

March 26, 2018

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Hon. Cheryl Andrews and
Members of the Board of Selectmen
Provincetown Town Hall
260 Commercial Street
Provincetown, MA 02657

Re: Proposed Revised Charter – Legal Risks and Potential Legal Liability to the Town

Dear Members of the Board of Selectmen:

You have requested that I outline the legal risks and potential liability to the Town in the event the proposed Revised Charter is approved by the voters at the May 1, 2018, Annual Town Election.

At the outset, please be advised that this letter sets forth initial impressions as to certain legal questions which have arisen in connection with the Revised Charter based on the text alone. As with any opinion, the specific set of facts presented at the time the opinion is requested may be dispositive. In addition, many of the concerns expressed in this letter are based on imprecise language contained in the Charter and there is no way of predicting with any degree of certainty how a court in litigation concerning a particular provision of the Revised Charter might interpret various provisions. It is safe to say, however, that some of the imprecise language in certain instances may be fraught with peril and could lead to legal challenges in the future. Please note that I have restricted my comments to legal issues and this letter should not be construed as making any comments on the policy implications associated with the Revised Charter.

The Board of Selectmen has also requested that I identify provisions which, in our experience, are unique among municipal charters in Massachusetts. In that regard, I would note that the Charter Commission is recommending a structure for municipal government which is outside the norm of most municipal charters in Massachusetts. As discussed below, the limitations on the authority of the Board of Selectmen to conduct internal investigations, the creation of the concept of “Regulatory Boards”, and the insertion of a role for the Board of Selectmen in reviewing promotion and discharge decisions of the Town Manager are just a few of the provisions which, in our experience, are unique.

The risk of legal challenges must be viewed in the context of G.L. c. 40, §53, which provides statutory standing to any ten taxpayers of the Town to seek to restrain the expenditure of any funds appropriated by the Town for an illegal purpose including the unlawful exercise or abuse of the corporate powers of the Town. Ten taxpayer suits could be filed against the Town seeking to enjoin the Town from expending any funds allegedly in violation of a lawfully adopted home rule charter.

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With these caveats in mind, I have set forth below the provisions of the Revised Charter which, in our judgment, pose the most significant risks for the Town.

Investigation of Complaints

Section 3-5-c places significant constraints on the ability of the Town Manager and the Board of Selectmen to conduct internal investigations of Town officials and employees. The provision as written does not allow the Board of Selectmen to conduct an investigation if the complaint received is anonymous and/or if the complaint is not made in writing. This provision could expose the Town to potential liability both under the Massachusetts Tort Claims Act and under state and federal employment statutes and regulations including G.L. c. 151B and Title VII. Employers have a legal obligation to investigate allegations of unlawful discrimination and harassment regardless of whether the complaint is made verbally or in writing. If the Town does not investigate and take appropriate remedial action when necessary and a subsequent complaint is brought against the same individual for discrimination or harassment, the Town could expose itself to liability because it could be argued that the Town knew or had reason to know the accused had engaged in similar behavior, but the Town failed to investigate and failed to take remedial action.

Likewise, if a complaint is made verbally and subsequent to the complaint, an individual suffers injury as a result of the conduct complained of, depending upon the nature of the conduct, the Town could be found liable because the Town knew or should have known about the purported conduct and failed to take action to investigate. The fact that the complaint was verbal has no bearing on the Town's liability if it is discovered that the Town was aware of the prior complaint.

With respect to anonymous complaints, a blanket prohibition against investigating such complaints is problematic, and we have previously advised against adoption of such blanket policies. While anonymous complaints can be hard to investigate, and there is a perception that anonymous complaints may have less validity precisely because they are anonymous, we cannot safely say that there are no instances where the Town might have a legal if not moral and ethical obligation to investigate an anonymous complaint. As with verbal complaints, the existence of an anonymous complaint may be deemed sufficient by a court (for instance) to have put the Town "on notice" of alleged misconduct. While the Town may not be able to effectively investigate an anonymous complaint, that does not relieve the Town of the obligation to conduct some review of the allegations raised in an anonymous complaint in certain circumstances.

In addition, Section 3-5-e requires the Board of Selectmen to identify sanctions if the conduct is found to be inappropriate, and guidance for future action at an open meeting. In my opinion, this provision may be inconsistent with the Open Meeting Law, G.L. c. 30A, which allows the Board of Selectmen, in its discretion, to hold an executive session to discuss the reputation, character, physical condition or mental health, rather than professional competence, of an individual or to discuss the

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discipline or dismissal or complaints or charges brought against, a public officer, employee, staff member or individual. By requiring that such discussions be held in open session, the Revised Charter purports to restrict the discretion of the Board of Selectmen to enter executive session for these purposes. Moreover, it may also violate provisions of applicable collective bargaining agreements, and may also violate individual privacy rights.

