

# Memo

**To:** Jack Yunits, County Administrator  
**From:** Robert S. Troy, County Counsel *RST*  
**Date:** September 13, 2016  
**Re:** Cape Light Compact

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The Cape Light Compact has proposed a revision of a 2000 "Administrative Services Agreement" that was agreed to by Barnstable County. Analysis of the proposed revision raises serious concerns that must be addressed by both organizations. While the Cape Light Compact and the County can work cooperatively to address these issues, the proposed revision of the current document is fraught with problems that must be analyzed before decisions are made by the respective parties as to how to move forward.

This Memorandum addresses the myriad of issues that have developed between the Cape Light Compact and Barnstable County since the inception of an Inter-Governmental Agreement between Barnstable and Dukes Counties and all of the twenty-one municipalities that comprise these two Massachusetts Counties. In order to properly ascertain what is required to address the issues regarding the modification of the current "Administrative Services Agreement," some fundamental starting points need to be highlighted.

First, Barnstable County is governed by its Charter (hereinafter "Charter"), and to the extent that the provisions of the Charter are consistent, by its Administrative Code.

Second, the Cape Light Compact is currently governed by its Sixth Amended and Restated Inter-Governmental Agreement of the Cape Light Compact, dated November 18, 2015 (Hereinafter, "IGA"). The sole authority supporting the IGA is the legislature enactment fund in M.G.L. Chapter 40, Section 4A.

Third, to the extent that the Charter and the IGA conflict, the provisions of the Charter supersede and nullify the terms of the IGA.

### ANALYSIS

These precepts guide us to the following conclusions:

- 1) The Barnstable County Charter and the Administrative Code of Barnstable County do not recognize the Cape Light Compact (hereinafter "CLC") as a Department of Barnstable County.
- 2) Barnstable County is authorized to enter into the IGA pursuant to Sections 1-5 and 1-6 of the County Charter as well as M.G.L. Chapter 40, Section 4A. Moreover, Section 1-5 of the Charter authorizes the County to enter into agreements with other governmental units and to become "the agent for any other unit or units of government... in the performance of any and all functions, services, activates and undertaking for which the contracting unit determines to employ the county as its agent."
- 3) CLC is not organized as a distinct corporation but exists solely as a result of contractual agreements between its constituent parts. CLC has not Federal or state corporate status.
- 4) CLC does not have a Federal Tax Identification Number.
- 5) CLC's authority to enter into contracts is ambiguous.

- 6) The Legislature has not recognized CLC in any legislative enactment.
- 7) Barnstable County has acted as the "Fiscal Agent" for CLC as a result of an Agreement executed by the County Commissioners and CLC in April of 2002.
- 8) CLC has proposed a "First Amended and Restated Administrative Services Agreement between Barnstable County and Cape Light Compact" that includes additional provisions relating to employee benefits and liabilities related to CLC's operations and a plethora of other issues
- 9) Although Barnstable County's current role is purportedly limited to acting as the "Fiscal Agent" for CLC, it currently includes the employees of CLC as County employees for employee benefits and retirement purposes.

These conclusions require that CLC act to clarify its legal status and bring the organization into compliance with federal and state law. Some, although not all, of potential remedies include:

- 1) CLC could seek to amend its IGA and subsequently seek to become a Department of Barnstable County through the Ordinance process under the Barnstable County Charter. Section 6-2 of the Barnstable County Charter establishes guidelines for circumstances where "Any unit of local government may contract with the Cape Cod regional government to provide for any local service function which the unit of local government is authorized to perform, provided that such contract shall first be ratified or approved by the legislative body of such unit of local government." Section 6-3 of the Charter provides that "Whenever two or more units of local government in Barnstable county shall determine, by the adoption of substantially similar resolutions of their legislative bodies, that the operations, procedures or functions of such units can more effectively and efficiently be exercised or provided as a consolidated activity performed by a single office or agency in which to consolidate any or all of the operations,

procedures, functions performed or carried out by such individual offices or agencies.”

- 2) CLC could seek legislative approval for recognition as a regional entity providing specific services; and subsequently seek recognition as a distinct governmental entity under state health and retirement agencies as well as seek its own federal tax ID.

The terms of Chapter 40, Section 4A require that any IGA created under its authority enable a governmental entity or more than one governmental entity to carry out “operations, procedures or functions” that a governmental entity is “authorized to perform.” Since the County Charter expressly provides for implementation of regional services and includes authorization for the County to act as a “Fiscal Agent,” the County appears to be an appropriate vehicle for CLC. This decision, however, is within the authority of CLC’s governing board and the County Commissioners and I defer to these bodies the decision as to how to proceed.

### DISCUSSION

Analysis of the Proposed "First Amended and Restated" Administrative Services Agreement contrasted with its April 5, 2000 predecessor reveals a startlingly different document. The original document includes a list of services that the Compact could lawfully seek under the IGA and the County could properly grant under the provisions of its Charter. The proposed document’s scope far exceeds its predecessor, ostensibly proposing the CLC reimburse the County for costs related to various federal and state regulations governing health insurance, retirement eligibility and employee unemployment, retirement and OPEB liability and various other issues. These issues could be successfully negotiated by the County and CLC but only after CLC clarifies its relationship with the County.

