

**SPECIAL MEETING OF JANUARY 21, 2020**

Special Meeting of the City Council was held in the City Council Chamber, Room 219, City Hall, on Tuesday evening, January 21, 2020.

CALL TO ORDER

Council President James Walsh called the meeting to order at 6:00 o'clock p.m.

CALL OF THE ROLL

City Clerk Alan Agnelli called the Roll of Members. Eleven (11) Councillors were present including President James Walsh and Councillors James Boone, Nathan Boudreau, Craig Cormier, Ronald Cormier, Aleksander Dernalowicz, Scott Joseph Graves, Karen Hardern, Judy Mack, Elizabeth Kazinskas, and George Tyros.

Also present was Attorney John Flick, City Solicitor.

OPEN MEETING RECORDING & PUBLIC RECORDS ANNOUNCEMENT

President Walsh announced to the assembly that the Open Meeting Recording and Public Records Announcement is posted at the entrance to the Chamber, and that any person planning to record the meeting by any means should identify themselves.

SPECIAL MEETING NOTICE

Council President James Walsh read aloud the Special Meeting Notice, as follows:

“Pursuant to Rule 1 of the Rules of the City Council, a Special Meeting will be held upon the request of Councillors Scott Joseph Graves, Esq. and Karen G. Hardern for the purpose of deliberating on the powers of an Acting Mayor under City Charter Section 32 and the issue of a vacancy in that office under Charter Sections 23 and 32.”

Commenting on the meeting’s proceedings, President Walsh stated that, customarily, a special meeting is for the purpose of voting on a particular item appearing on the Agenda and the discussion and debate associated with it, and then to act on the particular item. The subject matter in the call of this special meeting, he said, is for a discussion on the topics raised in the meeting request. Customarily, he said, a discussion about a certain topic is the subject of an Informal meeting of the Council, after the measure has been referred to the Council as a Committee of the Whole. “So, this is somewhat unusual in that respect,” he stated.

Continuing, President Walsh said that given the circumstances in which the Council finds itself, the resignation of the Mayor and the circumstances of an Acting Mayor, that he would “exercise his discretion to permit discussion on the topic even though it is not really a topic for a vote on tonight’s Agenda.” There were no objections, so Councillor Graves started the discussion.

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Councillor Graves moved to commit the discussion item in the Call of the Meeting to the Council as a Committee of the Whole for the purpose of discussing the issue.

Councillor James Boone seconded the motion.

On the motion to commit the matter to the Council as a Committee of the Whole, Councillor Graves stated that he and Councillor Hardern thought that the Council “should get its arms around the thing in advance,” and added, “The Mayor resigned today, so that issue is off the table, which is [now] moot.”

On the motion, Councillor Graves said, “As far as the powers of an Acting Mayor, it comes down to the phrase ‘matter not admitting of delay.’ A lot of issues will come back to the City Council from the Acting Mayor and the Council has to make sure that the Council is making the right decision. That whatever we’re working on, it has the have authority before it comes to us.” He remarked that [discussions] in the Committee of the Whole is more informal and that Councillors get to speak more than twice.

President Walsh stated that at the end of the meeting, a motion to adjourn will be required to close the Special meeting.

On the motion, it was voted viva voce, eleven (11) yeas, President James Walsh and Councillors James Boone, Nathan Boudreau, Craig Cormier, Ronald Cormier, Aleksander Dernalowicz, Scott Joseph Graves, Karen Hardern, Judy Mack, Elizabeth Kazinskas, and George Tyros, to commit the item to the Council as a Committee of the Whole for the purpose of discussing the issue.

Councillor Graves opened discussion by asking, “When can an acting mayor exercise mayoral powers under our Charter? Our Charter mimics two sections of State Law, which uses the phrase ‘not admitting of delay’.” In a meeting with the City Solicitor, Assistant City Solicitor, the Mayor, and City Clerk, Councillor Graves said that the City Solicitor used the term “emergencies” when describing “matters not admitting of delay,” and his [Atty. Flick] Memo of November 18, 2019 also referred to ‘emergencies’. Councillor Graves said that he did not agree with Atty. Flick’s Opinion, so he [Graves] sent a new response letter to the City Solicitor in December with 35 questions which, he added, are included in his letter that he distributed to the Councillors before the meeting.

Continuing, Councillor Graves stated, “After the election for Council President, the City Solicitor’s opinion changed from ‘emergencies’ to ‘a bunch of things’, but let’s just call it ‘a sense of a necessity’.” “I think,” He said, “that we [Graves and the City Solicitor] agree that the case we use is Dimick v. Barry, which is ‘the seminal case’.” “The statutes don’t define the meaning of ‘matters not admitting of delay,’ but that it just uses the phrase. The Dimick case if the only thing that we have to go by,” he added.

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Continuing, Councillor Graves said, as he “pointed out in his letter,” “It doesn’t mean what the City Solicitor says it means. The City Solicitor says it means a ‘sense of necessity’. First of all, a sense of a necessity is less than a necessity. A necessity in city government is just about everything.” “So,” he said, “if you want to call ‘a sense of a necessity’ the same as ‘a matter not admitting of delay’, then the Acting Mayor will be able to essentially make any decision that he wants, which may be you guys want that. Maybe the City wants that, I don’t know. Should we go to that lax of a definition of matters not admitting of delay?”

“Now,” Councillor Graves stated, “Dimick says that not only do you need more than a ‘sense of a necessity’ – I have no idea what that means. But, it’s like having a sense of a wind. If you’re in the middle of Lake Champlain in a sailboat, wind will get you to the other side of the lake. A ‘sense of wind’ will help you write poetry in the boat overnight while you’re stranded.”

Continuing, Councillor Graves stated, “Dimick says you need more than a necessity – you need an urgency. But, you need more than an urgency, you need ‘a pressing and irresistible public urgency of an unusual kind’.” “So,” he said, “I think it is important that we have the definition of ‘matters not admitting of delay’ and I think the Acting President needs to know the definition, because you’re not going to know when you can act and when you can’t act.” “So,” he said, “I think that if we agree that the definition – Dimick says it is “a pressing and irresistible public urgency of an unusual kind.”

Continuing, Councillor Graves stated, “Now, here’s the other point. The discretion is all with the Acting Mayor. I don’t think that there’s anything that the City Council can do about it. I just think that it’s good to talk about what that definition might be in open public, in a transparent situation where the public can see what we are talking about and can see what...the City Council thinks the definition is.”

Continuing, Councillor Graves said, “The other part of Dimick that I have a question about, and I read it several times, it almost sounds like Dimick is saying every time the issue comes up as to whether or not we need a determination about what is a matter ‘not admitting of delay’, it looks like they want us to go to Court for a judicial determination. It could be read that way.” “I don’t think it’s saying that,” he continued, “I’m using common sense. I think it is saying that you can make that decision at your own risk, but that it could be challenged – but ultimately it could always go to court to be challenged.” “It can’t mean that,” he continued,” because everything is challengeable in Court. Anyways, that is a question for the City Solicitor, but at the very least, we have to have that definition pinned down.” “A sense of a necessity is basically anything,” he added.

