

ARTICLE 12

SELECT BOARD'S SUPPLEMENTAL RECOMMENDATION

Article 12 was submitted by petition to strengthen the existing investigative authority of the Commission on Diversity, Inclusion and Community Relations (CDICR). This investigative authority was initially adopted by Town Meeting in 2019, but its implementation was deferred until July 1, 2022 in order to compel Commission on Diversity, Inclusion and Community Relations (CDICR) to submit refined legislation. The 2019 amendment will take effect at that time unless otherwise amended under Article 12 of this Warrant.

Article 12 would establish a new Complaint Committee and create a mechanism to issue monetary fines if the Committee determines that a party acted in a discriminatory manner. The reports of the Advisory Committee and the Committee on Town Organization and Structure (CTOS) are very detailed and do not need to be repeated here. Suffice to say that this article has been the subject of extensive analysis and review by both bodies in consultation with the petitioners, Town Counsel and other staff. Revisions have been discussed and adopted that resolve some, but not all, of the issues in dispute. However, the Advisory Committee has recommended No Action on the article while the CTOS recommends a referral back to the CDICR.

At their meeting on May 25, 2022, and following a prior public hearing on the matter, the Select Board voted 3-2 (Aschkenasy and Sandman opposed) to recommend No Action on this revised article.

ROLL CALL VOTE:

<u>Aye:</u>	<u>No:</u>
Hamilton	Aschkenasy
Greene	Sandman
VanScoyoc	

ARTICLE 12

MOTION OFFERED BY MARTY ROSENTHAL, TMM9

MOVED: To delete the following Section 3.14.3(B)(ix) (*emphases* added by MR):

(ix) The CC shall have the power to subpoena witnesses, compel their attendance, administer oaths, serve written interrogatories, take testimony of any person under oath, and require the production of any evidence and/or answers relating to any matter in question or under investigation before it, provided that such process shall be utilized at the reasonable request of either complainant or respondent. Witnesses shall be summoned in the same manner and be paid the same fees as witnesses in civil cases before the courts. Town departments and agencies shall cooperate as described in Section 3.14.5.

and to substitute the following Section 3.14.3(B)(ix):

(ix) [Reserved]

and to delete the following language from Section 3.14.3(B)(viii):

or as soon thereafter as practicable after completion of any discovery and process as set forth in Section 3.14.3(B)(ix).

EXPLANATION

This motion is in May 24th's updated Combined Reports (hereinafter "C/R"), *Supp'mt #3*, p. 18, drafted by our great and under-appreciated CTO&S -- FYI of which I was honored to be a member for maybe three decades, but who's counting? I myself attended their discussions, and most of CDICR's over the last two years, and I was one of the drafters of CTOS' 2019 report, which is in the current C/R (but too unexplained), now *Supp'mt #1* pp. 41-71, specifically 53-56.

With maybe the most C/R pages (that I recall in my 4+ decades) for a non-budget WA, today (May 26th) 144 pp., this actual motion seems on the surface clear; but to many TMM's its reasons may need highlighting or expanding. The pertinent provision of what seems **Petitioners' Motion** is above -- in *C/R Supp'mt #1*, p.9, now moved for deletion. Then, they explain, *Id.* p. 15 (*emphasis added*):

Subpoena Power. *Town Counsel has opined that the power to issue subpoenas by the CDICR is upheld in Bloom v. Worcester*, in which a similar committee issued a subpoena. Town Counsel has also made clear that should the subpoena be ignored, Town Counsel *would only go to court to enforce* the subpoena at the direction of the Select Board.

And, the A/C offers *C/R Supp'mt #3*, p.5 (*emphasis added*):

Subpoena power. The revised motion adds language making clear that *such process shall be utilized at the reasonable request of either complainant or respondent*. The limits of this power are better understood – that *enforcement is only available through*

action of the courts in response to a request made by Town Counsel with authorization of the Select Board.

So, my concerns begin with those in *CTOS' BACKGROUND* summary, *C/R Supp'mt #3*, p. 1, differentiating WA 12 from the 2019 WA24 version, saying the current proposal (emphasis added):

has changed from providing information, mediation and dispute resolution opportunities (the original 2014 version), to a *more active investigative role ...* to a proposal for *a more prosecutorial and punitive role* granting a new Complaint Committee (“CC”) within CDICR subpoena power and the authority to levy \$300 per day fines (Articles 12 and 13 ...).

