

CHARTER REVIEW COMMITTEE - AGENDA ITEM

ZONING BOARD OF APPEALS – Can it be elected?

Statements have been made by several individuals that the ZBA cannot be elected. Below are four findings on this topic, all of which suggest that the ZBA can be either elected or appointed.

#1 Massachusetts General Law seems to allow for the charter to govern.

MGL Chapter 40A, Section 12

Section 12. Zoning ordinances or by-laws shall provide for a zoning board of appeals, according to the provisions of this section, **unless otherwise provided by charter**. The mayor subject to confirmation of the city council, or board of selectmen shall appoint members of the board of appeals within three months of the adoption of the ordinance or by-law.

<https://malegislature.gov/Laws/GeneralLaws/PartI/TitleVII/Chapter40a/Section12>

#2 Town of Truro counsel reviewed 2021 ATM Warrant article 37

The warrant article that proposed that the ZBA be elected was reviewed by counsel and not found to be incorrect in that regard.

#3 Other Towns in the Commonwealth have an elected ZBA

Research revealed that the towns of Great Barrington and Taunton have elected ZBAs.

The Great Barrington Zoning Board of Appeals (ZBA) is an elected five-member board, with two alternate members.

<https://www.townofgb.org/zoning-board-appeals>

The Taunton Zoning Board of Appeals is a five member board with two alternate members. Members are elected at large in a City wide election every two years.

<https://www.taunton-ma.gov/zoning-board-appeals>

#4 KP Law (town counsel) provided an opinion memo that says that ZBA can be elected or appointed

See memo from KP Law that follows.

Part I ADMINISTRATION OF THE GOVERNMENT

Title VII CITIES, TOWNS AND DISTRICTS

Chapter ZONING
40A

Section 12 BOARDS OF APPEAL; MEMBERSHIP; RULES

Section 12. Zoning ordinances or by-laws shall provide for a zoning board of appeals, according to the provisions of this section, unless otherwise provided by charter. The mayor subject to confirmation of the city council, or board of selectmen shall appoint members of the board of appeals within three months of the adoption of the ordinance or by-law. Pending appointment of the members of the board of appeals, the city council or board of selectmen shall act as the board of appeals. Any board of appeals established hereunder shall consist of three or five members who, unless otherwise provided by charter, shall be appointed by the mayor, subject to the confirmation by the city council, or by the selectmen, for terms of such length and so arranged that the term of one member shall expire each year. Each zoning board of appeals shall elect annually a chairman from its own number and a clerk, and may, subject to appropriation, employ experts and clerical and other assistants. Any member may be removed for cause by the appointing authority upon written charges and after a public hearing. Vacancies shall be filled for unexpired terms in the same manner as in the case of original appointments. Zoning ordinances or by-laws may provide for the appointments in like manner of associate members of the board of appeals; and if provision for associate members has been made the chairman of the board may designate any such associate

member to sit on the board in case of absence, inability to act or conflict of interest on the part of any member thereof, or in the event of a vacancy on the board until said vacancy is filled in the manner provided in this section.

The board of appeals shall adopt rules, not inconsistent with the provisions of the zoning ordinance or by-law for the conduct of its business and for purposes of this chapter and shall file a copy of said rules with the city or town clerk. In the event that a board of appeals has appointed a zoning administrator in accordance with section thirteen said rules shall set forth the fact of such appointment, the identity of the persons from time to time appointed to such position, the powers and duties delegated to such individual and any limitations thereon.



Great Barrington MASSACHUSETTS

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Zoning Board of Appeals

The Great Barrington Zoning Board of Appeals (ZBA) is an elected five-member board, with two alternate members. Alternate members may represent an absent regular member. The ZBA has the power to hear and decide upon appeals by persons who have been unable to obtain a permit or enforcement action in accordance with Great Barrington's Zoning By-Law and related zoning provisions of Massachusetts law. Also, it has the power to hear and decide on applications for variances from the requirements of the By-Law and applications for special permits under the "grandfather" provisions of the By-Law.

Staff Contacts

Name

Christopher Rembold

Elected ZBA Members

Name	Position	Term Expires
Ron Majdalany	Chair	2023
Stephen McAlister	Vice Chair	2024
Carolyn Ivory		2022
Madonna Meagher		2024
Michael Wise		2023

Associate Members (Appointed)



Published on *City of Taunton MA* (<https://www.taunton-ma.gov>)

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Zoning Board of Appeals

The Taunton Zoning Board of Appeals is a five member board with two alternate members. Members are elected at large in a City wide election every two years. The purpose of the Zoning Board of Appeals is to hear cases for Variances, Special Permits and Comprehensive Permits.

Variances are cases where a petitioner is requesting a waiver of a zoning requirement. In cases where a hardship is determined to exist, the board may grant a variance from the requirements of the zoning ordinance allowing the project to proceed with the necessary relief.