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Continuing, Councillor Graves stated, “There is no way the City Council is going to know – we don’t have the executive that the people voted in – he’s gone, he resigned” “So,” he said, “we would like, if possible, [that] the City Council knows about the decisions that the Acting Mayor is making.” “But,” he said, “We’re not going to know what the Acting Mayor is doing unless the Acting Mayor tells us. I would hope that we are informed as to what the Acting Mayor is doing, but it’s his discretion and he doesn’t have to tell us anything.”

Continuing, Councillor Graves stated, “Some people say that the Charter needs to be revised or the Charter is lacking – it’s a nightmare – I’m just saying maybe you agree with me. There’s only so far the human language can go with these things.”

Citing the City of Fall River case, Councillor Graves stated, “They tried to come up with an Ordinance as to when a City Council can declare a vacancy. The Court said, ‘You can’t do that’. There’s only so much that a City Council can do – only so much a Charter can do.” “You hope,” he said, “that the people you elect – you hope that the City officials use common sense and reason when they make decisions and sometimes that doesn’t happen and so you have to revert to the Charter which really isn’t there to cover every consequence and every circumstance and every potentiality that might happen.” “So,” he said, “I don’t think there’s anything wrong with the Charter...I think at this point the City Council should, if at all possible, be kept in the loop as to what the Acting Mayor is doing.”

Council President Walsh recognized Councillor Karen Hardern, the second petitioner for the Special meeting.

Councillor Karen Hardern said, “My concern is that we need some kind of clarity like Councillor Graves has been speaking about – ‘Emergency’ or ‘matters of admitting to a delay.’” “I’ve had a few department heads give me a call,” she said, “as they have their own concerns about what if something should happen in their department. Can they take of that or will they have to wait many months before a new Mayor comes in?” “I’ve heard from quite a few people from the City who don’t understand this and I thought this meeting would be a great thing for the people and the Councillors to get together and speak about this,” she said, adding “I don’t think this situations ever happened quite like this.”

Council President James Walsh introduced City Solicitor John Flick.

The City Solicitor, Attorney John Flick, announced to the Council that he prepared a Power Point Presentation to summarize the standing laws currently relating to the Dimick Case and other matters, as well as the Law Department’s opinion regarding “matters not admitting of delay”.

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Attorney Flick cited the following:

From Section 32 of the City Charter:

If the Mayor is absent or unable from any cause temporarily to perform his duties, or if his office is vacant during the first eighteen months of his term, his duties shall be performed by the president of the city council. The person upon whom such duties shall devolve shall be called “acting mayor”, ***and he shall possess the powers of mayor only in matters not admitting of delay, but shall have no power to make permanent appointments.***

Matters Not Admitting of Delay

The phrase “matters not admitting of delay” comes from M.G.L. c. 39, § 5. Except as otherwise provided by city charters, upon the death, resignation or absence of the mayor, or his inability to perform the duties of his office, the president of the board of aldermen shall perform them; and if there is no such officer, or if he also is absent or unable from any cause to perform them, they shall be performed by the president of the common council, or, if there is no such officer, or if he is absent or unable to perform such duties, by such alderman as the board of aldermen may from time to time elect, until the mayor or the president of the board of aldermen is able to attend to said duties or until the vacancy is filled. **The person upon whom such duties devolve shall be called “acting mayor” and shall possess the powers of mayor only in matters not admitting of delay, and shall not make permanent appointments.**

Meaning of “matters not admitting of delay”

- There are two court cases which address the meaning of the clause “matters not admitting of delay.”

Ryan v. City of Boston, 204 Mass. 456 (1910)

Dimick v. Barry, 211 Mass. 165 (1912)

- Despite the age of these cases, they present the controlling law on the meaning of the clause “matters not admitting of delay.”

Ryan v. City of Boston

In Ryan v. City of Boston, the Court considered the validity of a contract to construct a public sewer signed by the then acting mayor Whelton.

The Court posed the question:



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- “But the powers of an acting mayor are expressly limited . . . to matters requiring immediate action. If this limitation is applicable to the defendant city, the contract is invalid, as it does not appear there was any urgent public necessity for the construction of the sewer”

The Ryan Court ultimately upheld the contract concluding that Whelton, as acting mayor was authorized to perform all the duties of the office of mayor as required by the “general and special laws applicable to the administration of the municipal affairs of the city.”

- In holding thusly, the Court acknowledges that there is a need of an acting mayor to maintain the administration of the municipal affairs of the City.

Atty. Flick added that he believes that the Ryan case is applicable in this instance, even though it was not referenced in the Dimick case, as “the Court acknowledges that there is a need of an acting mayor to maintain the administration of the municipal affairs of the City, which is very important as the City considers the question.”

Dimick v. Barry

Atty. Flick noted that the Dimick case was different, as it dealt with the absence of a Mayor.

- Dimick considered the application of M.G.L. c. 39, § 5 to the execution of a contract by an acting mayor occasioned by the absence of a mayor due to illness.
- In Dimick the Court considered the laying out of a public way.
- The Mayor’s absence lasted over four weeks and returned to the full performance of his duties.
- The Dimick decision provides a robust analysis of the meaning of the clause “matters not admitting of delay.” In presenting its initial analysis the Dimick Court states:

“While this language should not be given narrow or refined interpretation *and should be construed in view of the practical necessities of municipal administration* . . . The words are both plain and emphatic. They express a definite conception of a necessity so importunate that it cannot be resisted with reason.” [Emphasis Added.]

- The Dimick Court provides concrete examples to illustrate the meaning of “matters not admitting of delay.”
- “Cases might arise where it would be apparent as matter of law upon the face of the papers that the approval of the order was ‘a matter not admitting of delay.’ Such an inference might be drawn respecting a warrant for an election or an appropriation of

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money to be used for a Fourth of July celebration or a corporate anniversary, or like orders where time appears to be of the essence of the subject.”

- “Appropriations necessary for immediate payment of fixed charges of various municipal departments would come within this rule.”
- The Court concluded: “The mayor is the one designated by law to be the executive of the city. It is not a mere passing incident which enables another to supplant him, but a *pressing urgency of an unusual kind*.” [Emphasis added.]
- Continuation of illustration of “matters not admitting of delay.”
- An emergency measure requiring instant attention. Impending disaster, threatened disorder, public pestilence, devastation by flood or fire illustrate the range of subjects of this character

In Summary

When considering if a matter is not admitting of delay, the acting mayor should consider the following:

- Is the matter immediately necessary to maintain the administration of the municipal affairs of the City?
- Does the matter present an issue of urgent public necessity?
- Is time of the essence?
- Would a failure to act result in potential “immediate” liability to the City?
- This is a case by case analysis.
- The acting mayor must operate within the appropriations already made by the Council. If supplemental appropriations are needed, additional Council action will be required.

Attorney Flick suggested that the signing of contracts for road paving for [seasonal] work when funds have been appropriated, for example, is a determination to be made by the acting mayor as to whether it is a matter “not admitting of delay.” “What the Law Department has proposed,” he said, “is that department heads provide a statement that would list reasons why they believe a matter needs to be addressed immediately. The acting mayor could then review the request and in the acting mayor’s opinion that it is a ‘matter not admitting of delay’ and no further appropriation is necessary; the acting mayor could sign the measure, as the document is included within the contract packet, thus, the acting mayor had the authority to sign that contract.”