So, *first*, I think most everyone has thus far underestimated the emotional impact of a subpoena, especially to one who's never gotten one, has no lawyer friend, etc. A SAMPLE is appended hereto; it's designed to look at a minimum very formal, but also coercive (*intimidating*). See also, *supra*, “would *only go to court to enforce*.”

2nd, CTOS highlights issues in *C/R p. 12-19*, then later *Supp'mt #3 @ 2, & 5-6*, as now pertinent (emphases all added):

The provision in Article 12 giving the CC the authority and discretion to issue subpoenas, to serve interrogatories, to compel the attendance of witnesses, and so on, *has been controversial*. As noted, CTOS believes that giving these *powers to a Town body such as the CC* is a “political” decision to be decided at Town Meeting. ...

... Again, CTO&S recognizes that Petitioners in good faith seek subpoena authority to adequately investigate matters, but again there is the *potential for inequitable application* against individuals and small businesses, while *large corporations would be able to “lawyer up” and compel the Town to attempt to enforce* subpoenas through litigation. ...

... The provision ... giving ... the authority and discretion to issue subpoenas, to serve interrogatories, to compel the attendance of witnesses, and so on, was a *source of substantial controversy* during hearings. It is argued, on the one hand, that such language will allow the CC to get to the bottom of cases and that the complaint process would have no “teeth” without the ability to seek subpoenas and compel testimony. It is further argued that *a party could refuse to comply* with a subpoena from the CC, and the subpoena could not be enforced without a Select Board decision authorizing Town Counsel to file *a court action* under G.L. c.233, §10. A ... [court judge] would then have *discretion to decide whether to enforce* the subpoena. *In the view of Petitioners, these required steps provide adequate protection against abuse of the subpoena power.*

On the other hand, it is argued that the *power to initiate subpoenas should not rest in a local body*. It is argued that the subpoena/compulsory testimony provisions (and Article 12 generally) create an *unnecessary municipal process that is inherently inequitable*. Other agencies such as the MCAD can already enforce anti-discrimination laws. Moreover, they can provide actual relief to injured parties while Articles 12 and 13 can only provide for recommendations and, arguably in some cases, for *finest that would be paid to the Town but not to the injured party*. Moreover, *large deep-pocketed entities* would know that *they could refuse to comply with subpoenas* and thus compel

enforcement litigation, and they could then *readily afford the cost* of such litigation. *Individuals and small local businesses*, on the other hand, *even if not ignorant of their right to challenge* subpoenas, would be *forced* either to comply or to *face burdensome litigation costs*.

I share *all* -- and won't repeat most of -- those (now) *italicized* concerns, adding an unspoken one, that under MA Rule 45 of Civil Procedure, "failure by any person without adequate excuse to obey a subpoena ... may be *deemed a contempt* of the court."

So, assuming that all the foregoing suggests that "attention must be paid," two more concerns: I have for many months publicly and adamantly disagreed with Town Counsel's view (*supra*) that the *Bloom v. Worcester* case gives subpoena power to CDICR, or indeed to any committee in *a town* other than a Select Board, School Committee, or Board of Registrars of Voters. [ZBA's have a separate subpoena statute.] While *Bloom* does use some broad language (*dicta*) that would seem to include any "municipality," the case was about subpoenas for a Human Rights Commission in *a city*; and the court relied on a law that's very different for a town, M.G.L. c. 233 § 8, "Bodies authorized to summon witnesses" (essentially and emphasis added):

Witnesses may be summoned to attend and testify and to produce books and papers at a hearing *before a city council, ... or before a ... special committee of the same ...*, or before a *board of selectmen, a board of police commissioners, ...* [other irrelevant specific committees/officials], a school board, ... a board of registrars of voters, ... [various other irrelevant specific committees/officials], as to matters within their authority;

So, aside from at best (very) "*doubtful legality*," IMHO there are good WA 12 "policy" (or per CTOS, *supra*) *political*" reasons for such a narrow reading of *Bloom*, including specifically for CDICR. Should a committee under the auspices of CDICR be the first one Town Meeting tries to grant such power? For example, as per my last issue, *infra*, why not Human Resources, where there's considerable professional expertise and arguably less credibility issues than CDICR? Somebody has to say what many others think. I've been a five decade proponent of improving/empowering the Commission, as well as its (HRYRC) predecessor, e.g. my & Jeffrey Allen's 1987 (S-Bd) *Police and Community Relations Report*, later on the 2014 drafting committee for the CDICR by-law. On the latter, I and Stanley Spiegel (for PAX) moved the successful amendment that made the Diversity Office "director" (soon to be Lloyd Gellineau, who's done a great job) a *Department Head*, overcoming Town Administrator and (unanimous) Select Board opposition, with an Explanation emphasizing the (revamped) CDICR's importance.

