

Town Commissioners' Meeting Minutes
April 12, 2011, 6:30 pm

The meeting was called to order at 6:30 pm by Commission President Robert Gell. Also in attendance were Commissioners Michael Doss, Mary Carol Durange Joseph Letts. Commissioner Donna Sheets was absent.

The Pledge of Allegiance was led by Ryleigh Johnson.

The Accounts Payable report was reviewed and Commissioners Doss motioned to approve the expenditures. This passed 4-0.

The minutes from the March 22, 2011, were reviewed and Commissioner Durange motioned to accept them as written. This was approved 3-0 with one abstention

Sheriff's Patrol Report for March 2011, was delivered by Commissioner Letts since Sgt. Ronald Schmidt could not attend. With a total of 28 shifts and 112 hours approved, 108 hours were used.

The Miller Environmental report was given by Robert Corn. It was noted that they treated 2,287,000 gallons of water. He also noted samplings, water leak checks, water meter replacements and water shut offs.

David Gordon spoke about proposal to restore the Charlestown baseball field since the North East Little League uses the field for practice. He has found a product that would help with the field drainage; they can do the work but the league is requesting the funds (\$2,000) to purchase the product which is different from Diamondtex as it stabilizes the surface and promotes drainage. It was noted that additional product may be needed yearly. Currently there is not enough in the budget to purchase this since it costs more than the Diamondtex which has always been used. Additional discussion ensued about other concerns at the ball field. Also, a small equipment storage shed was requested. Research was requested to determine if funds can be made available for these projects.

Doug DeClerck reviewed the water tower painting project and the five bids received on March 22nd. The bidders were to provide four different prices and he discussed the differences between each price. The Town favors the option of price "D" which includes relocating the cell phone cables and antenna. The low bidder was Utility Service, however one item was so low and was found to be an error; they withdrew their bid without penalty. The next lowest bidder was S&T Painting at \$217,500 which includes their financing. Mr. DeClerck needs the Commissioner's approval to go ahead with S&T Painting's bid. He noted the relocation of the two cell company's equipment will be done at their cost. Additionally, the cell providers will be contributing \$32,333.33 of the \$48,500 cost to retrofit the tower for the cables and antenna. It was noted that it will require a motion to let the contract. Commissioner Durange moved to accept S&T Painting as the water tower painting contractor according to price "D" (60% initially and the remainder over a five year period which would cost approximately \$25,000 in finance charges). Commissioner Doss questioned the amount budgeted for this and was told that \$100,000 remains in the budget for this project. Additional fees will have to be added for inspections that must occur during the project. Commissioner Letts made the second and the motion passed 4-0.

Mr. Larry Tyson spoke about erosion problems at his residence, 210 Louisa Lane. There is a drainage ditch/vegetation maintenance area through his property which the builder (Justice Builders & Developers, Inc.) apparently indicated they would finish. This was never done. He discussed the various problems he has had with trying to rectify the situation with erosion in this area which he feels is caused by storm drain lines installed by Charlestown. Commissioner Letts feels that his problem is with the builder because the garage was placed on the property without a permit. Commissioner Doss explained that the County, not Charlestown, performed the inspections so the add-on work was completed before it was noticed. Charlestown sent the builder a letter ordering them to correct the problem. It was explained that if the problem area is in a buffer area, no one can dump dirt there without proper authority.

Commissioner Doss requested that McGuirk Construction be asked to assess the situation when they do drainage work in the area. President Gell suggested learning what the law will allow to be done and that perhaps Mr. Tyson would get the information. Mr. Tyson mentioned he is afraid if he does the research he will find that fixing it will be too expensive. In reviewing the details of the original building permit which was changed without notice to Charlestown, it was noted the builder and developer were advised that there was a problem which had to be rectified. One possible solution discussed would be to run a drainage pipe past his garage. This would have to be approved by Maryland Critical Area Commission.

President Gell spoke about May being tourism month in Cecil County. Charlestown has been asked for a proclamation declaring Charlestown Tourism Month. Commissioner Doss motioned to approved the proclamation and all agreed 4-0

Commissioner Doss addressed the board about the passing of Hershel Armour and to thank everyone for fast tracking the proclamation for presentation to the family and of their appreciation.

Town Administrator's Report

Old Business

A plaque has been received from the Sons-of-the American Legion in appreciation of Charlestown's hosting of the Ice Splash 2011. It was noted that the event raised over \$36,000 for the Cecil County Special Olympics.

A check for \$25 has been received from James R. Baker in honor of Katherine Shrivery's 80th birthday to go toward the cemetery fund.

It was noted that we still need information on placement for the outdoor exercise equipment. Commissioner Durange will explain about the locations.

