

February 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: Comparison of the Existing Charter to the Proposed Revised Charter

Dear Members of the Board of Selectmen:

The Board of Selectmen has asked that Town Counsel prepare a document comparing the provisions of the Town's existing Home Rule Charter with the Proposed Revised Charter to be voted at the May 1, 2018 Annual Town Election.

Enclosed, therefore, please find a chart identifying differences between the current Charter and the Revised Charter. The chart breaks down the major changes according to Town Government functions. We have also added a column entitled "Commentary" which highlights potential ramifications of the Revised Charter should it be approved by the voters, understanding, of course, that a charter can only be interpreted based upon specific facts and circumstances. We have also included a column assigning to each of the changes identified in the Chart a ranking of one to three, with one being the most significant, in our opinion. While there are many significant changes proposed in the Revised Charter and identified in the attached chart, we would highlight the following:

- Requires publication of the Town Meeting warrant within two days of closing of the warrant
- Delays the annual town election until the Third Tuesday in June
- Changes the name of the Charter Enforcement Commission to the Charter Compliance Commission and shifts the responsibility for Charter enforcement to the Board of Selectmen and Town Manager
- Prohibits members of the Board of Selectmen to deal directly with Town employees
- Significantly compresses the timeframe for the Board of Selectmen to consider the annual budget and the capital improvement plan
- Provides greater flexibility to the Board of Selectmen in negotiating an employment contract with the Town Manager
- Establishes limitations on the ability of the Board of Selectmen and the Town Manager to conduct internal investigations

- Removes the role of the Personnel Board in hearing appeals of disciplinary actions against the Town Manager and other Town employee

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- Requires the Board of Selectmen to act on confirmations of the appointment of Town official and employees by the Town Manager within fifteen calendar days
- Confers on the Town Manager the authority to execute all contracts for goods and services
- Eliminates term limits for elected boards and commissions.
- Term limits are retained for certain boards which will now be classified as Regulatory Boards
- Establishes a maximum term of six years for service as the Chair of any Town board
- Provides a procedure for the merger of Town boards
- Sets the default membership for all Town boards at five regular members and two alternates
- Allows the appointment of part-time residents to non-regulatory boards under certain circumstances
- Confers on the Board of Selectmen the responsibility for stepping into the role of certain Town boards if the board is unable to reach a quorum due to vacancies
- Establishes a “qualification” requirement for membership on appointed Town Board
- Reduces the number of registered voters that must vote in a recall election in order for the recall to be effective

I have enclosed a copy of the letter that the Attorney General provided to the Charter Commission, in accordance with G.L. c.43B, §10, commenting on the Preliminary Report of the Charter Commission and two letters from Attorney Lauren Goldberg to the Charter Commission and the Town Manager concerning the Charter revision and the process for adoption.

As you are aware, in addition to the comments of the Attorney General, Attorney Goldberg provided the Charter Commission with detailed comments and recommendations on the preliminary version of the proposed Charter and then following the issuance of the Preliminary Report. The focus of those comments and recommendations was to advise the Charter Commission regarding potential conflicts with state law as well as avoiding unnecessary ambiguity that could lead to Charter interpretation issues and ultimately to costly legal fees and litigation expenses in the future. Attorney Goldberg also pointed out numerous practical issues that could arise. We would like to point out that the Charter Commission addressed the comments of both the Attorney General and Attorney Goldberg in many respects. The Charter Commission Final Report addresses some, but not all, of the issues raised by Attorney Goldberg. Of course, it was up to the Charter Commission to decide whether to seek out or follow the guidance of Town Counsel since, in the end, the final document is a reflection of the priorities and vision of the Charter Commission, which, by law, is charged with making the final recommendation to the voters.

The Final Report contains significant changes and improvements as compared to the Preliminary Report. The Final Report of the Charter Commission, however, presents a proposed Revised Charter, which, although not necessarily inconsistent with state law, contains many provisions that may prove challenging to implement, and which proposes a significant change in how the Town of Provincetown would be governed. Ultimately, the voters of Provincetown at the

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2018 Annual Town Election will have to decide whether they share the same vision as the Charter Commission in terms of Town governance.

The preparation of the enclosed chart is intended to assist the Board of Selectmen in understanding the many ways in which the Revised Charter differs from the existing Charter. As you know, the decision as to whether to adopt a charter change can have implications for the Town for years to come. For that reason, we have sought to identify some of the practical implications created by the Revised Charter, and also, based on Town Counsel's many years of experience providing opinions to Town officials on Charter interpretations, have highlighted possible legal interpretation challenges that the Revised Charter may present that might, in turn, lead to the potential for disruption in Town governance and costly litigation.

The Charter Commission has stated that one of its main goals was to produce a Charter that was easy to understand and organized in a more logical way than the existing Charter. One of the challenges, however, in producing such a document is to ensure that, by doing so, the final document does not create unintended consequences, including the potential for imprecise or confusing language, or establishment of difficult procedures and processes that must be followed in order to achieve compliance with the Charter. Here, for example, there are a number of proposed Charter changes that significantly reduce timelines for action by Town officials, which may present significant challenges to Town staff and the Board of Selectmen to operate Town government effectively and efficiently. Additionally, to the extent that the Charter utilizes language that is not commonly used in other charters, there is little precedent on which to rely.

Of course, one of the difficulties in pursuing a charter change through the Charter revision process under G.L. c. 43B is that the final document is subject to an up or down vote at the ballot (as opposed to a special act Charter amendment through the Home Rule petition process, where Town Meeting has the opportunity to make amendments as part of the debate). If the Charter revision passes at the election, therefore, I would anticipate possible interest in pursuing targeted Charter amendments to address specific concerns. Such circumstances, could, in turn, lead to further uncertainty and disruption in the operation of the Town.

Both Attorney Goldberg and I would be more than happy to meet with the Board of Selectmen if the Board would like to discuss the enclosed comparison chart in more details.

Very truly yours,


John W. Giorgio

**TOWN OF PROVINCETOWN
ANALYSIS OF PROPOSED CHARTER REVISION**

February 26, 2018

FUNCTION	EXISTING CHARTER	CHARTER REVISION	COMMENTARY*	SIGNIFICANCE OF CHANGE ¹
Section References	All chapters, sections, and subsections are numbered. Sample reference: Section 2-1-7.	There is a combination of numbers and letters. Sample reference: Section 2-3-e.		
Town Meeting – Warrant	<p>Page 3 2-1-7. The warrant shall be closed thirty days prior to the date of the meeting, shall be published in a newspaper of general circulation within the town at least seven days prior to the meeting and shall be posted in at least ten public places in the town at least seven days prior to the annual town meeting, and at least fourteen days prior to a special town meeting.</p> <p>2-1-8. At least fourteen days prior to the date of the town meeting, a copy of the warrant shall be mailed by the board of selectmen to the moderator, town counsel, and each town board.</p>	<p>Page 8 2-3-e. The Warrant for the Annual Town Meeting shall be opened at least sixty days (60) prior and closed thirty (30) days prior to the date of the Town Meeting. The Warrant shall be posted on the Town’s website within two (2) business days of closing, and shall be provided to the registered voters of the Town by publication in a newspaper of general circulation within the Town at least fourteen (14) days prior to Town meeting, and in printed form in the office of the Town Clerk. As an alternative to publication in a local newspaper, the Warrant may be mailed at least fourteen (14) days prior to a Town Meeting to the last known address on file of the registered voters of the Town.</p>	<p>The requirement to post the warrant within 2 business days of closing creates a very short window for Town Counsel review, and for the Board of Selectmen and Town Staff to finalize the warrant after it is closed.</p> <p>Allows warrant to be mailed to all registered voters as an alternative to publication in a local newspaper.</p> <p>Note: in the absence of a charter provision or bylaw providing for more notice (such as here), state law (G.L. c. 39, §10) only requires that the warrant for an Annual Town Meeting be posted 7 days in advance, and 14 days in advance for a Special Town Meeting.</p>	1
Town Meeting – Remote Site	Not addressed.	<p>Page 9 2-4-e. Registered voters must be seated in an area designated by the Moderator. The Moderator may agree to establish a remote site in addition to the main site</p>	<p>This provision is largely redundant in that G.L. c. 39, §10 already allows Town Meeting to be held in more than one location.</p>	1

¹ The charter revisions have been assigned a number of 1, 2 or 3, reflecting the significance of the change, with 1 being the most significant.

*The commentary reflects initial impressions as to certain charter revisions based on the text alone. Formal opinions can only be provided as to specific meanings or application of a particular section when presented with specific fact patterns or circumstances.

FUNCTION	EXISTING CHARTER	CHARTER REVISION	COMMENTARY	SIGNIFICANCE OF CHANGE
		<p>of Town Meeting. The remote site must be able to communicate with the main Town Meeting site by some continuous visual and audio communication. If a remote site is established, the Moderator shall appoint a person to serve at the remote site as the Moderator's assistant, confirming registration and counting votes. Voters at the remote site shall be counted toward quorum.</p>	<p>However, the charter provision requires continuous visual communication. General Laws c.39 §10 only requires audio.</p> <p>A remote location must still be within the geographic limits of the Town (unless the Charter specifically provides otherwise) under G. L. c. 39, §9.</p>	
<p>Recession and Continuation of Town Meeting</p>	<p>Not addressed.</p>	<p>Page 8 2-4-a. Town Meeting may be postponed due to an emergency at the discretion of the Moderator.</p>	<p>G.L. c. 39, §10A provides a procedure for continuation of Town Meeting due to inclement weather or a public safety emergency. The statute provides extensive requirements that must be met, including consultation with the Board of Selectmen, the preparation of a Declaration and Recess by the Moderator, posting of the Declaration, and notification to the Attorney General. Because G.L. c. 39, §10A contains procedures that ensure notice is provided to voters and the Attorney General, we would generally advise that the statutory procedures be followed.</p> <p>The reference in 2-4-a to G.L. c. 39, §10 should be §10A.</p>	<p>2</p>
<p>Elections</p>	<p>Page 5 2-4-2 The regular elections to any office shall be by official ballot held on the first Tuesday in May of each year.</p>	<p>Page 9 2-5-b. The regular elections to any office shall be by official ballot held on the third Tuesday in June of each year.</p>	<p>The date of the Annual Town Election is being changed from the first Tuesday in May to the third Tuesday in June.</p> <p>The reason for this change stated in the ballot summary prepared by the Charter Commission is to advance the effective date of charter amendments approved at the Annual Town Meeting. It is not likely that this provision will have the desired effect because (1) any charter amendment approved at Town Meeting</p>	<p>1</p>

