



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

CENTRAL MASSACHUSETTS DIVISION
10 MECHANIC STREET, SUITE 301
WORCESTER, MA 01608

MAURA HEALEY
ATTORNEY GENERAL

(508) 792-7600
(508) 795-1991 fax
www.mass.gov/ago

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