

Report of the Ad Hoc Subcommittee on WA19: TO CREATE A COMMISSION FOR BROOKLINE BLACK N BROWN RESIDENTS

Primary petitioners: Adeniyi Ijanusi and Sana Hafeez

An Ad Hoc Subcommittee of the Advisory Committee held a public hearing on Monday, April 3rd to review WA19. In attendance were the Petitioners: Adeniyi Ijanusi, Sana Hafeez, Shataysia Barnes, Tamu Jackson, Rebecca Obguku, Samuel Pierce, Natacha Atey, Ty Pain and Donelle O’Neal, Sr (TMM-4, AC); John Moreschi (Town Counsel’s Office), Ian Roffman (CTO&S), Harry Bohrs (TMM-3, AC, CTO&S) and Ad Hoc Subcommittee Members: Ben Birnbaum (AL), Markus Penzel (TMM-17), David-Marc Goldstein (TMM-8) and Chair, Janice S. Kahn (TMM-15).

The public hearing ran for over 2 ½ hours, during which time the petitioners presented their article and spoke to the issues they wanted to address through this petition to create a Black and Brown Commission for Brookline residents. Here is a link to that public hearing:

https://brooklinema.zoomgov.com/rec/share/y2cm8N2Us4E28heFxEEmGhw33cNWwGLulu6uQsCY51WzoQpfXkNy3IQc5hkTpe2l.BrVozo_h9nPGqDMQ

A public meeting was held on Tuesday, April 18th for the Ad Hoc Subcommittee to reflect on what was learned at the public hearing, and to discuss and possibly vote on a Recommendation to the Advisory Committee. In attendance were: Ian Roffman (CTO&S), John Moreschi (Town Counsel’s Office), and Ad Hoc Subcommittee Members: Ben Birnbaum (AL), Markus Penzel (TMM-17), David-Marc Goldstein (TMM-8) and Chair, Janice S. Kahn (TMM-15). Here is a link to the public meeting:

https://brooklinema.zoomgov.com/rec/share/mNZg_jBCx0tVEHDBkkQmwJ62IAHlna8YZQnS-Or-lCerUFDXl22eKltcRrH9EQ_M.a5FySan5akGTETqy

Background:

Article 19 was based on an article that appeared in the Warrant for the Fall 2022 Town Meeting. That article, submitted by Arthur Conquest (TMM-6) was a resolution asking the Town to form a Black and Brown Commission. The subcommittee that held the public hearing encouraged Mr. Conquest to rewrite it as a by-law, and to consider using the language of the by-law establishing the Commission for Women as a guide. Article 19, however, was not rewritten and submitted by that petitioner. Instead, WA19 was submitted by members of the Black N Brown Club, Inc., a non-profit incorporated in 2022 and founded by low-income Black and Brown residents in Brookline, seeking representation on issues concerning their community. The goal of the proposed Black and Brown Commission is to give voice and resources to this low-income demographic in Brookline so that they can better address their own needs. Article 19 is the result of this community’s group effort.

The Public Hearing:

Many of the petitioners spoke about their lives and experience living in Brookline and why a Black and Brown Commission was important to them.

Sana Hafeez, a lead petitioner, spoke first and expressed that the Commission “will create the town infrastructure for Black and Brown residents to advocate for themselves and have racial economic equity.” She sees it as a necessary step towards an equitable Brookline. Many of the people making comments that followed echoed that purpose and provided context by sharing their hopes for themselves and their children growing up in Brookline. A common thread through the conversation was that the Black and Brown Commission would be one step towards that goal.

Several of the petitioners were classmates in Brookline and grew up here. Others moved here from other places, near and far. What follows reflects what the Subcommittee heard:

“We are the best ones to fix the problems in our community because we are the ones most impacted.”

“I want a future where my son can be an agent of changing his own community as he sees me standing up for him and he can be able to stand for himself as well, and where he and the Black and Brown kids in this town can see themselves represented and their voices be heard. I want what every parent wants for their kids, but our community has been denied that in Brookline.”

Several talked about the lack of child care options in the community and needing a platform to advocate for themselves and share the issues they face in Brookline.

“We need to be empowered like other commissions.”

“We need a Commission. Community involves everybody – many times I was the only person in my class, sometimes the whole school, unless there were METCO students.”

“The people of color in Brookline want a voice and not just someone who is trying to be the advocate for them.”

“The message we get is ‘we are never good enough, we’re not capable’”

“It’s a commission that the people can finally trust because it’s their own voices at the table.”

”It’s a good time to hear our voices. My daughter was one of the young pilots who flew last summer. It expands their world beyond what they are able to put their hands on now.”