FUNCTION	EXISTING CHARTER	CHARTER REVISION	COMMENTARY	SIGNIFICANCE OF CHANGE
Board of Selectmen— Vacancy	<p>Page 9 4-1-2 If a member of the Board of Selectmen dies, resigns, or ceases to be a registered voter, a vacancy shall result which shall be filled in accordance with G.L. c. 41, s. 10.</p>	<p>Page 10 3-1-c. If a member of the Board of Selectmen dies, resigns, is convicted of a felony while serving, or ceases to be a registered voter, the resulting vacancy may be filled by special election in accordance with Massachusetts General Laws.</p>	<p>must be submitted to the Attorney General for approval before it may be placed on the election warrant; and (2) G.L. c.43B, §11 provides that charter amendments are submitted to the voters at the first regular local election at least <u>2 months</u> after the proposed amendment becomes final.</p> <p>Should the Town desire to issue a combined town meeting and election warrant, this proposed change will result in there being more than 35 days between the town meeting and the election, and preclude the issuance of a single warrant for both. See G.L. c. 39, §9A.</p>	3
Charter Enforcement	<p>Page 11 5-2-1. Charter Enforcement Commission has authority to enforce the Charter through judicial process.</p>	<p>Page 5. 1-4-c & 1-4-f. The Board of Selectmen and the Town Manager are responsible for ensuring compliance with the Charter.</p> <p>Page 10. 3-2-a. The Board of Selectmen shall enforce the laws and orders of the Town, including this Charter.</p>	<p>This change represents a significant shift in Charter enforcement authority.</p> <p>It is unclear, however, what actions the Board of Selectmen would be required to take to enforce the Charter.</p> <p>Of note, however, the elimination of the previous language stating that the</p>	2

FUNCTION	EXISTING CHARTER	CHARTER REVISION	COMMENTARY	SIGNIFICANCE OF CHANGE
Board of Selectmen – General Powers	<p>Page 9 4-2-6 The board of selectmen shall exercise the powers and duties which are not vested in a town officer or another town board by the Massachusetts General Laws, the Provincetown General By-Laws, or this charter.</p> <p>Not addressed.</p>	<p>Page 5. 1-4-a. The Charter Enforcement Commission is renamed the Charter Compliance Commission. Its authority is limited to providing written interpretations of the Charter and providing recommendations to the Town Manager and the Board of Selectmen regarding charter enforcement petitions. Not addressed.</p>	<p>Charter Enforcement Commission has the authority to enforce the Charter through judicial process, addresses prior questions about the actual jurisdiction of any court over a complaint brought by the Commission to enforce the Charter.</p>	1
Board of Selectmen— Protecting the assets of the Town	<p>Not addressed.</p>	<p>Page 10 3-2-c. The Board of Selectmen has the responsibility to protect the assets of the Town.</p>	<p>The removal of the savings clause may lead to ambiguity in terms of the distribution of powers within Town government. However, even without this provision, the Board of Selectmen is the chief executive authority and may exercise all powers and duties consistent with such position. This new provision does not state how the Board should carry out this responsibility.</p>	2
Board of Selectmen— Annual Town Report & Annual Goal Setting Meeting	<p>Page 3 2-1-9 At least seven days prior to the annual town meeting, copies of the town report shall be made available for distribution at the town hall, and at least seven days prior to any town meeting copies of the finance committee report shall be made available at the town hall.</p>	<p>Page 10 3-3-b. The Board of Selectmen shall compile and publish an Annual Town Report for each calendar year which shall include reports from all elected and appointed Town Officials, including the Moderator and all Department Heads, and the Town Boards. The Annual Town Report shall be available at least 14 days before the Annual Town Meeting. Page 11 3-3-c. Within sixty (60) days after the Annual Town Election, the Board of Selectmen shall hold a Meeting for the purpose of stating the Board's goals for</p>	<p>G.L. c. 40, §49 already requires that the Board of Selectmen prepare an Annual Town Report; however, the statute merely requires that this occur before the annual town meeting, and does not require the Annual Report to be published at any time certain before the annual town meeting. The revised charter provides that the Annual Town Report be available 14 days prior to the Annual Town Meeting instead of the 7 day requirement in the current Charter, and may result on additional pressure on Town Staff.</p>	3

FUNCTION	EXISTING CHARTER	CHARTER REVISION	COMMENTARY	SIGNIFICANCE OF CHANGE
Board of Selectmen— Town Manager Contract	Page 10 4-4-1 The board of selectmen is required to establish an employment contract with the Town Manager. The Charter sets forth specific provisions that may be included in the employment contract. The contract is limited to a three year term.	the coming fiscal year, referred to as the Annual Goal Setting Meeting. Page 11 3-4-a. Removes specific terms for the Town Manager’s contract and adds a requirement that if the position is vacant, the Board shall “promptly hire a new Town Manager.” Eliminates the maximum term of the Town Manager’s contract.	Adds language to the Charter to require an Annual Goal Setting Meeting by the Board of Selectmen. G.L. c. 41, §108N authorizes the Selectmen to enter into an employment contract with a town manager. The statute does not specify a maximum term of years, and leaves that to the discretion of the Board. Note, however, that public policy considerations dictate a maximum term of five years. The revised Charter provides the Board of Selectmen with significant additional discretion to negotiate a contract with the Town Manager from the existing Charter.	2
Board of Selectmen— Investigatory Powers	Page 10 4-5-1 The board of selectmen may investigate and may authorize the town manager to investigate the affairs of the town and the conduct of any town department or town board, including any claim against the town.	Page 11 3-5-a. The Board of Selectmen may investigate the alleged misconduct of the Town Manager, any Town Board, or any member of a Town Board. The Board of Selectmen may direct the Town Manager to investigate the affairs of the Town, the conduct of any Town Department or Town Employee, and any claim against the Town.	The revised language differs from state law and could have unintended consequences of limiting the Town’s authority to conduct investigations that it would otherwise have under G.L. c.41, §23B. The Attorney General recommended that this provision be revised to be consistent with G.L. c.41, §23B, but no change was made in the Final Report.	1
Board of Selectmen— Investigatory Powers	Page 10 Section 4-5-2 For purposes of this section, the board of selectmen may subpoena witnesses, administer oaths, take testimony, and require the production of evidence.	Not addressed.	The existing Charter provides significant tools for the Board of Selection to use in conducting an internal investigation, which are consistent with the powers of a board of selectmen to conduct investigations under G.L. c. 41, §23B. G.L. c. 233, §8 authorizes a board such as the Selectmen to issue subpoenas for	1

FUNCTION	EXISTING CHARTER	CHARTER REVISION	COMMENTARY	SIGNIFICANCE OF CHANGE
Board of Selectmen— Investigatory Powers	Not addressed.	<p>Page 11</p> <p>3-5-b. Any criminal matter shall be referred to the Police or the Attorney General's Office for action after an initial investigation to determine if criminal behavior may have occurred.</p> <p>3-5-c. Investigations shall be based only upon factual allegations that can be confirmed or denied. If allegations are received from an individual, that person must be identified and the allegations must be in writing and must be specific. Any anonymous allegation or one of general behavior shall not be responded to.</p> <p>3-5-d. The individual who is the subject of an investigation shall be informed in writing of the investigation and shall have the right to a Public Hearing.</p> <p>3-5-e. The Board of Selectmen shall identify sanctions if the conduct is determined to be inappropriate. Sanctions may include an oral reprimand and guidance for future action at a Board of Selectmen open meeting, removal, or referral to an appropriate body for other action.</p>	<p>the production of documents to and the appearance of witnesses before the board at a hearing. In some respects, the statutory authority is not as broad as the authority conferred under the existing section of the Charter in this regard.</p> <p>The new provisions significantly restrict the Town's ability to act in the context of investigations.</p> <p>Town Counsel has previously advised against blanket rejections of anonymous complaints. While there are sound policy reasons for such a prohibition, we can envision circumstances where the Board may feel it necessary to investigate an anonymous complaint given the severity or gravity of the allegations, or the potential for an imminent threat.</p> <p>The Board of Selectmen would be required to comply with the Open Meeting Law if it were to hold a meeting to address an employment issue. Note, however, that the Town Manager would not otherwise be required to hold a public hearing to address such an issue.</p> <p>The sanctions provision lacks clarity, which could lead to enforcement issues.</p>	1
Board of Selectmen – Dealing with Town Employees	Not addressed.	<p>Page 12.</p> <p>3-6-b. The Board of Selectmen, and individual members thereof, shall deal with employees who are under the direction and supervision of the Town Manager solely through the Town</p>	<p>Although such provisions are not unusual in Town Charters, such provisions are often difficult to enforce against an elected official.</p>	1

FUNCTION	EXISTING CHARTER	CHARTER REVISION	COMMENTARY	SIGNIFICANCE OF CHANGE
Town Manager- Qualifications	<p>Page 18 7-1-1 The town manager shall be a person especially fitted by education, training, or previous experience in public administration, to perform the powers and duties of the office.</p>	<p>Manager. Furthermore, neither the Board of Selectmen nor its individual members shall give direct orders to any such employee.</p> <p>Page 13. 4-2-a. The minimum education requirement for a candidate for the position of Town Manager is a bachelor's degree, preferably in Public Administration, from an accredited degree-granting college or university. In addition, the candidate must have at least three years compensated service in public administration at a managerial level. If the educational qualification is waived by the Board of Selectmen, the professional qualification must include at least nine years compensated service in public administration with at least six at a managerial level.</p>	<p>Whether such a provision is appropriate for Provincetown is a policy question.</p>	2
Town Manager- Qualifications	<p>Page 18 7-1-6 The town manager shall not have served in an elective office in the town government for at least <u>six months</u> prior to his or her appointment.</p>	<p>Page 13. 4-2-g. The town manager shall not have served in any elected or <u>appointed</u> office in Town government for at least <u>one</u> year before being considered as a candidate for the position.</p> <p>Page 16. 4-5-a. Nothing in this Charter prohibits the Acting Town Manager from being hired by the Board of Selectmen as the Town Manager.</p>	<p>This language adds specific education and professional experience requirements. Although not expressly stated, it is implied that the Board of Selectmen can waive the educational requirement, in which case, more substantial professional experience is required.</p> <p>This provision could lead to litigation as to whether a candidate for the position of Town Manager is qualified.</p>	1
Town Manager- Responsibilities	<p>Page 18. Section 7-2-1 The town manager shall be responsible for the administration of all town functions including those related to the assessment and collection of taxes, the receipt and disbursement of monies, accounting of funds, the auditing of accounts, streets,</p>	<p>Pages 13-14 4-3-a. The Town Manager shall be responsible for the administration of all Town functions, including but not limited to: 1) assessing and collecting taxes, 2) receiving and disbursing monies, accounting funds, and auditing accounts,</p>	<p>While the list in the revised charter is in most respects identical to the current charter, specific references to "the providing of recreation, the town clerk, the town library, veterans' services," "public safety," and "the inspection of buildings and businesses" have been</p>	1

