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

Introduction

Warrant Article 12 would create procedures 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). 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 granting a new Complaint Committee ("CC") subpoena power and the authority to levy $300 per day fines (2022 Articles 12 and 13).

Warrant Article 13 would apply the enforcement procedures of Article 12 to By-Law Article 5.5 (the Fair Housing By-Law) and would amend By-Law Articles 10.2 and 10.3 to permit imposition of the $300 per day fines.

To be clear, CTO&S has viewed its role as being limited: recommending language designed to ensure, to the extent possible, that if there is favorable action on Articles 12 and 13, the Articles comply with federal and State law and the State constitution, avoid penalties that could well be viewed as inequitable, ensure strong protection for privacy rights, enhance due process protections, and reduce the likelihood of unnecessary and expensive litigation. CTO&S believes that the Petitioners are in agreement with the language included with this report, except that Petitioners would include a provision in By-Law Section 3.14.3(B)(x)(b) providing for $300 per day fines.

Thus, Town Meeting will likely first decide whether Articles 12 and 13 should be referred (if such a motion is made). If the Articles are not referred, Town Meeting will then debate the Articles, starting with either the CTO&S language or language offered by Petitioners (which, as noted, should be identical, other than the language regarding fines). CTO&S has identified three issues which are the most likely to be the subject of proposed amendments:

- whether the Complaint Committee created under Article 12 should have the authority to issue fines of up to $300 per day;
- whether there should be authority for the Complaint Committee to issue subpoenas and compel testimony; and
- whether the new By-Law should apply to employees, agents, officials and, particularly, students of the Public Schools.

CTO&S believes that these are ultimately "political" issues to be decided by Town Meeting, and offers amendments that provide options with respect to each of these issues. The issues are discussed below.

After these and any other amendments are resolved, Town Meeting will ultimately determine:

- whether the approach laid out in Articles 12 and 13 should be adopted with a "favorable action" vote, or whether the Town should retain the existing By-Laws, which would be the effect of a "no action" vote.

CTO&S views the issue of whether Articles 12 and 13 should be adopted, like the three subsidiary issues, to be a "political" decision that should ultimately rest with Town Meeting.

Thus, in an effort to narrow the issues for Town Meeting, CTO&S and the Petitioners have essentially agreed on language as a "starting point" for the debate (except that Petitioners have included fines and CTO&S has not). Town Meeting will decide about fines, subpoenas/compulsory process, and application to the Schools (and perhaps other amendments that may be raised). Ultimately, Town Meeting will decide whether to adopt the Article 12 approach at all.

Background – The Home Rule Amendment to the Massachusetts Constitution

Town Counsel Joe Callanan has provided CTO&S with a remarkable education about municipal authority under Massachusetts law. Under Section 7(5) of art. 89 of the Amendments to the Massachusetts Constitution, the so-called "Home Rule Amendment," 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."

Town Counsel has pointed to Bloom v. Worcester, 363 Mass. 136 (1973), which allowed that city to investigate and identify discrimination with only mediation and recommendations to the City Manager as remedies, with the Supreme Judicial Court stating that the ordinance was permissible because it was "concerned at most with adherence by persons in the city to those laws relating to unlawful discrimination which are already in effect and which do govern their civil relationships" and that the ordinance "at the most … can encourage a person by moral suasion to do what the law already requires him to do." Id. at 146-47.

On the other hand, in Marshal House, Inc. v. Rent Review & Grievance Bd. of Brookline, 357 Mass. 709 (1970), the Court struck down Brookline's rent control by-law, which limited rents and imposed fines prior to the State legislature explicitly authorizing rent control. The Court found that Brookline was precluded from regulating the landlord-tenant relationship. In the course of its opinion, the Court rejected the argument that the "police" power to, for example, protect against injury from fire or badly lighted passageways justified rent control; "a municipal law regulating a civil relationship is permissible (without prior legislative authorization) only as an incident to the exercise of some independent, individual component of the municipal police power." Id. at 717-18.

