

DRAFT MINUTES OF CTOS MEETING – April 27, 2022

The Brookline Committee on Town Organization and Structure (CTOS) held a duly posted meeting and public hearing via the Zoom platform on April 27, 2022 to discuss relevant warrant articles coming before the spring Town Meeting.

In attendance were; Jean Berg (CTOS), Dick Benka (CTOS), Harry Bohrs (CTOS), Abby Cox (CTOS – Arrived at 6:30 pm), Betsy DeWitt (CTOS), Sean Lynn-Jones (CTOS), Ian Roffman (CTOS), Ana Albuquerque (TMM), C. Scott Ananian (TMM), Sandy Batchelder (CDICR), Eileen Berger (TMM), Ben Birnbaum (AC), Deborah Brown (TMM), Joe Callanan (Town Counsel), Regina Frawley (TMM), Dave Gacioch (TMM), David Marc Goldstein (AC/TMM), Neil Gordon (AC/TMM), Susan Granoff (AC/TMM), Leigh Jackson (Parks & Recreation), Richard Mazandi Iseke, Mariah Nobrega (CDICR/TMM) Arthur Wellington Conquest III (TMM).

The meeting began at 5:00 p.m.

The meeting opened with a discussion of Articles 12 and 13. Mariah Nobrega for the Petitioners presented slides on Articles 12 and 13, a revision of the CDICR Discrimination Complaint Process. The purpose is providing fair and timely process and finding structural ways to reduce discrimination. The Articles provide for complaints against respondents in addition to Town employees, additional options for relief (fines), and an expert panel. The Complaint Committee would have up to 5 members with one-year terms and expertise and training. Complaints can be received orally; complainants will be advised of other venues. There will be steps in the process such as screening, investigation, with appeals. Violations by the Town are turned over to the Select Board. Violations by others will result in notice of violation and fine if allowed by law. There is a provision against retaliation. There are other communities with similar processes. People or organizations can make complaints; including third parties. No complaints against minors. Subpoenas would have to be enforced through courts by Town Counsel at direction of Select Board. Town is exposed to liability; hope is to de-escalate. Committee members are those with expertise and others from historically marginalized communities. Some discussions could be in executive session. If Article 12 fails, the 2019 version goes into effect. 2019 does not recognize boundaries of federal and other laws. Article 13 is the housekeeping article to accompany Article 12.

Petitioner Deborah Brown says a lot of work went into the document. . She did EEO for NYC Transit Authority. Proposal didn't reinvent anything and came up with a pretty good document as a way to avoid problems. Policies and procedures will keep problems from festering. Will keep Town out of trouble; give people an opportunity to be heard. She is tired of having to defend Brookline where not capture pattern of discrimination.

The public hearing was opened. Arthur Conquest, TMM6, stated that members of the committee had worked extremely hard, trying to do best for residents who previously brought complaints to Diversity Commission only to have complaints automatically passed on to MCAD, where they languished for 5 or more years before disappearing or being dismissed. Do the right thing for people who have been discriminated against in Brookline. Have been to MCAD and the way they do business is wrong; they sweep things under the rug. Thanks members who did this.

Regina Frawley, TMM16, asks whether somebody with a complaint against the Town has to use this process. Mariah Nobrega says complainant has option to file here, but doesn't have to; will be advised of alternate venues, including alternative dispute resolution. Respondent may have different rights if collective bargaining, student in school, HIPAA in health care.

Regina Frawley asked about neighbor vs. neighbor. Mariah Nobrega thinks the complaint procedure would apply. Ways to file complaint are in the by-law. Dick Benka asked what would happen if neighbor against whom complaint was filed wanted a different venue. Petitioner Sandy Batchelder said neighbor could refuse to participate and subpoena power would come into play; would require involvement of Town Counsel and approval of Select Board to enforce the subpoena, so would have to be a serious matter.

