



# TOWN OF BROOKLINE

## *Massachusetts*

### OFFICE OF TOWN COUNSEL

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TO: Bernard Greene, Chair, Brookline Select Board  
All Other Members of the Brookline Select Board

CC: Ben Kaufman, Town Clerk  
Chas Carey, Town Administrator  
Melissa Goff, Deputy Town Administrator  
Devon Fields, Assistant Town Administrator for Operations  
John A. Moreschi, First Assistant Town Counsel  
Jonathan Simpson, Associate Town Counsel

FROM: Joe Callanan, Town Counsel

SUBJECT: Compliance with General Laws, c. 53, §18B for the May 2, 2023, Annual Town Election

DATE: March 23, 2023

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This memorandum seeks to update you on my efforts to comply with [General Laws, c. 53, §18B](#), which is attached as Exhibit A. I hope with this memorandum to explicitly describe how I intend to have the Town comply with section 18B and the entire public process, including the solicitation of arguments by advocates, proponents and opponents, of the ballot questions.

**Background.** Town Meeting adopted the statute as Warrant Article 2 during the Special Town Meeting held on January 10, 2023. Town Meeting approved the warrant article by a vote of 223-1-4, and it became effective the following day.

During a Select Board meeting, held on Tuesday, March 21, 2023, the board approved three questions for inclusion on the ballot, including one with two parts. The board's action placed a total of four questions on the ballot for the Annual Town Election that you already had scheduled for Tuesday, May 2, 2023.

Those questions are attached as Exhibit B.

**What Section 18B Allows.** Section 18B(b) allows the Select Board to "print information relating to each question that shall appear on the" Town's local ballot. The statute specifies a method where

municipalities may inform voters about local ballot questions. The statute allows the Town to mail every voting household the following information: (i) “the full text of each question;” (ii) “a fair and concise summary of each question, including a [one] sentence statement describing the effect of a yes or no vote”; and (iii) “arguments for and against each question.” G.L. c. 53, § 18B(b).

The Select Board already approved Item no. i. Office of Town Counsel is preparing Item no. ii. Finally, residents, and not Town Counsel, will prepare Item no. iii, arguments for and against each question.

**Seeking Written Arguments.** Section 18B(d) states that “[n]ot later than [seven] days after the determination that a question shall appear on the ballot,” which is seven days after Tuesday, March 21, 2023, or before Tuesday, March 28, 2023, I must “seek written arguments from the principal proponents and opponents of the question.” I suggest we do not wait until that deadline, but instead, I wish to seek arguments from the principal proponents and opponents starting today.

I would kindly ask that you forward this memorandum to the members of the of Town Meeting Member Association listserv. Town staff will forward this memorandum to members of the Advisory Committee, and other Town boards and commissions. I will have the memorandum placed on the Town Clerk’s website, “[Election Information](#)” page, and look for a section entitled “Local Ballot Question Information.”

**Advocates step forward.** Proponents and opponents for each question may volunteer to be the principal author of the proposed arguments. If anyone is interested in advocating for a particular position on a ballot question, I would ask that they contact me via email [jcallanan@brooklinema.gov](mailto:jcallanan@brooklinema.gov) or by calling (617) 730-2190, to identify themselves as either a proponent or opponent and for which question.

I would ask advocates to identify themselves to me as early as possible. More than one person may wish to advocate for a particular position on a ballot question. In that case, I will let the multiple advocates know as they may try to work together as opposed to finding out after they have already prepared a 150-word argument.

The statute allows Town Counsel to determine “the principal proponents and opponents of a ballot question,” G.L., c. 53, §18B(e). I would prefer, however, to work collaboratively with all prospective advocates and not have to rely on the statute’s authority to choose a “principal” among more than one volunteer advocate. If all prospective advocates cannot work collaboratively, despite what will be my best efforts, then I “shall determine, based on a review of arguments received, the person or group best able to present arguments for and against a question.” *Id.*

**Receiving Written Arguments.** Section 18B(d) requires that I “provide not less than [seven] days’ written notice to the opponents and proponents of the date on which the written arguments shall

be received.” Arguments for and against each ballot question should be no more than 150 words. G.L., c. 53, §18B(d).