Continuing, Attorney Flick said that the same process could possibly be adapted to other scenarios. For example, he said, that “if there were a desire to pass Ordinances, such as creating

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a new public park. Would that be “admitting of delay? No, probably not.” “It would have to be considered on a case-by-case analysis,” he added.

In Conclusion

“There is force in the argument that the question whether a matter admits of delay or not is an administrative one and must in the nature of things *be decided by the officer called upon to act*, that it relates to public affairs of importance which ought not to be held in doubt as to their validity until there can be a determination by the courts; that public officers are assumed to act in good faith and that all reasonable presumptions should be drawn in favor of the existence of facts necessary to constitute a legal performance of duty.” *Dimick*, at 167-68

- In other words, the existence of an urgent matter requiring action by the acting mayor, must be left to his or her final determination.

Attorney Flick stated, “We trust in the good faith of the Acting Mayor in these decisions on a day-to-day basis when there is a call for these decisions to be made.” “Over the next five months,” he said, “we’ll see this issue primarily on the issue of contracts where the City Council has voted appropriations for those contracts.”

Concluding, Attorney Flick said, “We are ready to place a process in effect to deal that will provide sound defense for the City should somebody challenge the validity of a contract, but also give the acting mayor guidance to get through the next few months in an orderly way to maintain sound administration of the City’s government.”

Councillor James Boone stated that the public is still confused, but that through the [special] meeting, he would like to address a couple of issues. “One,” he said, “is that if the Mayor had not resigned today, what action could the City Council have taken?” “And,” he said, “number two, is there anything that could have been put into the Charter to prevent the situation that we are in?”

In response, Council President Walsh said that the question “is probably outside the scope of the matter that is subject of the Special Meeting. However, if the City Solicitor is in a position to respond, then he may have that opportunity.”

Attorney Flick remarked that Councillor Boone’s questions “are very large.” “The question ‘could this have been prevented?’” “The problem,” he said, “is that the Office of Mayor is elected by the people and has very specific and strict constitutional protections. The Council lacks the legal authority to declare a vacancy, absent very specific guidelines.”

“And,” he said, “in the case of the City Charter, only by death, resignation, or absence, as noted in Chapter 39, section 5.”

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Continuing, Attorney Flick stated, “In the Fall River case, the definition of ‘vacancy’ in that case is not defined. The Council, in that case, tried to force the question – the Mayor was indicted for criminal activity – so they [Council] said it constitutes a vacancy in the office. The Court said, ‘No, it does not.’ If he was convicted, then that would be a different story. But, the term vacancy wasn’t properly defined in the [Fall River] Charter.”

Councillor Boone asked, “What recourse does the City have if he [Hawke] stayed on and did not resign?”

Attorney Flick responded, saying that the City could certainly attempt to take action through the Law Department, whether through an injunctive action or a declaratory judgment action against the sitting Mayor or the Mayor-elect to force the Mayor-elect to take the oath of office. “The problem,” he said, “is that Section 23 of the City Charter says that ‘the Mayor-elect, should he or she be absent from the first meeting of the Council of the year following the election, or cannot attend that meeting, he or she can take the oath of office at any meeting of the Council thereafter.’” “So,” he said, “just on the face of the Charter, that matter, I believe, would get thrown out of Court because the Charter allows that person...months to take the oath of office.”

Councillor Boone remarked that it appears to him that the Charter does not have clear definitions and that it sounds like it [Charter] may need change.

Attorney Flick said that considering what the City is currently facing, there may be some room for clarification and refinement to the Charter.

Councillor Judy Mack stated that about thirty years ago, Council President Walsh served as Acting Mayor and then questioned the powers that he [Walsh] had at that time and whether there was any precedent then.

President Walsh stated that the City had been in this situation twice before. First, in June, 1933, the elected Mayor, George Sweeney, was appointed Assistant United States Attorney General and as a result, he resigned via telegram. As a result of Mayor Sweeney’s resignation, Council President Stanford Hartshorn became Acting Mayor.

Continuing, President Walsh informed the Council that he reviewed the minutes of Council meetings following Mayor Sweeney’s resignation and found that matters were addressed, that elections were ordered and held, and that James Timpany was elected Mayor at the Special Election to serve the unexpired term.

Continuing, President Walsh said that thirty years ago, there was no Mayoral vacancy, but that the Mayor was unavailable, which is mentioned in the City Charter and a situation in



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which an Acting Mayor becomes involved. As a result, as Council President, he became Acting Mayor, serving from November, 1989 until January, 1990, when the duly elected Mayor, Charles Manca, elected at the scheduled election in November, was sworn into office.

Continuing, President Walsh said that following the Mayor's unavailability, meetings of the City Council were conducted without difficulty and that he was aware of the limitations as Acting Mayor, including permanent appointments. He said that when he became Acting Mayor, the City did not have a Law Department since there was no City Solicitor or Assistant City Solicitor. Therefore, he appointed C. Deborah Phillips to the position of City Solicitor and Timothy Hillman, now a Federal District Court Judge, to the Assistant City Solicitor's position. Both were appointed for terms not more than 60 days. He added that he consulted with Mayor-Elect Charles Manca about the temporary appointments, both of whom were appointed by Mayor Manca to permanent appointments.

Concluding, President Walsh said that Council meetings and government operations functioned in an orderly fashion, adding, "I can tell you that I understand the limitations of the office and the guidance that the Dimick case provides and will conduct myself accordingly."

Councillor Nathan Boudreau complimented Attorney Flick for his eloquent presentation and noted solace in knowing the Attorney Flick will be available to guide the Acting Mayor.

Councillor George Tyros informed the Council that in his line of work, they operate using an "80-20" rule. He said that when a situation arises, outcomes cannot always be predicted, so solutions are designed to provide for 80% of anticipated situations and then deal with the 20% of unanticipated situations as they arise. He said that it is his understanding that the situation that the City now faces, the Acting Mayor's powers are limited to maintaining the administration, covering about 80% of situations that may arise. The other 20% of the situations may be beyond the authority of the Acting Mayor, so then the Acting Mayor would alert the Council.

In response, President Walsh said, "A more cogent analysis is that if it is a matter that isn't needed to be done right now and that it can be deferred or delayed until the elected Mayor can address it, then it should be delayed." "But," he added, "in the orderly administration of government, on a day-to-day basis – contracts, bills – those are matters that really cannot be delayed."

Attorney Flick commented that the 80% would be for items already appropriated, but the need to address a falling building, for example, would fall within the 20%, on a case by case basis.

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Councillor Ronald Cormier stated that his concern focused on matters where funds have been appropriated and contracts are of a time-sensitive nature, such as a school bus contract, where bidding has occurred and the contract would coincide with the school year.

Councillor Graves said that Dimick is an old case. “I don’t think it says exactly what the City Solicitor is saying it says, but the point that Dimick does make is, that four times it bends over backwards to say that the Acting Mayor’s power is severely limited,” he said. “Dimick,” he continued, “says it is an extremely limited power of the Acting Mayor. They [Court] say, ‘When a public officer undertakes to perform by way of substitution duties so definitely circumscribed it must appear they are warranted and no strong presumption exists in favor of the Acting Mayor’s decision.’”