Richard Mazandi Iseke said it was unusual for appeals to be decided by the same group that reviewed the complaint. He has issues with neighbor vs. neighbor. Sandy Batchelder noted that the investigation is conducted by different individuals than the appeal; three members who review are not part of the original process. Town Counsel Joe Callanan said that in administrative law you go to a separate office. After all this local process, person could appeal this to court.

Ben Birnbaum asks who has subpoena powers. Town Counsel says under Bloom v. Worcester the Complaint Committee could issue subpoenas. Person who receives it could obey or ignore. No consequence of ignoring, because subpoena meaningless unless enforced by court. Town Counsel would have to get the Select Board to authorize going into court to enforce. Ben Birnbaum also asks about neighbor vs. neighbor. Could he have complained that his neighbor was making complaints against him on the basis of religion? How does this relate to disputes over the back fence? Mariah responds that the Committee will develop written and published criteria for "plausibility" as a screening tool to eliminate specious complaints.

Ana Albuquerque, TMM1, asks what problem this is trying to solve, what is relevant background for members of the Complaint Committee, and how is retaliation prevented? Mariah Nobrega says it allows for complaints beyond Town employees, with different relief options, expert panel, due process, legal training. Mariah says that neighbor vs. neighbor complaints are allowed, such as complaints about language on Facebook. Deborah Brown says that for retaliation you don't need to show original complaint was valid, only that you were retaliated against.

Regina Frawley now very concerned about article. Previously the articles were aimed at the Town and Public Safety. This has morphed into quasi-judicial and complex. Even if different persons, will still be influenced by collegiality. A very dangerous article giving power to people who are not qualified.

Eileen Berger comment was read: Seems like a judicial process. It is less concerned about reputations and ways to ameliorate disputes rather than amplifying disputes. Concern about false complaints. Richard Mazandi Iseke agrees. Town Counsel says it is quasi-judicial because it is in executive branch.

Neil Gordon, AC and TMM1, asks about enforcement of subpoenas. Who does Town Counsel represent if the complaint is against a Town employee or official? Town Counsel says he would not take it to the Select Board; would take it to the department expecting them to follow through. What about a complaint against a Town official or a Town Meeting Member who said something on the floor of Town

Meeting? If Town Meeting Member didn't cooperate, Town Counsel would not have an obligation to defend the Town Meeting Member.

Susan Granoff, AC and TMM, had two questions. What is Town's legal exposure with the quasi-judicial system should a respondent claim they haven't been given a fair hearing, rights have not been protected, inadequate training or bias? What ethical obligations would CC be under? Judicial ethics avoid even the perception of bias in the rest of their lives – e.g., restrict practice so as not appearing to favor one side or another. Will staff in Town Counsel's office have to be increased? Town Counsel says legal exposure hard to quantify; he is worried that there will be a challenge to by-law the first time somebody is charged or fined. If found invalid, there is legal exposure; if the town wins, less concern. If it is facially valid, worries most about article as applied: someone not understanding due process, open meeting law, privacy, discrimination. Cannot create new law in Brookline. Burden in discrimination case shifts back and forth; worry about a civil rights lawsuit that says people not trained adequately. Town Counsel does not need additional staffing. Panel covered by c. 268A, State conflict of interest. Could have rules and regulations. Decisions have obligation to put aside bias and make decisions based on facts and evidence. It would be hard to attract lawyers if they couldn't still practice in the area.

No other member of public indicated desire to speak during the public hearing, and CTO&S turned to comments from Committee members.