A sea wall is eroding at the border of Lee's Marina and North East River Marina with a question as to who owns the property since it is adjacent to a strip leased from Charlestown by Lee's Marina. In order to resolve the question Mr. Pumpaly asked surveyor, Mike McAllister, to consider the job. Since a full survey is very expensive, Mr. McAllister has proposed a "special purpose survey" to determine the property line but this could not be legally binding and would cost between \$1300-2000. A full survey would cost just under \$10,000. This does not need to be done immediately but the Town has to learn who is responsible for the repair when it has to be done. Commissioner Doss mentioned a survey having been done recently and survey pins should be there and locating them would be somewhat inexpensive. President Gell mentioned the need to determine who is responsible for this area. Mr. Pumpaly asked for a motion to move forward and Commissioner Doss made the motion to do a "special purpose survey". This was approved 4-0. Discussion commenced concerning the differences in the types of surveys and the ramifications of the findings.

Resolution 2011-02 to reimburse the Department of Housing and Community Development for four loans which Charlestown has requested (water tower refurbishment, the Artesian emergency interconnect, the community building and the Town Hall/Post Office drainage project). This resolution is a step in the loan process but does not commit the Town to accepting more loan money than is needed. Commissioner Doss motioned to approve the resolution and this passed 4-0.

New Business

Proposed Sewer & Water Rate Increase

The Town Administrator, Wib Pumpaly, reviewed the need to increase water and sewer rates in order to adequately fund future repairs, maintenance and operations of Charlestown's water and sewer systems. Water and sewer rates have not been increased since June 2005. The County has had three sewer rate increases since 2005 which have been absorbed by the Town. These rates increases are to be effective July 1, 2011. Because of the current rates, which are about the lowest in Cecil County, Charlestown does

not qualify for grants or low-interest loans from various government entities since they feel we are not supporting our operating expenses with our rate structure revenues.

The proposed water rate increase of 5% would yield, at minimum, \$11 per year from each of the 545 residential units (approximately \$6,000 additional revenue annually). Also, a sewer rate increase of 15% is being proposed for 411 residential units to yield \$33 more per year per unit (approximately \$13,560 additional annually). The residential units of Trinity Woods and Charlestown Manor will not be affected by the sewer rate increases since they are on the Cecil County system. The additional revenues would be placed, periodically, into long-term MMA savings accounts to cover future repairs, maintenance and operation of the water/sewer systems. These increases have already been built into the fiscal 2011-2012 budget.

Resolution 2011-03 was presented for consideration with an overview of the proposed rate increases. A motion to adopt and sign the resolution would be needed at the next Commissioners' meeting. Also, with adoption, a public hearing must be scheduled and held before the July 1st adoption date.

- Mosquito Spraying would begin in late May and run through late September the cost being \$280/month. It was agreed to continue with this service.
- Port-a-Pot for Fairgreen Park & Athletic Complex – A-1 sanitation will hold pricing at the same price as last year.
- March Budget Review – Note we are favorable on the revenues, slightly over on expenditures but the net effect is still favorable.
- March Cash Balance Review
- March Accounts Receivable Review
- March Fuel Reports (Gas – Diesel)
- March Maintenance Work Order Review
- March Building Permit Review – Ryan Homes is now the sole builder in Cool Springs.

Period of Public Comment

Any resident who wishes to comment on this proceeding, or who may have comments for the good of the Town of Charlestown, may offer their comments to the Commissioners for a period of not to exceed (5) five minutes. All residents offering comments must first sign the “Public Comment Speaker” roster.

Gophery Richardson commented on the planned executive session concerning a pending court case and opinions requested during an open meeting. He feels the requested (hopefully written) opinions should be disclosed in an open meeting since that is when they were solicited. He also spoke about the cost of attendance for the MML Annual Convention. He feels there is little benefit in attendance compared to the costs involved. He mentioned hearing that some Commissioners may feel this is a summer vacation paid by the Town to compensate for all their unpaid time. He suggested that because of the economic situation, the Town should skip this year's convention. If the Commissioners do go they should justify each dollar that is spent.

Dennis Taylor asked about the annexation proposal that was discussed at the last meeting. President Gell answered that several property owners are being contacted regarding annexation and it is moving forward.

Ken Confalone asked to have signage indicating the lines of private property at the parks and beaches. He also wondered if the Town is proceeding with plans to charge for using the boat ramp. President Gell noted that no action has been taken on this; but he agrees that private property signs should be placed at all parks. It was noted that residents have complained about property line signs at Town Footlog Park.

Commissioner Durange motioned to adjourn. The open meeting adjourned at 8:14 pm.