Continuing, Councillor Graves said, “So, the point is you can have the best plan that you can come up with - by the way [it] doesn’t include the City Council unless you need money - but the contract’s not going to be valid unless a court says it is.” “What this is going to do,” he said, “unfortunately, nine times out of ten, you’re going to know what to do – it’s definitely a ‘matter not admitting of delay.’ But, in those gray areas, if we don’t get court approval, it’s just going to give somebody down the road fodder to say, ‘Well, this is an illegal contract because that wasn’t a matter ‘not admitting of delay.’” Continuing, “This is why I think what Dimick is saying – the court is what makes the judicial determination, on a case by case basis, as to whether something is not a matter admitting of delay. So, I’m thinking that nine times out of ten you’re going to be okay, then that one time, I hope that – nobody – the City Council – cannot approve that the make it valid, unless it’s a court.”

Commenting on Councillor Graves’ remarks, President Walsh said, “The factual basis upon which the decision to act is based on that establishes it as an urgent matter that can’t be delayed would form the foundation for any defense of an action challenging it. And I believe that the Dimick case addresses that in a meaningful way.”

Seeking clarification, Councillor James Boone questioned whether Council President Walsh would continue to serve as Council President while also serving as Acting Mayor.

Council President Walsh nodded in the affirmative.

Councillor James Boone questioned whether Council President Walsh could vote on an appropriation if he filed it in his role as Acting Mayor.

President Walsh responded, saying that as the Acting Mayor, he is able to vote, unless excluded by interest.



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ADJOURNMENT

On a motion by Councillor Ronald Cormier and seconded by Councillor Nathan Boudreau, it was voted viva voce, eleven (11) yeas, President James Walsh and Councillors James Boone, Nathan Boudreau, Craig Cormier, Ronald Cormier, Aleksander Dernalowicz, Scott Joseph Graves, Karen Hardern, Judy Mack, Elizabeth Kazinskas, and George Tyros, to adjourn at 6:44 p.m.

Accepted by the City Council: *February 3, 2020*

CITY OF GARDNER

Law Department

Powers of the Acting Mayor

Discussion

January 21, 2020

The City Charter

- From Section 32 of the City Charter:

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Matters Not Admitting of Delay

- The phrase “matters not admitting of delay” comes from M.G.L. c. 39, § 5
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M.G.L. ch. 39, § 5 (West)

Meaning of “matters not admitting of delay”

- There are two court cases which address the meaning of the clause “matters not admitting of delay.”
 - Ryan v. City of Boston, 204 Mass. 456 (1910)
 - Dimick v. Barry, 211 Mass. 165 (1912)
- Despite the age of these cases, they present the controlling law on the meaning of the clause “matters not admitting of delay.”

Ryan v. City of Boston

In Ryan v. City of Boston, the Court considered the validity of a contract to construct a public sewer signed by the then acting mayor Whelton.

The Court posed the question:

- “But the powers of an acting mayor are expressly limited . . . to matters requiring immediate action. If this limitation is applicable to the defendant city, the contract is invalid, as it does not appear there was any urgent public necessity for the construction of the sewer.”

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- In holding thusly, the Court acknowledges that there is a need of an acting mayor to maintain the administration of the municipal affairs of the City.

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- In *Dimick* the Court considered the laying out of a public way.
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- The *Dimick* decision provides a robust analysis of the meaning of the clause “matters not admitting of delay.” In presenting its initial analysis the *Dimick* Court states:

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- The Dimick Court provides concrete examples to illustrate the meaning of “matters not admitting of delay.”
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 - “Appropriations necessary for immediate payment of fixed charges of various municipal departments would come within this rule.”
- The Court concluded: “The mayor is the one designated by law to be the executive of the city. It is not a mere passing incident which enables another to supplant him, but a *pressing urgency of an unusual kind*.”
[Emphasis added.]

Dimick v. Barry

- Continuation of illustration of “matters not admitting of delay.”
 - An emergency measure requiring instant attention. Impending disaster, threatened disorder, public pestilence, devastation by flood or fire illustrate the range of subjects of this character.

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 - Is time of the essence?
 - Would a failure to act result in potential “immediate” liability to the City?
- This is a case by case analysis.
- The acting mayor must operate within the appropriations already made by the Council. If supplemental appropriations are needed, additional Council action will be required.

In conclusion

“There is force in the argument that the question whether a matter admits of delay or not is an administrative one and must in the nature of things *be decided by the officer called upon to act*; that it relates to public affairs of importance which ought not to be held in doubt as to their validity until there can be a determination by the courts; that public officers are assumed to act in good faith and that all reasonable presumptions should be drawn in favor of the existence of facts necessary to constitute a legal performance of duty.” Dimick, at 167-68

- In other words, the existence of an urgent matter requiring action by the acting mayor, must be left to or his final determination.

Scott j. Graves
City Councillor AT LARGE

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[“Sandwiches sure taste better with milk.” Opie Taylor]

MEMORANDUM

To: Attorney John Flick, Esq., City Solicitor
From: Scott j. Graves, Councillor AT LARGE
Date: Jan. 21, 2020
Re: Your Nov. 18, 2019 Memorandum and Three Emails of Jan. 8, 2020

BACKGROUND.

On Nov. 14th you and Mayor Hawke met with me (the Asst. City Solicitor was there, as was the City Clerk). You said that the Acting Mayor (to be me, at that time – as we discussed during that meeting) would not have any powers of the Mayor unless in connection with an “emergency.” Your word.

Four days later, you issued your “Memorandum” in which you confirmed that aforementioned legal opinion that the Acting Mayor (still, to be me at that time) “does not assume the office of the mayor” and cannot take any action unless in response to “emergencies.”

In December 2019, I provided you a letter in response to your said 11/18/19 opinion in which I formally asked you many (35) questions raised by your said 11/18 Memorandum. I stated that there were certain aspects about your “Memorandum” and its opinions that caused me concern, and requested clarification. That was in December. You have never responded to my December communication.

In December, you sent emails to Councillor James Johnson (but never responded to my December questions) which included, among other sentiments, your opinion that, even given our established facts, the Mayor could keep the Mayor’s office empty (no Mayor, no Acting Mayor) for two years - and there would be nothing the City could successfully do about it.¹ Now that the Mayor has resigned, I do not need to provide my response to that opinion of yours – but I will say that I see it as patently astounding.

On Jan. 8th – you informed me that you were working on a plan to “protect the actions of Acting Mayor,” and that that plan involved the legal determinations of an unelected Department Head, the unelected City Solicitor, and the Acting Mayor – but not the City Council. This caused much confusion and potential chaos in city government. No City Councillor knew about this plan of yours.

YOUR CHANGING OPINION.

On Jan. 6th, I was removed as Council President. After I was removed, you sent me an email in which you provided a drastic change in your opinion that the Acting Mayor could only act in the face of “emergencies.” Again, you never responded to my aforementioned December letter.

¹ So, according to you, if the People kept electing him, and if he kept refusing to take the oath, the City of Gardner would never again have a Mayor or an Acting Mayor – with nothing the City could do about it.

Your new opinion, post-Jan. 6th, is that you didn't actually mean "emergencies" when you wrote "emergencies" in your 11/18/19 Memorandum. You say, post-Jan. 6th, that when you wrote "emergencies" you really meant a "sense of something where time appears to be of the essence," or a "sense of a necessity."