“We are the only minority group with a slave house in Brookline.”

Discussion:

The language of the warrant article as filed was “To Create a Black N Brown Commission,” which is identical to the name of the Black N Brown Club. A question was asked if the petitioners saw any formal or informal relationship between the Commission and the Black N Brown Club. In response, we heard that these are two separate organizations since the club is a non-profit. “The language may seem borrowed; it’s the same demographic seeking self-advocacy on multiple fronts.”

Subcommittee members noted that within the by-law itself the language used is Black and Brown, with each defined separately, and recommended using “Black and Brown” for the Commission to avoid confusion. That suggestion was accepted and the petitioners’ current version makes that change.

A subcommittee member asked the petitioners how they saw themselves as different from the Commission for Diversity, Inclusion and Community Relations (CDICR), which is the Commission tasked with working on issues related to all protected classes, including racial classes. The indirect response was that they viewed Dr. Gellineau, the Chief Diversity Officer in the Town, as having a lot on his plate and that there were a lot of issues affecting their community, especially through an economic lens that the Office of Diversity has not to-date addressed.

The discussion turned to the FUNCTION AND PURPOSE subsection (c) which defined the terms Black and Brown.

A member of the subcommittee, quoting from the definition of “Brown” in the article, wondered about the phrase “other minorities that are similarly marginalized due to the color of their skin” and who that might refer to. A lead petitioner noted that the reality of BIPOC is that it’s not an accurate word for the way that other minorities are marginalized in America. Brown-skinned Asians are not given the same minority status that other Asians are, and suffer different marginalization coming from “colorism.” Article 19 emphasizes those who are marginalized because of their color, which is related to their race.

Another petitioner noted that was true for Black people as well and gave the example of former Red Sox star David Ortiz who looks Black but identifies as Hispanic, so the term “Black and Brown” would include many different people from the diaspora. The term “African Diaspora” refers to the mass dispersion of peoples from Africa during the transatlantic slave trades which took place from the 1500s to the 1800s.

The subcommittee also discussed the definition of “Black” which was defined as “persons that are African, or African American with emphasis on those descended from slavery.” The petitioners explained that all Black people, even those who have been nationalized through colonialism, identify as African first before their nationality. The discussion talked about changing the word “or” to “including”, mentioning African heritage and adding Afro-Caribbean. The current definition incorporates much of that discussion and reads as follows:

“Black will refer to persons that are of African heritage, including but not limited to: African, African American, Afrocaribbean [sic], those descended from chattel slavery and the trans atlantic [sic] slave trade.”

One member of the subcommittee felt strongly that the by-law as written would have Town Meeting legally defining how a Black person may identify as, and who a Brown person may as well. Also, Indigenous persons are included in the definition of Brown persons, even though they are a distinct people. Besides asking Town Meeting to define how people of color may define themselves, or self-identify as, it also asks Town Meeting to declare that some minorities have been marginalized more or less than others (*“as not all racial minorities are marginalized in the same ways”*). The subcommittee member further felt that Town Meeting should not be deciding or limiting the definition or self-identification of anyone’s race or ethnicity.

The subcommittee also discussed that some statements in the proposed by-law are more typical of a Resolution, or may be found on a Commission’s website, rather than in the law itself. When another member offered an alternative definition (*“Black and Brown shall refer to minorities who have been marginalized due to the color of their skin.”*), that broader definition was not accepted by the petitioners.

The subcommittee then looked at the section POWERS AND DUTIES subsection (a) which simply reads *“To ensure equity in the status of Black and Brown people in Brookline.”* While much of the language is taken from the by-law establishing the Commission for Women, this sentence left out *“educational, economic, political, health, legal and social spheres.”* Adeniyi Ijanusi, the lead petitioner who filed the warrant article, responded that the group felt it was limiting the scope, but that they expected to do all of that and more.

The most problematic issue with the proposed by-law deals with the section on MEMBERSHIP, APPOINTMENT, TERM. The Article has gone through a couple of revisions since it was placed on the warrant. The discussion on April 18th focused on the most current version, received April 12th:

Under **“MEMBERSHIP, APPOINTMENT, TERM”**- [underline added for emphasis by the subcommittee)

- *(a) The Commission shall consist of thirteen members, 12 of whom shall be appointed by the Select Board with consideration of the results of a nomination process by Black and Brown residents, facilitated by the Office of Diversity, Inclusion and Community Relations to serve a term of 3 years. The nomination process will include: Black and Brown Residents showing proof of residency in Brookline and nominating who they desire to represent them and their interests. The Select Board will then appoint the individual(s) nominated by Black and Brown Residents to the Commission. I will be appointed by the Town via the 11 [sic] Select Board, to serve for a term of three years.*

