REPORT OF THE COMMITTEE ON TOWN ORGANIZATION & STRUCTURE (CTO&S) ON WARRANT ARTICLES 12 AND 13

Introduction

Warrant Articles 12 and 13 have their genesis in Warrant Article 24 at the November 2019 Special Town Meeting. Article 24, filed by TMM Arthur Wellington Conquest III, was designed to impose more stringent standards under which the Commission for Diversity, Inclusion and Community Relations ("CDICR" or "the Commission") would resolve discrimination complaints under Town By-Law Article 3.14 (the article establishing and governing CDICR). Under the original 2014 version of By-Law Article 3.14, for example, CDICR had no time limits to resolve such complaints and a number of complaints had remained unresolved.

Basically, the approach under By-Law Article 3.14 has changed from providing information, mediation and dispute resolution opportunities (the original 2014 version), to a more active investigative role with time limits (the 2019 Conquest Amendments), to a proposal for a more prosecutorial and punitive role with subpoena power and fines (2022 Articles 12 and 13).

A number of concerns were raised about the requirements and time limits for handling complaints included in the 2019 Conquest Amendments. As a result, although the 2019 Amendments were passed, their effective date was postponed until July 1, 2021 and later further postponed to July 1, 2022.

That brings us to the current Articles 12 and 13. Language from the 2019 Amendment that is changed by Article 12 was shown as "~~strikethroughs~~" in the original Article. Article 12 would replace the 2019 language with new procedures that would establish a new Complaint Committee, have it utilize a multi-step investigation and appeals process, give it subpoena power, and provide for the imposition of $300 per day fines. Article 13 would replace the existing procedures in By-Law Article 5.5 (the Fair Housing By-Law) with those same new procedures, and also make technical changes to By-Law Articles 10.2 and 10.3 to allow the imposition of the $300 per day fines incorporated in Article 12.

As a result of all this,

- If this Town Meeting refers Article 12 or votes "no action' on Article 12, the 2019 language for By-Law Article 3.14 will go into effect on July 1, 2022. If it refers or votes "no action" on Article 13, the existing enforcement procedures in By-Law Article 5.5 will remain in effect.
- If Articles 12 and 13 are passed as proposed, the new procedures outlined in Article 12 (e.g., the Complaint Committee, subpoenas, fines) would, if approved by the Attorney General, replace the 2019 procedures in By-Law Article 3.14 and the existing procedures in By-Law Article 5.5.

Article 12 could also be passed in amended form to address the significant problems that it creates, if the Articles are not referred. CTO&S recommends that course of action.

CTO&S Recommendation

CTO&S is, after a number of meetings with Town Counsel, recommending revisions to Article 12. The amendments proposed by CTO&S, discussed below with respect to each affected section of By-Law Article 3.14, are designed to address potential violations of federal and State law and

of the State constitution inherent in Article 12, to avoid inequitable application of $300 per day fines, to ensure strong protection for privacy rights, to enhance due process protections, and to reduce the likelihood of unnecessary and expensive litigation.

CTO&S recommends "FAVORABLE ACTION" on Article 12 if Articles 12 and 13 are not referred and if the CTO&S amendments are adopted.

CTO&S recommends "FAVORABLE ACTION" on Article 13 (which incorporates Article 12) if the CTO&S amendments to Article 12 are adopted to address the significant issues that have been identified. If the CTO&S amendments to Article 12 are not adopted, CTO&S would recommend "NO ACTION" on Articles 12 and 13.

Recommended Amendments to Article 12

By-Law Section 3.14.2

CTO&S retains language in Section 3.14.2 that makes clear the ability of the Chief Diversity Officer ("CDO") to attempt to mediate disputes outside of and prior to the filing of a formal complaint. (Such clarification is also added by CTO&S to Section 3.14.3(B)(vi)). CTO&S believes that efforts to de-escalate and resolve issues before the initiation of the formal complaint process, if the parties agree in a given situation, is healthy and should be expressly encouraged.

Indeed, pre-complaint mediation can benefit all parties. It reduces the exposure of the respondent to the burden and expense of the complaint process, and it could result in an agreement to provide actual compensation to an injured party. Article 12, unlike the MCAD procedures or litigation, provides no compensation to injured parties. Petitioners seek to impose a $300 per day fine, but even in the narrow class of cases where such a fine might legally be imposed it would be paid to the Town and not to the injured party.

In addition, and consistent with the advice of Town Counsel, CTO&S has retained language that strongly recognizes the privacy rights of individuals, including language ensuring that the obligation of protect privacy rights applies to both the CDO and the Commission.