FUNCTION	EXISTING CHARTER	CHARTER REVISION	COMMENTARY	SIGNIFICANCE OF CHANGE
Town Manager- Reorganization of Town Departments	parks, wharves, cemeteries, public grounds, the municipal water system, the disposal of sewage and waste, the providing of recreation, the town clerk, the town library, veterans' services, licensing, parking, civil defense, disaster relief, the police department, the fire department, the rescue squad, public health, public safety, the inspection of buildings and businesses, and such other matters as shall be assigned by this charter, the general by-laws, or vote of the board of selectmen.	3) evaluating and maintaining the quality of streets, parks, wharves, and cemeteries, 4) evaluating and maintaining the water system, the disposing of sewage and waste, 5) maintaining the conditions of town buildings, such as the Town Hall, the Library, etc., 6) controlling licensing, parking, civil defense, public health, and disaster relief, 7) administering the Police Department, Fire Department, and Rescue Squad, 8) and such other duties and responsibilities as provided for by this Charter, the Town Bylaws, or the majority vote of the Board of Selectmen.	deleted. The implications of this revision are not clear.	2
Town Manager -hiring of town employees	Page 18. Section 7-2-2 of the current Charter sets forth a process by which the Town Manager may reorganize Town departments, subject to the approval of the Town Manager. Page 19 7-2-5 The town manager shall hire the following town employees with the approval of the board of selectmen; (a) accountant; (b) assessor; (c) assistant town manager; (d) clerk; (e) licensing agent; (f) police chief (g) tax collector (h) town counsel; and (i) treasurer.	Page 14 4-3-b. The Town Manager has the same authority but may also remove an employee who has become redundant, presumably as a result of a reorganization. Page 14. 4-3-d. The Town Manager may hire, promote and remove all Town Staff, except the secretary to the Board of Selectmen. Any action with regard to the following positions shall be subject to confirmation by the Board of Selectmen, except that if the Board of Selectmen fails to confirm or object within fifteen (15) days of the notice of such proposed action, such failure shall constitute implied confirmation: 1) Assistant Town Manager 2) Finance Director 3) Police Chief 4) Town Clerk	At a minimum, it is unclear how "redundant" would be defined and how the termination, in practice, would be accomplished. Any underlying requirements related to removal would still have to be met. The proposed language reduces the number of positions for which a Town Manager appointment requires Board of Selectmen approval. Importantly, it also increases the authority of the Board of Selectmen with respect to personnel action involving positions where confirmation is required. Chapter 6 provides for a Finance Department that consolidates duties of assessor, treasurer, collector and accountant and for department to be managed by finance director. The Finance positions have been removed	1

FUNCTION	EXISTING CHARTER	CHARTER REVISION	COMMENTARY	SIGNIFICANCE OF CHANGE
			<p>from the list of Town Manager appointments in this section. Section 6-1-c, however, provides for appointment of the Finance Director by the Town Manager with the confirmation of the Board of Selectmen.</p> <p>The Licensing Agent has been removed from the list of appointments, but the position would qualify as Town Staff, so the appointing authority will remain the Town Manager.</p> <p>It is not clear what the intent of removing Town Counsel from the list of appointments requiring Board of Selectmen confirmation was. However, it appears that Town Counsel would be considered "Town Staff" appointed by the Town Manager, without confirmation by the Board of Selectmen. The Town Manager has the authority to hire "Town Staff". By definition the term "Town Staff" includes "hired employees who report to the Town Manager". See 1-3-k. In turn, the definition of "Town Employee" includes persons providing services for the town, including a contract for hire. See 1-3-j.</p> <p>On appointments requiring the confirmation of the Board of Selectmen, the Board must act within 15 days. Failure to act within 15 calendar days, constitutes implied confirmation.</p>	
Town Manager--- Discharge of	Page 28 10-4-3 The town manager may, after a hearing, discharge any non-union paid	Page 14 4-3-h. In addition, the Town Manager may discharge any Town employee not	Removes administrative procedures related to notice, hearing before the personnel board and adds requirement	1

FUNCTION	EXISTING CHARTER	CHARTER REVISION	COMMENTARY	SIGNIFICANCE OF CHANGE
Non-Union Employees	town employee for good cause. An employee who is discharged has a right of appeal to the Personnel Board, which after a hearing, may reinstate the employee by a two-thirds vote.	subject to a collective bargaining agreement for good cause if the action is taken in accordance with all applicable personnel policies and laws. The discharge shall be done in person, in private, and with a person with HR expertise in attendance.	that discharge be done in person, in private with a person with HR expertise present at the time of discharge. The requirement that the discharge be done in person may have the unintended effect of precluding the discharge if the employee is absent from work for any reason, such as in the case of incarceration or for any other reason. Also, the proposed language contemplates that the Town Manager cannot be the "person with HR expertise" so as to potentially require that the Town fund and hire a new HR position.	
Town Manager—Authority to Execute Contracts.	Page 19 7-2-10 The town manager shall be responsible for purchasing for all town departments and offices, and if so requested, for the school committee or the board of library trustees.	Page 15 4-3-k. The Town Manager is the Chief Procurement Officer of the Town, with the authority to award and execute contracts for the purchase of all supplies and services for all Town Departments and offices and if requested, for the School Committee and for the Board of Library Trustees.	Provides the Town Manager with specific authority to execute contracts pursuant to G.L. c.30B. Currently, the authority to execute contracts on behalf of the Town rests with the Board of Selectmen as the chief executive officers of the Town, although the Board has delegated signing authority to the Town Manager for contracts under \$100,000.	1
Town Manager—Resignation or Removal	Page 19 7-3-1 The town manager shall provide the board of selectmen with thirty days written notice of his or her intention to resign. 7-3-2 If a town manager resigns, the town treasurer shall pay to him or her from the funds appropriated to pay the assistant town manager severance pay of an amount equal to the compensation which he or she would have received had he or she continued in office for four weeks.	Page 15 4-4-a. The Town Manager's contract shall require notice of an intention to resign and shall address the Town Manager's right to receive accrued sick pay and vacation time at the time of resignation. 4-4-c. After the Town Manager has been in office longer than six (6) months, the Board of Selectmen may initiate the removal of the Town Manager by following the procedure included in the Contract. The right to the removal	Unlike the current Charter, there is no provision for the payment of severance pay to the Town Manager in the event of a resignation. Whether established by charter or employment contract, there are questions about the overall enforceability of requirements that any employee provide advanced notice of an intent to resign. The proposed Charter language actually provides more flexibility in this regard, allowing the Selectmen to craft a contract provision	1

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	<p>Page 27 10-3 The procedure for the removal of the Town Manager is set forth in detail. The procedures include an appeal to the Personnel Board which may reinstate the Town Manager by a two-thirds vote.</p> <p>Page 27 10-3-12. Town Manager is entitled to four weeks' severance pay upon removal.</p>	<p>process delineated in the Contract does not apply if the term of the Town Manager's Contract term (original or extended) has expired.</p>	<p>that potentially has some consequences should the town manager not provide sufficient notice in advance of a resignation. However, such a contract provision could <u>not</u> condition payment to an outgoing town manager for accrued but unused vacation time on provision of the agreed-upon advanced notice due to the operation of the state's wage statute.</p>	
Town Boards - Generally	<p>Page 11 Chapter 5 lists all Town boards that are elected.</p> <p>Page 13 Chapter 6 lists all Town appointed boards</p>	<p>There are five classes of Town Boards: Page 21 (1) 5-8-a. Elected Town boards. There is no composite list, but certain sections specify that a Town board shall be elected.</p> <p>Page 17 (2) 5-1-a. Boards established by Town Meeting.</p> <p>(3) 5-1-b. Ad hoc or temporary advisory boards established by vote of the Board of Selectmen.</p> <p>Page 19 (4) 5-6-a. Regulatory boards which are defined as boards authorized by Massachusetts General Laws to establish regulations. This section contains a specific list of regulatory boards.</p> <p>Page 20 (5) 5-7-a. Appointed Town Boards such as the Finance Committee which is appointed by the Moderator. The</p>	<p>By creating 5 classes of Town Boards, the revised charter will add a significant level of complexity to Town government.</p> <p>If the Charter Revision is approved, it would be important to develop and maintain a list of all Town boards in each of the five categories.</p> <p>The revised charter does not specify the boards and offices that are elected. However, as far as we can tell, there does not appear to be any change in the mode of selection for the boards and offices presently elected.</p> <p>Special rules have been established for regulatory boards. They are the only appointed boards subject to term limits and members must be registered voters of the Town.</p> <p>Appointments by the Town Manager to the Historical Commission and Conservation Commission are no longer</p>	2

FUNCTION	EXISTING CHARTER	CHARTER REVISION	COMMENTARY	SIGNIFICANCE OF CHANGE
Town Boards – Formation	<p>Page 17 6-16-2. Any town board created by vote of town meeting shall continue to exist until dissolved by town meeting.</p>	<p>Conservation Commission and the Historical Commission are appointed by the Town Manager. All other Appointed Town Boards are appointed by the Board of Selectmen.</p> <p>Page 17 5-2-b. Boards that were created by a vote at Town Meeting can only be dissolved by a vote at Town Meeting.</p> <p>5-1-b. Town Boards may also be created by a majority vote of the Board of Selectmen, but such Boards shall be Ad Hoc or Temporary Advisory Boards, unless and until ratified by a majority vote of Town Meeting. Ad Hoc or Temporary Advisory Boards must be reauthorized by the Board of Selectmen each year within thirty (30) days of the Annual Town Election or they are automatically dissolved. Ad Hoc or Temporary Boards are only advisory and cannot be established to carry out a requirement of State law.</p>	<p>subject to approval by the Board of Selectmen.</p> <p>New language regarding ad hoc or temporary advisory boards not re-authorized automatically dissolved.</p>	3
Town Boards— Merger	Not addressed.	<p>Page 17 5-2-a. Unless otherwise prohibited by State law, the Appointing Authority of two or more town boards may merge those boards by majority vote, after an opportunity for comment by the Chairs of both of the boards and after receiving the recommendation of the Charter Compliance Commission whether merger would be in conflict with any provision of this Charter. The Finance Committee cannot be merged with any other board.</p> <p>5-2-d. In the event that an appointed, non-regulatory Town Board shall have</p>	<p>This provision would appear to apply to any Town appointed board, except the Finance Committee. Note, however, that this provision could not apply to statutorily created boards.</p> <p>It is unclear whether the Charter Commission intended this provision to apply to Regulatory boards.</p>	2

