town would organize an auto-insurance arm of the government, determine and raise the initial amount of money necessary to write and back up insurance policies, market and sell policies, and project the subsequent staff needed to operate a municipal insurance agency.

ARTICLE 20

VOTE/PUBLIC REMOTE PARTICIPATION

To see if the Town will vote to establish parameters for interactive, simultaneous remote participation by members of the public in meetings of all public bodies in the Town of Arlington; or take any action related thereto.

(Inserted at the request of Elizabeth Dray and ten registered voters)

To my understanding, the purpose of this article is to establish a set of uniform parameters for public bodies conducting meetings by “Zoom” or other videoconferencing technology by town bylaw or special legislation depending on the final parameters of what is proposed. By default, significant discretion is afforded to the chairs of public bodies with respect to how they will administer meetings of such bodies so long as they meet the requirements of the open meeting law. A town bylaw likely could establish further terms by which remote participation is to be conducted.¹ If however, the article’s proponent proposes to amend any

¹ The Open Meeting Law affords municipalities the ability to further restrict the use of remote participation beyond the requirements of 940 CMR 29.10. While the intent of the proponent does not appear to be to restrict the use of remote participation, setting mandatory criteria for

requirements of the Open Meeting Law relative to Arlington public bodies, special legislation would be required.

Remote Participation by Public Body Members

As an initial matter, it is important for the Board and the public to recognize that in ordinary time, remote participation by members of public bodies is only permitted under limited circumstances under the Open Meeting Law as detailed in c. 30A sec. 20(d) and 940 CMR 29.10. It is only by operation of the March 11, 2020 Executive Order of Governor Baker that the general requirement for public bodies to meet in person is suspended during the COVID-19 Pandemic.

Absent the Executive Order's suspension of such requirements, in order to have any remote participation by members a municipality's executive body must first vote to authorize remote participation by its public bodies (which this Select Board has done).² Second, because the Attorney General's Office believes that in person participation is more transparent than remote participation, the law encourages members of public bodies to physically attend all meetings. Thus, there are only five permitted reasons for remote participation:³

- 1) Personal Illness;
- 2) Personal Disability;
- 3) Emergency;
- 4) Military Service; and
- 5) Geographic Distance.⁴

Third, remote participation is further limited to those circumstances where:

1. A quorum of the public body are physically present at a physical meeting location;

employing remote participation and would *likely* be construed as additional requirements and approved by the Attorney General's Office.

² The sole exception to this requirement is a local disability commission, which shall be discussed further below.

³ These reasons should be provided by the Chair at the start of the meeting.

⁴ The Attorney General's Office has consistently advised that geographic distance cannot be a mere inconvenience. In person attendance must be "unreasonably difficult."

2. Remotely participating members *and all persons present at the meeting location must be clearly audible to each other*;⁵ and
3. All votes taken during a meeting in which a member participates remotely must be by roll call vote.

Furthermore, if videoconferencing is utilized, the remotely participating member (not members of the public, applicants, etc.) must be both audible and *visible* to all persons present at a meeting.

Disability Commissions are afforded more latitude with respect to remote participation in two respects. They can adopt remote participation for their business without Select Board authorization (which is moot in Arlington), and the in-person quorum requirement does not apply (though the Chair, or a member acting on behalf of the chair must be physically present at a meeting location).

On a final note, members of public bodies cannot be compelled to participate remotely (as opposed to missing a meeting or participating in person).

Members of the Public & Applicants

The Open Meeting Law does not set forth requirements for public participation beyond the requirements relative to members (i.e. the public in attendance at a physical location must be able to hear, or in a video conference context, hear *and* see the remotely participating members); nor does it require public bodies to allow for remote public participation.⁶ As stated in the Division of Open Government's Open Meeting Law Guide:

Note that the Attorney General's regulations enable members of public bodies to participate remotely if the practice has been properly adopted, but do not require that a public body permit members of the public to participate remotely. If a public body chooses to allow individuals who are not members of the public body to participate remotely in a meeting, it may do so without following the Open Meeting Law's remote participation procedures.

Open Meeting Law Guide, January 2018, pp. 15-16.

⁵ For example, a web-based messenger or chat function is not considered an acceptable means of remote participation;

⁶ Indeed the Open Meeting Law itself does not mandate any public participation. Formal legal hearings typically require opportunity public comment as discussed further herein.

The Open Meeting Law's requirements should however be differentiated from *hearing requirements* within public meetings, which typically have additional metrics in order to constitute a legal hearing. For example, in-person attendance by applicants and certain interested parties is typically required in ordinary time under c. 40A for zoning hearings, or for a dangerous dog hearing, or an alcohol licensing hearing. There is likely more latitude with respect to general public comment in many hearings, but of course, in hearing contexts, written comments have conventionally presented the primary option for testimony by persons who cannot attend a live meeting.

If the petitioner intends to require remote participation be made available to members of the public, it is not immediately clear whether such a bylaw would survive scrutiny from the Attorney General's Office. At a minimum, it would be important to understand the logistical requirements of implementing such a requirement across all Town public bodies and ensure that required hearing parties are present in person.

Finally, any discussion of parameters of participation by members of the public should not be conflated positively or negatively with accommodations under the Americans with Disability Act. While the ADA's primary requirement is that public meetings be held in an accessible physical location, disabled parties, members of the public, and public body members may request reasonable accommodations through or in conjunction with the Town's ADA Coordinator. Such requests can be highly varied and adopting a specific mode of remote participation would not relieve the Town of its responsibility to provide appropriate reasonable accommodations.

ARTICLE 24 HOME RULE LEGISLATION/RANKED CHOICE VOTING

To see if the Town will vote to authorize and request the Select Board to file Home Rule Legislation to elect Town offices by Ranked Choice Voting; or take any action related thereto.

(Inserted by the Select Board and at the request of the Election Modernization Committee)

See previous materials submitted under formerly numbered Article 26.

ARTICLE 26 ENDORSEMENT OF CDBG APPLICATION

To see if the Town will vote to endorse the application for Federal Fiscal Year 2022 prepared by the Town Manager and Select Board under the Housing and Community Development Act of 1974 (PL 93-383) as amended; or take any action related thereto.

(Inserted by the Select Board and at the request of the Town Manager)

This article presents the annual vehicle for consideration and endorsement of Community Development Block Grant expenditures. Should the Board approve the CDBG proposal, a draft vote and comment have been prepared for your review below.

VOTED: That the Town hereby endorses the application for Federal Fiscal Year 2022 prepared by the Town Manager and the Board of Selectmen under the Housing and Community Development Act of 1974 (PL 93-383), as amended.

COMMENT: This article represents the annual vote to endorse the annual application for Community Development Block Grant funds, a summary of which Town Meeting may find attached to this report.