A Special Permit is a request that is appropriate in some areas of the Cities but not in all areas. A determination of whether a proposal is detrimental to the public good must be made by the Board.

Comprehensive Permits are permit requests that are designed to create affordable housing through the waiver of some zoning requirements. Meetings are generally held once a month on the fourth Thursday at 6:00 PM in the Chester R Martin Council Chambers. However, this is subject to change and special meetings are held as needed.

Board Members:

Dennis Ackerman
Steven Vieira
George Moniz
Wayne Berube
Craig Faria
Seth Turner
John Joyce

Staff Contacts:

Kevin Scanlon
Denise Paiva

Phone:

(508) 821-1051

Address

*Gertrude M Boyden Wildlife Refuge
1298 Cohannet Street
Taunton, MA 02780
United States*

See map: [Google Maps](#)

When:

Meetings are generally held once a month on the fourth Thursday. However, this is subject to change and special meetings are held as needed

Where:

Bob,

You have requested an opinion regarding the possibility of, and process for, changing certain positions from elected to appointed. You ask further about potential implications of such changes.

In our opinion, in accord with the provisions of G.L. c.43B, §§10(a) and 13, adoption or amendment of a charter (whether through the statutory or Home Rule process) may be used to change any position from elected to appointed, excluding the Select Board and the Town Meeting, and regardless of whether that same position appears in the General Laws. Whether a board or position “should” be elected or appointed is a decision for the drafter and the legislative body. There are many factors to consider. The decision to appoint or elect a board is largely a policy decision and up to the Town’s discretion.

By way of background, a charter is a document that stands on equal footing with the General Laws with respect to certain matters. General Laws c.43B, §13 contains a number of local changes in government that are deemed “consistent with law”, including, but not limited to,

the provisions of any law relating to the structure of city and town government, the creation of local offices, the term of office or mode of selection of local offices, and the distribution of powers, duties and responsibilities among local offices. Such provisions may provide: that any particular local office shall be either elected or appointed; provided, however, that in any town having a board of **selectmen** the members of such board shall always be elected; provided, further, that in any city or town having a **school committee** the members of such committee shall always be elected; and provided, further, that in any town having a form of town meeting open to all of its registered voters the **town moderator** shall always be elected and in every other case all of the members of the legislative body shall always be elected...

For that reason, even if a General Law dictates the manner of selection and size of a board, a charter can change that, and such change is deemed consistent with state law. General Laws c.43B, §10(a) makes clear, however, that any changes “relating in any way to the composition, mode of election or appointment, or terms of office of the legislative body, the mayor or city manager, or the board of selectmen or town manager” cannot be changed, unless such a change is a result of a recommendation from an elected charter commission or a special act of the General Court.

Whether a position (other than Select Board, Moderator and School Committee) “should” be elected or appointed therefore is not fixed by the General Laws, and the Town may wish to consider the following in making a decision as to how to proceed.

1. History of Elections for that Office – How many elections for the particular office were contested in the last 10 years, including where there was a serious write-in candidate. How many appointments to the position have been made to fill vacancies? If there have been many contested elections and relatively few appointments, it would seem that there is a high level of interest in serving in the position.
2. Running for Office – If elections are not typically contested, and the same person is elected each year, questions may be asked as to whether there is sufficient interest in the position or whether people might be concerned about running for office (i.e., the actual process and campaign).
3. Qualifications for Office - Another issue that might be implicated if elections are not typically contested is whether the holder of the office needs specific skills to properly carry out the duties of that office. For example, the positions of Town Clerk, Town Accountant and Town Treasurer require particular skills. Often, when such positions are

elected, the voters are loath to make changes, and often no one will run against them. If this is the case, and there is concern that if and when that person retires, that the next person would lack necessary skills, is there interest in planning for the future by changing the position at this time to an appointed position?

4. Supervision with respect to Personnel Matters – It may also be appropriate to consider what level of daily support or supervision the office requires. Oftentimes, when the working conditions in one office are different than in other offices, resentment and frustration can result (i.e., the employees of one office work remotely). Be reminded that the statutory duties of the board or office, and the complexity or discretionary nature of them, should not be affected by a change of position from elected to appointed. For easy examples only, consider that regardless of whether the Town Treasurer is elected or appointed, municipal finance laws still apply. Similarly, regardless of whether the Conservation Commission is elected or appointed, the Commission will still be required to apply the standards set forth in the Wetlands Protection Act and relevant regulations.

5. Conflict of Interest Issues – Be reminded that elected officials are never permitted to “waive” a financial interest in a particular matter, and must recuse themselves from such matters or violate G.L. c.268A, §19, with serious repercussions. In contrast, an appointed official or employee with a financial interest in a matter can request a waiver from their appointing authority. The appointing authority may approve such a waiver if they find e “that the interest [disclosed in writing by the appointee prior to participation] is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee...”

If you have any further questions, or would like to discuss, please do not hesitate to contact me or Attorney Lauren Goldberg.

Very truly yours,
Janelle

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