Thus, I propose a deadline to receive arguments to be Friday, March 31, 2023 at 4:30 p.m., which is more than seven days from today.

I will not consider any proposed arguments received after that date and time. Nor will I provide any preference to any arguments before any other arguments received later, as long as all arguments are received before the deadline.

Arguments should be sent via email to [jcallanan@brooklinema.gov](mailto:jcallanan@brooklinema.gov) with a copy also sent to [townclerk@brooklinema.gov](mailto:townclerk@brooklinema.gov). *Id.* (“Proponents and opponents shall submit their arguments, which shall be not more than 150 words, to the solicitor or counsel, together with a copy thereof to the city or town clerk or, in a district, to the clerk of each city and town within the district.”)

If anyone wishes to submit a proposed argument, but does not wish to use email, I suggest they call the Office of Town Counsel, (617) 730-2190, to make other arrangements. For example, Town Hall is usually closed Friday afternoons after 12:30, so hand delivery of a proposed argument on the day of the deadline may be problematic without advance notice.

**After Receipt of the Written Arguments.** After Friday, March 31, 2023, we will have received written arguments and know the identities of the proposed proponents and opponents. If there is no identified proponent or opponent for a particular position, the Office of Town Counsel will draft a 150-word argument for that particular position ourselves.

**Reviewing Written Arguments.** The proposed arguments shall only include advocacy germane to the individual question and the particular position. For example, an opponent cannot volunteer to provide the proposed proponent argument leaving the voters essentially two arguments against and none in support of a question. The proposed argument must be about the local ballot question, and not a different national or international concern.

We will count the number of words of each proposed argument. The statute requires “not more than 150 words.” G.L., c. 53, §18B(d). Thus, an argument may contain 149 words, but not 151 words. Microsoft Word’s Word Count feature will be the definitive authority here.

The advocacy must be truly, First Amendment-protected speech. The arguments cannot include obscenity, words harmful to minors, speech inciting imminent lawless action, true threats, or so-called “fighting words.” The proposed arguments cannot include commercial speech nor defamatory content.

For example, while subjective statements and statements of opinion are not defamatory, a statement may be defamatory if it would reasonably be understood to declare or imply provable

assertions of fact. *See e.g. Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 110 S. Ct. 2695 (1990) (“Thus, unlike the statement, “In my opinion Mayor Jones is a liar,” the statement, “In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,” would not be actionable.”).

Thus, I will review any proposed argument along these lines before agreeing that a proposed argument may be mailed unchecked to more than 30,000 Brookline households at taxpayers’ expense. *See e.g. Town of Brookline v. Goldstein*, 388 Mass. 443, 450 (1983) (“Those [First Amendment] rights do not disable the government from taking reasonable steps to ensure that such rights are not exercised in a manner which infringes on the legitimate rights of other citizens.”)

**Communicating with Advocates after this Review.** If this review requires any editing of the proposed arguments, I will communicate my concerns to the advocate promptly. If they are multiple advocates and multiple arguments for the same position, I will convene everyone on that side and question together to discuss cooperatively a mutually agreeable argument. I expect this process to occur in the first few days of April. At the end of this phase of the process, I hope to have draft arguments available for public circulation.

**Public Circulation of the Draft Ballot Information.** I hope to have a draft of the complete section 18B ballot information by Tuesday, April 4, 2023. I will email this information to advocates and ensure it is posted on the Town Clerk’s website, “[Election Information](#)” page, and look for a section entitled “Local Ballot Question Information.”

We will ask you again to share the release of this information with the members of the Town Meeting Member Association listserv. Town staff will forward this draft ballot information to other elected officials, members of the Advisory Committee, and other Town boards and commissions.

At this point the public may weigh in on all the proposed ballot information, except the text of the ballot questions themselves as they have been set already by the Select Board. Thus, the public may critique the proposed summaries, one-sentence descriptions, and the arguments for and against.

If anyone has any concerns, then they should send me an email at [jcallanan@brooklinema.gov](mailto:jcallanan@brooklinema.gov). I will be unlikely to take phone calls during this time, and strongly suggest you communicate to me any concerns in writing.

