

ARTICLE 19

ADVISORY COMMITTEE’S SUPPLEMENTAL RECOMMENDATION

Recommendation: FAVORABLE ACTION on Article 19, as amended, by a vote of 23-0-2.

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|----------------------------------|---|
| Executive Summary: | Article 19 was filed to create a Black and Brown Commission to serve as “a centralizing force in the Town of Brookline...which will deal with all Black and Brown issues.” The Article proposes a 13-member Commission appointed by the Select Board to 3-year terms with input from both the Office of Diversity, Inclusion and Community Relations, and from the public and particularly members of the Black and Brown community. The Article as initially written faced legal challenges, in particular the conditioning of participation on the Commission on the basis of race, which would violate the Equal Protection Clause of the U.S. Constitution (14 th Amendment). The Moderator reviewed the language of the Article and suggested modifications both within its scope and that would pass a “strict scrutiny” test. |
| Voting Yes will... | Create a Commission that would focus on issues specific to the Black and Brown community in Brookline. |
| Voting No will... | Keep the status quo, with the Office of Diversity, Inclusion, and Community Relations (OCDICR) and the Commission on Diversity, Inclusion, and Community Relations tasked with addressing the issues raised by the petitioners. |
| Financial impact [if any] | There will be some administrative support required, but the fiscal impact, if any, is not yet known. |
| Legal implications | None identified in Article 19 as recommended by the Advisory Committee. As noted below, there were several identified legal concerns with the Article as filed. |

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, Article 19 was submitted by members of the Black and Brown community, including members of the Black N Brown Club, Inc., a non-profit incorporated in Brookline in 2022 and founded by low-income Black and Brown residents in Brookline seeking representation on issues concerning their community. The Club is a chapter of a national organization, Black N Brown, Inc. (BNB, Inc). A key goal of the proposed Black and Brown Commission under Article 19 is to give particular attention to this low-income demographic in Brookline so that they can better address their needs.

Evaluation Methodology/Research

- The Ad Hoc Subcommittee held several meetings, consulted with Town Counsel's Office and the Moderator, and reviewed the enabling legislation for other commissions in the Town of Brookline and the City of Boston.
- A public hearing was held on Monday, April 3, 2023, via Zoom. The 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. The recording of that hearing is available here: https://brooklinema.zoomgov.com/rec/share/y2cm8N2Us4E28heFxGEMGhw33cNWwGLulu6uQsCY51WzoQpfXkNy3IQc5hkTpe2l.Brvozo_h9nPGqDMQ
- A follow-up public meeting was held on Tuesday, April 18, 2023, for the Ad Hoc Subcommittee to discuss and vote on a Recommendation to the Advisory Committee. The recording of that hearing is available here: https://brooklinema.zoomgov.com/rec/share/mNZg_jBCx0tVEHDBkkQmwJ62IAHlna8YZQnS-Or-ICerUFDXl22eKlrcRrH9EQ_M.a5FySan5akGTETqy
- A third public meeting was held on May 4, 2023, for the Ad Hoc Subcommittee to review a version of the warrant article that eliminated the problematic language within WA19 and was approved by Town Counsel, the Moderator and the petitioners to be brought to Town Meeting for a vote. The recording of that hearing is available here: https://brooklinema.zoomgov.com/rec/share/cvlgm5xXefT4JwWcYH0UoQ6SmoKZ2KYdqCWi_4RS4DrqJ_FHCBS22Pm9YETQKYq1.DG8qWOWJPYqf3uXz
- Town of Brookline General By-Laws. In particular Article 3.9 (Brookline Commission for Women). <https://www.brooklinema.gov/DocumentCenter/View/25283/Brookline-Town-By-Laws>

- City of Boston Ordinance Creating a Commission on Black Men and Boys.
<https://www.boston.gov/sites/default/files/file/2022/01/Commission-on-Black-Men-and-Boys-Ordinance.pdf>

Introduction

During the public hearing, many of the petitioners spoke about their lives and experience living in Brookline and why creating a Black and Brown Commission was important to them.

Sana Hafeez, a lead petitioner, and Program Director for BNB, Inc., stated 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 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.