This requires analysis of MGL Chapter 40, Section 4A. This statute, which is the predicate of an IGA, confers authority on governmental units to “*enter into an agreement with another governmental unit to perform jointly or for that unit’s services,*

*activities or undertakings which any of the contracting units is authorized by law to perform...*” (Italics added). The statute proceeds to enumerate the requirements on an IGA: “All agreements put into effect under this section shall provide sufficient safeguards for all participants, including, but not limited to: Accurate and comprehensive records of services performed, costs incurred, and reimbursements and contributions received; the performance of regular audits of such records; and provisions for officers responsible for the agreement to give appropriate performance bonds.

A review of the Proposed Agreement against the initial statutory requirements of MGL Chapter 40, Section 4A requires the conclusion that the Proposed Document does not comport with Legislative mandates. Each criteria should be analyzed:

- 1) “Accurate and comprehensive records of services performed.” This task should be the responsibility of CLC and it should be reflected in the any agreement with the County.
- 2) “Costs incurred.” This too, should be recorded as a responsibility of CLC in the any agreement with the County.
- 3) “Reimbursements and contributions received.” Similarly, any agreement between CLC and the County should include a provision requiring CLC to transmit this information to the County.
- 4) “Performance of regular audits” should be required in any agreement and in a form satisfactory to the County Director of Finance.
- 5) “Performance Bonds” similarly should be included in any agreement and in amounts satisfactory to the County Director of Finance.

The statute provides additional requirements for an IGA: “The agreement shall also require that periodic financial statements be issued to all participants....All bills and payrolls submitted for work

done under any such agreement shall be plainly marked to indicate that the work was done under authority thereof. Any reimbursement for or contribution toward the cost of such work shall be made at such intervals as the agreement provides. The amount of reimbursement received under any such agreement by any governmental unit shall be credited on its books to the account of estimated receipts, but any funds received under the provisions of section fifty-three A of chapter forty-four for contribution toward the cost of such work may be expended in accordance with the said provisions. The equipment and employees of a governmental unit while engaged in performing any such service, activity or undertaking under such an agreement shall be deemed to be engaged in the service and employment of such unit, notwithstanding such service, activity or undertaking is being performed in or for another governmental unit or units."

Analysis of this portion of MGL Chapter 40, Section 4A suggests that any Agreement under this statute include:

- 1) "All bills and payrolls submitted for work done under any such agreement shall be plainly marked to indicate that the work was done under authority thereof." I interpret this obligation to fall on the CLC. In my Opinion, this statutory provision should be reflected in an Agreement between the County and CLC.
- 2) "Any reimbursement for or contribution toward the cost of such work shall be made at such intervals as the agreement provides." My review of the proposed Agreement does not include a provision defining the "intervals" at which time reimbursement or contribution shall be made.
- 3) "The amount of reimbursement received under any such agreement by any governmental unit shall be credited on its books to the account of estimate receipts, but any funds received under the provisions of section fifty-three A of chapter four-four for contribution toward the cost of such work may be expended in accordance with the said provisions." The

proposed Agreement does not include this provision that is required by state law.

- 4) "The equipment and employees of a governmental unit while engaged in performing any such service, activity, or undertaking under such an agreement shall be deemed to be engaged in the service and employment of such unit, notwithstanding such service, activity or undertaking is being performed in or for another governmental unit or units."
  
- 5) This provision of the statute that enables Intergovernmental Agreements such as the IGA establishing CLC is the most problematic in assessing the current structure of the CLC. As I read the statute, it allows qualifying governmental units to enter into contracts with other governmental units "to perform jointly or for such other unit or units, services that "any of the contracting units is authorized by law to perform." This authorization is tantamount to permitting a governmental unit to either jointly perform or delegate to another governmental unit authority to provide services, but it does not authorize the creation of an entity that is distinct from either of the governmental units. In short, this requires that CLC be a jurisdictional subordinate of one of the governmental units. The language in the proposed Agreement fails to track the statute. Indeed, the problem is more pervasive: CLC cannot act as an independent entity based on the authority in this statute. This leads to the ultimate conclusion that CLC must take steps to include itself under the aegis of Barnstable County government as a County Department (through the Ordinance process, as outlined in the Charter and through amendment of its IGA) or seek legislative approval from the General Court to seek recognition as a separate and distinct governmental entity outside the scope of MGL Chapter 40, Section 4A.

I conclude that the proposed "First Amended and the Restated Administrative Services Agreement" does not satisfy the statutory requirements of M.G.L. Chapter 40, Section 4A.

It is therefore my Opinion, the County is constrained from entering into the Proposed Agreement unless CLC initiates action to clarify its legal status. If the County and CLC's intended goal is to include CLC under the aegis of its Charter, CLC must initiate action in some manner similar to those suggested herein. Otherwise, CLC must seek legislative approval for its functions as the current configuration appears to be outside of the requirements of MGL Chapter 40. Section 4A.

If you have any questions, please do not hesitate to contact me.  
Thank you.

RST:geo

Cc: County Commissioners  
Finance Director