Fines

That background brings us to some of the specifics of Article 12. The potential use of the $300 per day fine is sharply constrained by the Home Rule Amendment – if, indeed, fines are to be permitted at all. As noted above, Bloom v. Worcester approved an anti-discrimination ordinance that provided only for "moral suasion" (mediation and recommendations to the City Manager) rather than fines. That sort of "moral suasion" is the approach taken by the 2019 Conquest Amendments that will remain in place if Articles 12 and 13 are not passed. Those 2019 Amendments, leading to recommendations (e.g., to the Select Board, Superintendent and School Committee) can be seen as "~~strike throughs~~" in Warrant Article 12. They correspond to the recommendations to the City Manager approved in Bloom v. Worcester but would be replaced if Article 12 were passed.

Town Counsel has noted that we may be able to argue that the "exercise of an independent municipal power" language allows the Town to fine, for example, a local bar, restaurant or tattoo parlor, because they receive licenses from the Town. But Marshal House brings even that argument into question, since the Court looked at municipal powers independently and individually. Thus, while the Town might be able to fine a local bar, restaurant or tattoo parlor for unsanitary conditions or equipment, there would be question as to whether the "independent" and "individual" municipal power to protect public health extended to regulations regarding discrimination, just as the power to regulate public safety (fire, lighting) in rental buildings did not permit the imposition of rent control.

Thus, Town Counsel has pointed out (and CTO&S agrees) that in the absence of municipal licensing fines could not be applied to housing including landlord-tenant relations, health care, private employment, and private education. In corresponding fashion, it would appear that the Home Rule Amendment would also bar fines in the areas of credit, any public accommodations not licensed by the Town, and the sale of property, even if there were some narrow area of local business activities where fines could be levied.

This could lead to a situation where the $300 per day fine could arguably be levied against a local business such as a pizza parlor licensed by the Town, but not against, for example:

- the Bank of America, over which we have no municipal power, if it discriminated against hundreds of individuals in refusing credit or mortgages;
- a major landlord that had repeatedly discriminated on the basis of race, the use of Section 8 certificates, or the presence of children; or
- a major private employer engaged in salary discrimination against its entire workforce on the basis of sex.

Petitioners have argued that fines are needed to get respondents to "cooperate" and to "change behavior." Petitioners attempt to thread the needle by imposing fines only "to the extent the law allows." While this qualifying phrase might permit fines to pass muster during the Attorney General's review of the By-Law, it is simply a recipe for inequitable application and expensive and burdensome litigation down the road. As discussed above, the largest and worst potential offenders would not be subject to fines at all, and would have both the resources and incentive to successfully challenge any fines the Town tried to impose. Local businesses could, on the other hand, be faced with $300 per day fines. Even if those fines were unlawful because the Town was exceeding its independent, individual municipal power, the local business would be confronted with costly and burdensome litigation. Given the dictates of the Home Rule Amendment, CTO&S believes that retaining the $300 per day fine would be inherently inequitable.

CTO&S has therefore not included fines in its "starting point" language. If the CTO&S language is used as the starting point for debate, CTO&S has provided an amendment should Town Meeting wish to include fines. It has also provided an amendment to delete fines from Petitioners' proposal, should that be the starting point of debate. This is ultimately a decision for Town Meeting; CTO&S has attempted to provide the options.

The Subpoena Power

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, was a source of

substantial controversy during hearings. As noted, CTO&S believes that giving these powers to a Town body such as the CC is a "political" decision for Town Meeting.

It is argued, on the one hand, that such language will allow the Complaint Committee to get to the bottom of cases and that, in any event, subpoenas would not be enforced without a Select Board decision authorizing Town Counsel to file a court action under G.L. c.233, §10. A Justice of the Supreme Judicial Court or a Superior Court would then have discretion to decide whether to enforce the subpoena.

On the other hand, it is argued that the subpoena power (and, indeed, the entire Article 12 structure) creates an unnecessary and burdensome municipal process that is inherently inequitable. Other agencies such as the Massachusetts Commission Against Discrimination can already enforce anti-discrimination laws and provide actual relief to injured parties. The remedies under Articles 12 and 13 simply provide for findings and recommendations and, perhaps in some cases, fines which would be paid to the Town but not to the injured party. Moreover, subpoenas if challenged could only be enforced judicially. Large deep-pocketed entities could readily afford this litigation, while individuals or small local businesses would be forced either to comply or to face expensive litigation costs.

