



Charter Compliance Commission

Consideration and Decision, 2021-2

The Charter Compliance Commission met on Tuesday, June 1, 2021, at 12:00 pm, via Microsoft Meeting/Conference Call in accordance with Governor Baker's Executive Order of March 12, 2020, "Order Suspending Certain Provisions of the Open Meeting Law" to consider a Request for Interpretation of the Charter. All participation in the Meeting was by remote access.

On the video/call were Charter Compliance Commission members Robert Klytta, Chair; Oriana Conklin, Vice Chair; and Julia L. Perry, Secretary. Also on the call were Alex Morse, Town Manager; David Gardner, Assistant Town Manager; and Michela Carew-Murphy, Complainant. Also on the call were members of the Public.

The Minutes of the Meeting where this Consideration and Decision was discussed are a separate document.

The authority of the Commission in this matter is stated at Chapter 1, Section 4.b. of the Town of Provincetown Charter:

The Commission shall provide its written interpretation of the Charter on the written request of any resident or official of the Town. The Commission's interpretation is advisory only and for educational purposes and shall not be the basis for any legal action. A copy of the request and the proposed response shall be provided to the Board of Selectmen and the Town Manager for review prior to being issued.

Via email dated May 24, 2021, the Town Clerk forwarded to the Charter Compliance Commission a petition in accordance with Chapter 1, Section 4g of the Town Charter from registered voter Michela Carew-Murphy via Attorney Anthony Panebianco alleging a violation of the Charter.

The Petition begins, "I am sending this letter on behalf of Michela Carew-Murphy, a member of the Historic District Commission ("HDC"). The intention of this letter is to report a series of potential violations of the Town Charter in the initial termination and following resignation of the Chair of the HDC, Thomas Biggert, as well as a request for clarification on who the current appointing authority for the vacant seat is." The Petition then goes on to describe a sequence of events. The Petition then ends with the following statement:

"To summarize, it is requested that the CCC adjudicates on the following:

1. Was the termination/forced resignation of the former HDC Chair Thomas Biggert a violation the Charter?
2. Do terms as an alternate member count toward the three overlapping three year terms?
3. When was Chair Biggert's term due to expire according to the charter?
4. When did/does the PMPM nominating authority expire for the vacant seat on HDC?
5. Who is the current appointing authority for the vacant seat on HDC and when does that authority expire?"

The Petition does not reference any specific sections of the Charter.

Charter References

In reviewing the Petition filed by Ms. Carew-Murphy through Attorney Anthony Panebianco, the Charter Compliance Commission referred to the following sections of the Charter, as well as to the Charter as a whole –

Chapter 1. THE TOWN AND THE CHARTER

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Section 2. The Provincetown Charter

- a. This Charter may be replaced, revised, or amended only in accordance with the Constitution of the Commonwealth of Massachusetts and the Massachusetts General Laws.
- b. All Town Employees shall act in accordance with this Charter.
- c. This Charter has precedence over the Town of Provincetown General Bylaws.

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Section 3. Definitions of Terms within the Charter

- c. "Appointing Authority" is the person or Board with authority to appoint members of a Town Board. Authority to appoint members also includes the authority to remove members for good cause as determined by the Appointing Authority in accordance with Chapter 5.

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Chapter 5 THE TOWN BOARDS

Section 4. Membership on Town Boards

a. Unless otherwise specified in Massachusetts General Laws or this Charter, each Town Board consists of five regular members and two alternate members. New members shall not participate in a Board meeting until they have been sworn in by the Town Clerk. Alternate members shall have the right in order of seniority on the Board to vote at a Board meeting in place of a regular member who is absent.

Section 6. Rules Specific to the Regulatory Town Boards

a. Regulatory Town Boards are those Boards authorized by Massachusetts General Laws to establish regulations applicable to activities within their authority. The following are identified as the Regulatory Town Boards for the Town of Provincetown:

...

3) the Historic District Commission,

...

c. Members of Regulatory Town Boards may serve for only three three-year overlapping full terms. When a member is appointed to complete the term of another, it shall count as a full term if it exceeds 18 months.

d. No person shall serve as a member/alternate member of more than one of the Regulatory Town Boards simultaneously.

Section 7. Rules Specific to Appointed Town Boards

a. The Moderator is the Appointing Authority for the Finance Committee and the Personnel Committee. The Town Manager is the Appointing Authority for the Conservation Commission and the Historical Commission. The Board of Selectmen is the Appointing Authority for all other appointed Town Boards.