So, you now believe that a "sense of a necessity" triggers the Acting Mayor's powers as a "matter not admitting of delay." That is not correct, obviously, as set forth below.

I have no idea where this "sense" comes from, and you don't say where it comes from.

You write that the Dimick Court made "necessities" the same thing as "emergencies." This obviously is not correct, far from it - as I point out below.

I hope we will all be able to eventually agree that a "matter not admitting of delay" is much more than a "sense of a necessity." Otherwise, the Acting Mayor will literally have unbounded and unchecked Mayoral power – because a "sense of a necessity" is just about anything you want it to be.

I do not know where you originally came up with "emergency" in November (pre-Jan. 6th) to define a "matter not admitting of delay." We can agree that Dimick does not hold that "matters not admitting of delay" are *only* emergencies. Though emergencies do suffice to trigger the Acting Mayor's powers (obviously), what else can trigger them? In November (pre-Jan. 6th), according to you, nothing else.

So, I agree: the case law does not require an all or nothing "emergency" in order for it to be "a matter not admitting of delay." The City Charter, likewise, also does not require an emergency in this regard.²

But, something far greater than what you say is merely a "sense of a necessity" is required to amount to a "matter not admitting of delay."

So, post-Jan. 6th, you say that the triggering of the Acting Mayor's powers does not have to be an "emergency," and, in fact, we do not even need an *actual* "necessity" itself. All it takes, according to you (post-Jan. 6th), is a lyrical "sense" of a necessity. Obviously, that is a definition so devoid of a skeleton that it would be whatever the Acting Mayor wants it to be.

No court has used the phrase "sense of necessity," or a "sense" of anything. So not only can no one know what it means, legally it means nothing. It's like being on the middle of a Lake Champlain in a sailboat. The wind gets the boat to the shore. A "sense" of the wind helps you compose poetry while stranded in the middle of the Lake all night.

DOES DIMICK REQUIRE A JUDICIAL DETERMINATION THAT SOMETHING IS A "MATTER NOT ADMITTING OF DELAY"?

Dimick v. Barry is the seminal case law that defines "matters not admitting of delay." I think we agree on that. The Dimick Court states this: "[t]he statute makes no provision for the ascertainment of 'matters not admitting of delay.' Therefore, it must be determined according to the usual course of judicial procedure as each case arises." So, it looks like the SJC kept *for the courts* the ultimate role of determining what it

² The City Charter shows this by its use of "emergencies" (and a 2/3 CC vote) in other Sections of the Charter. Obviously, the Founders chose not to use "emergencies" in Section 32. Logic demands, therefore, that the Founders' employment of the phrase "matters not admitting of delays" means they did not require "emergencies."

means, on a case by case basis.³ So, the Court is pointing out that the Acting Mayor makes a mayoral decision without *prior* judicial approval at the City's own risk and peril.

The Dimick Court considered the argument that such municipal decisions as those of the Acting Mayor "ought not to be held in doubt as to their validity until there can be a determination by the courts." But, Dimick is not persuaded that that concern overrides the Public's interest that the decisions of the Mayor should be made by the human they elected as Mayor, and not some "substitute."

The Court goes on to say that, "[t]he extremely limited power conferred by the statute does not seem to us to indicate a legislative intent to leave a question deemed so important to the conscience of persons clothed temporarily with a power, for the exercise of which they were not primarily selected." In other words, the Acting Mayor should not be the one to decide when a "matter not admitting of delay" exists.

So, do we have to go to Court each time the question comes up as to whether a situation triggers the Acting Mayor's exercise of mayoral powers? Should we?

THE LAW REGARDING THE DEFINITION OF "MATTERS NOT ADMITTING OF DELAY."

No statute defines a "matter not admitting of delay." So, we rely on Dimick – which *is* the law on this. Dimick does not state that the Acting Mayor's powers are triggered by something as vague and amorphous as a "sense of a necessity," as you say is the case. In fact, Dimick does not use the word "sense" at all.⁴ It requires much more than that.

Furthermore, apart from the fact that your mystical illusion of a "sense of a necessity" is nowhere to be found in Dimick, the Court does state that an *actual* "necessity" is not even enough to amount to a "matter not admitting of delay." Dimick says you need *more than* even an actual "necessity." Dimick provides that you need a necessity that rises to a level that is so compelling ("importunate") that it cannot be "resisted with reason." But, the Dimick reasoning goes even *further* than that – it states that you need *more than* an actual necessity – you need an actual "urgency" (not a "sense" of an urgency). But, believe it or not, Dimick goes even *further* than that – you need not just an actual urgency, but an actual urgency that rises to the level of a "*pressing* urgency of an *unusual* kind," an "*irresistible* public urgency."

So, Dimick's holding is that the definition of a "matter not admitting of delay" is:

"A pressing and irresistible public urgency of an unusual kind."

So, no. You are not correct when you state that Dimick states that "emergency" and a basic "necessity" are the same thing. That only muddies the unfortunate dilemma facing the City, and expands the Acting Mayor's powers when Dimick is bending over backwards to limit them.

³ It can be argued that every decision the Acting Mayor makes requires *prior* judicial approval to have validity.

⁴ You cite the Ryan v. Boston case. But, Ryan contains only dicta – and contains no reasoning or analysis whatsoever as to what constitutes a "matter not admitting of delay." The Ryan Court talks about what *reaction* is required in consequence of the existence of an "urgent public necessity" – such *reaction* being "immediate action." If anything can be taken away from Ryan (and Dimick is two years newer than Ryan, and did not even give it a passing reference) is that the Court required, at the least, an "urgent public necessity" – not just a "sense" of a necessity or even a basic "necessity" or even a basic "urgency." In other words, it takes a lot to amount to a "matter not admitting of delay." Anyway, Ryan is only dicta.

So, the Acting Mayor's powers are triggered by 1) an actual "public urgency," which is 2) pressing, and 3) irresistible, and 4) unusual. All of those elements are required. A nebulous "sense" of a basic "necessity" is nowhere near enough.

DIMICK PROVIDES THAT THE INTEREST AT STAKE IS THAT OF THE CITIZENS IN HAVING THEIR ELECTED OFFICIALS MAKE THE DECISIONS THEY WERE ELECTED TO MAKE.

In Dimick the SJC points out *four times* in a very short decision, that the primary interest is the public, the citizenry, in making these determinations. Dimick points out that this is an "*extremely limited power of the acting mayor.*" Where the SJC in Dimick bent over backwards (see below) to point out that the acting mayor's powers should be as *limited* as possible, your opinion seeks to *expand* those powers.

The Dimick court repeatedly states that the primary interest here is that Mayoral decisions be made "by the person elected by the people, rather than by a substitute (the Acting Mayor)." The Dimick Court repeats this concern for the interests of the Citizenry: "[w]hen a public officer undertakes to perform by way of substitution duties so definitely circumscribed . . . it must appear that they are warranted and no strong presumption exists in (favor of the Acting Mayor's decision)."

The Dimick Court says it yet again in explaining the priority of the Public's interest here: "[t]he Mayor is the one designated by law to be the executive of the city. It is not a mere passing incident which enables (the Acting Mayor) to supplant him."

