

M. HICKEY DRAFT – FOR BOARD DISCUSSION ON 4/29/19

Background

2018 Fall Annual Town Meeting Article 39 – “Appointment and constitution of zoning board of appeals, and assignment of counsel” – Sponsored by Julian Munnich, et al. – was referred to the Board of Selectmen (the “Board”) for their review of the following matters:

- Whether the Zoning Board of Appeals should be elected or appointed.
- If by appointment, whether by the Board of Selectmen, or by other appointing authority.
- Whether the number of Members and Associate Members should remain the same, or if some other number should serve.
- To review the current ZBA practice of not considering aspects of the Zoning Bylaw, and statute, beyond specific relief required that has been identified by the building commissioner.
- To review, and consider changes to, Town Bylaws Article 22, “TOWN COUNSEL”
- For the Board of Selectmen to draft a set policy, and or criteria, for intervening in the statutory functions of town bodies and their requisite access to Town Counsel.

Following referral, the Board tasked an informal (Board) working group comprised of Mr. Hickey and Ms. Salamoff to investigate the matters referred and report back (with the intent of reporting to Town Meeting at an appropriate time). Mr. Hickey contacted the Sponsor in January to advise him of the foregoing. (Mr. Hickey had spoken with the Sponsor prior to 2018 FATM about the intent of Art. 39.)

Discussion/Summary of Findings

Whether the Zoning Board of Appeals should be elected or appointed.

The Sponsor explained his view that the Town should consider (from an accountability standpoint) whether the ZBA ought to be elected (rather than appointed, as they are in Natick). Zoning Boards of Appeal are “quasi-judicial” boards, and the vast majority of municipalities provide for an appointed board – presumably to remove such Boards from the political process. As one commentator noted in a 2015 Boston Globe editorial on this question: *“It is notable that the section in state law governing zoning boards of appeals membership only references the appointment of members, not their election. In my opinion, that is because the Legislature rightly understood that zoning boards of appeals should not come under the sway of politics.”* Further, Mr. Hickey conducted an informal canvassing of other communities in the Commonwealth and found only one (1) in which the ZBA which is elected. It is noted that the Sponsor did not provide evidentiary support for the proposition that an elected ZBA would be a better model than an appointed ZBA. For these reasons, the Board finds no compelling reason to move to an elected ZBA model in Natick.

If by appointment, whether by the Board of Selectmen, or by other appointing authority.

The Sponsor expressed concerns about what goes into the Board’s appointment process; for example, whether Board members conduct an adequate level of due diligence prior to making appointments. The Sponsor noted that some televised “interviews” for appointment are brief affairs in which candidates are not questioned extensively, and he questioned whether a different appointing authority might conduct a more rigorous appointment process. Mr. Hickey suggests that this concern may stem from a lack of transparency and understanding relative to the manner in which the Board handles such

appointments. Often, the Board receives information about an applicant in advance of their open (televised) meetings. These materials include a statement of interest, background qualifications, resume, etc. These materials are typically reviewed by Board members in advance. Given that it's also often the case that the Board receives one (1) applicant for one (1) vacancy, provided the applicant appears to be well-positioned to serve, the "public interview" can be a rather cursory event. That said, Board members take great interest in the composition of the ZBA. In some cases, Board members have actively recruited residents to serve on the ZBA. And, at this time, the ZBA is comprised of a well-rounded group of professionals – including at least two (2) attorneys – (one, an expert in land use litigation and zoning; another, also an engineer) – a professional planner, a builder (residential construction), a manager of commercial construction projects, and a landscape architect. The Board respectfully suggests that the current composition of the ZBA demonstrates the Board's ability to assemble a qualified, dedicated and well-rounded group of volunteers to serve on the ZBA and carry out its functions in a capable and professional manner.

Whether the number of Members and Associate Members should remain the same, or if some other number should serve.