By-Law Section 3.14.3(B)

The petitioners' proposal under Article 12 would allow third persons to file complaints "on a person or organization's behalf" regardless of whether that person or organization had authorized the complaint or even wanted the complaint filed and pursued. Town Counsel has noted that this language violates constitutional principles for standing under Massachusetts law. Petitioners, though explicitly recognizing that a third-party complainant "may ultimately have no standing to continue the complaint," have nonetheless chosen to disregard Town Counsel's advice and to impose burden and expense on the parties and the Town by allowing an unconstitutional complaint to be filed, forcing the respondent to challenge the third party's standing.

The language substituted by CTO&S tracks the language utilized by the MCAD and adheres to the State's jurisprudence on constitutional standing. It provides that a complaint can be filed by an aggrieved person or an organization whose members include aggrieved persons, or by "a duly authorized" representative of such person or a "duly authorized third party, such as an attorney" representing a person or organization. The CTO&S language complies with the law.

Article 12 also states that complaints "are not limited to" discrimination regarding employment, housing, and other areas covered by federal and State law. CTO&S has inserted explicit language stating that complaints are limited to incidents "that are illegal under federal or State law."

Petitioners stated during the CTO&S hearing that it was their intent to, for example, allow complaints regarding "neighbor vs. neighbor" disputes. As a matter of policy, CTO&S does not believe that such disputes should be subject to escalation through a formal complaint process, although the CDO could certainly engage in pre-complaint mediation efforts as noted above.

Moreover, Town Counsel has made clear that as a matter of law the Town is limited by the Home Rule Amendment. Under Section 7(5) of the Home Rule Amendment, art. 89 of the Amendments to the Massachusetts Constitution, municipalities have no power "to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power." For example, Brookline was barred from enacting rent control without express home rule authorization. Marshall House, Inc. v. Rent Review Grievance Bd. of Brookline, 357 Mass. 709 (1970). And the case that allowed Worcester to investigate and identify discrimination, with only mediation and persuasion as remedies, did so because the ordinance "at the most … can encourage a person by moral suasion to do what the law already requires him to do." Brookline does not have authority to define (and fine) new areas of civil liability. Trying to do so is itself unlawful.

Section 3.14.3(B) as proposed by petitioners, states that "this Bylaw shall be applicable to students, faculty and staff of the School Department to the extent permitted by federal law." CTO&S has added language to make clear that the complaint process when applied to School employees and students must comply with State as well as federal law, in addition to corrective language discussed below with respect to other sections of the By-Law.

By-Law Section 3.14.3(B)(i)

CTO&S has expressly added the word "disability" to make clear that access and accommodations should be applied in cases beyond limited English proficiency.

By-Law Section 3.14.3(B)(ii)

The Complaint Committee ("CC") established by Article 12 is a quasi-judicial body with significant authority. In the view of CTO&S, the CC should be appointed by a body that is accountable to the public, rather than by a body which is itself appointed. In addition, it should be appointed by a body with the visibility to reach more broadly into the community to attract candidates. Thus, CTO&S recommends that the Select Board rather than CDICR be the appointing authority.

CTO&S has also modified the language to make clear that attorneys who are appointed to the CC should have civil rights experience. Given the quasi-judicial power of the CC and its focus on civil rights and discrimination claims, an estate planning or corporate tax attorney would bring little relevant expertise to the table.

By-Law Section 3.14.3(B)(iii)

Under Article 12 as proposed by the petitioner, a complaint could be made by an unauthorized third party (as discussed above) without any knowledge of an alleged discriminatory act or,

indeed, without any basis at all for making the complaint. The complaint could be oral or written. This would be sufficient to trigger the complaint process and impose costs and reputational damage through unfounded complaints. The petitioners have countered with the argument that the Open Meeting Law permits executive sessions where "reputation" and "character" are being discussed, but this language is permissive rather than mandatory and applies only to the reputation and character of "individuals" and not, for example, to a local business whose reputation might be severely damaged by a frivolous complaint. CTO&S, therefore, would continue to allow initial complaints to be made orally or by an informal writing, but has included language tracking the MCAD requirement that such initial complaints be reduced to a formal writing signed and verified by the complainant, under the pains and penalties and perjury, that the allegations are true to the best of their knowledge.

CTO&S has also included customary language that "cleans up" provisions relating to the statutory time for filing complaints, again utilizing language from the MCAD clarifying the situation where the filing deadline could be extended by a continuing violation or pattern of discrimination or until the complainant knew or should have known of the unlawful conduct. CTO&S also clarifies language providing for the statute of limitations to be "tolled" as well as language recommended by Town Counsel regarding the extension of time for good cause or excusable neglect.