Commissioner Doss motion to move into Executive Session was approved 4-0

Executive Session

Meeting with Town Attorney to discuss the pending court case, Town Commissioners of Charlestown vs. Charlestown Marina LLC (C-10-308) and opinions requested by the Commissioners concerning the authority and power of Town Commissioners and competitive bidding for professional services. The opinions are here attached in their entirety.

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Dennis S. Clower
David H. Parrack
Perry J. Seaman

MEMORANDUM

TO: The Town Commissioners
Town of Charlestown

FROM: Dennis S. Clower

RE: Authority and Power of Town Commissioners

DATE: April 6, 2011

I was asked at the Town Commissioners Meeting of March 8, 2011, to provide a written opinion regarding the proper role of Town Commissioners in the everyday functioning of town government. In preparing such an opinion, I have reviewed the accepted, preferred sources on the general subject of the various models of municipal government, and I have reviewed the Charlestown Charter in its entirety.

Section 402 of the Charlestown Charter clearly states that the President is the Chief Executive Officer, and head of the administrative branch of the Town government. Article V then lays out the general powers for the Town Commissioners when they are acting as a group. Every one of the powers cited in Article V is a legislative power, in that it says the Commissioners may "pass all such ordinances...as it may deem necessary for the good government of the Town". Under Section 5.01(b), the Commissioners "shall have the power to pass ordinances...for the following specific purposes:" Despite the fact that the Town Commissioners are called "Commissioners," their power is limited to legislation as in the Strong Mayor-Council form. Unlike the Strong Mayor-Council form, however, the President does not have veto power.¹

The Charlestown Charter establishes a separation of powers, following more closely the American model that we have at the Federal and State level than the Commission form of government that has been adopted in some cities and towns. Under it, individual Commissioners have no authority to act on behalf of the Town unless it is delegated to them by the Town Commissioners as a whole². The President (or in the absence of the President, the Vice President) is the only one authorized to execute the laws or speak on behalf of the Town Commissioners. This would mean that no individual Commissioner could represent the Board at a hearing, for instance, on Planning and Zoning or some other such matter.

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Neither could an individual Commissioner represent the Town of Charlestown in interacting with another branch of government. An individual Commissioner is not authorized by the Charter to direct the actions of an employee of the Town of Charlestown.

On the other hand, I do not believe that accepting the position of Town Commissioner deprives anyone of their fundamental rights as citizens. Therefore, I believe that a Town Commissioner has every right to call to the attention of the Town Administrator, for instance, what the Commissioner believes to be a violation of Town law or a matter of concern to the overall administration of the Town. This right of speech is no greater than, nor less than the right enjoyed by other citizens.

Though I have not been specifically asked this question, the issue arises in my mind as to whether Commissioners have the right to request information regarding Town government that might not be generally available to the public. I have not thought of a specific example of governmental information that would not be available to the public, so maybe this is not really an issue. However, if there is information that is or could be helpful to Commissioners in exercising their legislative powers, that information should be readily available to Town Commissioners, whether or not it is generally available to all citizens. Under the Public Information and Transparency Laws of Federal and State government, however, there may not be any such category of "classified" information. Similarly, it is appropriate and proper for a Town Commissioner to request information from the Town Administrator or other Town employees regarding what has happened or is happening on matters about which the Town government is concerned.

In conclusion, if a Commissioner is acting as an individual citizen, the Commissioner should make it clear to the person or entity with whom he or she is interacting, that he or she is acting as an individual. It is not appropriate for an individual member of the commission to interpret the laws or speak for the will of the Commissioners absent direct delegation of authority to do so. Neither is it appropriate for the Town Commissioner to be the interpreter of the Town's law when another procedure exists for interpretation. As an example, a Town Commissioner is specifically excluded from questions involving interpretations of the Zoning Ordinance under §175-46B, which reads as follows:

"It is further the intent of this chapter that the duties of the Town Commissioners, in connection with this chapter, shall not include hearing and deciding questions of interpretation and enforcement that may arise. The procedure for deciding such questions shall be as stated in this section and this chapter. Under this chapter the Town Commissioners shall have only the duties of considering and adopting or Rejecting proposed amendments or the repeal of this chapter as provided by law and of establishing a schedule of fees and charges as stated in § 175-47 below."

The same would be true for matters involving building codes, historic preservation, public utilities, etc. If the Charter or enacted legislation of the Town establishes an operating procedure, a hearing process, or a quasi – judicial procedure, there is no place for a Town Commissioner to be inserted into that process.