FUNCTION	EXISTING CHARTER	CHARTER REVISION	COMMENTARY	SIGNIFICANCE OF CHANGE
Town Boards— Composition	<p>Page 17 6-16-3 Unless otherwise provided by the vote creating a town board, the board shall consist of five regular members plus one alternate and may have two alternates when formally requested to do so by the board in question and approved of by the board of selectmen for three year overlapping terms so arranged that the term of at least one regular member shall expire each year.</p>	<p>failed to convene a meeting for the period of one year, or shall have had no members for one year, the Town Clerk shall notify the Appointing Authority, the Board of Selectmen and the Charter Compliance Commission. If that Town Board does not convene a meeting for a period of six months immediately following that notice, then it shall be automatically dissolved.</p> <p>Page 18 5-4-a. Unless otherwise specified in Massachusetts General Laws or this Charter, each Town Board consists of five regular members and two alternate members. . . . 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.</p>	<p>The change in composition to a default of 5 members and 2 alternates appears to impact a number of the Town Boards. For example, under the current Charter, the Zoning Board of Appeals consists of 5 regular members and 5 alternates (6-15-1). It is not clear how this provision would impact the ZBA, although given the constructive grant provisions contained in G.L. c. 40A, reduction of the alternate members available to the ZBA to hear cases could lead to the granting of zoning relief in circumstances that are not in the interests of the Town, and could lead to litigation expenses to appeal constructive grants.</p> <p>The transitional provisions, Chapter 8, Section 2, provide, however, that those persons who are serving at the time the charter is adopted continue to serve in accordance with their appointment or election, but does not address how to handle boards where members will be added or removed.</p> <p>Pursuant to Chapter 364 of the Acts of 2010, this provision would not impact the Water and Sewer Board when acting</p>	1

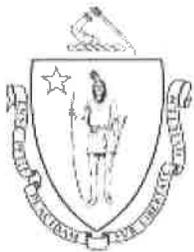
FUNCTION	EXISTING CHARTER	CHARTER REVISION	COMMENTARY	SIGNIFICANCE OF CHANGE
Town Boards— Registered Voters	<p>Page 7 3-4-1 A person shall not be a member of a town board unless he or she is a registered voter of the town of Provincetown.</p>	<p>Page 19 5-6-b. Members of Regulatory Town Boards must be registered voters in the Town of Provincetown, unless otherwise allowed or directed by State law.</p> <p>Page 20 5-7-c. If the Appointing Authority determines that there are an inadequate number of registered voters who are willing to serve as members or alternates on appointed non-regulatory Boards, then the Appointing Authority may appoint part-time residents to serve as alternates, as long as the majority of members are registered voters.</p> <p>Individuals who are not registered voters shall be appointed to a non-regulatory Town Board only if they can commit to be present for a majority of the meetings of the Board.</p>	<p>as a Water Board, which consists of 7 members including three residents of Truro (6-14-1).</p> <p>Notwithstanding this provision, the provisions of G.L. c. 39, §23D, which limits the number of absences from adjudicatory hearings by board members and alternates, will continue to apply.</p> <p>Removes requirement to be a registered voter for all town boards and allows appointment of part-time residents to serve as alternates on non-regulatory boards.</p> <p>It may be difficult to enforce the attendance commitment requirement for appointed non-registered voters.</p>	1
Town Boards— Term Limits	<p>Page 7 3-4-4 An elected member of a town board shall not serve on that town board for more than three consecutive terms. An appointed member of a town board shall not serve on that town board for more than four consecutive terms.</p>	<p>Page 19 5-5-e. No member of a Town Board may serve as Chair for more than six consecutive years, unless at the end of the sixth year (and each successive year) no other member is willing to serve as Chair.</p>	<p>Removes term limit for non-regulatory boards and elected boards and officials. Members on regulatory town boards are subject to term limit of 3 terms.</p> <p>Places a term limit of six years on serving as the Chair of any Town Board.</p>	1

FUNCTION	EXISTING CHARTER	CHARTER REVISION	COMMENTARY	SIGNIFICANCE OF CHANGE
		<p>5-6-c. Members of Regulatory Town Boards may serve for only three three-year overlapping full terms.</p> <p>Page 20 5-7-f. There is no term limit for service on an appointed, non-regulatory Board.</p>		
Board of Selectmen serving as a Regulatory Board	Not addressed.	<p>Page 20. 5-6-e. If there are an inadequate number of members appointed to provide quorum for any Regulatory Town Board, the responsibilities of that Board shall fall to the Board of Selectmen.</p>	<p>The step in authority of the Board of Selectmen would only be triggered if there are an insufficient number of appointees to a Regulatory Board to establish a quorum. If appointed board members are simply absent, this provision would not be triggered.</p> <p>For example, if the Zoning Board of Appeals, which under the Revised Charter would have 5 members and 2 alternates, had five vacancies, the Board of Selectmen would step in to hear any pending cases.</p> <p>This is a highly unusual provision which could, depending on the particular circumstances, increase the burden on members of the Board of Selectmen, who may not have time or sufficient expertise to sit on a complicated case involving zoning relief, for example.</p> <p>Furthermore, if the Board of Selectmen simply declined to fill vacancies as they occur on a particular Regulatory Board, at some point the Board of Selectmen could step in and hear cases for that particular board.</p>	1

FUNCTION	EXISTING CHARTER	CHARTER REVISION	COMMENTARY	SIGNIFICANCE OF CHANGE
Town Boards – Qualifications	Not addressed.	<p>Page 20 5-7-b. No person shall be appointed to a Town Board: 1) unless determined to be qualified by the Appointing Authority, or able to become qualified by serving and there are a sufficient number of members already serving on the Board who are qualified to carry out the responsibilities of the Board, 2) if appointment would be contrary to the Conflict of Interest laws, or 3) based on political party consideration, with the exception of the Board of Registrars or as otherwise provided by State law.</p>	<p>It is unclear what would be included in the determination to be “qualified”. It is also unclear whether this requirement is applicable to all appointed town boards given the expansive definition of Town Boards contained in 1-3-i.</p> <p>It is, therefore, not clear whether the “qualification” requirement applies to Regulatory Boards.</p> <p>Having a standard that board members must be “qualified” could lead to judicial challenges of actions or decisions of Town Boards, and additional litigation expenses.</p>	3
Town Boards – Removal	<p>Page 26 10-2-1. Town board members may be removed for good cause, subject to a hearing before the Personnel Board, which may, after a hearing, reinstate the member by a two-thirds vote.</p>	<p>Pages 20-21. 5-7-g sets forth a procedure for removing an appointed member of a Town Board for Good Cause.</p> <p>The procedures include the Board member’s ability to request a “closed meeting” with the appointing authority and to request a public hearing.</p>	<p>While many provisions of the General Laws relating to specific boards and commissions provide for a removal process, it is usually comparable to the current Charter’s requirement of good cause (as defined in the Charter) and some sort of hearing requirement. This provision provides similar due process protections.</p> <p>This provision, however, cannot grant rights to a public body with respect to conducting a closed meeting that do not exist pursuant to the Open Meeting Law.</p>	2
Recall	<p>Page 26 10-1-11. A majority vote of the voters shall be required to recall such elected officer but shall not be effective unless a total of at least twenty-five percent of the electors entitled to vote on the question shall have voted for recall.</p>	<p>Page 22 5-8-e (11). A majority vote of at least twenty-five (25%) of registered voters is required to recall an elected Official. If fewer than twenty-five (25%) of registered voters cast a ballot, the ballots regarding the Recall shall not be counted.</p>	<p>It is unclear whether this provision was intended to revise the current language. However, regardless of intent, it could reasonably be read to decrease the minimum threshold for recalling an elected official to a vote of 12.5% plus 1% of the registered voters, as long as 25% of the registered voters cast a ballot at the election, thus leading to confusion</p>	1

FUNCTION	EXISTING CHARTER	CHARTER REVISION	COMMENTARY	SIGNIFICANCE OF CHANGE
Financial Procedures	<p>Page 22 Chapter 9 sets forth the procedure for preparation and adoption on the Town budget and the capital improvement plan.</p>	<p>Page 25 Chapter 6 sets forth similar procedures.</p>	<p>regarding the results of any recall election. The revised Charter significantly compresses the timeframe for the preparation and adoption of the annual budget and capital improvement program. See 6-4-e, for example, which only provides the Board of Selectmen with one week to review the Town Manager's budget before submitting it to the Finance Committee. Similarly, 6-6-b, the Board of Selectmen must act on the Town Manager's proposed capital improvement program in a very short timeframe.</p>	1
Public Safety - Police	<p>Page 21 8-2-1. The town manager makes all appointments in the Police Department.</p>	<p>Page 29 8-2-b. The Town Manager must consult with the Police Chief before making any appointments.</p>		3
Police Chief Appointment	<p>Page 21 8-2-2. The town manager appoints the Police Chief with the approval of the Board of Selectmen.</p>	<p>Page 29 8-2-a. The Town Manager and the Police Chief must enter into an employment contract.</p>	<p>Chapter 133 of the Acts of 1993 entitled "An Act Relative to the Appointment of a Chief of Police in the Town of Provincetown" allows for a five year employment contract and requires that any employment contract be subject to G.L. c. 41, §97A. The provisions of the special act do not appear to be inconsistent with the Revised Charter, so it will continue in effect.</p>	3
Public Safety – DPW Director	<p>Not addressed.</p>	<p>Page 29. 7-4 sets forth the appointment, duties and responsibilities of the DPW Director.</p>	<p>The inclusion of this provision in the Revised Charter does not affect the general supervisory authority of the Town Manager over DPW operations under 4-3-a, nor would it prohibit the reorganization of town departments pursuant to section 4-3-b of the revised charter.</p>	2
Public Pier Corporation	<p>Not addressed.</p>	<p>Page 30</p>	<p>There are no substantive changes to the Pier Corporation set forth in the Revised Charter. However, where the Pier</p>	2

FUNCTION	EXISTING CHARTER	CHARTER REVISION	COMMENTARY	SIGNIFICANCE OF CHANGE
		7-5-a. Summarizes the special legislation (c. 260 of the Acts of 2002) that created the Pier Corporation.	Corporation is established by special act, including a summary of the act in the revised charter creates ambiguity. In the future, should the Town decide to address governance issues associated with the Pier Corporation, an amendment to the special act, as well as a charter amendment, may be required.	
Shellfish Constable	Not addressed.	Page 30 7-5-a. Discusses the position of Shellfish Constable and Shellfish Committee.	The provision neither creates the position nor the committee and its inclusion renders uncertain the authority for such position and committee.	2
Emergency Management	Page 19. 7-2-8. The Town Manager is the Commissioner of Public Safety.	Page 30. 7-6. Provides that the Town Manager shall be the Commissioner of Public Safety and sets forth the requirement for the development of an Emergency Management Plan.	This provision expands the requirements for an Emergency Management Plan. It also adds a level of complexity which may conflict in a specific emergency situation with the emergency command system required by federal law.	2
Miscellaneous	Section 1-1-b provides that "The elected Board of Selectmen and the Town Manager are the executive body of the Town . . ." This statement confuses the correct statements in 3-1-a that the Board of Selectmen is the executive branch of the Town and 4-1 that the Town Manager is the chief administrator. Section 1-3-g includes a definition of "adjudicatory hearings," but this term is not used elsewhere in the charter (although it was referenced in a prior draft). Section 2-3 subsections go from c to e, and omit subsection d.			