CTO&S has also deleted language stating that the CC "encourage the public to file complaints." Such language would put the CC into a prosecutorial rather than quasi-judicial role. It would be similarly repugnant to the concepts of fairness and due process for a federal court judge to urge the U.S. Attorney to bring more drug-related prosecutions before the judge for verdicts and sentencing.

By-Law Section 3.14.3(B)(v)

Because the appeal from dismissal of a complaint by the CDO is a quasi-judicial action, CTO&S has included language requiring such appeals to be heard by a member of the CC who is a civil rights professional, that is, by a CC member with applicable civil rights experience. CTO&S has included language stating that such appeals, which are still in a pre-investigative stage, will be non-public and confidential.

By-Law Section 3.14.3(B)(vi)

As noted above, this section makes clear that alternative dispute resolution can occur, by agreement of the parties, prior to the filing of a formal complaint. It also does not limit arbitration to the formal American Arbitration Association process, but allows the parties to mutually agree to another arbitrator.

By-Law Section 3.14.3(B)(vii)

In order to reduce potential bias, CTO&S includes language stating that the CC member involved in the investigation be different from the CC member who decided the prior appeal stage under Section 3.14.3(B)(v). CTO&S also includes language stating that investigations under this provision will be non-public and confidential.

By-Law Section 3.14.3(B)(viii)

The appeal from the investigation is a quasi-judicial action with significant potential consequences. CTO&S thus includes language specifying that the 3-person appeals panel should include at least one and, if practicable, two civil rights professionals. In addition, in order to better protect the due process rights of both the complainant and the respondent, CTO&S would allow time for the parties to conduct discovery as provided in Section 3.14.3(B)(ix) (see below).

By-Law Section 3.14.3(B)(ix)

Giving the CC the authority and discretion to issue subpoenas, to serve interrogatories, to compel the attendance of witnesses, and so on, was a subject of controversy. CTO&S has determined to retain these provisions, but in order to ensure due process to both parties in the proceeding, has included language limiting the discretion of the CC by requiring it to invoke such processes if reasonably requested by either the complainant or the respondent. This will permit both parties to undertake a form of discovery in the proceedings.

By-Law Section 3.14.3(B)(x)(a)

Section 3.14.3(B)(x)(a) deals with relief for discriminatory acts committed by an employee, agent, or official of the Town or the Town itself and, as drafted by petitioners, provides relief in the form of referral to the Select Board.

Section 3.14.3(B) makes the CC complaint process applicable to the faculty and staff of the School Department (as well as Brookline Public School students, as discussed below). However, petitioners' version of Article 12 inexplicably eliminates any involvement of, or even notice to, the Superintendent of Schools and School Committee. Under Massachusetts General Laws ch. 71, sec. 42, the Superintendent of Schools has the authority to review and approve the dismissal of teachers and employees at a school, and to dismiss district-level employees. Because under Massachusetts law discipline of School Department employees does not rest in the Select Board, CTO&S has amended 3.14.3(B)(x)(a) to preserve the existing by-law concept that recommendations regarding actions by School Department faculty and staff should be provided to the Superintendent and School Committee.

By-Law Section 3.14.3(B)(x)(b)

Section 3.14.3(B)(x)(b) deals with relief against persons and organizations other than the Town and Town employees and officials covered by the previous subpart.

This subsection (b), as amended by the petitioners, provides for issuance of a notice of violation, referral to the Select Board, and "to the extent the law allows" the imposition of a $300 per day fine for each violation of the By-Law. In summary, this section violates State and federal law regarding complaints against students. And, because the potential use of the $300 per day fine is sharply constrained by the Home Rule Amendment to the Massachusetts Constitution, CTO&S recommends that the language in subsection (b) providing for fines be deleted to avoid costly and ultimately fruitless litigation and to negate the inequitable application of fines.

Because Brookline Public School students are not Town employees covered by subsection (a), those who are 18 or older would be subject to subsection (b) and $300 per day fines, a concept that CTO&S rejects, even for out-of-school conduct. Moreover, State and federal law places student discipline in the hands of the principal, headmaster and Superintendent and a 2019 opinion letter from outside counsel to the School Committee concludes that it would violate State

and federal law to remove school disciplinary proceedings from the Schools. CTO&S has concluded that, at a minimum, Brookline Public School students should not be subject to the $300 per day fine and CC recommendations involving acts by students should also be referred to the Superintendent and School Committee, even if they occur outside the school setting. The CTO&S amendments accomplish this.