Obviously, the Courts are firmly *against* the Acting Mayor making Mayoral decisions right from the get-go. There is no presumption in favor of the Acting Mayor, only against him.

The Dimick court goes on to say that in an analysis of whether a decision of the Acting Mayor was made validly as to a "matter not admitting of delay," the Acting Mayor's discretion is not determinative. Instead, the Court held that "[t]he extremely limited power conferred (to the Acting Mayor) does not seem to us to indicate a legislative intent to leave a question deemed so important to the conscience of *persons clothed temporarily with power, for the exercise of which they were not primarily elected* (emphasis added)."

YOUR STATEMENTS AND YOUR NEW PLAN HAVE CAUSED CONFUSION

The point here, though, is that there is much confusion inserted here by your post-Jan. 6th reversals, and by your misstatements as to the Dimick holding.

For you to say a "necessity" (or even less – a "*sense*" of a necessity) is the same thing as an "emergency" is incorrect, and misstates the Dimick holding. We must be careful not to expand the Acting Mayor's powers where the Dimick SJC bent over backwards to limit them.

Prior to Jan. 6th, your opinion was that it took "emergencies" to amount to a "matter not admitting of delay." We all know that you know what the word "emergencies" means.

Your newly-reformed (post-Jan. 6th) legal opinion on this subject means that the Acting Mayor is free to do virtually anything the elected Mayor can do (except for making appointments).⁵ This is an astounding

⁵ I will not go into a long philosophical diatribe to support the obvious reality that, in government, one is hard-pressed to come up with anything that requires Mayoral imprimatur that does not have a "sense" of necessity. But, if you want me to – I will.

development, post-Jan. 6th, which essentially erases your original, pre-Jan. 6th opinion regarding the powers of the acting mayor.

Now, to make matters worse, on Jan. 8th you revealed to me your private plan to affect and effect (I guess) the Acting Mayor's authority. No City Councillor knew about your plan. I am not sure they all know about it now. Your plan does not include notice to or input from the City Council as to any legal determination triggering the Acting Mayor's authority to act. Instead of involving the City Council in this critical aspect of city government, your plan requires unelected city employees to issue legal conclusions as to when a "matter not admitting of delay" exists as a matter of law. I'm not sure that the Councillors will see that as the best idea – when the CC is here to help.

The Dimick Court suggested that the City Council be the elected body to weigh in on these determinations.⁶ Yet, you cut the CC out of it (unless you need taxpayer money).

Can the plan of an unelected city employee in the Executive Department, a plan that seeks to substantively affect/effect Executive authority, be enacted and take effect in the absence of an elected Executive/Mayor? Remember, an Acting Mayor (you have written) does not "assume the office of the Mayor." If your plan goes into effect, I assume it will only be a safeguard or informal process of some kind. I don't know for sure because your reference to it was not specific. But, the question is an interesting one - and the legal issue should be explored. Regardless, why it is that the City Council, the law-making branch, is not a part of it seems to be something that should be addressed.

CONCLUSION.

The *elected* Mayor might be gone, but the *elected* City Council is still here. The City Council is made up of the *only* people at City Hall who were elected by the People. I think the Citizens, whose 2019 vote for Mayor has now been left to the curiosities of posterity, will have confidence at this time of flux if their 11 elected lawmakers are included in any plans moving forward regarding decisions to be made by the Acting Mayor as a substitute for the elected Mayor (Mayor Hawke, of course).

This is especially the case because everything the CC does is in the open, and after due notice to the public.

But, the decision as to whether to include the CC is within the discretion of the Acting Mayor.

I suggest that the full City Council, in order that the City comply with the case law set forth by the SJC in Dimick, adopt the following definition of "matters not admitting of delay":

"A pressing and irresistible public urgency of an unusual kind."

Of course, for each decision of the Acting Mayor that does not require City Council action - the City Council will have no prior knowledge of it (unless the Acting Mayor voluntarily notifies the CC in advance). Likewise, the CC will have no role in the determination of whether a matter is one "not admitting of delay" in those same decisions unless the Acting Mayor voluntarily gives the City Council such role.

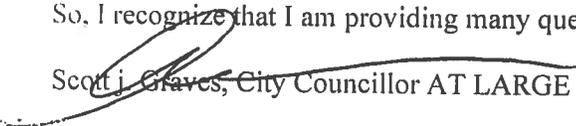
⁶ I know Dimick had to do with a CC decision, which is probably why the Court suggested a role for the CC, but later in the case the Court seems to imply a general role for the CC in these determinations.

However, the Acting Mayor's understanding of the definition of "matters not admitting of delay" is critical to the interests of the Citizens of this City. I hope that my reasoning in this letter will be of use in that regard. This is his prerogative, not mine.

I hope that the CC will be informed of each instance where the Acting Mayor is making a decision with mayoral powers. But, at the very least, I hope that the CC is seasonably informed of each decision the Acting Mayor has made with mayoral powers.

I know that we guard the usual separation of powers. But, that might not be an ideal that the City can entirely maintain with a crystal clear delineation right now given the unique and unusual situation at hand.

So, I recognize that I am providing many questions, but not enough solutions.


Scott J. Graves, City Councillor AT LARGE



CHARLES W. DIMICK v. J. EDWARD BARRY & others.

211 Mass. 165

November 17, 1911 - February 29, 1912

Middlesex County

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DECOURCY, JJ.

Municipal Corporations, Approval by mayor, "Acting mayor." Certiorari. Way, Public. Words, "Matters not admitting of delay."

The time given to the executive officer of a city for deliberating whether he shall approve or disapprove an act of a legislative body of the city does not begin to run until the legislative act has come to him in fact, and no constructive or implied action falling short of a physical putting of the act before him suffices.

What is a matter "not admitting of delay" as to which under R. L. c. 26, §§ 29, 30, except as otherwise provided by city charters, the presiding officer of the board of aldermen of a city has power to act, in case of the death, resignation or absence of the mayor or of his inability to perform the duties of his office, must be determined according to the usual course of judicial procedure as each case arises.

On June 7 and 8, 1910, the two branches of the city council of a city passed an order laying out a street. The charter required that such an order should be approved or vetoed by the mayor within ten days after it was presented to him. The mayor by reason of illness was absent from his office when the order was passed and continued so until July 6. Under the provisions of R. L. c. 26, §§ 29, 30, the president of the board of aldermen became "acting mayor" possessed of "the powers of mayor only in matters not admitting of delay." The order was presented to and approved by the "acting mayor" on June 10, and never was presented to or approved by the mayor. The city entered upon the location described in the order for purposes of constructing the street on June 1, 1911. Seven days later an owner of land taken in laying out the street petitioned for a writ of certiorari to quash the proceedings. Held, that the order was not a matter "not admitting of delay" and that the acting mayor had no power to approve it, that the error in accepting his approval and in not procuring that of the mayor was substantial and not technical, that there was no unconscionable delay by the petitioner, and therefore that the writ should issue.

PETITION , filed on June 8, 1911, for a writ of certiorari, directing the mayor and the members of the board of aldermen and of the common council of Cambridge to

quash proceedings with regard to the laying out of an extension of Waverly Street from Erie Street to Pacific Street in that city.

The case was reserved for the full court by Morton, J., upon the pleadings and an agreed statement of facts. The facts are stated in the opinion.

