

April 16, 2018

**E-MAIL DELIVERY**

Ellen Planer, Town Clerk  
Town of Falmouth  
271 Falmouth Road  
Falmouth, ME 04105

RE: Voters' Petition to Rescind the Town Council Decision of July 2016

Dear Ellen:

You have asked for a legal review of a voters' petition submitted to you on or about April 10, 2018, stating as follows:

We, the citizens of the town of Falmouth, Maine petition the Town to rescind the Town Council decision of July 2016,  
Creating high density residential zoning in established areas of the Town of Falmouth.

Based on our review of the petition and relevant provisions of the Falmouth Town Charter and for the reasons discussed below, it is our opinion that the petition is legally defective and the Town Council is not legally obligated to place a question before the voters with respect to this request.

Note that, for purposes of this opinion, we presume that the petition has been validated—meaning, the petition bears a sufficient number of signatures of registered voters in the Town to satisfy legal requirements. If it does not, then the Town Council may dismiss it without further consideration.

*Charter Requirements for Voters' Petitions*

The Council-Manager Charter of the Town of Falmouth, Maine (hereafter, the "Charter") limits the subject of voters' petitions to three categories: (1) petitions concerning certain expenditures,<sup>1</sup> (2) petitions to overrule the Town Council's action, and (3) petitions to enact ordinances. *See* Charter, Art. IX. With respect to the third category, we interpret petitions to enact ordinances to include petitions to repeal ordinances or ordinance amendments, since the classic method of repealing an ordinance is to enact one that does so.

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<sup>1</sup> Because this voters' petition does not concern the first category, we do not discuss it further.

The Charter also imposes specific requirements on voters' petitions. With respect to petitions to overrule the Town Council's action, the Charter requires that such petitions be filed with the Town Clerk within 60 days after the enactment of any Council ordinance, order, or resolve. *See* Charter, Art. IX, Sec. 901. With respect to petitions seeking to enact ordinances, the Charter requires that such petitions be accompanied by "the complete text of such ordinance." Charter, Art. IX, Sec. 902. The Charter also states that the Council must be given the opportunity to enact a petitioned-for ordinance prior to the call for a Town election. *Id.* Finally, the Charter provides that any petition to enact an ordinance must be reviewed by the Town Attorney before being submitted to the voters to, among other things, ensure "clearness and preciseness in its phraseology," although it prohibits the Town Attorney from materially changing the ordinance's meaning and effect. *Id.*

### *Legal Analysis*

The text of the voters' petition apparently seeks to rescind a July 2016 Town Council decision. The Charter, however, provides that any petition to overrule a Town Council action must be filed within 60 days after the Council's enactment of an ordinance, order, or resolve. Charter, Art. IX, Sec. 901. In this case, the voters' petition concerns a decision made nearly two years ago—in "July 2016." Accordingly, this petition is not a timely petition to overrule the Council's action. For this reason alone, the petition is legally defective.

Even if the petition could be interpreted as a petition to enact an ordinance pursuant to Section 902 of the Charter, the petition would be legally defective because it was not accompanied by any proposed ordinance text. It therefore does not comply with the Charter's requirement to include the complete text of the ordinance. And, in the absence of specific ordinance language, the petition does not provide an opportunity for the Town Council to enact a petitioned-for ordinance prior to the call for a Town election.

Finally, it bears mention that interpreting the petition, without the accompaniment of an ordinance, as a request to repeal Ordinance No. 10-2017—the sole ordinance that was adopted by the Town Council in July 2016—would be legally problematic because it is unclear whether the petitioners seek to repeal the complete text of that ordinance or merely those provisions "[c]reating high density residential zoning in established areas of the Town."<sup>2</sup> Nothing about the language of the petition points in one direction or the other, and the Charter does not provide any authority for the petitioners to ask the Council to repeal unspecified portions of an ordinance. Moreover, correcting the petition language to specify that the petition seek to repeal the 2016 ordinance in whole or in part runs the risk of materially changing the petition's meaning and effect—something the Charter does not allow.

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<sup>2</sup> Further complicating the matter is that Ordinance No. 10-2017 adopted by the Town Council on July 11, 2016 amended numerous provisions of the Falmouth Code of Ordinances and the zoning map—none of which are specifically identified as "high-density residential zoning in established areas of the Town." For example, the ordinance changed minimum lot sizes in some of the Town's zoning districts, altered zoning district boundaries, modified requirements related to accessory dwelling units, and restructured the regulatory framework for the issuance of rate of growth permits. Deciding which of these provisions might be characterized as "creating high density residential zoning," however, would require the Town Council and/or the Town Attorney to exercise substantial discretion and in effect to materially change the substance of the petition. Neither the Town Council nor the Town Attorney is authorized under the Charter to exercise such discretion in response to a valid petition.

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*Conclusion*

For all of the foregoing reasons, it is our opinion that the petition is legally defective and the Town Council is not legally obligated to adopt a vote or call a referendum in response to the petition. We note, however, that while the Town Council is not legally obligated to respond to the petition, the Council would be within its authority to issue an order directing the Town's Planning Division to further investigate the land use issues that the petitioners appear to be concerned with, hold workshops or hearings on the matter, and ultimately revisit some or all of the ordinance provisions that were adopted in July 2016 pursuant to the Council's ordinance-enactment authority.

We trust that this letter is responsive to your request. Please don't hesitate to contact us if we can be of further help.

Very truly yours,



*for*

Amy K. Tchao and Agnieszka A. Dixon  
Drummond Woodsum & MacMahon