The Town increased the "size" of the ZBA years ago. It is our understanding that this was done, at least in part, with the intent of providing a better opportunity to handle an ever more demanding caseload and to deal with issues such as conflicts of interest as they arise. In any case, no evidence has been presented that returning to a smaller (e.g. 3-member) board will help the ZBA better manage its caseload. In fact, Mr. Hickey advises that, in his experience as a member of the ZBA for approximately ten years (including three as Chair), having a "larger" board (the ZBA is comprised of 5 Members and 3 Associates) provided better flexibility in navigating absences, conflicts of interest, scheduling challenges, etc. For these reasons, the Board finds no compelling reason to alter the size of the Natick ZBA.

To review the current ZBA practice of not considering aspects of the Zoning Bylaw, and statute, beyond specific relief required that has been identified by the building commissioner.

To better understand the concern behind this item, Mr. Hickey arranged an in-person meeting which included himself, Ms. Salamoff, the Sponsor, Mr. Jackowitz (Chair of the ZBA), Mr. Errickson (Community & Economic Development Director), and Mr. Gusmini (Building Commissioner). This led to a productive discussion, during which meeting attendees sought to understand each other's perspectives relative to roles and responsibilities. The Sponsor indicated that he felt the ZBA sometimes took a somewhat narrow approach to certain cases – specifically, declining to consider issues that were not expressly before it for consideration or relief. Mr. Jackowitz felt that it is not for the ZBA to conduct a "de novo" zoning analysis – whereby the ZBA would look for potential violations or issues outside the specific relief being requested. Mr. Jackowitz further noted that the ZBA is "not an enforcement board" – and that the enforcement of the Town's Zoning Bylaws is the Building Commissioner's responsibility (i.e., as the "Code Enforcement Officer"). Meeting attendees then discussed specific case examples where there appeared to be genuine disagreement as to whether the "right" result was reached. The Sponsor indicated that he was concerned by certain instances in which he had learned of certain ZBA cases – including those which may be of interest to the Planning Board – from informal discussions "on the street". Mr. Hickey then inquired whether the Planning Board was still advised of pending ZBA cases. The Sponsor advised that this was no longer done (as it was when Mr. Hickey served on the ZBA), and that this practice had evidently been discontinued by a past Planning Board Chair. Mr. Hickey suggested

that the practice was useful in the sense that it encouraged communication between these two “sister”-boards, and recalled that the Planning Board would, at times, offer useful recommendations to the ZBA relative to pending cases – in particular, relative to cases requiring review/relief by both boards. It was therefore agreed that this practice should be reinstated. It was also suggested by the Sponsor that abutter notices could be crafted in a manner which provides more detailed information and encourages citizen engagement. It was therefore agreed that such notices would be revised to include language encourage abutters to review files/applications in advance of scheduled meetings, and to raise any questions and/or concerns with the Building Department. In summary, it appears that there are certain philosophical differences of opinion relative to the ZBA’s role, and also valid concerns relative to room for improved communications among Planning and Zoning Board members and support staff. The Board encourages these key stakeholders to consider best practices and to find ways to ensure better collaboration, and mutual understanding relative to their respective roles and responsibilities. The Board offers its continued support for this effort.

To review, and consider changes to, Town Bylaws Article 22, “TOWN COUNSEL”

(and)

For the Board of Selectmen to draft a set policy, and or criteria, for intervening in the statutory functions of town bodies and their requisite access to Town Counsel.

The Board is taking a number of steps at this time to take a fresh and objective look at Town Counsel services, the Town Counsel model as a whole, and key Town stakeholder access to the legal advice and services they require. The Board has appointed a Town Counsel Screening Committee (officially formed as of April 3, 2019), and it has engaged the Collins Center based out of the University of Massachusetts Boston to interview key stakeholders about legal services and various issues relating thereto. Further, the Board is actively considering the appointment of a Town Counsel Study Committee to review, study, analyze and report on possible changes to the Town Counsel model – with a scope that would encourage collaboration with the Town Counsel Screening Committee and the Collins Center. In short, the Board is fully-engaged in a responsive effort to examine the Town Counsel model holistically. The Board therefore recommends that these various efforts be allowed to take their course and looks forward to receiving and considering the findings and recommendations that result. The Board further welcomes the Sponsor’s engagement with these efforts.