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A. Kendall, for the petitioner.

J. F. Aylward, (F. M. Phelan with him,) for the respondents.

RUGG, C. J. The point to be decided is the validity of an order passed by each branch of the city council of Cambridge on June 7 and 8, 1910, respectively, laying out a street. The city charter required that it be approved or vetoed by the mayor within ten days after it was presented to him. St. 1891, c. 364, § 11. The mayor was absent from his office continuously from May 6 to July 6, by reason of illness, and was unable to perform his duties. Under R. L. c. 26, §§ 29, 30, the president of the board of aldermen became "acting mayor," and possessed "the powers of mayor only in matters not admitting of delay." The "acting mayor" approved the order on June 10, and it was never presented to nor approved by the mayor.

It has been decided that the time given to the executive officer for deliberating whether he shall approve or disapprove an act of a legislative body does not begin to run until the legislative act has come to him in fact, and that no constructive or implied action, falling short of a physical putting before him, suffices. *Farwell v. Boston*, 192 Mass. 15. See *Opinion of the Justices*, 99 Mass. 636, and *Galligan v. Leonard*, 204 Mass. 202.

These decisions, together with the express words of the statute and the inherent importance of the acts to be done, indicate the significance attached to the performance of official executive duties by the person elected by the people, rather than by a substitute designated in this instance in another way. The case would be quite different if the statute required the order to be presented to the mayor within a definite time after it was passed by the city council.

The statute makes no provision for the ascertainment of "matters not admitting of delay." Therefore, it must be determined according to the usual course of judicial

procedure as each case arises. The powers of the acting mayor are expressly limited to such matters as do not admit of delay. While this language should not be given a narrow or refined interpretation and should be construed in view of the practical necessities of municipal administration, yet it should be given its natural force and meaning in the connection in which it is found. The words are both plain and emphatic. They express a definite conception of a necessity

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so importunate that it cannot be resisted with reason. When a public officer undertakes to perform by way of substitution duties so definitely circumscribed, and their validity is questioned, it must appear that they are warranted and no strong presumptions exist in their favor. The irresistible public urgency which warrants the "acting mayor" in performing the functions of mayor chosen by popular election might be manifested in various ways.

Cases might arise where it would be apparent as matter of law upon the face of the papers that the approval of the order was a matter "not admitting of delay." Such an inference might be drawn respecting a warrant for an election or an appropriation of money to be used for a Fourth of July celebration or a corporate anniversary, or like orders where time appears to be of the essence of the subject. Appropriations necessary for immediate payment of fixed charges of various municipal departments would come within this rule. The nature of the order might stamp it as an emergency measure requiring instant attention. Impending disaster, threatened disorder, public pestilence, devastation by flood or fire illustrate the range of subjects of this character. The layout of a public way, although based upon an adjudication that common necessity and convenience require it, usually does not fall within any of these classes. While it is conceivable that an exigency might demand it, there is nothing to indicate that in the case at bar. The city council might vote that any particular order was of a nature not admitting of delay in executive determination as to its wisdom. While this would not be conclusive, in most instances it would be strongly persuasive of the existence of pressing need. Universal acquiescence by public officers charged with the performance of official duties coupled with the acquirement of rights in reliance upon the validity of the act might create a presumption in favor of the existence of the pressing necessity. *Burrage v. County of Bristol*, 210 Mass. 299. Instances may arise when the delay of public business

required for awaiting the mayor would be so great as to be unreasonable and to create a situation calling for action by the acting mayor. These would be likely to occur in the ordinary conduct of the administrative affairs of the city far more frequently than in the approval of acts of its legislative body.

There is force in the argument that the question whether a

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matter admits of delay or not is an administrative one and must in the nature of things be decided by the officer called upon to act; that it relates to public affairs of importance which ought not to be held in doubt as to their validity until there can be a determination by the courts; that public officers are assumed to act in good faith and that all reasonable presumptions should be drawn in favor of the existence of facts necessary to constitute a legal performance of duty. The adoption of this rule of construction in substance would leave the existence of the exigency requiring action by the acting mayor to his final determination in most instances. The extremely limited power conferred by the statute does not seem to us to indicate a legislative intent to leave a question deemed so important to the conscience of persons clothed temporarily with a power, for the exercise of which they were not primarily selected. The mayor is the one designated by law to be the executive of the city. It is not a mere passing incident which enables another to supplant him, but a pressing urgency of an unusual kind. These two circumstances are emphasized by the statute and lead us to the conclusion stated.

The case at bar comes within none of these principles. There is nothing in the record to indicate that the health of the mayor on June 10 was such that he was not reasonably expected to resume his duties in the near future. In fact, he did return to his public work within four weeks. For aught that appears, the order might well have waited this length of time without detriment to the public welfare. It cannot be said upon this record that it was a matter "not admitting of delay."

This is not an error so technical or insubstantial as not to warrant issuance of the writ of certiorari. Exercise of the power of eminent domain is a governmental function of importance, both to the landowner whose property is taken and the public whose money must pay for it. In this instance the decision of the designated public officer was wanting. There was a failure to comply with an essential provision of the statute

which involved the application of sound business judgment and executive discretion upon a matter affecting both public and private interests. It may be that a different result would have been reached if the statute had been followed. *Bowditch v. Boston*, 168 Mass. 239, 243. *Warren v. Street Commissioners*, 181 Mass. 6.

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The defense of laches has not been relied upon. Upon the facts disclosed in this record it was not apparent, until the city entered upon the land in question and constructed edgestones at a street junction on or about June 1, 1911, that the city might not let the alleged location lapse under R. L. c. 48, § 92. This petition was brought on June 8, 1911. There is nothing to show that any substantial expenditures have been made or that the rights of other persons have been materially affected.

Writ of certiorari to issue.

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DENNIS S. RYAN v. CITY OF BOSTON.

204 Mass. 456

November 17, 1909 - January 13, 1910

Suffolk County

Present: Knowlton, C. J., Morton, Braley, Sheldon, & Rugg, JJ.

Boston, Acting mayor, Superintendent of streets. Contract, Validity. Statute, Repeal. Pleading, Civil, Answer. Words, "Act as mayor."

The provision of St. 1895, c. 449, § 1, in the revision of the charter of the city of Boston of that year, that if a vacancy in the office of mayor occurs in the last six months of the term, "the chairman of the board of aldermen shall act as mayor for the unexpired term," was not restricted nor repealed by implication by the provisions contained in R. L. c. 26, §§ 29, 30, which, "except as otherwise provided by city charters," limit the power of an acting mayor to "matters not admitting of delay."

The provision of St. 1895, c. 449, § 1, in the revision of the charter of the city of Boston of that year, that if a vacancy in the office of mayor occurs in the last six months of the term, "the chairman of the board of aldermen shall act as mayor for the unexpired term," gives to such an acting mayor the power to

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perform all the duties of the office of mayor as defined by the charter, and he accordingly has authority to approve a contract for the construction of a sewer for which the necessity is not immediate.

Under St. 1885, c. 266, § 6, and St. 1890, c. 418, § 6, although the superintendent of streets of the city of Boston is authorized to make a contract in behalf of the city for the construction of a sewer for a price less than \$2,000 without the approval in writing of the mayor, if in his judgment such a course is advisable, he is not required to act thus independently, and may make a contract for a price less than \$2,000 in such a form that its validity depends on the mayor's approval in writing.