But, one elephant in this room: I and many others feel the recent Commission, albeit out of very good intentions, has been too knee-jerk and one-sided, ignoring both nuances and its implicit mission to "*build bridges, not walls*." By exaggerating how much racism there is in Brookline, I can attest that people of color too often and too loudly hear "*stay away!*" One of many examples of why many don't view CDICR as sufficiently thoughtful, open-minded, balanced or "fair": They supported (by 10-1-0) the 2020 WA to amend by-law 3.1.3, "Litigation and Claims," by giving Town Meeting the (budgetary) power to foreclose for any reasons/whims any specific litigation. Here's what they said (10-1), with *zero* explanation: "The Commission disagrees with the Select Board's and Town Counsel's interpretation of 3.1.3 that Town Meeting does not in fact have the power to prevent such

appropriations and expenditures.” Even in the midst of Gerald Alston prominence, that was defeated (131-88).

Near lastly, revised WA12 very welcomely mandates *later* rules with help of Town Counsel; but bare-bones WA12 is weak on many *DUE PROCESS issues*, like two examples, the meaning of “*at the reasonable request* of either complainant or respondent”; and what is the “*burden of proof*” -- always the most important procedural issue? Cf. Justice Frankfurter: “The history of liberty has largely been the history of the observance of *procedural safeguards*.” [*McNabb v. US*, 318 U.S. 332, 347 (1943)(suppressing evidence from improper interrogations).

Lastly, and tangential to the foregoing, some of us have been saying -- to deaf ears -- since 2016, and especially since 2019 (CTOS re WA 24, *supra*) that MULTIPLE PARALLEL/COMPETING COMPLAINT PROCESSES must be reconciled. I believe *there is a real need for a complaint forum for “regular [protected class] person” vs. “regular person”*; and that -- with more study -- CDICR *should be* the forum. But for complaints against Town *staff*, especially those with union contracts, it should generally be the 2016 *Human Resources* process, and for Police their intricate process -- that I’ve thrice helped write/reform -- that includes S-Bd. “*civilian review*” (with subpoena power). Those two already have jurisdictional confusion, including a court case. Now we’ll have a third.

Nobody has yet answered my question, subpoenas included (or aside): *If a complainant calls or goes to the Town Clerk and asks how/where to complain about alleged racism by a DPW worker or a cop, what will they be told, “Well, you have three choices, but I can’t help you decide, so good luck?”* That too is not just a legal issue, but is also not “welcoming” to complainants, as we should maximize, even if their complaints are later deemed unfounded.

(MR’s NB: a boilerplate form for court cases; fonts as in original; spacing now altered)

The Commonwealth of Massachusetts
Subpoena

_____, ss.

To: _____

You are hereby commanded, in the name of the Commonwealth of Massachusetts, to appear before the _____ Court at _____ in the County of _____ on the _____ day of _____, in the year _____ at _____ am/pm, and from day to day thereafter, until the action hereinafter named is heard by said Court, to give evidence of what you know relating to an action then and there to be heard and tried between _____, Plaintiff, and _____, Defendant, docket number _____, and you are further required to bring with you:

Hereof fail not, as your failure to appear as required will subject you to such pains and penalties as the law provides.

Dated at _____ the _____ day of _____, in the year _____.

Notary Public – Justice of the Peace

RETURN OF SERVICE

I, _____, *certify that I this day summoned the within named*

to appear and give evidence at Court as directed by the attached subpoena by delivering to

in hand, - leaving at

_____ *a copy of the*
subpoena together with _____ fees for attendance and travel.

I further certify that I am not a party to the above entitled action and that I am not less than 18 years of age.

Signed under penalties of perjury this _____ **day of** _____, **in the year** _____

ARTICLE 22

SELECT BOARD'S SUPPLEMENTAL RECOMMENDATION

At their meeting on May 24th the Select Board discussed Article 22 which seeks to restrict the sale of certain products containing fluorinated hydrocarbons in the Town of Brookline. The Board agreed that these products are dangerous and felt that the revised petitioner motion would allow the Board to work with the Advisory Council on Public Health (ACPH) to develop regulations that identify products that should be restricted.

A unanimous Select Board voted FAVORABLE ACTION on the petitioner motion.