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September 28, 2017

Julia L. Perry, Chair
Provincetown Charter Commission
Town of Provincetown
260 Commercial Street
Provincetown, MA 02657

**Re: Preliminary Report of the Provincetown Charter Commission
Case # 8593**

Dear Ms. Perry:

Pursuant to the provisions of General Laws Chapter 43B, Section 9, we have reviewed the Preliminary Report of the Provincetown Charter Commission (“Commission”) received by this Office on August 31, 2017. Pursuant to Section 9, and within four weeks after receipt, the Attorney General is required to furnish the Commission with a written opinion setting forth any conflict between the proposed Charter (“Charter”) and the Constitution and laws of the Commonwealth.

We have determined that two sections of the proposed Charter conflict with state law: (1) Chapter 4 Section 5 (a) that prohibits the Town Manager from receiving accrued vacation time and (2) Chapter 5 Sections 8 (e) (8) and (13) that prohibits recalled officials from appearing on subsequent election ballots. (See Sections I (A) and (B) below, “Conflicts with State Law”). We have also determined that the remaining portions of the proposed Charter do not conflict with the Constitution or laws of the Commonwealth.

In addition to the conflicts with state law identified in Sections I (A) and (B) below, we offer the following comments for the Commission to consider when drafting its Final Report. We offer these comments because a Town’s Charter establishes the form, structure, and organization of the Town’s government, and as currently drafted, certain provisions may cause implementation problems. These issues may be well addressed in the Commission’s Final Report and after discussion with Town Counsel.

I. Conflicts with State Law.

A. Chapter 4 Section 5 (a).

Section 5 (a) pertains to the Town Manager's resignation and provides as follows (with emphasis added):

The Town Manager's contract shall require notice of an intention to resign and shall address the Town Manager's right to receive accrued sick pay and vacation time. Failure to provide the required notice shall result in waiver of accrued sick pay and vacation time.

We conclude that the text "vacation time" is in conflict with G.L. c. 149, § 148, which pertains to payments of wages. Paid vacation time is considered wages. See G.L. c. 149, § 148. (The word "wages" shall include any holiday or vacation payments due an employee under an oral or written agreement); see also, Massachusetts v. Morash, 490 U.S. 107 (1989). Upon separation from employment, employees must be compensated by their employers for vacation time earned under an oral or written agreement. Section 148 further provides that no employer shall "by special contract with an employee or by any other means exempt himself" from Section 148. Thus, it is in conflict with G.L. c. 149, § 148, for the Charter to provide that accrued vacation time will be forfeited if the Town Manager does not give proper notice of his or her resignation. In order to avoid a conflict with G.L. c. 149, § 148, the Commission may wish to consider amending this section in its Final Report.

B. Chapter 5 Sections 8 (e) (8) and (13).

Section 8 (e) (8) provides that if the town official subject to the recall petition resigns the "Official who resigned cannot appear on the ballot as a Candidate." In addition, Section 8 (e) (13) provides that any person who has been recalled or who has resigned from office during the recall proceedings is ineligible for election to any town board for two years after the recall or resignation.

We conclude that Sections 8 (e) (8) and (13) are inconsistent with state election law. The election, removal, and replacement of town elected officials are the subject of comprehensive state statutes. See Turner v. City of Boston, 462 Mass. 511, 516 (2012). The Charter cannot prohibit an otherwise qualified candidate from appearing on the ballot solely because such person resigned or was recalled from an elected office. In order to avoid a conflict with state election law the Commission may wish to consider amending this section in its Final Report.

II. Comments on Other Portions of the Preliminary Report.

A. Chapter 1. The Town and The Charter.

1. Section 2. The Provincetown Charter.

Section 2 (b) provides that the provisions of the Charter "cannot be waived" by the Board of Selectmen or any other Town Board, the Town Manager or any other person. It is unclear

what the Commission means by “cannot be waived.” The Commission may wish to discuss this issue with Town Counsel and clarify this text in the Final Report.

2. Section 4. Charter Compliance Commission.

Section 4 provides for a Charter Compliance Commission.¹ As part of its powers and duties, the Compliance Commission shall “take formal action” when the Compliance Commission receives a written petition from a registered voter(s) alleging a violation of the Charter by certain listed boards and officials. The Compliance Commission may dismiss the petition or hold a hearing on the petition. At the hearing the named party or parties “shall have the right to be advised or represented by Town Counsel.” The Compliance Commission shall also have the right to be advised by “Town Counsel, but counsel to the Commission shall not be the same individual who is advising or representing the Named Party or Parties.” The petitioner shall have the right to be advised and represented by private counsel. See Section 4 (g) (4). If the Compliance Commission votes that there is a violation of the Charter, the Compliance Commission shall require the party to correct the violation. If the violation is not corrected the Compliance Commission may seek an injunction in Superior Court. The Compliance Commission “shall be represented by Town Counsel. . . before the Superior Court, and all costs all be paid by the Town.” See Section 4 (g) (8).

We find no conflict in the Town establishing a local commission to investigate whether the Town is following the provisions of the Town’s Charter. However, Section 4 cannot be construed or applied in a manner that takes away any rights, causes of action, or remedies a person may have under state law against a local official or board for violations of the Town’s Charter.

In addition, whether and under what circumstances Town Counsel can lawfully provide advice and representation to a named party and then subsequently the Compliance Commission is a matter governed by state law. There may be instances in which state law prohibits Town Counsel from providing advice and representation to both of these entities. In those instances, the Charter cannot require such advice and representation. Also, absent an appropriation from Town Meeting, the Charter cannot require the costs for such representation to be paid by the Town. The Commission may wish to amend Section 4 in its Final Report to recognize the limitations placed on Town Counsel’s advice and representation and the costs associated with such representation under state law. The Commission may wish to discuss this issue in more detail with Town Counsel.

B. Chapter 2 Town Meeting, The Moderator, and Town Elections.

1. Section 1. Town Meeting.

Section 1 (a) provides “[e]xcept as otherwise delegated to the Board of Selectmen by this Charter, the legislative powers of the Town shall be exercised by...the registered voters at an Annual Town Meeting or Special Town Meeting.” It is unclear what the Commission means

¹ The Town’s existing Charter provides for a Charter Enforcement Commission. See Section 2 of the Provincetown existing Charter.

“[e]xcept as otherwise delegated to the Board of Selectmen by this Charter.” However, Town meeting serves as “the legislative body for the town.” Conroy v. Conservation Commission of Lexington, 73 Mass.App.Ct. 552, 558 (2009). As such, Town Meeting is “vested [with] the traditional powers of the legislative branch of any level of government, i.e. the power to make laws (by-laws) and the power of the purse.” Wright v. Town of Bellingham, 2007 WL 1884657 (Mass.Land Ct.), *quoting* Town Meeting Time, 2d ed. 1984. In drafting its Final Report, the Commission may wish to delete the words “[e]xcept as otherwise delegated to the Board of Selectmen by this Charter” from Section 1 (a). The Commission may wish to discuss this issue in more detail with Town Counsel.

2. Section 3. Preparation of the Warrant and Preliminary Hearings and Reports.

Section 3 (d) pertains to warrant articles proposed by registered voters and provides as follows:

When a Warrant article has been proposed by a registered voter or voters at least three (3) weeks before the Warrant closes, the Board of Selectmen, with the assistance of the Town Manager, shall review the article for format and legality, and propose changes to the submitter if the article cannot be voted by the Town as submitted.

It is unclear what the Commission means by “if the article cannot be voted by the Town as submitted.” Section 3 (d) cannot operate to limit the rights of citizens under G. L. c. 39, § 10, to petition the Board of Selectmen for inclusion of articles on the warrant. A citizens petition properly submitted under G.L. c. 39, § 10, must be included on the warrant. The Commission may wish to discuss this issue with Town Counsel.

Section 3 (e) provides that “[t]he Warrant shall be opened at least sixty days (60) prior and closed thirty (30) days prior to the date of Town Meeting.” General Laws Chapter 39, Section 9, authorizes a board of selectmen to call special town meetings. In addition, G.L. c. 39, § 10, requires the selectmen shall call a special town meeting “upon request in writing, of two hundred registered voters or of twenty per cent of the total number of registered voters of the town, whichever number is the lesser; such meeting to be held not later than forty-five days after the receipt of such request, and shall insert in the warrant therefor all subjects the insertion of which shall be requested by said petition.” The warrants for special town meetings must be noticed at least fourteen days before such meeting. See G.L. c 39, 10. Thus, the provisions of Section 3 (e) cannot be applied to a special town meeting called pursuant to the authority given to the selectmen and registered voters under G.L. c. 39, §§ 9 and 10. The Commission may wish to discuss this issue with Town Counsel.

Section 3 (j) prohibits Town Meeting from being held on a “holiday.” The Charter does not define “holiday.” It is unclear whether “holiday” includes legal holidays or religious holidays, or both. However, G.L. c. 39, § 10, prohibits town meeting on legal holidays. Thus, Section 3 (j) must be applied consistent with G.L. c. 39, § 10. The Commission may wish to discuss this issue with Town Counsel.