In an action against the city of Boston for the breach of an agreement in writing for the construction of a sewer, which was made with the plaintiff by the superintendent of streets of the defendant in the month of December and was approved lawfully in writing by the acting mayor, the defendant, under an answer containing a general denial and an allegation of payment, cannot set up the defense that the superintendent of streets did not comply with the requirement of St. 1903, c. 268, § 1, by filing in the registry of deeds before beginning the work a statement approved by the mayor of his intention to construct a sewer, and did not comply with the requirement of St. 1891, c. 323, § 13, which by amendments includes the construction of sewers,

by filing a certificate in writing approved by the mayor that public necessity required the work to be done after the fifteenth of November in that year.

CONTRACT against the city of Boston for the alleged breach of a contract in writing, by which the plaintiff agreed to lay for the defendant five hundred and seventy-five linear feet of sewer pipe in Walk Hill Street, in that part of Boston called West Roxbury, for the prices set out in a proposal submitted to the deputy superintendent of the sewer division of the street department of the defendant on December 4, 1905, the cost of the labor and materials to be furnished by the plaintiff being estimated by the city engineers as \$1,960. Writ in the Municipal Court of the City of Boston dated February 10, 1908.

The defendant's answer consisted of a general denial and an allegation of payment.

On appeal to the Superior Court the case was tried before Crosby, J. It appeared that the contract was signed on December 22, 1905, by the plaintiff and by James Donovan, the superintendent of streets of the city of Boston, and was approved by Daniel A. Whelton while acting as mayor of the city of Boston, its form being approved by Thomas M. Babson, Esquire, the corporation counsel.

On December 26, 1905, the plaintiff began the work of excavating, and continued to work under the contract until January 4, 1906, when the newly elected mayor, John F. Fitzgerald,

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and the acting superintendent of streets, one Logue, ordered the work stopped by a notice which also stated that the street would be put in condition by the city at the expense of the plaintiff, as the contract under which he was working was illegal because the acting mayor possessed the powers of mayor only in matters not admitting of delay.

The plaintiff asked the judge to give to the jury the following instructions:

"1. The jury are instructed that the superintendent of streets had authority to make a binding contract with the plaintiff without the approval of the mayor where the amount involved does not exceed \$2,000 and since the estimated cost of the labor and materials to be furnished by the plaintiff under this contract was less than

\$2,000 the jury may disregard the signature of the acting mayor and also the question of whether or not he was acting within his rights in signing this contract.

"2. There is a presumption of right acting by the mayor until the contrary is shown.

"3. The plaintiff is entitled to recover as damages the amount paid out for labor and materials and the difference between the amount it would cost him to complete the contract and the contract price.

"4. The plaintiff is entitled to interest on any amount it may find him entitled to recover from the time fixed in the contract when the work was to be completed."

The judge refused to make any of these rulings. He ruled that as a matter of law the plaintiff was not entitled to recover, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

D. V. McIsaac, for the plaintiff.

G. A. Flynn, for the defendant.

Braley, J. If the city of Boston became bound by the contract, the plaintiff, having been prevented from full performance by the defendant's repudiation and interference, can recover damages for the breach. *Clark v. Gulesian*, 197 Mass. 492. *Moffat v. Davitt*, 200 Mass. 452.

The agreement is signed in behalf of the city by the superintendent of streets, and approved by "Daniel A. Whelton, acting Mayor." The defense rests upon the ground, that the approval

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having been unauthorized, the contract is void. Section 29 of R. L. c. 26 provides for the discharge of the duties of the office where the mayor is absent, or becomes incapacitated, or a vacancy occurs by resignation or death. But the powers of an acting mayor are expressly limited by § 30 to matters requiring immediate action. If this limitation is applicable to the defendant, the contract is invalid, as it does not appear there was any urgent public necessity for the construction of the sewer. Before the enactment of the revision, the charter of the defendant was amended by

St. 1895, c. 449, § 1. This act not only lengthened the tenure of office, but further provided that "in case of a vacancy in the office of mayor, the city council shall, if such vacancy occurs before the last six months of said term, order an election for a mayor to serve for the unexpired term, and if such vacancy occurs in the last six months of the term, the chairman of the board of aldermen shall act as mayor for the unexpired term." The defendant, while conceding that, a vacancy having occurred in the last six months of the term, Daniel A. Whelton, the chairman of the board of aldermen, was empowered by the charter to act for the unexpired time, contends that the scope of his duties was defined by R. L. c. 26, § 30. It is a general rule that statutes, where possible, are to receive such a construction as will give them full effect. It was within the power of the Legislature to have made the revision applicable to all cities, but this was not done, and the exception by § 29 of cities whose charters otherwise provided removes all ground for argument that there was a repeal by implication. By the amended charter ample provisions were made for filling a vacancy if one occurred, and if the powers of the chairman of the board upon succession are not specifically enumerated, they are designated by the phrase that he "shall act as mayor." The legislative intention having been unambiguously expressed is to be accorded full recognition, and these words are to be given their ordinary acceptance. To "act as mayor," is to perform all the duties of the office as defined by the charter, and the general and special laws applicable to the administration of the municipal affairs of the city. It is unquestioned that, if the contract had been approved by his predecessor, the approval would have been binding. And, as Whelton came into office by a statutory succession which

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conferred upon him the right to exercise all its functions, the defendant cannot repudiate his action.

The plaintiff also contends that the contract was valid without the mayor's approval. If, however, by the St. of 1885, c. 266, § 6, and St. of 1890, c. 418, § 6, the superintendent of streets is authorized to contract for building a sewer, where the amount involved neither equals nor exceeds \$2,000, he is not required to act independently. If in his judgment such a course is advisable, the validity of the contract may be made to depend upon its written acceptance by the mayor. The plaintiff does not even suggest that he has been misled, or that any mistake was

made, and the rights of the parties must be determined by their written agreement, of which the mayor's approval forms an essential element.

But, if there was no error in refusing the plaintiff's first request, and the third and fourth requests correctly stated the measure of recovery, the defendant relies on St. of 1903, c. 268, § 1, and St. of 1891, c. 323, § 12, as amended by St. of 1902, c. 521, § 1, in justification of the order which rendered a continuance of the work impossible. We express no opinion, however, upon these questions as they are not before us. If under St. of 1903, c. 268, § 1, where the superintendent of streets, or other officer by appointment of the mayor, constructs the sewer, he shall file in the registry of deeds before beginning the work notice of his intention, naming the street or otherwise describing the land in which it is to be laid, and if by § 13 of St. 1891, c. 323, which by amendments includes the construction of sewers, the superintendent of streets "shall not do, or permit to be done, any of the work described in any year after the fifteenth day of November, unless he certifies, in a writing approved by the mayor and kept on file in the office of said superintendent, that public necessity requires the work to be done," this defense has not been pleaded. It is not open under an answer which contains only a general denial, with a plea of payment. *Kidder v. United Order of the Golden Cross*, 192 Mass. 326, 336, 337, and cases cited.

The ruling that the action could not be maintained was wrong, and the exceptions must be sustained.

So ordered.

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