Authority to Execute Contracts

Section 4-3-k confers on the Town Manager the sole authority “to award and execute contracts for supplies and services on behalf of all Town departments and offices, and, if requested, for the School Committee and for the Board of Library Trustees.” Under the existing Charter, only the Board of Selectmen has the authority to execute contracts, although I understand that the Board has delegated that authority to the Town Manager for certain classes of contracts.

While it is not unusual for a town with a strong town manager form of government to confer authority on a town manager to execute contracts, this provision represents a significant shift in authority away from the Board of Selectmen. By conferring the power to execute contracts on one individual with no oversight by an elected board, the Town could potentially be subjecting itself to significant contractual liability. Although the authority of the Town Manager to execute contracts will necessarily be subject to oversight by Town Meeting in terms of the appropriation of funds before any contract would be enforceable against the Town, there are often contractual liabilities other than monetary obligations, incurred by the execution of a contract that pose a significant risk of liability to the Town.

Minimum Qualifications for Town Manager

Section 4-2-a establishes certain minimum qualifications for the position of Town Manager and contains very specific requirements such as minimum years of experience and educational requirements. The Revised Charter also implies that the educational requirement can be waived by the Board of Selectmen, but only if the candidate has “at least nine years compensated service in public administration with at least six at a managerial level.”

There have certainly been examples in other municipalities where litigation has been commenced challenging a decision of a board of selectmen in selecting a candidate for the position of town manager where the candidate allegedly did not possess the requisite experience under a charter provision. While a court may give deference to a Board of Selectmen decision in this regard, because the Revised Charter contains unusually specific objective minimum qualifications, it may be more difficult to defend the appointment even if the candidate is exceptionally well-suited to be Town Manager based on other criteria not set forth in the Revised Charter.

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In addition, this provision must be read in conjunction with Section 4-2-g of the Revised Charter, which would disqualify any individual from being considered for appointment to the position of Town Manager who “served in any elected or appointed office in Town government for at least one year before being considered as a candidate for the position.” The one exception to this prohibition is the Assistant Town Manager who automatically serves as the Acting Town Manager in the event that the position of Town Manager becomes vacant under Section 4-5-a, and this section also states that “Nothing in this Charter prohibits the Acting Town Manager from being hired by the Board of Selectmen as Town Manager.”

Section 4-2-g is an example of imprecise language since the Revised Charter does not define the term “office.” Nevertheless, it would likely be interpreted as including department heads or other Town officials. For example, in many towns it would not be unusual for a police chief, a finance director, a town planner, or a DPW director to be considered for an internal promotion to the position of Town Manager. Under this provision of the Revised Charter, however, no individual who holds one of those positions in the Town would be eligible for promotion to Town Manager for a period of one year after a vacancy in the position occurs.

When coupled with the residency requirement for the Town Manager, the minimum qualification requirements could substantially limit the ability of the Board of Selectmen to appoint an otherwise qualified candidate for the position of Town Manager. Given the importance of the position in protecting the interests of the Town, these restrictions could pose legal risks to the Town.

Charter Enforcement Authority

Section 5-2-1 of the Existing Charter provides for a separately elected Charter Enforcement Commission that has authority to enforce the Charter through judicial process. Under Section 1-4-a of the Revised Charter, the Charter Enforcement Commission is renamed the Charter Compliance Commission which is also an elected board. Notably, under Section 1-4-a through i, the authority of the Charter Enforcement Commission is substantially reduced, and the authority to enforce the Charter is shifted to the Town Manager and the Board of Selectmen.

The existing Charter Enforcement Commission, which has unusually broad authority to enforce the Charter including filing of a petition in Superior Court, acts as a significant check and balance on the Board of Selectmen and the Town Manager. By shifting enforcement authority to the Town Manager and the Board of Selectmen, however, the Revised Charter eliminates that check and balance. While the existing Charter may be somewhat impractical in terms of providing an enforcement mechanism in Superior Court for the Charter Enforcement Commission, it does define a process for a public hearing to address alleged Charter violations. By contrast, under the Revised Charter, the Charter Compliance Commission assumes merely an advisory role, and there is no public hearing process required. By eliminating the public hearing process, residents will only be left

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with the option of filing a ten taxpayer's suit to enforce the Charter which will require the hiring of counsel and the incurring of court costs and legal fees, thus limiting remedies for ordinary citizens to compel Charter compliance. In addition, the Town may face increased legal fees in defending ten taxpayer lawsuits if there is no opportunity to resolve Charter disputes through a public hearing process.

