

# Memo

**To:** Ronald Bergstrom, Speaker, Assembly of Delegates  
**From:** Robert S. Troy, County Counsel *RST*  
**Date:** December 14, 2015  
**Re:** Proposed Resolution 15-07

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This will respond to your request for my Opinion as County Counsel as to whether Proposed Resolution 15-07 can be lawfully voted by the Assembly of Delegates pursuant to Section 2-6 of the Barnstable County Charter. I conclude that the Resolution mechanism of the Charter is not the appropriate vehicle for the Assembly to pursue its concerns, as expressed in the Minutes of the December 2, 2015 meeting. I predicate this conclusion on the language of Section 2-7 of the Charter that imposes the responsibilities of inquiry and investigation squarely on the Assembly of Delegates "sitting as a committee of the whole" and not the Speaker of the Assembly. In my Opinion, the Charter does not permit the Assembly to delegate its responsibilities under Section 2-7 to the Speaker. I also conclude that the Assembly has broad and plenary authority to pursue its expressed concerns about the issues identified at its last Meeting through its express powers in the Barnstable County Charter under Section 2-7. I respectfully recommend to the Assembly that it pursue any action that any of its members believe to be in the public interest under that provision of the Charter entitled "Inquiring and investigation."

Section 2-6 of the Charter is titled "Prohibition." Its intent, in this context, is to prohibit members of the Assembly to "influence" at least two members of the County Commissioners to dismiss, appoint or promote "any person to any position in the executive branch" of County government. This section, however, cannot be interpreted to bar elected

public officials from expressing opinions about the direction of county government or how they perceive the functions of county operations could be improved. These rights are guaranteed by the First Amendment to the United States Constitution that elected public servants enjoy. Because two of the members of the County Commissioners and Delegate Taylor informed the Committee that there had been no discussions on this matter outside of the requirements of the Open Meeting Law, I conclude that there was no attempt to "influence" the Board of Regional Commissioners to act in violation of the "prohibition" set forth in Section 2-6.

An essential predicate for a violation of Section 2-6 requires an effort by an Assembly Delegate or Delegates to "influence" at least two members of the County Commission "to dismiss, to appoint or to promote" a person to an executive branch position. Hiring, firing and promoting individuals to county positions requires compliance with various federal and state (including the Open Meeting Law) legal requirements as well as compliance with the Charter. The December 2, 2015 Minutes of the Assembly do not contain any reference to any lawful proceedings undertaken to either dismiss, appoint, or promote any individual within the County structure. On the contrary, the Assembly record appears to document improperly posted Meeting Notices under the Open Meeting Law and a series of unauthorized and unofficial conversations about possible scenarios that might not be within the framework of the Charter or otherwise permitted under state and federal law. In the circumstances described by the Assembly Minutes, I conclude that the failure to comply with legal requirements makes the described actions improbable at this point in time and therefore outside the realm of Section 2-6.

The current County Administrator has been under contract with the County since October 30, 2013. On October 29, 2014, the Commissioners entered into a second Contract continuing his services until June 30, 2015. On June 10, 2015, the Commissioners and the County Administrator executed an "Employment Agreement Extension" that provides a contract term "...until the start date of a new County Administrator that will be hired on a non-interim basis." All three of the Agreements were signed by unanimous vote of the County Commissioners. There is no suggestion in the Minutes of the December

2, 2015 meeting that there has been any effort to curtail the contract of the County Administrator through any legal means authorized by the County Commissioners. Such a scenario would have to be accomplished by agreement or by the removal process contained in the Barnstable County Personnel Policy. As such, I conclude that there is no vacancy in the office of the County Administrator of Barnstable County. Therefore, since there is no record of any proposed action to "dismiss" or "appoint" or "promote" any individual to the filled position of County Administrator through required legal process, I conclude that the provisions of Section 2-6 are not applicable to the circumstances identified by the Assembly as matters of concern.

Nonetheless, the Minutes of the Assembly do express concerns about efforts to fill the position of County Administrator on a "non-interim basis." Members of the Assembly articulated various expressions of bewilderment about how the lawful processes of the Charter and federal and state law have ostensibly been supplanted by unofficial behind-the-scenes actions outside of the scope of public scrutiny. Refer to the statements in the Minutes by Delegates Zuern (p.8); Killion (p.9); O'Malley (p. 12); McCutcheon (p. 15) and King (p. 15). Pursuant to Section 2-7, the Assembly has broad jurisdictional powers to inquire and investigate concerns it has over County Government. Any one or more of its members may "request a report on any aspect of the Cape Cod regional government by making such a request, in writing to the board of regional commissioners. The assembly of delegates may require the board of regional commissions and the administrator to appear before the assembly of delegates sitting as a committee of the whole and to bring before the assembly of delegates such records and reports, and such officials and employees...as the assembly of delegates shall deem necessary to insure clarification of any matter under study."

At its December 2, 2015 Meeting, the County Commissioners were responsive to the questions and concerns of the Delegates. If any Delegate deems this response inadequate and seeks supplementation and further information, the Charter empowers the Assembly to require the Commissioners and any needed employees and records and documents to appear before it under its powers to inquire and investigate under Section 2-7.

It is therefore my Opinion as County Counsel that the Assembly of Delegates should pursue any further proceedings, if deemed necessary, under Section 2-7 of the Charter. For reasons described herein, I conclude that the provisions of Section 2-6 of the Charter are inapplicable to the current circumstances as detailed in the Assembly's proceedings of December 2, 2015.

RST:geo

Cc: County Commissioners  
County Administrator  
Janice O'Connell, Assembly of Delegates