

Nancy E. Glowa  
City Solicitor

Arthur J. Goldberg  
Deputy City Solicitor

Vali Buland  
First Assistant City Solicitor



Assistant City Solicitors  
Paul S. Kawai  
Samuel A. Aylesworth  
Keplin K. U. Allwaters  
Sean M. McKendry  
Megan B. Bayer  
Brian A. Schwartz

Public Records Access Officer  
Jennifer Simpson

## CITY OF CAMBRIDGE

Office of the City Solicitor  
795 Massachusetts Avenue  
Cambridge, Massachusetts 02139

December 11, 2017

Louis A. DePasquale  
City Manager  
City Hall  
Cambridge, MA 02139

### **Re: Appointment authority for Historical Commission members**

Dear Mr. DePasquale:

You have requested a legal opinion on the question of whether a Cambridge City Manager's appointments of Historical Commission members, including alternate members, are subject to confirmation by the Cambridge City Council. For the reasons stated below, I conclude that the City Manager's appointments of Historical Commission members and alternates are not subject to City Council confirmation.

This question arose when you, as the City Manager, transmitted to the City Council notification of your appointment of two alternate members to the Historical Commission as Item #3 on the City Manager's Agenda of October 23, 2017.<sup>1</sup> Your transmittal letter did not request City Council confirmation of these appointments, and the City Council did not vote to confirm the appointments at the October 23 meeting. However, on a motion of Councilor Kelley, the City Manager's Agenda Item relating to the notification was referred to the City Council's Government Operations, Rules and Claims Committee.

Your October 23 notification to the City Council of your appointments to the Historical Commission is consistent with past practice. For example, notice of prior Historical Commission appointments were transmitted to the City Council by former City Managers on June 15, 2009, September 26, 2011 and February 11, 2013, and it appears that those notifications were simply placed on file by the City Council each time, without any question raised about whether the Council had the authority to confirm those appointments. The long-time Executive Director of the Historical Commission has stated that, to his knowledge, the City Council has never had a confirmation vote on the appointment of Historical Commission members or alternates.

---

<sup>1</sup> The City's Plan E Charter, at G.L.c.43, §105 provides in part: "The city manager shall report every appointment and removal made by him to the city council at the next meeting thereof following such appointment or removal."

The question of whether the City Council has the authority to confirm the City Manager's appointments to the Historical Commission appears to have arisen in part because of language in Cambridge City Code §2.78.010 which states:

The Cambridge Historical Commission established under the Historic Districts Act, General Laws Chapter 40C, with all the powers and duties of an historic district commission, shall consist of seven members and three alternate members to be appointed by the City Manager **with the approval of the Council...**<sup>2</sup>

The Commission shall, in addition to the powers and duties contained in this chapter and under the Historic Districts Act as in effect from time to time, also have all the powers and duties of an Historical Commission as provided in Section 8D of General Laws, Chapter 40 as in effect from time to time.

Furthermore, G.L.c.40C, §4 provides in part that when a historic district commission is established, the members "shall be appointed in a city by the mayor, subject to confirmation by the city council...." However, in contrast, G.L.c.40, §8D (also referenced above in the quote from §2.78.010) provides in part that with regard to a historical commission: "that in cities having a city manager form of government, said appointments shall be by the city manager, subject to the provisions of the charter..." and that "alternate members may be appointed in like manner...."

The provisions of the Plan E Charter are clear with regard to the City Manager having the power to appoint employees and officials without City Council confirmation. The Charter, at G.L.c.43, §104, provides in part: "[The City Manager] shall make all appointments and removals in the departments, commissions, boards and offices of the city for whose administration he is responsible, except as otherwise provided in this chapter...." The Charter, at G.L.c.43, §105, provides in part: "[Employees] of the departments, commissions, boards and offices of the city for whose administration the city manager is responsible shall be appointed, and may be removed by the city manager." The Charter at G.L.c.43, §107 provides: "Neither the city council nor any of its committees or members shall direct or request the appointment of any person to, or his removal from, office by the city manager, or any of his subordinates, or in any manner take part in the appointment or removal of officers and employees in that portion of the service of said city for whose administration the city manager is responsible." There is a criminal penalty provided in G.L.c.43, §107 for any member of the city council who violates these provisions.

Generally, the City Manager is responsible for the administration of all departments, commissions, board and offices of the City, except that of City Clerk, City Auditor, any official appointed by the Governor and anybody elected by the voters. 18 Mass. Practice, Municipal Law and Practice §5.13 (5<sup>th</sup> ed.); see G.L.c.43, §18. The

---

<sup>2</sup> This reference to the approval of the Council in this section is in contrast to the ordinance provisions regarding appointments to the neighborhood conservation district commissions which provide only for appointment by the City Manager. Cambridge City Code §2.78.160A.

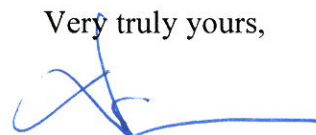
Historical Commission is one of those commissions for whose administration the City Manager is responsible.

The Plan E Charter provisions are statutory, and may not be superseded by local ordinances. Therefore, the City Council is not empowered by ordinance to impinge on the Charter powers of the City Manager. The language in Cambridge City Code §2.78.010 (quoted above) that purports to make the City Manager's appointments to the Historical Commission subject to Council approval conflicts directly with the Charter provisions that give the City Manager the sole authority to make such appointments, and is therefore of no effect.

The statutory language regarding the appointment of Historical Commission members and alternates in G.L.c.40, §8D provides that the City Manager has such appointment authority, subject to the provisions of the applicable charter. As stated, the Plan E Charter is clear that the City Manager has sole appointment authority for Historical Commission members and alternates, and that if any City Councilor in any manner takes part in the appointment or removal of officers and employees in that portion of the service of the City for whose administration the City Manager is responsible, that Councilor is subject to criminal penalty. G.L.c.43, §107. Although there is language in G.L.c.40C, §4 that historic district commission members are to be appointed by the "mayor<sup>3</sup>, subject to confirmation by the city council," that language conflicts with the City Manager's authority in the Charter and conflicts with the appointment powers of the City Manager over Historical Commission members in G.L.c.40, §8D. Also, to the extent that Cambridge City Code §2.78.010 may be interpreted as importing City Council appointment confirmation authority from the state law, it is an ordinance provision that conflicts with the Charter and is therefore superseded by the Charter.

Therefore, in my opinion, the City Manager's appointments of Historical Commission members and alternates are not subject to City Council confirmation.

Very truly yours,



Nancy E. Glowa  
City Solicitor

---

<sup>3</sup> In Cambridge, because of the Plan E Charter, many statutory references to the powers of a mayor, such as this one, refer to the City Manager.