The following statements offered by petitioners and other members of the public:

“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.”

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

Discussion

The language of the warrant article as filed was “To Create a Black N Brown Commission,” which is nearly identical to the name of the Black N Brown Club, Inc., whose members are lead petitioners. 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; however, they serve the same demographic.

It was noted that within the By-Law itself the language used is Black and Brown, with each defined separately, and a recommendation to use “Black and Brown” for the Commission to avoid confusion, was accepted by the petitioners and is in current version of Article 19.

When asked how the petitioners saw themselves as different from, for instance, the Commission on Diversity, Inclusion and Community Relations (CDICR) which is tasked with working on issues related to all protected classes, including racial classes, and the Town’s Office of Diversity, Inclusion and Community Relations, which was also created in part to address their needs, the petitioners expressed that there hasn’t been adequate attention paid to looking at issues through an economic justice lens and felt that a Black and Brown Commission would be able to focus on that perspective.

There was a discussion about 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. Changing the word “or” to “including”, mentioning African heritage, and adding Afro-Caribbean was discussed. 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.”

In the discussion of the definition of “Brown,” Ms. Hafeez explained that the term BIPOC doesn’t accurately convey the way that minorities are marginalized in America. An example given was that Brown-skinned Asians are not given the same minority status as other Asians are and suffer different marginalization coming from “colorism.” Article 19 emphasizes those who are marginalized because of their color, which is also related to their race. Language was modified to make it clear that the definition refers to discrimination on the basis of race and skin color.

“Brown refers primarily to Latinx and Indigenous persons that suffer from the institutional harms of being racially marginalized, as well as other minorities that are ~~similarly~~ marginalized due to the color of their skin. ~~This does not encompass all racial minorities, as not all racial minorities are marginalized in the same ways. This~~

~~commission is to address the specific marginalization of these populations most disenfranchised in Brookline.~~

The most problematic issue with the Article 19 as submitted, was found in the section on MEMBERSHIP, APPOINTMENT, TERM. The Article has gone through multiple revisions since it was placed on the warrant. The discussion on April 18th focused on the version received April 12th:

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

- *(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 for appointing members to this Commission that sets up what could be interpreted as a local election process 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 appointed 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 originally proposed.

Under (c), it gives the Commission the ability to by-pass the Select Board and put people on the Commission without Select Board 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 are elected by the voters, get their authority from the State, and whose members may fill a temporary vacancy.

1st Assistant Town Counsel John Moreschi advised the Committee on the two legal concerns raised by this section, and particularly conditioning participation in the selection process on race, which is likely unconstitutional.

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), as well as the State Constitution.

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 Advisory Committee, supportive of creating a Black and Brown Commission, chose to defer voting on Article 19 on April 27th, to give the petitioners another opportunity to meet with Town Counsel and to have the Moderator review the Article for scope and other legal issues. Although language cannot be added to a warrant article that expands

its scope, language can be removed. The Moderator reviewed the language of the Article and suggested modifications that were both within the scope of the article and would pass a “strict scrutiny” test. Additional language was recommended by Counsel Moreschi as follows (deleted language struck through, added language underlined):

MEMBERSHIP, APPOINTMENT, TERM

(a) The Commission shall consist of thirteen members, ~~12 of whom~~ who shall be appointed by the Select Board ~~with consideration of the results of a nomination process by Black and Brown residents, facilitated by~~ in consultation with the Office of Diversity, Inclusion and Community Relations and with input from the public, including, but not limited to the Black and Brown community, ~~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. 1 will be appointed by the Town via the 11 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.~~

~~(b) 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.~~

Recommendation

By a vote of 23-0-2 the Advisory Recommends Favorable Action on the following motion:

VOTED: That the Town will amend the General By-laws to add the following Article:

ARTICLE X.XX BROOKLINE COMMISSION FOR BLACK AND BROWN RESIDENTS

SECTION X.XX.1 ESTABLISHMENT

To Create a Brookline Black and Brown Commission.