Unless the public identifies an issue that I overlooked in my review that I described above and I should have caught it upon my initial review, **only** the advocates may change their proposed argument at this point. Advocates will be able to see the arguments of their counterparts and they may change their arguments in response. I want to re-emphasize this point: the advocate controls their own argument at this point – whether they wish to respond to critiques they receive is entirely up to them.

Advocates will have until Thursday, April 6, 2023, at 4:30 p.m. to revise their draft arguments. This is optional: advocates do not need to change their draft arguments at all. If the changes create new issues as to my review I described above, I will communicate with the relevant advocates before noon the next day.

**Concerns over Circulation of the Draft Information.** If anyone is concerned about this public circulation of the draft ballot information, I wish to respond by pointing out three things. First, the statute explicitly expects a public process. G.L., c. 53, §18B(f). (“All arguments filed or prepared pursuant to this section and the information prepared pursuant to subsection (b), **shall be open to public inspection** at the” Town Clerk’s Office) (emphasis added). It does not state the information shall be public records, which the Town would have ten business days to produce. The statute says the information must be available upon request.

Second, this process I describe within this memorandum is what I promised the Advisory Committee when they considered Warrant Article 2. *Combined Reports*, January 10, 2023, Special Town Meeting, Article 2 — Supplement No. 1, at page 2 (“No objection to voters being better informed surfaced during the subcommittee’s public hearing or the Advisory Committee meeting. Accordingly, **much of the discussion centered on the role of Town Counsel as a presumably neutral party, areas where Town Counsel (or others) might exercise discretion over content ...**”) (emphasis added); *Id.* at page 4 (“TC Callanan indicated **he’d conduct a transparent, public process** including outreach to TMMs through the Listserv, to ballot question committees, and other relevant groups and individuals in a vetting process. **All relevant correspondence would be available to the public. ... , TC indicated he could exercise some discretion regarding claims made, and assuring that arguments are on point within the context of the ballot question.**”) (emphasis added).

Third, the Town has a demonstrated history of expecting transparency, accountability, and equity in the administration of its municipal government. As the Town implements section 18B for the first time, and in all other matters too, I would want my office involved in a process that only models the acme in transparency and accountability.

**Submission of the Final Ballot Information to the Select Board.** After advocates have had a chance to revise their draft arguments, submitted any changes, and we have heard from the public on all the reviewable section 18B information, I hope to have a final copy ready to submit to the Select Board on Friday, April 7, 2023. My intent is that the Select Board would approve the final version of ballot information during your meeting scheduled for Tuesday, April 11, 2023. G.L., c. 53, §18B(b) (first sentence).

If the Select Board were to approve the information at that meeting, then we would be able to meet the statute’s mailing deadline. G.L., c. 53, §18B(b) (penultimate sentence) (“The arguments and summary shall be submitted by the solicitor or counsel to the governing body at least 20 days before

Memorandum to the Select Board

**Compliance with General Laws, c. 53, §18B for the May 2, 2023, Annual Town Election**

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the election for distribution to voters in accordance with subsection (b).”) Twenty days before the May 2 election would be Wednesday, April 12, 2023.

**After the Select Board Meeting of Tuesday, April 11, 2023.** I would strongly suggest the Select Board approve the section 18B ballot information during its Tuesday, April 11, 2023 meeting. Otherwise, we may miss other deadlines.

The Town Clerk, Ben Kaufman, indicated that Town staff will require three full days of work to complete the more than 30,000-piece mailing, including printing, folding, stuffing envelopes, sealing, and adding postage.

Since mailing ballots and the section 18B ballot information use the same staff and equipment, Town staff must complete the section 18B ballot information work before the Town Clerk’s Office can start work on mailing ballots.

The Town Clerk intends to start mailing “Vote by Mail” ballots beginning Tuesday, April 18, 2023. Working backward, printing of the section 18B ballot information must begin Wednesday, April 12, to complete the mailing by Friday, April 14, 2023, which is also the same day the printer will deliver ballots to the Town Clerk’s Office. Tuesday, April 18, 2023 is the next business after Friday, April 14, 2023, as Monday, April 17, 2023 is Patriots Day.

Thus, any delay in approving the section 18B ballot information **after** the Tuesday, April 11, 2023 Select Board meeting will result in a delay in mailing “Vote by Mail” ballots. We would prefer not to encounter that situation.