**Board of Selectmen Authority over Appointment and Employment Decision
of the Town Manager**

Section 4-3-d of the Revised Charter significantly expands the oversight role of the Board of Selectmen in the day-to-day authority of the Town Manager to supervise, promote, and discipline Town staff.

Under Section 7-2-5 of the Existing Charter, the role of the Board of Selectmen in employment decision is limited to the approval of the appointment of certain Town Officials listed in Section 7-2-5, and there is no deadline for such approval. Under Section 4-3-d of the Revised Charter, the appointment by the Town Manager of certain officials, including the Licensing Agent, Town Counsel, and certain statutory offices under the Finance Director, will no longer require approval of the Board of Selectmen. By contrast, however, the hiring, promotion, and removal of the Assistant Town Manager, the Finance Director, the Police Chief, and the Town Clerk, will be subject to confirmation by the Board of Selectmen. If the Board fails to confirm or object within fifteen days, "such failure shall constitute implied confirmation".

This section of the Revised Charter presents three legal risks. First, injecting the Board of Selectmen into the role of confirming or objecting to promotion and removal decisions made by the Town Manager may lead to significant litigation. As with most towns, employment-related litigation is a major component of legal costs to the Town. Expanding the role of the Board of Selectmen in employment decisions may lead to additional claims challenging the action of the Town Manager, including allegations of undue political influence or other improper motivation, calling into question whether the "good cause" standard in Section 4-3-h was met. Given the highly sensitive nature of such employment actions, it is preferable from a legal perspective to restrict that process to professional Town staff including the Town Manager. Furthermore, this provision may be inconsistent with the purpose and intent of Section 3-6-b of the Revised Charter, which prohibits the Board of Selectmen from dealing directly with employees of the Town who are under the supervision and control of the Town Manager.

Second, the elimination of any role of the Board of Selectmen in the appointment of Town Counsel, which is very unusual in town charters, could pose significant legal risks to the Town. While Town Counsel is required under the Rules of Professional Responsibility, the General Laws, and Town Charter to provide unfiltered and independent legal advice to the Board of Selectmen,

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Town boards, and Town Meeting, such advice is typically provided in the context of a posted meeting. Although subject to the attorney client privilege and executive session, nevertheless a written record of Town Counsel's advice through meeting minutes and opinion letters is maintained. By establishing a structure whereby the Town Manager is the sole appointer of Town Counsel, there is an inherent danger that Town Counsel's advice may not be available for the benefit of other Town officials, thus potentially eliminating an important check and balance.

Third, establishing a deadline for the Board of Selectmen to confirm appointments, or act on promotion and removal decisions, may prove to be a significant limitation on the effective oversight of appointment decisions by the Town Manager that the Board currently has under the Existing Charter, especially in light of quorum requirements under the Open Meeting Law.

Discharge of Town Employees

Section 4-3-h of the Revised Charter requires that the discharge of non-union employees by the Town Manager be done in person, in private, and with a person with HR expertise in attendance.

As stated above, given the significant amount of litigation that inevitably arises in connection with the discharge of Town employees, this very unusual provision would add additional requirements to the removal of non-union personnel which could lead to legal challenges. For example, if an employee is absent for any reason from work, this provision could be interpreted as prohibiting the discharge of the absent employee. If an employee is incarcerated or decides to be absent from work in anticipation of being discharged, the ability of the Town Manager to effectively manage the affairs of the Town could be compromised, and could certainly lead to costly litigation if an employee decided to challenge his or her removal based on an allegation that the Town failed to comply strictly with these procedural Charter requirements.

Compressed Deadlines for Certain Actions by Town Officials

The Revised Charter contains several provisions that substantially reduce the deadlines for Town Officials to act with respect to certain matters. For example, Section 2-3-e requires the Board of Selectmen to publish the warrant within two days of closing the warrant. In addition, Section 6-4-b provides that the Town Manager must submit to the Board of Selectmen a proposed budget by the third Tuesday in January of each year. In turn, Section 6-4-e obligates the Board of Selectmen to send its recommendations on the budget to the Finance Committee on or before January 31st. Using 2018 as an example, this requirement would have given the Board of Selectmen less than two weeks to consider the Town Manager's proposed budget and to prepare the Board's recommendation to the Finance Committee. In contrast, under the Existing Charter, the Board of Selectmen has approximately five weeks to act on the Town Manager's tentative budget. There is a similar deadline in Section 6-4-b for submission of the Capital Improvement Program.