SECTION X.XX.2 FUNCTION AND PURPOSE

The function of the Commission shall be to:

(a) Act as a centralizing force in the Town of Brookline and the community, which will deal with all Black and Brown issues, providing information, referral, guidance, and coordination to educate and to offer and provide technical assistance to other public agencies and private persons, organizations and institutions engaged in activities and programs intended to eliminate systemic, racism prejudice and discrimination against a person because of the color of their skin and racial status as Black and Brown.

(b) Take such action as the Commission considers appropriate to advance the aims of the State Equal Rights Amendment to ensure the equal status of Black and Brown persons.

(c) The term "Black and Brown" in this Warrant Article shall include:

- I. Black will refer to persons that are of African heritage, including but not limited to: African, African American, Afro-Caribbean, those descended from chattel slavery and the transatlantic slave trade.
- II. Brown refers primarily to Latinx and Indigenous persons that suffer from the institutional harms of being racially marginalized, as well as other minorities that are marginalized due to the color of their skin.

SECTION X.XX.3 POWERS AND DUTIES

The powers and duties of the Commission shall include the following:

(a) To ensure equity in the status of Black and Brown people in Brookline.

(b) To design and implement programs that promote equity for all Black and Brown people in the Town of Brookline.

(c) To develop recommendations and recommend policy to all departments, divisions, and agencies of the Town, including the Select Board.

(d) To act as liaison with all departments and divisions of Town government on issues affecting Black and Brown people.

(e) To initiate and coordinate and monitor the enactment of legislation which promotes equal status of Black and Brown people on the Municipal, State, and Federal levels, and to assure that appropriate regulations are adopted and enforced pursuant to such legislation.

(f) To work with and assist the appropriate Town agencies in their investigation of incidents of discrimination against Black and Brown people.

(g) To obtain from Town departments, divisions, and agencies, information necessary to carry out the functions, purposes, programs, and activities of the Commission.

(h) To initiate public exhibits and media events in Town Hall, Town libraries, and other town-owned property as well as in other locations within and without the Town.

(i) To raise funds for the use of the Commission and to accept money, gifts and services for its exclusive use.

(j) To appoint task forces to assist the Commission in its operations.

(k) Such other powers and duties as may be agreed on by the Select Board and the Commission.

SECTION X.XX.4 MEMBERSHIP, APPOINTMENT, TERM

(a) The Commission shall consist of thirteen members, who shall be appointed by the Select Board in consultation with the Office of Diversity, Inclusion and Community Relations and with input from the public, including, but not limited to, the Black and Brown community, to serve for a term of three years.

(b) A person is not precluded from serving more than one term. Commissioners must be residents of the Town of Brookline.

SECTION X.XX.5 ELECTION OF CHAIR & BY-LAWS

The members of the Commission shall elect a Chair, Vice Chair, Treasurer, and Secretary, from among its members, and shall adopt by-laws for the Commission.

SECTION X.XX.6 ANNUAL REPORT

The Commission shall make an Annual Report of its program and activities to the Select Board.

ARTICLE 12 ADVISORY COMMITTEE VOTES

| Article Description | Create Black and Brown Commission |
|--|-----------------------------------|
| AC recommendation (Favorable Action unless indicated) | 23-0-2 |
| Ben Birnbaum | Y |
| Harry Bohrs | A |
| Cliff Brown | |
| Patty Correa | Y |
| John Doggett | Y |
| Katherine Florio | Y |
| Harry Friedman | A |
| David-Marc Goldstein | Y |
| Neil Gordon | Y |
| Susan Granoff | Y |
| Kelly Hardebeck | Y |
| Amy Hummel | Y |
| Anita Johnson | Y |
| Alisa Jonas | Y |
| Janice Kahn | Y |
| Pam Lodish | Y |
| Joslin Murphy | |
| Donelle O’Neal, Sr. | Y |
| Linda Olson Pehlke | Y |
| Markus Penzel | Y |
| David Pollak | Y |
| Stephen Reeders | Y |
| Carlos Ridruejo | Y |
| Lee Selwyn | Y |
| Alok Somani | Y |

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|---|---|
| Carolyn Thall | Y |
| Christine Westphal | Y |
| Dennis Doughty * | |
| | |
| * Chairperson does not vote except to break a tie | |