In addition, under the Home Rule Amendment to the Massachusetts Constitution, the Town cannot enact law "governing civil relationships except as an incident to or as an exercise of an independent municipal power." Thus, Bloom v. Worcester approved an anti-discrimination ordinance that provided for "moral suasion" (mediation, persuasion, and so on, as in the 2014 and 2019 versions of Brookline By-Law 3.14) rather than fines. As Town Counsel has advised CTO&S and petitioners, the "to the extent the law allows" provision could allow files to be applied to businesses licensed by the Town if found to be "incident to an exercise of an independent municipal power." Thus, Town Counsel has pointed out (and CTO&S agrees) that fines could not be applied to housing including landlord-tenant relations, health care, private employment, and private education. The Home Rule Amendment would accordingly also bar fines in the areas of credit, any public accommodations not licensed by the Town, and the sale of property. Thus, the CC might be able to level a $300 per day fine against a local business such as a nail salon that discriminated against a customer, but would not be able to levy any fine against, for example, the Bank of America if it discriminated against multiple individuals in refusing credit or mortgages; against a major landlord that discriminated hundreds of times on the basis of race, the use of Section 8 certificates, or the presence of children; or against a major private employer discriminating against hundreds of employees on the basis of sex. Given the constraints of the Home Rule Amendment, the $300 fine would not only lead to burdensome litigation but could only be applied in a bizarre inequitable manner targeting a limited group of local businesses.

By-Law Section 3.14.3(B)(xi)

This section prohibits retaliation or intimidation of witnesses. CTO&S retains the $300 fine for each occurrence or day when a violation of this section occurs, to ensure an enforcement tool. It believes that protecting the integrity of the CC proceedings would be authorized under the Home Rule Amendment and would not be considered an impermissible effort to govern civil relationships. To ensure access to established legal process, CTO&S also makes clear that either party would not violate the section by seeking relief, as from frivolous claims or claims impermissible under the Home Rule Amendment, through proceedings before an administrative or judicial body.

By-Law Section 3.14.3(B)(xii)

The provision requiring the CC (as opposed to CDICR) to take "appropriate corrective actions" to reduce or eliminate by-law violations has been removed. The CC's role is that of a quasi-judicial body that should fairly decide complaints brought before it rather than that of a body taking "corrective actions" outside of those claims. For similar reasons, as noted above, CTO&S removed the provision in Section 3.14.3(B)(iii) requiring the CC to "encourage the public to file complaints."

By-Law Section 3.14.4

CTO&S has included language reiterating the importance of procedural rules and regulations to implement the CC complaint process.

By-Law Section 3.14.5

CTO&S has included language recommended by Town Counsel (see above) reiterating the need to respect the privacy of individuals.

By-Law Section 3.14.8

As emphasized by Town Counsel, the CC complaint process will require training and the adoption of regulations and rules of procedure. The language makes clear that the complaint process can become effective when such steps have been accomplished.

Recommended Action on Article 13

Amendments to By-Law Article 5.5. Warrant Article 13 proposes amendments to the Town's Fair Housing By-Law, Article 5.5 of the General By-Laws, to incorporate the CC complaint process outlined in Article 12 as the enforcement mechanism. It also deletes the existing enforcement procedures under By-Law Article 5.5.

As noted above, the Home Rule Amendment prohibits the imposition of fines in areas covered by the Fair Housing By-Law (e.g., housing, credit). If the proposed CTO&S Amendments to Article 12 are adopted, including the elimination of impermissible fines, CTO&S recommends "FAVORABLE ACTION" on Article 13.

Amendments to By-Law Articles 10.2 and 10.3. Finally, Warrant Article 13 would amend Articles 10.2 and 10.3 of the By-Laws to provide for enforcement by CDICR of the $300 per day civil fine. Because CTO&S recommends that civil fines be retained for instances of retaliation and intimidation, CTO&S recommends "FAVORABLE ACTION" on the provisions of Warrant Article 13 that would amend By-Law Articles 10.2 and 10.3.

If the Recommended Amendments to Article 12 Fail

If the recommended CTO&S amendments to Articles 12 and 13 are not adopted, CTO&S would recommend "NO ACTION" on Articles 12 and 13, believing that it would be preferable to retain existing enforcement mechanisms rather than to put into place a system riddled with flaws under State and federal law, utilizing a punitive and inequitable system of fines, and breeding costly and burdensome litigation.