ARTICLE 24

ADVISORY COMMITTEE'S SUPPLEMENTAL RECOMMENDATION

At its May 25th meeting, the Advisory Committee amended its April 14th vote on Article 24 (an amendment to the Town's General Bylaws pertaining to Artificial Turf Surfaces). By a vote of 15-7-1, the Committee had previously voted to refer the subject matter of Article 24 to the Task Force on Athletic Field Surfaces, created by Article 23.

In response to the possibility that Town Meeting may not approve Article 23, by a vote of 20-1-0, the Advisory Committee now recommends the following amended motion under Article 24:

MOVED:

To refer the subject matter of Article 24 to ~~the~~ an Athletic Field Surface Task Force, appointed by the Select Board with membership and tasks as described in ~~pursuant to~~ Warrant Article 23 at the 2022 Annual Town Meeting, ~~with the understanding~~ provided, however, that maintenance or replacement of synthetic/artificial turf that has been installed ~~and is existing~~ prior to ~~the adoption of this resolution,~~ such Town Meeting, including, but not limited to, the artificial turf fields at Skyline Park and at Soule Recreation, is permitted.

If the Motion to Refer fails, the Advisory Committee, by a vote of 16-2-2, recommends supporting the following amendment offered by Casey Hatchett (TMM 10) and Janice Kahn (TMM 15):

MOVED:

Add to subsection (a) under SECTION 8.X.2 RESTRICTIONS:

(a) The Town of Brookline shall neither install nor authorize or allow the installation of synthetic/artificial turf on any property owned by the Town, for a period of three years from the effective date of this moratorium. This moratorium shall not apply to the maintenance or replacement of any synthetic/artificial turf field that has been installed, is scheduled for installation, ~~and~~ is existing, prior to the adoption of this bylaw amendment, or any combination thereof, and specifically including the Driscoll School field, which has completed the design review and budget process.

ARTICLE 24 - AMENDMENT ADVISORY COMMITTEE VOTES

Article Description	Update Referral Motion to change details of referral committee
AC recommendation (Favorable Action unless indicated)	20-1-0
Scott Ananian	Y
Carla Benka	Y
Ben Birnbaum	Y
Harry Bohrs	
Cliff Brown	Y
John Doggett	Y
Katherine Florio	Y
Harry Friedman	Y
David-Marc Goldstein	Y
Neil Gordon	Y
Susan Granoff	Y
Kelly Hardebeck	
Anita Johnson	Y
Georgia Johnson	
Alisa Jonas	Y
Janice Kahn	
Carol Levin	Y
Pam Lodish	Y
Linda Olson Pehlke	N
Donelle O’Neal, Sr.	Y
David Pollak	Y
Stephen Reeders	Y
Carlos Ridruejo	Y
Lee Selwyn	Y
Alok Somani	Y
Christine Westphal	
Dennis Doughty*	
* Chairperson does not vote except to break a tie	

ARTICLE 24 HATCHETT/KAHN AMENDMENT ADVISORY COMMITTEE VOTES

Article Description	Exempt Driscoll from subject matter of WA 24 in the event referral motion fails
AC recommendation (Favorable Action unless indicated)	16-2-2
Scott Ananian	Y
Carla Benka	Y
Ben Birnbaum	Y
Harry Bohrs	
Cliff Brown	Y
John Doggett	Y
Katherine Florio	Y
Harry Friedman	A
David-Marc Goldstein	A
Neil Gordon	Y
Susan Granoff	Y
Kelly Hardebeck	
Anita Johnson	N
Georgia Johnson	
Alisa Jonas	Y
Janice Kahn	
Carol Levin	Y
Pam Lodish	Y
Linda Olson Pehlke	N
Donelle O’Neal, Sr.	
David Pollak	Y
Stephen Reeders	Y
Carlos Ridruejo	Y
Lee Selwyn	Y
Alok Somani	Y
Christine Westphal	
Dennis Doughty *	
* Chairperson does not vote except to break a tie	

ARTICLE 25

**MOTION OFFERED BY SELECT BOARD CHAIR HAMILTON,
SECONDED BY SELECT BOARD MEMBER ASCHKENASY**

MOVED:

To refer the subject matter of Article 25 to the Advisory Council on Public Health (ACPH).

Note: The Select Board will be considering this motion on 5/31 after discussing the revised AC motion on 5/25. The Board expressed that there was still a need for ACPH to provide more guidance on how to best implement article 25, and thought that a referral motion would allow for that to happen.