C. Chapter 3. The Board of Selectmen.

Section 5 authorizes the Board of Selectmen to investigate alleged, non-criminal conduct of the Town Manager, any Town Board or any member of a Town Board. It is unclear what the Commission means by “alleged, non-criminal conduct.” However, G.L. c. 41, § 23B, authorizes the selectmen to investigate the *conduct or operation* of any town department. The investigation can be for conduct that is potentially non-criminal or criminal in nature. The Commission may wish to change Section 5 in its Final Report to be consistent with the Board of Selectmen’s authority under G.L. c. 41, § 23B. The Commission may wish to discuss this issue with Town Counsel.

D. Chapter 5. The Town Boards.

1. Section 1. Formation of Town Boards.

Section 1 (a) pertains to the formation of Town Boards. Specifically, Section 1 (a) provides as follows:

Town Boards may be established pursuant to Massachusetts General Laws by a majority vote of Town Meeting, after Town Meeting has received the recommendation of the Board of Selectmen, the Finance Committee, and the Charter Compliance Commission. Each Town Board has the duties and responsibilities assigned to it by State law as adopted by Town Meeting, or as assigned by vote of Town Meeting.

It is unclear whether Town Meeting can establish a Town Board if it does not receive a recommendation from: (1) the Board of Selectmen; (2) the Finance Committee; and (3) the Charter Compliance Commission. In instances where Town Meeting is given the authority under state law to create a local board, that authority cannot be taken away for failure to receive a recommendation from another local board. In addition, there are many instances where a local board had powers given directly from state law and there is no requirement that such power be adopted by Town Meeting. The Commission may wish to amend Section 1 (a) in its Final Report in order to avoid an as applied inconsistency with state law. The Commission may wish to discuss this issue with Town Counsel.

2. Section 2. Merger and Dissolution of Town Boards.

Section 2 (a) authorizes the merging of two or more Town Boards by majority vote of the appointing authorities. While, Section 2 (a) provides that the Finance Committee cannot be merged with any other Board, Section 2 (a) cannot authorize the merger of other Town Boards that would otherwise be prohibited under State law. The Commission may wish to address this issue in its Final Report after discussion with Town Counsel.

Section 2 (c) authorizes Town Meeting to dissolve “Boards” created by the Board of Selectmen.² A vote by Town Meeting to dissolve a local Board created by the Board of

² In addition, Chapter 5 (1) (b) provides that Ad Hoc or Temporary Advisory Board must be authorized by the Board of Selectmen each year within thirty days of the Annual Town Election or they are automatically dissolved.

Selectmen could be an invalid directive from the legislative branch (Town Meeting) to the executive branch (the Board) on a matter within the exclusive authority of the executive branch: the power under state and local law to create certain local boards. Town Meeting serves as “the legislative body for the town.” A legislative body cannot interfere with the executive branch on a matter which is in the exclusive authority of the executive branch. See Anderson v. Board of Selectmen of Wrentham, 406 Mass. 508 (1990) (Selectmen not bound by Town Meeting vote purporting to establish the Town’s rate of contribution for group insurance benefits). By allowing Town Meeting to dissolve a local board created by the Board of Selectmen, Section 2 (c) potentially limits the Board’s ability to carry out its duties under state and local law. The Commission may wish to discuss this issue with Town Counsel.

3. Section 4. Membership on Town Boards.

Section 4 (a) provides that alternate members of Town Boards shall have the right based on the order of seniority on the Board, to vote at a Board meeting in place of a regular member who is absent. State Laws, including the Open Meeting Law and Conflict of Interest Law, may preclude an alternate member from serving in place of regular member. The Commission may wish to address this issue in its Final Report after discussion with Town Counsel.

4. Section 7. Rules Specific to Appointed Town Boards.

Section 7 (b) pertains to persons appointed to Town Boards and provides in pertinent part as follows:

No person shall be appointed to a Town Board:

* * *

3) based on political considerations, with the exception of the Board of Registers or as otherwise provided by state law.

The Commission may have meant to insert the word “party” after the word “political” and before the word “considerations.” See, e.g., G.L. c. 51, § 15, which pertains to local Board of Registrars and requires selectmen or the appointing authority to appoint members of the board that represent the two leading political “parties.” The Commission may wish to address this issue in its Final Report after discussion with Town Counsel.

5. Section 8. Rules Specific to Elected Town Boards.

Section 8 (e) establishes a recall provision for members of elected Town Boards. Section 8 (e) (5) provides that within twenty-four hours of receipt of signed recall petitions, the Town Clerk shall confirm the authenticity of each signature on the recall petitions and refer the recall petitions to the Board of Board Registrars of Voters to certify the signatures. It is unclear how the Town Clerk is to confirm the “authenticity of each signature” within twenty-four hours of receipt of the Recall Petitions. The Commission should discuss Section 8 (e) (5) with Town Counsel and whether it should amend this section in its Final Report.

E. Chapter 6. Finance.

1. Section 5. Financial Procedures – Specific to the School Committee.

Sections 5 (b) and (c) pertain to the School Committee providing its “adopted Budget” and its “final Budget” to the Town Manager. The Commission may wish to amend these section in its Final Report to make it clear that the School Committee puts forth a “proposed budget” or “budget proposal” that is not a final or adopted Budget unless and until it is voted by Town Meeting. The Commission may wish to discuss this issue in more detail with Town Counsel.

F. Chapter 7. Public Safety.

Section 6 pertains to Emergency management in the Town. Specifically, Section 6 (c) requires an emergency management plan for the Town. However, Section 6 (c) does not state who is charged with creating such a Plan. If the Town wishes to have the Town Manager, as the Emergency Management Coordinator, create the plan it should amend Section 6 to so provide. The Commission may wish to discuss this issue in more detail with Town Counsel.

G. Appendix to the Charter.

The Charter includes an Appendix which “provides supplemental information to the Charter.” The text included in the Appendix is “part of the Charter and can only be modified as . . . set forth in State law.” However, such text may be deleted from the Charter and added to the Town by-law. See Appendix, 1st ¶. The Appendix includes sections pertaining to remote sites for Town Meeting, availability of the Annual Town Report, goal setting of the Board of Selectman, investigations by the Board of Selectmen, Town Manager education and experience requirements, procedures to remove the Town Manager, and the Emergency Management Plan. The text included in the Appendix should either be included in the body of the Charter or be inserted into the Town’s by-laws. While the Appendix states that it is part of the Charter, including substantive provisions in an Appendix may be confusing. The Commission may wish to address this issue in its Final Report after discussion with Town Counsel.

1. Section 2-4 Remote Site to Supplement Town Meeting.

Section 2-4 of the Appendix authorizes the Town to establish a remote site for registered voters that must be able to communicate with the main Town Meeting site.

General Laws Chapter 39, Section 10, authorizes the Moderator to upon his own motion, “recess the meeting for any period during the day of the meeting” or after consultation with the Board of Selectmen, “adjourn the [meeting] to another date...” when a place or facility in the Town is available to accommodate all voters attending the meeting. Nothing in Section 2-4 can take away the Moderator’s authority under G.L. c. 39, § 10. The Commission may wish to discuss this issue in more detail with Town Counsel.

2. Section 3-5-a. Investigations by the Board of Selectmen.

Section 3-5-a. provides that any criminal matter must be referred to the Police or the "State's Attorney." It is unclear what the Town mean's by State's Attorney. The Commission may wish to discuss this issue in more detail with Town Counsel.

3. Section 7-6-c. Emergency Management Plan.

Section 7-6-c. provides as follows:

The following shall be deemed a matter of public record in the Town's Emergency Management Plan:

- 1) The location of public shelter;
- 2) The availability to the citizens of the Town of emergency management information and updates.

The disclosure of public records is governed by G.L. c. 66, § 10 (the Public Records Law), which declares all government records to be subject to disclosure unless specifically exempted. Moreover, the authority to determine the public records status of information held by municipalities is vested in the Supervisor of Public Records. G.L. c. 66 § 10 (b). The Commission may wish to discuss this issue in more detail with Town Counsel.

Very truly yours,
MAURA HEALEY
ATTORNEY GENERAL

Kelli E. Gunagan

By: Kelli E. Gunagan
Assistant Attorney General
Municipal Law Unit
10 Mechanic Street, Suite 301
Worcester, MA 01608
(508) 792-7600

cc: Town Counsels Lauren F. Goldberg
The Department of Housing and Community Development
Town Clerk Doug Johnstone

January 3, 2018

Lauren F. Goldberg
lgoldberg@k-plaw.com

Mr. David Panagore
Town Manager
Provincetown Town Hall
260 Commercial Street
Provincetown, MA 02657

Re: Charter Revision Process – Next Steps

Dear Mr. Panagore:

You have requested guidance on behalf of the Board of Selectmen and the Town Clerk as to the remainder of the Charter revision process pursuant to the provisions of G.L. c.43B. I understand that the Charter Commission submitted its final report to the Board of Selectmen, in accordance with G.L. c.43B, §9, recommending a revised Town Charter. I have outlined the applicable statutory process, as well as the role of the various Town officials with respect thereto.

A. Charter Revision Process

1. *2018 Annual Town Election*

In accordance with the provisions of G.L. c.43B, §11, a question seeking approval of the proposed charter must be placed on the ballot at the first annual Town election occurring at least two months after the report is submitted. Pursuant to the provisions of Section 2-4-2 of the Town Charter, the Annual Town Election must be held on the first Tuesday in May, which, this year, is May 1, 2018. Where the 2018 Annual Town Election will be held more than two months following the date the final report was submitted to the Board, the question of whether to adopt the proposed Charter revision must appear on the ballot at that election.

2. *Form of Question*

General Laws c.43B, §11, sets forth the form of the ballot question, as follows, “Shall this Town approve the charter revision recommended by the Charter Commission summarized below?” The law provides further, in relevant part:

Where a new charter or single charter revision is being submitted at an election, set forth here a brief summary of its basic provisions (composition and mode of selection of the legislative and executive branches and school committee or, if a change of none of these is involved, the most significant proposed change)...The charter commission shall prepare the summaries of its own proposals and the city solicitor or town counsel shall prepare the description of proposed amendments. [emphasis added].

Mr. David Panagore
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Thus, where the Charter revision is being proposed by the Charter Commission, the Charter Commission's summary will appear on the ballot.

3. Timing for Board's Action on Form of Question and Summary

In accordance with G.L. c.54, §35, the proposed summary, in its entirety, and ballot question must be filed with the Town Clerk no later than Tuesday, March 27, or 35 days prior to the May 1, 2018 election, or.