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Although the Revised Charter does not contain any provision which would preclude the Town from acting on the warrant, the Town budget, or the Capital Improvement Plan should these deadlines not be met, there is a risk that with respect to Town Meeting actions that require approval from other parties (approval of bylaws by the Attorney General and approval of bond authorizations by the Town's bond counsel), such approvals may not be forthcoming should the Town fail to comply with the Charter procedures. For example, before receiving authorization to issue bonds, bond counsel routinely sends a requirements letter to the Town, requesting confirmation that all of the required procedures under the General Laws and the Town Charter with respect to the Town Meeting vote have been met.

Given the significantly shortened deadlines for Town Officials to act with regard to Town Meeting matters, there is certainly a risk that positive votes of Town Meeting may not be able to be implemented in the event of even a technical violation of a Charter requirement. Moreover, should those deadlines not be met, legal challenges may be filed which could lead to costly and disruptive litigation, and uncertainty with respect to Town Meeting action.

Imprecise Language - Recall of Elected Officials – Term Limits

The process of recalling an elected official can be one of the most difficult times for a municipal government and can often lead to legal challenges based on the alleged non-compliance with the recall procedures set forth in a municipal charter. The Revised Charter rewrites an important threshold requirement for the recall of an elected official. Under the Existing Charter, a recall is not effective unless a total of at least twenty-five percent of the electors entitled to vote on the question shall have voted for recall. This is not an unusual provision in other charters and has been interpreted to mean that not only must at least 25 percent of the registered voters vote in the recall election, but that at least 25 percent must vote yes on the question. Under the Revised Charter, that language has been changed to state that a majority vote of at least 25 percent of the registered voters is required to recall an elected official. This change substantially lowers the bar to a recall since it will mean that 12.5 percent of all registered voters plus one will be sufficient for a recall rather than the 25 percent requirement under the Existing Charter. It is not clear whether the Charter Commission intended to change the threshold for a recall election, but that certainly seems to be the effect based on the revision of the language in the recall section. See 5-8-e (11). At a minimum, the use of imprecise language in the Charter, of which the recall provision is only one example, could lead to costly and disruptive litigation.

The Final Report of the Charter Commission dated November 1, 2017 states that the Revised Charter eliminates term limits for appointed, non-regulatory boards. Yet, an examination of the Revised Charter itself reveals that term limits for elected Town boards and officials, including the Board of Selectmen and the Town Moderator, have been eliminated as well. This discrepancy may

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present a conflict between the actual wording of the Revised Charter and the legislative intent of the framers of the Charter, i.e., the Charter Commission.

Qualifications Requirement for the Appointment of Town Board Members

Section 5-7-6 of the Revised Charter contains a provision that Town Board members must be “qualified”. No further explanation is provided, nor are there any minimum qualification standards set forth. While a Court would likely defer to the judgment of the appointing authority on the question of whether a particular individual was “qualified” for the position, this revision could potentially be used to support a claim that a particular decision was arbitrary and capricious due to the alleged lack of qualifications by one or more Board member.

Town Boards – Elimination of Listing of Elected and Appointed Boards – Regulatory Boards

Chapter 5 of the Existing Charter lists, in addition to the Board of Selectmen, the officials and boards to be elected, including the Moderator, the Charter Enforcement Commission, the Housing Authority, the Board of Library Trustees and the School Committee. The Revised Charter eliminates the list of elected officials and boards. Although there are separate sections in the Revised Charter that reference an elected Board of Selectmen, a School Committee, a Charter Compliance Commission, and elected Town Moderator, no mention is made of an elected Housing Authority or a Board of Library Trustees. Although the General Laws provide that Library Trustees and Housing Authority members are elected, the elimination of the list of elected officials and boards in a single section of the Charter could lead to confusion and uncertainty.

Section 5-6-a of the Revised Charter creates a new category of Town boards called “Regulatory Boards.” They generally include statutory boards that have specific authority under the General Laws to issue licenses, permits, and approvals, including the Conservation Commission, the Board of Health, the Historic District Commission, the Licensing Board, the Planning Board, the Water and Sewer Board, and the Zoning Board of Appeals. In addition, Regulatory Boards are the only Town boards that will be subject to term limits, and membership on such boards is limited to registered voters of the Town.