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e. Vacancies on appointed Boards shall be filled as follows:

- 1) The Appointing Authority shall fill the vacancy within sixty days of the receipt of the notice of vacancy.
- 2) In the event of the failure of the Appointing Authority to fill the vacancy within the allotted time, and when the Moderator is not the Appointing Authority, the Moderator

shall fill the vacancy within thirty days.

- 3) In the event of the failure of the Appointing Authority/Moderator to fill the vacancy within the allotted time, the Board may fill the vacancy, unless the Board lacks the quorum to act.

...

- g. An appointed member of a Town Board may be removed for Good Cause as outlined below:
 - 1) A written notice to remove shall be sent by the Town Clerk by registered mail to the last known address of the member who is proposed to be removed. The notice shall include a statement by the Appointing Authority of the reasons for the removal which must be based on a finding of Good Cause.
 - 2) Within one week of receiving the written notice, the member may resign or may request a closed meeting with the Appointing Authority by delivering written notice to the Town Clerk. If the member does neither, the Town Clerk shall send out a written notice identifying a date and time within fourteen (14) days for a Public Hearing on the proposed removal.
 - 3) If the closed meeting takes place, within seven (7) days following adjournment of the closed meeting, the member may resign or may request a Public Hearing by delivering notice to the Town Clerk. The Public Hearing shall be held within fourteen (14) days of the request. If the member fails to resign or to request a Public Hearing, the Appointing Authority shall decide whether to remove the member for Good Cause. The decision shall be by a majority vote if the Appointing Authority is a multi-member body.
 - 4) The member who is proposed to be removed may be represented by counsel at his or her own expense at the closed meeting as well as at the Public Hearing. The member and the Appointing Authority shall be entitled to present evidence, call witnesses, and examine any witness at the Public Hearing.
 - 5) Within ten days after the Public Hearing is adjourned, the Appointing Authority shall decide whether to remove the member for Good Cause. The decision shall be by a majority vote if the Appointing Authority is a multi-member body.
 - 6) A notice of the decision whether or not to remove the member and the reasons therefor shall be sent by the Town Clerk by registered mail to the last known address of the member.
 - 7) This procedure does not grant any rights when a member who has been appointed to a fixed term is not reappointed when the term expires.
- h. The Appointing Authority shall file a copy with the Town Clerk of each notice of appointment or rescission of an appointment to a Town Board, and the same shall be a public record.

The following sections of the Provincetown General Bylaws (last updated: March 23, 2021) relate to the Historic District Commission and are cited below for reference only:

15-4. Commission composition and appointments.

15-4-1. Number of commissioners, terms of appointments: The District [Provincetown Historic District] shall be overseen by a Commission [Historic District Commission] consisting of five members and two alternates to be appointed by the Selectmen, one member initially to be appointed for one year, two for two years, and two for three years, and each successive appointment to be made for three years. The alternates shall be appointed, one for periods of two years and one for three years; and for three year terms thereafter.

15-4-2. Appointment process: The Selectmen shall appoint one Commission member from up to two nominees solicited from the Provincetown Chamber of Commerce; one member from up to two nominees solicited from the Provincetown Business Guild; one member from up to two nominees solicited from the Provincetown Art Association and Museum; one member from up to two nominees solicited from the Provincetown Historical Commission; and one member from up to two nominees solicited from the Pilgrim Monument and Provincetown Museum. If, within 30 days after submission of a written request for nominees to any of the organizations herein named, no such nominations have been made, the Select Board may proceed to make appointments as it desires.

15-4-3. Alternate Commission members: The Select Board shall appoint two alternate members to the Commission. In the case of the absence, inability to act or unwillingness to act because of self-interest on the part of a member of the Commission, his place shall be taken by an alternate member designated by the chairman.

15-4-4. Background recommendations: It is recommended, but not required, that Commission members selected by the nominating entities, including the Select Board, have educational and/or professional experience in one or more of the following fields: historic preservation, architecture, land use planning, architectural history, history, law or engineering.

15-4-5. Term expiration: Each member and alternate shall continue to serve in the office after the expiration date of his or her term until a successor is duly appointed.

15-4-6. Meeting schedule: Meetings of the Commission shall occur as provided for under M.G.L. c. 40C, §11, sentence 1 and, in any event, shall be held at least once per month and more often as necessary and as provided for under any applicable rules and regulations promulgated by the Commission.

15-4-7. Quorum: Three members of the Commission shall constitute a quorum.