Where G.L. c.43B, §11, provides that the Board of Selectmen must "order the charter revision to be submitted to the voters", the Board may therefore, at any time prior to March 27, vote to place the question on the ballot at the 2018 Annual Town Election and forward to the Town Clerk the ballot question and summary. To facilitate this process, I would suggest that the Board or its designee coordinate with the Commission to ensure that the Board receives the summary timely.

4. Effective Date of Charter

If the voters approve the Charter revision by a majority vote, the Charter revision will take effect immediately, or at such later time as the revised Charter may specify (i.e., transitional provisions may provide for the Charter to be implemented over time).

Be further aware that if the Charter revision fails, but receives the affirmative vote of at least 35% of those voting on the question, a petition process may be initiated to again submit the proposed Charter revision to the voters.

5. Distribution of Charter Commission Final Report

General Laws c.43B, §11 mandates that the Board of Selectmen cause a copy of the final report of the Commission to be distributed to each residence of one or more registered voters in the Town. The distribution must occur no later than two weeks prior to the May 1, 2018 election. In my experience, in other towns this responsibility is often delegated to the Town Clerk. Often the Clerk will be able to utilize a bulk mailing rate if voter registration materials are included with the final report. Note further that the Town Clerk must retain copies of the report for distribution upon request, and a copy must be posted in the Town Clerk's office.

6. Filing Requirements if Charter Revision is Approved by the Voters

If the voters at the 2018 Annual Town Election approve the proposed Charter revision, copies of the Charter revision, and the Town Clerk's certification of its approval, must be maintained



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as a permanent record of the Town, and be sent to the Department of Housing and Community Development, the State Archivist, and the Office of the Attorney General.

B. Application of the Campaign Finance and Conflict of Interest Laws to Municipal Activities in Connection with Ballot Question

The Campaign Finance Law, G.L. c.55, prohibits the expenditure of public funds to promote or oppose the Charter ballot question, or any other ballot question. Similarly, G.L. c.268A, Conflict of Interest Law, also prohibits the use of public resources (including employee time) to “campaign” in connection with the ballot question. I have addressed these issues in further detail, below. Please be aware, however, these restrictions do not apply to the mailing of the Charter Commission’s final report, as such mailing is specifically authorized by the provisions of G.L. c.43B, §11. See OCPF AO-96-03.

1. *Campaign Finance Law*

In Anderson v. City of Boston, 376 Mass. 178 (1978), the Court identified a dividing line between permissible and impermissible expenditures of municipal resources in connection with ballot questions. In that case, the court held that the Campaign Finance Law prohibits municipalities, including municipal officials, committees and employees, from expending public funds or resources to influence the outcome of an election. Anderson, 376 Mass at 187. Although the holding of the case, and the manner in which it has been implemented by the Office of Campaign and Political Finance, is nuanced, in general the Town may not utilize public funds to influence the outcome of elections. The prohibition includes activities that are traditionally associated with “campaigning” such as using photocopiers, paper and/or postage to leaflet, pamphlet, or the sending of other types of unsolicited information concerning a ballot question, even if such information is neutral or “informational” in nature, whether using the United States Postal Service, e-mail, reverse 9-1-1 call systems or similar media.

The Town is not, however, prohibited by Anderson from using municipal resources to analyze a ballot question, including a question related to revising the Town’s Charter, and its effect on the Town and its operations. Thus, the Town could prepare analysis of the impact of a ballot question on physical infrastructure, human resources and financial obligations, identify key issues in implementation, and address the relationship of the Charter revision proposed by the ballot question to overall capital, master, or budget planning issues. The Town may also, in response to a request for public records, send a copy of any analysis it has prepared of the issues. The Town could also make that analysis available at a meeting or forum about the issues, and could post the analysis on its website. While the Town could not, for example, have 500 copies of materials available for a meeting at which it expects only 20 people will attend, it could prepare a smaller number of copies for that meeting.



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Office of Campaign and Political Finance guidance provides further that an elected official may take positions on any ballot question that may be presented to the voters, regardless of whether the ballot question relates to a matter within that official's jurisdiction. Thus, elected officials, elected multiple-member bodies, and members of such bodies may talk about any ballot question at meetings, issue press releases, hold informational forums, write letters to the editor, or make individual and group statements about their position on any ballot question.

In contrast, the restrictions on the use of public resources imposed by the Campaign Finance Law apply more strictly to appointed officials and employees. The Office of Campaign and Political Finance advises that policy-making appointed officials and multiple member bodies may only act or speak with respect to a ballot question if it is relevant to their position with the Town, while non-policy making officials are prohibited from taking any position with respect thereto. An example would be that the Head Librarian could comment on, provide analysis of, and seek support for, a debt exclusion question to borrow for the construction a new Library, but could not be involved in a similar effort for a new fire station. In contrast, a Library employee could not independently be involved in such efforts for a new Library, unless providing support for the Head Librarian at the direction of the Head Librarian.

Therefore, in my opinion, the individual members of the Board of Selectmen, as elected officials, may talk about and take positions on the charter revision at meetings, issue press releases, hold informational forums, write letters to the editor, or make public statements about their position on the question in compliance with the Campaign Finance Law. Similarly, in my opinion, the Board of Selectmen could use municipal resources to analyze the effect of the Charter revision on the Town and its operations and subject to the provisions related to distribution of the information, outlined above, make that information available at a meeting or forum on the issue. The Town Manager, as a policy-making official, would have similar discretion to make statements and take positions about the Charter revision, and to use public resources to analyze the impacts of the Charter on Town government. The Town Manager and/or Board of Selectmen would also be permitted to post a link on the Town's website to its analysis of the Charter and its impacts on the Town.

Enclosed herewith please find two detailed memoranda prepared by the Office of Campaign and Political Finance outlining in detail the restrictions on the use of municipal resources and the degree to which elected and appointed officials may act and speak in connection with ballot questions.

2. Conflict of Interest Law

The Conflict of Interest Law is also implicated with respect to expenditure or use of municipal resources, financial or otherwise, in connection with a Town election, depending on the circumstances. General Laws c.268A, §23(b)(2)(ii) prohibits the use of one's public position to

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engage in so-called "political activity", because a public employee who does so is using his official position to secure for herself or others unwarranted privileges of substantial value that are not properly available to similarly situated persons. Typically, action taken in violation of the Campaign Finance Law will also constitute a violation of the Conflict of Interest Law. For these reasons, elected and appointed public officials and employees must proceed carefully in connection with any election-related activities.

In Advisory 11-1 Public Employee Political Activity (attached), the State Ethic Commission analyzes the application of the law to various activities by elected and appointed officials with respect to political activity. Similar to the conclusions reached by the Office of Campaign and Political Finance, the Commission's analysis suggest that unilateral distribution by a public official or employee of information concerning a ballot question in their official capacity constitutes an unwarranted privilege or benefit not available to similarly situated individuals. Similarly, the Conflict of Interest Law may be implicated by a member of an appointed multiple member body using an official title in connection with a matter not within that body's jurisdiction or with a matter upon which such body has not taken an official position. Elected officials are not subject to limitations of this nature in connection with use of their official titles, however.

It is important to note that while the Conflict of Interest Law restrictions would apply to members of the Board of Selectmen and other municipal officials and employees, the definition of municipal employee for purposes of the Conflict of Interest Law excludes members of a charter commission.

Please contact me with any further questions concerning these issues.

Very truly yours,



Lauren F. Goldberg

LFG/KRG/bp

Enc.

cc: Board of Selectmen
Charter Commission

599127/PROV/0404

June 14, 2017

Lauren F. Goldberg
lgoldberg@k-plaw.com

Ms. Julia Perry, Chair
Charter Commission
Provincetown Town Hall
260 Commercial Street
Provincetown, MA 02657

Re: Charter Revisions

Dear Ms. Perry:

We have completed our review of the draft Proposed Charter for the Town of Provincetown. Below, please find general comments concerning potential issues implicated by the contemplated revisions. At the request of the Commission, we would happy to supplement this letter with detailed commentary on a section-by-section basis and to meet with the Commission to discuss these matters.

Preliminary Comments

It is important to emphasize that it is not the purpose of any comment in this letter to argue for or against adoption of the Proposed Charter. That task is assigned by law to the voters of the Town of Provincetown. As you are aware, the Home Rule charter amendment procedure imposes certain significant constraints. As codified in G.L. c.43B, the procedure contains rigid deadlines and allows only for adoption or rejection of a charter in its entirety as printed in the final report of a charter commission. There is no opportunity for amending any provision after the publication of a final report. This inflexibility can pose difficulties, not only for those serving on a charter commission, but also for the electorate faced with interpreting a charter and having only the option to accept or reject it in its entirety. The drafting of a charter poses a formidable challenge, and we are fully cognizant of the extensive work involved in reviewing, revising and explaining a proposed charter revision.

Charter Content

A charter establishes “the form, structure, and organization, including the powers and duties of important officials, of a city or town government in Massachusetts. The charter is the ‘constitution’ of the city or town”. See Secretary of the Commonwealth, Elections Division, Local Charter Procedures, 1995. Thus, a charter has significant implications for a municipality. Pursuant to G.L. c.4, §7, a charter is defined as follows:

a written instrument adopted, amended or revised pursuant to the provisions of chapter forty-three B which establishes and defines the structure of city and town government for a particular community and which may create local offices, and distribute powers, duties and

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responsibilities among local offices and which may establish and define certain procedures to be followed by the city or town government. . . .

For these reasons, drafting a charter involves a careful balance between establishing appropriate, achievable goals for the function of government and “over-legislating” the function of government by establishing administratively burdensome procedures that can unintentionally impose barriers to orderly operation of government. This balance is even more important when the failure to comply with requirements in the charter has significant consequences, as is the case here.

As with the drafting of any legislation, it is important to consider not only the intended consequences, but the unintended consequences of an amendment, and further, to include in the charter only those high-level provisions necessary to create the framework for Town government, i.e., the local “constitution”. As with the federal and state governments, matters more appropriate for “day to day” governance are found in laws and regulations enacted consistent with the constitution. Here, for example, certain of the proposed revisions appear more appropriately located outside of the Charter, such as the introduction and section on the history of Provincetown’s government. Also, certain appendices have been added to the document, which, in my experience, would not typically be found in a charter due to their operational focus.

“Will” or “Shall”

Throughout the Proposed Charter, the word “shall” has been replaced with the word “will”. It appears that the intent of this change is to express the legislative body’s position that the action identified “must” be taken, particularly when reading this change together with Section 1-2-2 of the Proposed Charter providing that the provisions of the charter cannot be waived. Typically, in our experience, when legislation intends to require a particular outcome, the word “shall” is used.