Finally, Section 5-6-e provides that if a quorum of a Regulatory Board cannot be achieved due to an inadequate number of members appointed sufficient to constitute a quorum, the Board of Selectmen is designated to hear and decide on applications. Putting aside the availability of alternate members, this provision would not become operative in the case of a five member board, for example, unless there were three vacancies (unfilled positions) on the Board. The fact that board members were not available to hear a case due to absences for any reason would not be sufficient. It should be pointed out, however, that this provision would only be of limited value to the Zoning Board of Appeals, where an application requires a supermajority vote (such as a variance or special

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permit which require four affirmative votes regardless of the number of members present and voting, to grant the requested zoning relief). For example, if there are at least three appointed members of the Zoning Board of Appeals, the Board of Selectmen could not step in to hear a case because three members is sufficient to constitute a quorum. A super majority vote could not be achieved, however, because there are not four members available to vote.

The concept of designating Regulatory Boards is unique among municipal charters, in our experience, so it is not entirely clear how these Charter provisions may be interpreted. For example, requiring the Board of Selectmen to step into the shoes of a Regulatory Board could potentially lead to legal challenges by persons aggrieved by the regulatory decision at issue.

I would also note that the Revised Charter generally creates five different types of Town Boards: elected boards (5-8-a); boards established by Town Meeting (5-1-a); ad hoc or temporary advisory boards established by the Board of Selectmen (5-1-b); Regulatory Boards (5-6-a); and Appointed Town Boards such as the Finance Committee, the Personnel Committee, the Conservation Commission (which is also a Regulatory Board), and the Historical Commission. Unlike the Existing Charter, there is no mention in the Revised Charter of the Council on Aging, the Airport Commission, the Art Commission, or the Building Committee. Similar to the elected boards, all of these boards exist by virtue of specific provisions in the General Laws, with the exception of the Building Committee. A Building Committee could, however, be established by Town Meeting or as an Ad Hoc Committee appointed by the Board of Selectmen. I also note that elimination of the Art Commission from the Charter may be problematic, as state law requires either town meeting acceptance of G.L. c. 41, §82, or inclusion of the Art Commission in a Charter, to create such a commission.

With respect to the Water and Sewer Board, which is designated as a Regulatory Board under the Revised Charter, the Existing Charter includes a provision (6-14-10) relative to the membership of Truro residents on the Board. This provision was authorized by special legislation (c.364 of the Acts of 2010) at the time Provincetown and Truro entered into an intermunicipal agreement relating to the supply of water. The Revised Charter, however, makes no mention of the composition of the Water and Sewer Board including membership by Truro residents, and the provision in Section 5-4-a which sets the default membership for every Town board at five members is inconsistent with c.364 of the Acts of 2010.

Section 8-2 of the Revised Charter (Transition Provisions) includes an explanation of why the Charter Commission decided to remove the list of Town elected and appointed boards. It further provides that “all Town boards that were in place at the time the Charter was revised, shall continue to exist until modified, merged or dissolved in accordance with this Charter.” By virtue of this transitional provision, it would be our opinion that the Building Committee and the Water and Sewer

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Board would continue in their current form under the Existing Charter, although it is not advisable to rely on a transitional provision for such purpose.

Finally, I would point out that Section 5-4-a provides that all Town boards will have five regular members and two alternatives. Typically, alternate members are only provided for boards, such as Regulator Boards, that are required to hold adjudicatory hearings. This provision, however, is not restricted to Regulatory Boards and, as such, will create a large number of vacancies that will have to be filled. With regard to the Conservation Commission, there is already an article on the warrant for the Annual Town Meeting to create alternate positions. That home rule petition will not be needed, however, if the Revised Charter is adopted, and we have provided contingency language in the Article to deal with this issue.

Reduces the Number of Alternates for the Zoning Board of Appeals

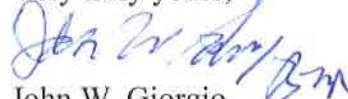
The Zoning Board of Appeals is one of the most active and important boards in Town. The Existing Charter provides for five regular members and five alternate members. The Revised Charter makes no exception for the Zoning Board of Appeals with respect to only providing two alternates. Should the Revised Charter pass, the number of alternates to the Zoning Board of Appeals would have to be reduced to two as vacancies occur. Given the volume of applications before the Zoning Board of Appeals and the specific deadlines within which the Board has to act in order to avoid a constructive grant, the reduction in the number of alternates could cause significant impediments to the Zoning Board being able to meet its statutory obligations within the time frames provided by law, thus raising the potential for legal challenges in the future.

Conclusion

While the letter only identifies provisions in the Revised Charter which may pose legal risks and liabilities to the Town should the Revised Charter be adopted, there are many other provisions in the Revised Charter which present important policy implications in terms of changes in the structure of Town government. Ultimately, it is up to the voters of Provincetown to determine whether the vision of the Charter Commission as expressed in the Revised Charter is appropriate for the Town.

Please let me know if the Board of Selectmen has any further questions.

Very truly yours,


John W. Giorgio