**Conclusion.** I intended this memorandum to address any concerns anyone may have about my plans to comply with Warrant Article 2 and the obligations of section 18B. If I have not, then please feel free to contact me. Thank you very much.

EXHIBIT A

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title VIII. Elections (Ch. 50-57)

Chapter 53. Nominations, Questions to be Submitted to the Voters, Primaries and Caucuses (Refs & Annos)

M.G.L.A. 53 § 18B

§ 18B. Information relating to questions on city, town or district ballot; contents; written arguments by principal proponents and opponents; public inspection

Effective: January 3, 2011

Currentness

<[ Section impacted by 2020, 45, [Secs. 1 and 1A](#), as amended by 2020, 92, [Secs. 1 to 3](#), effective March 23, 2020 and 2021, 5, [Secs. 1 and 2](#), effective March 16, 2021 and 2020, 92 [Secs. 15 to 17](#) effective June 5, 2020 relating to postponing municipal elections in order to address disruptions caused by the outbreak of COVID-19.] >

(a) As used in this section “governing body” shall mean, in a city, the city council or board of aldermen acting with the approval of the mayor subject to the charter of the city, in a town having a town council, the town council, in every other town, the board of selectmen and in a district as provided in [sections 113 to 119, inclusive, of chapter 41](#), the prudential committee, if any, otherwise the commissioners of the district.

(b) The governing body of a city, town or district which accepts this section in the manner provided in [section 4 of chapter 4](#) shall print information relating to each question that shall appear on the city, town or district ballot. The information shall include: (1) the full text of each question; (2) a fair and concise summary of each question, including a 1 sentence statement describing the effect of a yes or no vote, which shall be prepared by the city solicitor, town counsel or counsel for the city, town or district; and (3) arguments for and against each question as provided in subsections (d) and (e). Not later than 7 days before an election at which the question shall be submitted to the voters in a city, town or district, the information in this subsection shall be sent to each household wherein a person whose name appears on the current voting list for the city, town or district resides.

(c) Not later than the day following the date of the determination that a question shall appear on the ballot in an election, the governing body shall provide written notification to the city solicitor or town or district counsel and to the city or town clerk.

(d) Not later than 7 days after the determination that a question shall appear on the ballot, the city solicitor or town or district counsel, as applicable, shall seek written arguments from the principal proponents and opponents of the question. For the purposes of this section, the principal proponents and opponents of a question shall be those persons determined by the

solicitor or counsel to be best able to present the arguments for and against the question. The solicitor or counsel shall provide not less than 7 days' written notice to the opponents and proponents of the date on which the written arguments shall be received. Proponents and opponents shall submit their arguments, which shall be not more than 150 words, to the solicitor or counsel, together with a copy thereof to the city or town clerk or, in a district, to the clerk of each city and town within the district. The arguments and summary shall be submitted by the solicitor or counsel to the governing body at least 20 days before the election for distribution to voters in accordance with subsection (b). A copy of the arguments and summary shall also be submitted by the solicitor or counsel to the city, town or district clerk.

(e) In determining the principal proponents and opponents of a ballot question, the solicitor or counsel shall contact each ballot question committee, if any, as defined in [section 1 of chapter 55](#). The principal proponents or opponents of a ballot question may include officers of a ballot question committee or officers of a city, town or district office or committee including, but not limited to, a finance committee or a school committee. In addition, the principal proponents or opponents may include the first 10 signers or a majority of the first 10 signers of a petition initiating the placement of such question on the ballot. The solicitor or counsel shall determine, based on a review of arguments received, the person or group best able to present arguments for and against a question. If no argument is received by the solicitor or counsel within the time specified by the solicitor or counsel, the solicitor or counsel shall prepare an argument and submit the argument to the governing body and to the city or town clerk or, in a district, to the clerk of each city and town within the district within the time specified in subsection (d).

(f) All arguments filed or prepared pursuant to this section and the information prepared pursuant to subsection (b), shall be open to public inspection at the office of city or town clerk or, in a district, at the office of the clerk of each city and town within the district. In addition, each city or town clerk shall make such information available to the voters at all polling places within the city, town or district.