Timeline as Provided by the Town Clerk

The Town Clerk had been contacted regarding whether members of the Pier Corps had exceeded their term limits. As a result of this situation, the Town Clerk considered the Town Boards and identified that Thomas Biggert had exceeded his term limits on the Historic District Commission, which, per the Charter, only allows three, three-year terms for Regulatory Boards.

On March 12, 2021, Thomas Biggert was notified in writing via email that he had inadvertently been reappointed and exceeded his term limits. Thomas Biggert says he did not receive until March 17.

On March 17th, 2021, 5 days after being originally notified, Thomas Biggert chaired a meeting of the Historic District Commission. At that time, he had not responded to or acknowledged receipt of the notification of removal.

On March 18th, 2021, Thomas Biggert was sent a second email, which also included the original thank you letter to Thomas Biggert explaining the situation at hand, and a phone call was made. Thomas Biggert phoned the Town Clerk back. After the phone call, emails were exchanged with Thomas Biggert on March 18th asking for his resignation and further explaining the situation.

As of March 23, 2021, Thomas Biggert still had not resigned. At this time, the Town reached out to Town Counsel again to advise as to the next steps. Town Counsel reviewed and confirmed the Town Clerk's determination that Thomas Biggert had indeed been inappropriately reappointed in 2019 and that he had in fact exceeded term limits pursuant to the Charter.

At this time, Town Counsel reached out to Thomas Biggert directly to explain to him that he was placing the Town at risk of litigation by continuing to vote on applications before the HDC. Town Counsel explained that without a resignation, the Town would be obligated to hold a show cause hearing before his Appointing Authority in order to remove him from service by cause.

Thomas Biggert's resignation was received March 30, 2021. The Select Board was notified that the resignation was received on this date.

CONSIDERATION

The Petition filed by Ms. Carew-Murphy through Attorney Anthony Panebianco contains multiple statements, which are addressed below in the order they are presented in the Petition.

1. In a letter dated March 12, 2021, from the Town Clerk to the Chair of the HDC, the Chair was informed that his: *"service on this regulatory board has exceeded its time limit as outlined by the Town Charter Chapter 5 Section 6c. (His) fulfillment of 3 overlapping terms expired on June 30, 2019. (His) first appointment as an alternate was less than 18 months and therefore according to the Town Charter it does not count towards three overlapping terms. Then (he) served as an alternate from December 17, 2012-June 23, 2014, when (he) moved to a regular position. This is term 1. Term 2 was from June 23, 2014- June 30, 2016. Term 3 was June 27, 2016-June 30, 2019."*

2. This letter was followed up on with an email dated March 18, 2021, to the rest of the members of the HDC, as well as the Select Board, the appointing authority, entitled "removal effective immediately" which attached the aforementioned letter and relayed the following:

*“Members of the Historic District Commission,
Attached you will find the letter to Mr. Biggert dated March 12, 2021 regarding his service to the Historic District Commission. He has exceeded his term limits in accordance with the Town Charter Chapter 5 s. 6c. Effective immediately Mr. Biggert is no longer eligible to serve on your regulatory board until he has an absence of one year, at which time he may be re-appointed.*

Once again as I mentioned to you in the previously stated email, Thank you Mr. Biggert for your service to the Town of Provincetown.

To the remaining members of the Board, please notify the office of the Town Clerk when you appoint a new chair.”

3. Following this, it is my understanding that Town Counsel called Chair Biggert and explained that the Town required his immediate resignation, which is believed to be in direct conflict with the Town Charter.

4. The following timeline was proposed to the Clerk under “Section 6. Rules Specific to the Regulatory Town Boards”:

“The Charter clearly makes a distinction between member and alternate member but does not set a time limit for alternate members. The charter also states that ‘Members of Regulatory Town Boards may serve for only three three-year overlapping full terms.’, however, in your letter to Thom, you not only counted his time as an alternate member, the first two terms counted were only for two years each.

From my understanding, Thom’s “clock” should have started ticking down on June 23, 2014 when he became a “member” rather than an “alternate member” and his terms should be 2014-2017, 2017-2020 and his final term would expire in June of 2023.”