Dick Benka of CTO&S listed subjects of concern: Application to students and Schools; this deletes reference to the Superintendent or the School Committee, has School issues referred to the Select Board. Student discipline under State law is in the hands of the Superintendent or the School Committee; that is not the case here. Also, a non-minor student could be subject to \$300 fines. As to \$300 fines, the Bloom case involved investigation rather than punitive fines. Town Counsel has noted fines cannot be imposed in landlord-tenant, health care, private education, private employment; would also not apply to credit, public accommodations not licensed, seller-buyer housing. Essentially couldn't fine landlord, bank, employer engaged in widespread discrimination. Wouldn't apply to Article 5.5 Fair Housing. At a minimum, the one certainty would be litigation. No definition of discrimination with the inclusion of "but not limited to" language. The intent to apply to "neighbor vs. neighbor" raises issues. Certainty of litigation here as well. As to complaints by third parties; Town Counsel has raised the issue of the State standards for standing. Complaints also do not have to be in writing or sworn. Nothing requiring that people investigating, on panel be different; nothing requiring that panel have legal training. Nothing provides initial investigations have to be private, raising questions of confidentiality and damage to reputation. Subpoena power have to be dealt with by Town Meeting. The potential for proceedings in multiple venues also raises issues. No time limits on certain steps.

Ian Roffman of CTO&S. Thinking about appellate process, with appeals to same process. Concerned about when complaints become part of public record. Validity of by-law will depend on how it is applied as well as how it is written. Is the by-law good enough? Can the points be fixed?

Betsy DeWitt of CTO&S. Intent is aspirational. Will continue listening. If serious technical issues that need to be addressed, would like to know priorities for addressing. Our responsibility is to try to limit undesirable consequences.

Sean Lynn-Jones of CTO&S. Are issues such as neighbor vs. neighbor and appeals being heard by same body similar to what exists in other communities? If no action, 2019 language would go into effect;

what could you do if you don't want 2019 or this version. Mariah Nobrega said that 2019 language would go into effect. Kate Poverman, Moderator, stated she would not allow a motion to extend the effective date of 2019 Amendments to 2023. With regard to neighbor vs. neighbor, Sandy Batchelder says that most communities allow people vs. people complaint. Deborah Brown thinks they don't typically come up.

Harry Bohrs notes that enforcement with fines is narrow. Where is line between discrimination in employment, for example, and perceived slights? How would one account for reputational damage where complaints are not sworn? Town Counsel asks where is the adverse action with a perceived slight? Plausibility review would need plausibly sufficient facts that action happened because of membership in a protected class. Wants to have the Chief Diversity Officer's plausibility discretion defined by established case law.

Arthur Conquest asks who this would get referred to; how many cases has CDICR heard? Dick Benka states that if Articles 12 and 13 were referred, or there was "no action," the 2019 Amendments would go into effect. The 2019 language could probably be amended within the scope of Article 12, or Article 12 could be amended. Given the time, amendments would have to be done by Petitioners, AC, Select Board, or CTO&S, not a new subcommittee.

The Committee discussed Warrant Article 33. First, the Committee opened the discussion to public comment.

Co-petitioners, C. Scott Ananian, stated that the petitions spoke with an attorney in Town Counsel's office. Co-petitioner Dave Gacioch presented slides to the Committee and stated that petitioners were concerned that the phrase "traditions in Brookline" as written in Section 2.1.9 of the Town By-Laws is too vague. Mr. Gacioch and Mr. Ananian walked through their presentation which reflected a proposed amended version of Article 33 and stated petitioner's reasons for proposing Article 33.

Moderator Poverman stated that she will not be moderating Art 33 at Town Meeting. She stated that she believes Art 33 would complicate not simplify town meeting procedures. She stated that the Handbook is meant to be guidelines, not rules. She noted that state law provides for the scope of the Moderator's authority and that court cases have held that the Moderator's decisions are not subject to judicial review, absent active bad faith, and that the proposed amended Art 33 would violate or be inconsistent with state law.

Regina Frawley corrected a statement made by the petitioners and stated that she opposed Art. 33

David-Marc Goldstein stated that he opposed Art 33 because it attempts to take authority from the Moderator, would politicize the position of Moderator, violates state law, and attempts to bind future town meeting.

Co-petitioner Dave Gacioch stated that he disagreed with the position that proposed Art 33 violates state law and stated that the Moderator's authority is not unbridled.