#### Credits

Added by [St.2010, c. 188, § 37, eff. July 27, 2010](#). Amended by [St.2010, c. 409, § 3, eff. Jan. 3, 2011](#).

<[ Chapter impacted by 2020, 45, [Secs. 1 and 1A](#), as amended by 2020, 92, [Secs. 1 to 3](#), effective March 23, 2020 and 2021, 5, [Secs. 1 and 2](#), effective March 16, 2021 and 2020, 92, [Secs. 15 to 17](#), effective June 5, 2020 relating to postponing municipal elections in order to address disruptions caused by the outbreak of COVID-19.]>

M.G.L.A. 53 § 18B, MA ST 53 § 18B

Current through the 2022 2nd Annual Session. Some sections may be more current, see credits for details.



EXHIBIT B

**Proposed ballot.**

Questions 1 through 3 are separate questions. You may vote for or against each question independently. Each question requires a majority of those voting on that question to pass.

Question 1.

Shall the Town of Brookline be allowed to exempt from the provisions of proposition two and one-half, so-called, the amounts required to pay for the bonds issued in order to pay costs of constructing a new PreK-8 School which includes renovations/addition to the existing historic Pierce School and other site improvements including reconstruction and repair of the Town Hall and Pierce School garages which are beneath the new school and the Town Park across School Street, including the payment of all costs related to designing the new school project, equipping and furnishing the school, site improvements, and all other costs incidental and related thereto?

Yes \_\_\_\_\_ No \_\_\_\_\_

Questions 2A and 2B are separate questions. You may vote for or against each question independently. Each question requires a majority of those voting on that question to pass. If both Questions 2A and 2B pass, the question with the highest dollar amount will prevail over the other.

Question 2A.

Shall the Town of Brookline be allowed to assess an additional \$11,983,367 in real estate and personal property taxes for the purposes of funding the costs of Brookline Public Schools (\$6,988,367) and funding the costs of additional expenditures in municipal departments (\$4,995,000) for the fiscal year beginning July 1, 2023?

Yes \_\_\_\_\_ No \_\_\_\_\_

Question 2B.

Shall the Town of Brookline be allowed to assess an additional \$13,833,367 in real estate and personal property for the purposes of funding the costs of Brookline Public Schools (\$6,988,367), funding the costs of additional expenditures in municipal departments (\$4,995,000), and funding the costs of a municipal composting collection service (\$1,850,000) for the fiscal year beginning July 1, 2023?

Yes \_\_\_\_\_ No \_\_\_\_\_

Question 3.

Shall the Town of Brookline adopt the following changes to the Town’s General Bylaws that would limit the number of Storefront Marijuana Retailer licenses to no more than four, consistent with Warrant Article 15 of the November 2022 Special Town Meeting?

TOWN COUNSEL SUMMARY:

If passed, this local ballot question would limit the number of storefront marijuana retailer licenses in the Town to four or less. The November 2022 Special Town Meeting passed this proposed bylaw as Warrant Article 15. State law requires that the Town of Brookline voters decide whether to adopt this bylaw change. General Laws, c. 94G, § 3(e).

The license cap will stay unchanged for all other license types. These other license types include marijuana delivery operators, social consumption retailers, and marijuana couriers. The present license cap for each license type equals 20% of the number of liquor licenses for off-premises alcohol consumption that the Select Board has issued. Today, the cap is five.

A “yes” vote on this question would limit the number of storefront marijuana retailer licenses in the Town to four or less.

A “no” vote would make no changes to the number of storefront marijuana retailer licenses in the Town.

TEXT OF THE BYLAW:

Section 8.37.4 Caps on the Number Select Board Licenses for Marijuana Retailers

The Select Board shall not issue more Marijuana Establishment licenses in each of the following categories of Marijuana Establishment licenses than the number that is 20% of the number of liquor licenses for off-premises alcohol consumption that have been issued by the Select Board pursuant to M.G.L. c. 138, §15, as rounded up to the nearest whole number in the event the number is a fraction: a) Marijuana Delivery Operators, b) Social Consumption Retailers, and c) Marijuana Couriers.

The Select Board shall not issue more than four Storefront Marijuana Retailer licenses.

Yes \_\_\_\_\_ No \_\_\_\_\_