5. If the initial timeline proposed by the Town Clerk was correct, as is his assertion, the termination and demand for resignation were still not only inappropriate but once again contrary to the Charter which states:

*“15-4-5 Term Expiration: Each member and alternate **shall** continue to serve in the office after the expiration date of his or her term until a successor is duly appointed.”*

6. Following the termination/forced resignation, there is now a vacant seat. Can you please provide clarity on whether the 60 days in which the Select Board is the appointing authority began with the termination on March 18, 2021 or the forced resignation letter of March 30, 2021? Did the PMPM’s nomination power expire when they failed to nominate a viable candidate within 30 days of the notice of the vacancy per:

“15-4-2 Appointment Process: The Selectmen shall appoint one Commission member from up to two nominees solicited from the Provincetown Chamber of Commerce; one member from up to two nominees solicited from the Provincetown Business Guild; one member from up to two nominees solicited from the Provincetown Art Association and Museum; one member

from up to two nominees solicited from the Provincetown Historical Commission; and one member from up to two nominees solicited from the Pilgrim Monument and Provincetown Museum. If, within 30 days after submission of a written request for nominees to any of the organizations herein named, no such nominations have been made, the Board of Selectmen may proceed to make appointments as it desires."

DECISION

It is our Decision, based on the above, that

1. Under the Charter, as specified at Chapter 1, Section 3c, and at Chapter 5, Section 7, only the Appointing Authority has the authority to appoint or remove a Board Member. The Appointing Authority may request that the Town Clerk prepare and issue the notice per the Charter. Only the Appointing Authority may initiate a removal and, because of the time limit on filling a vacancy, has the right to know when a vacancy following a removal will occur.
2. Removal, per Chapter 5, Section 7g, may only be for "Good Cause". "Good Cause" is any valid reason for removal, which includes the term limits for Regulatory Boards at Chapter 5, Section 6c.
3. The Member being removed has rights under the Charter specifically spelled out at Chapter 5, Section 7g - including the right to receive notice of removal by registered mail, the right to a closed meeting with the Appointing Authority, and the right to a public hearing.
4. Until the rights spelled out in Chapter 5, Section 7g, are met, or until the Member resigns, the time limit at Section 7e for the Appointing Authority to fill a vacancy does not begin. Mr. Biggert's resignation on March 30, 2021, starting the time limit.
5. There is no distinction in the term limits for Regulatory Boards at Chapter 5, Section 6c, between full and alternate members. Alternate members have the right in order of seniority on the Board to vote at a Board meeting in place of a regular member who is absent, per Chapter 5, Section 4a.
6. The Charter Compliance Commission does not have the authority to interpret the Provincetown General Bylaws - except to the extent that they conflict with the Charter. Therefore, the Charter Compliance Commission does not have authority to address the rights of the PMPM to nominate a member of the Historic District Commission.
7. In addition, the Charter Compliance Commission has no authority to interpret the section of the Bylaws which states: "**15-4-5. Term expiration:** Each member and alternate shall continue to serve in the office after the expiration date of his or her term until a successor is duly appointed." In addition, Chapter 5, Section 7.g.(7) of the Charter states

that, "This procedure does not grant any rights when a member who has been appointed to a fixed term is not reappointed when the term expires." Therefore, because the Charter takes precedence over this section of the Bylaws, on the expiration of a term the individual does not continue in office.

8. In response to the specific questions raised by the Petitioner:

1. Was the termination/forced resignation of the former HDC Chair Thomas Biggert a violation the Charter?

Mr. Biggert's removal was required consistent with the term limits as stated in the Charter, and his resignation on March 30, 2021, did create a vacancy. However, the process of removal by the Town Clerk starting on March 12, 2021, was not done in accordance with the Charter.

2. Do terms as an alternate member count toward the three overlapping three year terms?

Yes, as discussed above with reference to Chapter 5, Section 4a.

3. When was Chair Biggert's term due to expire according to the charter?

When he completed three terms as defined by the Charter - June 30, 2019, as indicated on his certificate of appointment.

4. When did/does the PMPM nominating authority expire for the vacant seat on HDC?

This is not a valid question for the Charter Compliance Commission because it is a Bylaw question.

5. Who is the current appointing authority for the vacant seat on HDC and when does that authority expire?"

The Appointing Authority for the Historic District Commission is the Select Board. That authority does not expire, but it may temporarily be transferred to the Moderator if the Select Board fails to act within 60 days of when a vacancy is valid, as described above. The appointing authority in this instance transferred to the Moderator on May 29, 2021, which is 60 days after the resignation of Mr. Biggert on March 30, 2021.

Per the Charter, a Decision of the Charter Compliance Commission is advisory only and for educational purposes and shall not be the basis for any legal action.

Motion to Approve the Consideration and Decision 2021-2, dated June 1, 2021

Motion by Julia L. Perry/second by Oriana Conklin to accept the Consideration and Decision as presented.

Moved and approved by the Charter Compliance Commission by a vote of 3-0-0.