Moderator Poverman responded by noting that judicial decisions have found that a Moderator's decisions on procedural matters are no subject to judicial review absent a showing of bad faith or improper conduct.

The Committee then began a discussion about Article 33. Ian Roffman asked the petitioners whether the intent of Article 33 was to limit the powers of the Moderator and what was the relationship between Article 33 and 34.

Co-petitioner Ananian responded that he was trying to build consensus. Mr. Gacioch stated that he did not believe there was a relationship between article 33 and article 34.

Ian Roffman stated that he believes Article 33 creates more confusion than clarity, and that attempting to codify an educational guidebook would not bring more clarity to the procedures of Town Meeting. He stated his view that Town Meeting has the ability to proposed specific procedures by By-Law, but that the proposed Article 33 appears to be an attempt to limit the authority and ability of the Moderator to preside over debate.

Harry Bohrs asked if Town Counsel could weigh in on the question of one Town Meeting can bind a future Town Meeting and expressed concern about politicizing debate

Abby Cox and Betsy Dewitt stated that their views have already been discussed by others. Dick Benka asked the Moderator and co-petitioners to provide him with citations for judicial decisions that they discussed. Co-Petitioner Gacioch recited several citations. Dick Benka expressed concern about the hierarchy stated in the proposed amended Article 33.

A public hearing was opened for Article 26, but the petitioners were not present and no one from the public asked to speak. Harry Bohrs reported that he attended the Parks & Recreation Commission (P&RC) the previous evening, and the P&RC has not yet taken any action. He gave a brief history of the P&RC and its mission, and then summarized the provisions of the proposed bylaw revisions in Article 26. He noted that the commissioners are concerned about the language requiring them to engage in fundraising, as that it normally a staff assignment and a lot of work for volunteer commissioners. There also was concern that many revisions are coming at the last minute, so they have not had adequate time to address them, and some question about whether these changes are best effected through a bylaw. Harry Bohrs reported that a motion is being offered by the Advisory Committee's sub-committee to refer this article to the P&RC and ask them to return to Town Meeting in the fall with a report in the hopes that additional time will allow them to understand the associated costs and come up with some sort of a plan of implementation. Leigh Jackson has provided some numbers that showed approximately 219 participants receiving scholarships at a cost of close to \$90K. At the P&RC meeting, Deborah Brown, the petitioner, offered that there could be 500 kids who would want to participate and the cost would probably be \$1M. It is clear that work needs to be done around the numbers and cost. The question for CTO&S is whether it's appropriate to have such detailed prescriptions in a bylaw or whether it should be addressed through administrative policies, and what kind of precedent it might set. Abby Cox asked whether there was any explanation from the petitioners of why they included the fundraising piece as a duty of the commissioners, and whether that would apply to other commissions as well. Betsy DeWitt and Dick Benka asked questions around P&R program costs. Leigh Jackson of Parks & Recreation explained that programs can range from \$5 for a class to \$285 for a week of summer camp. She pointed out that if Article 26 passes, it will take a lot of work to operationalize it. Abby Cox observed that the goal of the petitioners seems to be to ensure access and it's a question of whether Town Meeting is going to affirm that goal, but that CTOS might be concerned about whether the imposition of the requirement on commissioners through the bylaw to play a role in fundraising is appropriate. The

committee discussed alternative ways to address issues of concern other than putting them in a bylaw, and that valuable policy decisions are durable and do not have to be enshrined in this way as bylaws can become rigid and static. The committee explored its options to address Article 26. Harry Bohrs suggested it should be referred back to the P&RC to give them more time to digest the task and assemble a plan. Betsy DeWitt asked that with a referral, a request for more specific & detailed financial data be made. Dick Benka added that there would need to be some work around determining the number of participants who would be eligible and want to take part. Harry Bohrs also pointed to the shortage of usable recreation space.