Even acknowledging the Commission’s goals, however, there is a significant body of case law interpreting the word “shall,” in certain circumstances, as directory rather than mandatory, particularly where: the statute is directed at public officials and refers to a particular time for action; failure to comply with the directive has no express penalty or other consequence for noncompliance; and where there is no harm caused to the rights of any individual by failure to comply. In Kiss v. Board of Appeals of Longmeadow, 371 Mass. 147, 157 (1976), the Supreme Judicial Court stated that where the word “shall” appears in a statutory provision that is “only a regulation for the orderly and convenient purpose of public business,” it is directory, and not mandatory. The Appeals Court noted that it is established law that, “[a]lthough ‘shall’ is commonly a word of imperative obligation, it does not inflexibly have that signification.” Warman v. Warman, 21 Mass.App.Ct. 80, 82 (1985).

In City of Boston v. Barry, 315 Mass. 572 at 578 (1941), the court held that a word of command, such as “shall,” that may appear “‘imperative in phrase’ prescribing the time or manner of performance by a public or corporate officer of an act not intended for the benefit of a person . . . is

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ordinarily construed as a merely directory provision for the orderly conduct of business, and compliance with it is not a condition of the validity of the act.” This case law reflects the conclusion that operation of government should not be interrupted due to minor oversights or insubstantial deviations from the letter of the law.

In my opinion, therefore, changing the word “shall” to “will” will not make a substantial difference to the manner in which the Charter may be interpreted by a reviewing court. In contrast, in my further opinion, it is possible that such a revision would result in the conclusion that the action addressed is less imperative.

Instead, if the Charter Commission seeks to ensure that certain of the Charter provisions must be strictly met, then the most appropriate way to accomplish that goal is to consider the imposition of a repercussion for failure to comply therewith. In considering this issue, query whether all uses of the word “shall” in the Charter are of equal importance and should be treated in the same manner. For example, what should the consequence be, if, as required by Section 2-3-3, the Board of Selectmen fails to provide for the Annual Town Report to be available 14 days prior to Town Meeting? If this item is considered paramount, then, for example, the Charter could provide that no action may be taken at an annual town meeting following until the Board of Selectmen has prepared such report and a 14 day period passes or Town Meeting has voted by a 2/3 vote to waive the requirement. There are similar examples throughout that should be reviewed.

In connection with our comments about the use of “shall” and “will”, please also note that, in our opinion, additional consideration should be given to the role of the Charter Compliance Commission. Where not every “shall” or “will” can be interpreted as mandatory in nature, and where it is not clear what the repercussion can or should be for certain non-compliance, in our opinion, the role of the Charter Compliance Commission must be examined for both intended and unintended consequences, and be analyzed in the context of what overall relationship the Commission has to the functioning of Town government.

Level of Detail

As indicated above, a charter typically establishes the overall framework for government. Including extensive detail or regulation of a body or process in a permanent document such as a charter can prove problematic. Certain revisions to the Proposed Charter may be of the nature more appropriately found in a bylaw, regulation, or policy statement, in our opinion.

For example, Section 2-3-5 of the Proposed Charter requires the Board of Selectmen hold a policy meeting with all Town officials, department heads and chairs of multiple-member bodies. The language dictates the manner in which the meeting will be held, who will attend, and that there will thereafter be a “question and answer period” led by the Moderator. It further mandates the attendees at such meeting, that a “public hearing notice” will be advertised, and that the “general

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public” will be invited. Typically, in our experience, such level of detail would not be found in a Charter. Will the meeting be invalid if the presentation is made after the question and answer period, if the Chairman of the Board of Selectmen leads the question and answer period if the meeting notice is not entitled “Public Hearing Notice”, or if certain Town officials or Chairpersons do not attend? Instead, the Charter might provide similarly to the following, “The Board of Selectmen shall hold a meeting within 60 days of the Annual Town Election to establish goals for the upcoming fiscal year, and to review action taken over the fiscal year then-ending. At least one week’s notice of such meeting shall be posted on the Town’s official website or in such other manner as shall be provided by by-law.”

I would be happy to review similar issues with the Commission on a case by case basis, of course.

Specificity of Language

As with all legislation, it is often the case that the language therein is subject to more than one interpretation. To avoid such a result, it is important at the drafting stage to try to concisely express the intended outcome with precision, and to ensure internal consistency. I have highlighted a few areas of concern below by way of example only.

For example, in Section 4-4, Dissolution of Town Boards, the Proposed Charter indicates, in part, “A Town Board may be dissolved by majority vote of Town Meeting or the Appointing Authority of the Town Board. Boards that were created by a vote at Town Meeting can be dissolved by a vote at Town Meeting. . . .” This raises questions as to whether a Town Board created other than by Town Meeting can be dissolved by Town Meeting, even over the objection of the appointing authority of that Board. Moreover, that section provides further, “Any vote to dissolve a Board shall be subject to the review of the Charter Compliance Commission.” It is not clear what role the Charter Compliance Commission would have with respect to the dissolution of a board, however.

Similar lack of clarity is found in Section 4-13, Rules Specific to Appointed Town Boards, wherein the section provides:

No person can be appointed to a Town Board:

- a) If he or she is unqualified, unless he or she is able to become qualified by serving and sufficient members who are qualified are serving;
- b) If he or she has a conflict of interest with the duties of the Board;
- c) Based on political consideration.

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These criterion are undefined and unclear, in my opinion. Implementation of such provisions could, therefore, expose the Town to potential claims, particularly with respect to an allegation that someone was appointed based upon “political consideration” in violation of Section 4-13(c). Note further that the Board of Registrars must be appointed on the basis of political party.

Section 4-14-2 of the Proposed Charter also raises implementation issues. The section provides, in part, “A non-elected member of a Town multi-member body also may be removed pursuant to a majority vote of co-members of the multi-member body on which the member sought to be removed serves.” What are the reasons authorizing removal? What if the appointing authority refuses to remove, but the co-members try to remove anyway? Can the co-members remove solely because they are opposed to the position taken by their co-member? These questions will, in my opinion, lead to implementation issues.

Particularly in light of the role of the proposed role and authority of the Charter Compliance Commission, it is imperative that the Proposed Charter be reviewed for similar issues prior to presentation to the voters.

Charter Obligations Requiring Funding

There are several provisions of the Proposed Charter that seek to require action to be taken that would require an appropriation. For example:

- 3-3-6 The Town Manager will hire a person with expertise in Human Resources to advise the Town Manager and Town Staff, the Board of Selectmen, the Moderator, and the Town Boards on any matters relating to personnel issues, including discrimination and ADA issues. This position may be full or part-time, dedicated or shared with another community or communities on the Outer Cape.
- 6-3-9 The Town Meeting Voters Guide and the Finance Committee Report will be posted on the Town website and made available for distribution in the Town Clerk's office at the Town Hall. Sufficient copies for the expected attendance will also be made available at the Town Meeting the day it opens.

In each of these cases, and others, it is possible that if Town Meeting does not appropriate funding for the directive, it will not be able to be carried out. In our opinion, therefor, it is important to review the Proposed Charter for similar issues, and, as appropriate, add language clarifying that the obligation exists to the extent an appropriation is made therefor. Especially with the role of the Charter Compliance Commission, it is essential that if the Charter imposes duties on Town officials and employees that the Charter reflect that such obligations are contingent upon allocation by Town Meeting of resources to allow such duties to be executed or that the Charter takes the same into account.

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Allocation of Legislative vs. Executive Authority

Another important theme for the Commission to consider is the allocation of legislative and executive authority. As noted above, the Proposed Charter is quite detailed in requiring Town officials and employees to take particular actions. Note, however, that Massachusetts appellate courts definitively and consistently hold that the local legislature lacks any executive authority, and therefore, no action may be taken that could dictate the action of the executive in any respect. So, for example, it is well established that “The power of appointment is, by its nature, an executive power.” City Council of Boston v. Mayor of Boston, 383 Mass. 716, 721 (1981). While a “sweeping determination of municipal policy as to the scale of salaries to be paid to all municipal employees... is a legislative function, [] the appointment of single officers or employees is reserved to the executive.” City Council, 383 Mass. at 722.

This conclusion is echoed in a long line of case law holding, as a general principal, that a legislative body has no ability to exercise direction or control over a board or officer whose duties are defined by the General Court, or, in this case, a charter. See, e.g., City of Boston v. Boston Police Superior Officers Federation, 29 Mass. App. Ct. 907 (1990); Anderson v. Board of Selectmen of Wrentham, et al, 406 Mass. 508 (1990); Russell v. Canton, 361 Mass. 727 (1972); Breault v. Auburn, 303 Mass. 424 (1939); Daddario v. Pittsfield, 301 Mass. 552 (1938); and Lead Lined Iron Pipe Co. v. Wakefield, 223 Mass. 485 (1916). The distinction between executive and legislative action is important for many reasons, including that authority of the legislative in executive matters would result in significant negative impacts on the “efficiency and economy in the business administration” of a municipality. See Dooling v. City Council of Fitchburg, 242 Mass. 599, 602 (1922), (considering whether the action of authorizing the execution of a contract was subject to a referendum).

This issue, in my opinion, is of particular consequence when reviewing the Proposed Charter, especially in light of the role of the Charter Compliance Commission. For example, it is generally the case that the power to appoint includes the power to supervise performance and the power to suspend or remove, as appropriate. In the Proposed Charter, however, if the Charter Compliance Commission votes that there has been a violation of the Charter, it “will direct the named Party to correct the violation”. This presents a potential scenario where an employee or appointee is acting consistent with direction from its appointing authority, but the Charter Compliance Commission directs the Party to act otherwise. Moreover, using the example above with respect to the position of Human Resources Officer, the Proposed Charter indicates that the Town Manager “will hire” a person for such purposes. What is the result of the Town Manager decides that such person should not be hired, or that such person shall not advise Town Staff on human resources issues? These matters are typically executive decisions, and not legislative ones.



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I would be pleased to meet with the Commission at its convenience to discuss these matters and assist the Commission in bringing its Proposed Charter to the voters in a manner best crafted to meet the Commission's goals while protecting the Town from exposure to risk

Very truly yours,

A handwritten signature in black ink, appearing to read 'Lauren F. Goldberg', with a long horizontal flourish extending to the right.

Lauren F. Goldberg

LFG/

cc: Board of Selectmen
Town Manager

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