- *(b) The initial appointments shall be made by the Select Board through a Black and Brown community nomination process overseen by the Office of Diversity and Inclusion to ensure that only black and brown residents are participating in the nomination process.*
- *(c) If any positions cannot be filled, or when a vacancy occurs, a majority of seven (7) Commission members shall be sufficient to appoint a replacement to serve for the remainder of the term. A person is not precluded from serving more than one term. Commissioners must be residents of the Town of Brookline.*

As articulated, this by-law proposal would establish a system of appointing members to this Commission that is exclusive, not inclusive, and bars others from applying to serve based on their ancestry.

Under (a), an exclusive group of residents who (as written in the by-law) would exclude people of other races and ethnicities, and, with candidates chosen based on their race, would choose amongst themselves who could serve on a Town Commission. No Town board or commission works this way. The Select Board would then be compelled (“shall”) to appoint those self-selected residents, superseding the Select Board’s legal authority to consider and appoint other qualified applicants who wish to serve on the commission.

Under (b), this provision is discriminatory and a violation of State and Federal civil rights laws by setting up a situation where the Town of Brookline allows only persons of certain racial classes to vote and serve on a Town Commission. A private organization has much more latitude in establishing its rules for membership than does a municipal body. With a private organization, it can set its own rules as to who can join, and who can run it. But with a *municipal body*, an entity authorized and run by the government, one cannot discriminate against anyone based on their race, which is subject to the highest bar of judicial scrutiny. There is no mention in the Commission for Women that says only women may serve on it, for example. Further, no Town entity that deals with race can legally be restricted in the ways the petitioners are proposing.

Under (c), it gives the Commission the ability to by-pass the Select Board and put people on the Commission without the Select Board’s approval, even though it is the Select Board that is the sole Appointing Authority in the Town. Exceptions are the School Committee and the Select Board, who get their authority from the State, and whose members may fill a temporary vacancy.

1st Assistant Town Counsel John Moreschi advised the subcommittee on the legal concerns raised by this section, and particularly conditioning participation in the selection process on race, which is likely unconstitutional. “By conditioning participation on race, this nomination process is almost certainly an equal protection violation.”

The critical legal issue here is “strict scrutiny”. There are three levels of scrutiny: “Strict Scrutiny”, “Intermediate Scrutiny” and “Rational Basis”. “Strict Scrutiny” is the highest bar and

race-based government actions are subject to strict scrutiny under both the state and U.S. Constitutions. According to Counsel Moreschi, “Strict scrutiny is an issue here so long as race is a criteria. Socioeconomic status is not a protected status, and is subject to only rational basis scrutiny. As a result, commission membership can likely be conditioned on socioeconomic status and be constitutional, so long as there’s a reason for it. As soon as race is added to the qualifications, though, strict scrutiny will attach.” In his view, that would be essentially impossible to meet with the by-law as written.

The petitioners were given an opportunity to address the subcommittee’s Constitutional concerns after the first hearing, but chose not to do so.

Subsequent to the second subcommittee meeting, Town Counsel Joe Callanan and Counsel John Moreschi met with Adeniyi Ijanusi and Sana Hafeez, the lead petitioners of WA 19, on April 19th and explained the two legal concerns with the article as drafted:

- (1) The appointment process could be read as an “election” which is not permitted under the Home Rule Amendment of the MA Constitution; and
- (2) Conditioning participation on the Commission on the basis of race would be unconstitutional and violate the Equal Protection Clause of the U.S. Constitution. (14th Amendment)

Suggestions were made for addressing the Equal Protection violation, such as using socioeconomic status, rather than race, or using different qualifications or experiences as qualifiers for membership. That second approach was used in establishing the Boston Commission for Black Men and Boys, whose members must have expertise, experience, or knowledge on issues facing Black men and boys in Boston. That Commission was established through a 2021 ordinance signed into law by former Mayor Kim Janey.

The subcommittee strongly believes in the aims of both the original petitioner, Arthur Conquest, and the petitioners of Article 19, that there is a strong need in Town to reach out to those residents who have been marginalized, and those who, as stated by the petitioners have experienced “racism prejudice and discrimination...because of the color of their skin and racial status as Black and Brown.” Given the legal challenges inherent in the membership provision, however, Article 19 as a by-law would create new and potentially numerous problems for the Town.

The Ad Hoc Subcommittee by a vote of 4-0-0 recommends No Action on WA19.