¹ There are a number of alternatives for the organization of local governments in the United States:

1. The Mayor-Council form in which the Council and Mayor share a range of legislative and administrative powers;
2. The Strong Mayor form in which the Mayor has broad budgetary, appointive and administrative powers, including veto power over ordinances enacted by Council;
3. The Commission plan under which the legislative, executive and administrative functions are performed by elected officials; and
4. The Council-Manager plan under which local affairs are administered by an executive official appointed by the elected representatives.
Antieau, *Local Government Law*, Section 11.01

² The use of the term "Commissioner" is somewhat misleading, because the model for a Commission form of government has Commissioners exercising some executive power, sometimes over specific departments. When the legislative body has only legislative powers, it is more commonly called a Council. McQuillan, *The Law of Municipal Corporations*, Section 9.20. In Maryland, County Commissioners also have executive powers though not as individuals, unless specially delegated. See Article 25, Maryland Annotated Code.

Table of Sources

Article 11E, Maryland Constitution
Article 23A, Maryland Annotated Code
Article 25, Maryland Annotated Code
Antieau, *Local Government Law*, Section 11.01
Charlestown Charter, Sections 4 and 5
C. Dallas Sands and Michael E. Libonati, *Local Government Law*
McQuillan, *The Law of Municipal Corporations*, Section 9.20

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Dennis S. Clower
David H. Parrack
Perry J. Seaman

MEMORANDUM

TO: The Town Commissioners
Town of Charlestown

FROM: Dennis S. Clower

RE: Competitive Bidding for Professional Services

DATE: March 28, 2011

One of the first questions asked of me upon receiving your appointment as the new Town Attorney was to review the Charter regarding "Purchasing and Contracts" Section 25-722. Specifically, the question relates to the process of contracting with an accounting firm to do the annual audit. I understand that the accounting firm in question has been retained by the Town for a number of years, has familiarity with the Town's systems and that all of the Town personnel with whom they interact are comfortable with the relationship. The question is whether Section 25-722(b), as amended by the Charter Amendment Resolution 2008-01, requires that the contract be put out for competitive bid. That section says that "all expenditures for supplies, materials, equipment, construction of public improvements or contractual services involving more than ten thousand dollars (\$10,000.00) shall be made utilizing competitive bids and written contracts."

The apparent conflict arrives from Section 25-722(c), which says "all contracts involving professional services, such as accounting, architecture, auditing, engineering, law, planning, and surveying, shall be negotiated by the Town Commissioners." So we must determine whether the Town can contract with the auditing company by negotiation rather than by competitive bidding. My conclusion is that it can.

Since there have been no recent Maryland cases on the subject, we widened the scope of our research to include *Antieau's Local Government Law*, and the widely known treatise by McQuillin, *The Law of Municipal Corporations*. We believe Section 25-722(c), which allows for negotiated contracts, prevails for at least two reasons:

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1. The general law of local government states that even where the Charter or Code calls for competitive bidding, that contracts for such professional services do not require competitive bidding unless specifically so stated. In writing of services for which the local government can contract without bidding, Antieau lists almost verbatim those items set forth in your Charter Section 25-722(c). This leads me to believe that the general proposition was known and incorporated into your Charter when originally adopted and subsection (c) was specifically placed there to reduce any potential for confusion created by the all encompassing language of subsection (b). When subsection (b) was amended in 2008 to change the threshold amount for required bidding from \$2,500 to \$10,000, subsection (c) was not altered. This leads to the further conclusion that it was intended to remain in effect; the only change intended by the 2008 amendment was to raise the threshold for the requirement for competitive bidding for other contracts.

2. McQuillin also makes a special point of the situation, as we have in Charlestown, where there is specific charter authority to dispense with competitive bidding in certain cases. Those cases such as are set forth in subsection (c) to include auditing, accounting, legal services, etc., are clearly legal, when specifically authorized in the language of the Charter.

As mentioned above, we cannot cite a line of Maryland cases for this proposition because it has been so widely accepted for so long that there have been no court cases. I believe it is generally true in public sector practice that professional services contracts are exempt from the requirement for competitive bidding. This is further buttressed by the existence of the two-tier section of the Charlestown Charter. Anyone challenging the propriety of such a procedure should be unsuccessful. However, this does not mean that the Commissioners could not decide, in any particular case, to solicit bids for professional services as well as public construction, etc. Again, the Charter merely authorizes negotiated contracts without competitive bidding – it does not require it.

In my general research, there have been wide ranging discussions about procedures for contracting with professionals. Even when the Commissioners have are generally happy with the services, if they want to check on alternatives, without committing to accepting the lowest bid, they can do a periodic Request for Proposal. It is suggested that a Town might want to do this every few years if there is a concern about increasing costs. However the literature certainly recognizes the advantages of continuation of set professional services from a costs savings standpoint. There is some expense in educating any new professional, in bringing them up to the same level of familiarity with the Town's needs and procedures as that possessed by its current professional.

As always, if this memo fails to answer all the questions you may have on this issue, please feel free to ask for further clarification.

Dennis S. Clower