CTO&S has included an amendment that would allow Town Meeting to remove the subpoena authority from Article 12. It views this issue as a "political" issue for Town Meeting to decide.

The Schools and Students

The language of Article 12 would make the new enforcement structure "applicable to students, faculty and staff of the School Department to the extent permitted by State and federal law (including, but not limited to, Title IX)." Findings and recommendations against employees, agents or officials of the School Department would be provided to the Superintendent or, in the case of the Superintendent, to the School Committee. Findings and recommendations against a student in the Brookline Public Schools would be provided to the Superintendent. Students would be subject to the enforcement procedures only if they were adults, that is, older than 17.

Town Counsel has expressed concerns about the applicability of Article 12 to the Schools, and the language that now appears narrowed the initial warrant article, which had School-related complaints being referred to the Select Board instead of solely to the Superintendent or School Committee.

The School Department and School Committee have not raised any objections to CTO&S, and one of the Petitioners is a member of the School Committee. That being said, CTO&S has been provided with an October 23, 2019 opinion letter from outside counsel John Foskett, Esq. of Valerio, Dominello & Hillman LLC to Julie Schreiner-Oldham, then Chair of the Brookline School Committee. This opinion letter concluded that the 2019 proposal "as it would affect discrimination claims by or against PSB students would be neither valid nor advisable." The opinion letter argued that adding a third party to the PSB process "either initially or as a further step" would prevent Title IX, Title VI and bullying investigations from being "resolved expeditiously."

The opinion letter also states that student discipline is clearly the province of School officials under G.L. c.71, §§ 37H, 37H ½, and 37H ¾, and 603 CMR 53.00 and that under federal and

State law personally identifiable student information cannot be disclosed to third parties who are not "authorized school personnel" without the consent of parents or eligible students.

The issue of applying the Article 12 procedure to Public School students (again, complaints could be made only against "adult" students, i.e., 18 or older) is fraught with difficulty. Mahanoy Area School District v. B.L., 594 U.S. ___ (2021), concluded that the First Amendment limited the authority of schools to punish off-campus speech (in that case vulgar language criticizing a school team and its coaches), at least where it did not lead to a "substantial disruption" of school activity or "threatened harm to the rights of others." Thus, the 2019 opinion letter would apparently not apply to at least some off-campus conduct which would not be subject to Public School disciplinary procedures and thus would allow the Article 12 procedures to be applied.

The 2019 opinion letter indicates that any on-campus student acts would be entirely within the province of the School Department and thus Article 12 would not apply at all. It would also appear that Article 12 could be invoked against some ill-defined group of off-campus acts committed by students, where those acts were not subject to school discipline under Mahanoy. Unfortunately, there is no bright line defining the off-campus conduct that is subject to School discipline (and therefore beyond the reach of Article 12) and the off-campus conduct that is not subject to School discipline (and therefore could be reached by Article 12).

If the By-Law is to apply to students at all, perhaps the best that can be done is to further limit By-Law Section 3.14.3(B) to state that if Article 12 is adopted, "this Bylaw shall be applicable to students for off-campus incidents, faculty and staff of the School Department to the extent permitted by State and federal law (including, but not limited to, Title IX)." This would at least remove on-campus incidents from the reach of Article 12, leaving open to further litigation the question of whether a particular off-campus incident was not within the exclusive jurisdiction of the Schools and thus the application of Article 12 was "permitted by State and federal law."

Conclusion

Each Town Meeting Member will have the opportunity to decide whether the procedures outlined in Article 12 are necessary and appropriate for Brookline. Each Town Meeting Member will also have the opportunity to decide the scope of those procedures (e.g., fines, subpoena authority, and perhaps other issues) if Article 12 is implemented. CTO&S considers many of these issues to ultimately be political in nature, and thus has sought to provide a road map with various options in the potential votes that follow.