

**EXTRA INFORMATION**  
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7/14/08

**Christine Joyce**

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**From:** Lauren Rosenzweig  
**Sent:** Saturday, July 12, 2008 12:49 AM  
**To:** Board of Selectmen  
**Subject:** FW: Acton/GenSel: Prohibitions on a member of the Board of Selectmen serving in another appointed position

At Terra's request I inquired of Town Counsel as to whether or not a Selectman could continue to serve on a committee to which he/she was appointed prior to becoming a Selectman. Town Counsel's opinion is below.

In summary, Town Counsel advises that a Selectman may complete their appointed term but not be reappointed. Therefore, since Terra's term on the Design Review Board ended as of June 30, she is no longer a member of that committee. However, as their liaison, she gets to interview and recommend her replacement.

Her term as an Alternate on the Historic District Commission would have expired on June 30, 2011. Therefore, she may continue her term as an Alternate until that time. I believe there are certain caveats that she must be aware of at times when her dual role may conflict—ie. a project that is reviewed by the HDC as well as the Board of Selectmen. I recommend that Terra inquire through the Town Manager as to what procedures she should follow in these cases. Also, HDC is a committee that is regulated under State Law as well as Town Bylaws. There may be special rules to follow based on state law as well.

Since there was some confusion on this issue, at the reappointment meeting Terra was voted as ending her term on the HDC as of June 30, 2008. If she wishes to continue her term, the Board of Selectmen needs to vote to reinstate her to complete her term. We can do so at our upcoming meeting.

Steve—can you add this to the consent agenda?

Lauren

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**From:** Steve Ledoux [mailto:sledoux@acton-ma.gov]  
**Sent:** Tuesday, July 08, 2008 3:11 PM  
**To:** Lauren Rosenzweig  
**Subject:** FW: Acton/GenSel: Prohibitions on a member of the Board of Selectmen serving in another appointed position

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When writing or corresponding, please be aware that the Secretary of State has determined that most email is a public record and, therefore, may not be kept confidential.

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**From:** Stephen Anderson  
**Sent:** Tuesday, July 08, 2008 2:13 PM  
**To:** Steve Ledoux; John Murray

7/14/2008

**Cc:** George Hall

**Subject:** Acton/GenSel: Prohibitions on a member of the Board of Selectmen serving in another appointed position

Dear Steve and John:

You have asked me whether there any prohibitions on a member of the Board of Selectmen (BOS) serving on another appointed policy or regulatory board in the Town. For example, the newest Selectman is an alternate member of the Design Review Board, a position appointed by the BOS.

The short answer is yes, there are certain restrictions. Most notably, the State Ethics Act, G.L. c. 268A, § 21A, provides as follows (emphasis added):

Except as hereinafter provided, **no member of a municipal commission or board shall be eligible for appointment or election by the members of such commission or board to any office or position under the supervision of such commission or board.** No former member of such commission or board shall be so eligible until the expiration of thirty days from the termination of his service as a member of such commission or board.

The provisions of this section shall not apply to a member of a town commission or board, if such appointment or election has first been approved at an annual town meeting of the town.

State Ethics Act, G.L. c. 268A, § 20 (which generally prohibits a municipal employee from having a financial interest, directly or indirectly, in a contract made by a municipal agency of the same town, in which the town is an interested party of which financial interest), also contains the following additional prohibitions with respect to a member of the BOS:

This section shall not prohibit an employee or an official of a town from holding the position of selectman in such town nor in any way prohibit such employee from performing the duties of or receiving the compensation provided for such office; provided, however, that such selectman shall not, except as hereinafter provided, receive compensation for more than one office or position held in a town, but shall have the right to choose which compensation he shall receive; provided, further, that no such selectman may vote or act on any matter which is within the purview of the agency by which he is employed or over which he has official responsibility; and, provided further, that no such selectman shall be eligible for appointment to any such additional position while he is still a member of the board of selectmen or for six months thereafter.<sup>[1]</sup> Any violation of the provisions of this paragraph which has substantially influenced the action taken by any municipal agency in any matter shall be grounds for avoiding, rescinding or cancelling the action on such terms as the interest of the municipality and innocent third parties may require

However, in addition to the exception in the last sentence of § 21A (appointment or election approved at an annual town meeting of the town), there are several other situations in which a member of the BOS may appropriately serve (or continue to serve) on a board appointed by or under the supervision of the BOS, such as those situations discussed below:

1. **Subcommittees**

The BOS may create subcommittees to deal with certain matters committed to it by statute or a bylaw. Such subcommittees may be limited to a subset of the BOS members or they may be broadened to include participation by outsiders as well. The hallmarks of a subcommittee are that (a) it does not have any independent standing or authority under statute or bylaw, (b) it can be dissolved at the pleasure of the BOS, and (c) its role is limited to the development of information or recommendations concerning a function or duty of the BOS. Subcommittees are often formed to screen candidates for positions subject to the BOS's hiring authority, to review building proposals or other purchasing issues, or for collective bargaining purposes.

2. **Boards or Committees Not "Supervised" by the BOS**

In Acton, the BOS has very broad powers. For example, the Town Charter specifies in § 4-1(b) and § 4-1(f) that:

- "The executive powers of the town shall be vested in the board of selectmen, who shall have all the

powers given to boards of selectmen by general laws or otherwise.”

- “The board of selectmen shall act through the adoption of policy directives and guidelines which are to be implemented by officers and employees appointed by or under its authority.”
- The BOS “shall make appointments to the offices specified in section 4 - 2 of this Article, and they may make appointments to temporary posts and advisory committees they create for special purposes.”
- The BOS directly hire the Town Manager, Town Accountant, Town Clerk, and Town Counsel.
- “Town agencies may be formed by the selectmen” and by “the town manager with the approval of selectmen” (in addition to by vote of the town or by-law).

Section 4-2 of the Town Charter lists various boards and commissions appointed by the BOS

Acton/Boxborough Cultural Council  
 Acton Community Housing Corporation  
 Board of Appeals  
 Board of Appeals (Assoc. Members)  
 Board of Assessors  
 Board of Assessors (Alternate Members)  
 Board of Health  
 Board of Health ( Associate Members)  
 Cemetery Commissioners  
 Commission on Disabilities  
 Conservation Commission  
 Council on Aging  
 Election Officers  
 Hanscom Field Advisory Commission  
 Historical Commission  
 Historic District Commission  
 Historic District Commission (Alternate Members)  
 Metropolitan Area Planning Council Representative  
 Personnel Board  
 Planning Board  
 Planning Board (Associate Members)  
 Recreation Commission  
 Registrars of Voters

Given these powers, much of the Town’s offices and positions are “under the supervision of” the BOS for purposes of § 21A.

However, there may well be some boards or commissions that are not appointed by or under the “supervision” of the BOS so that a BOS member may serve on the board or commission while also serving on the BOS. These could include for example (a) certain committees created by statute or bylaw where a BOS member serves *ex officio*, (b) committees whose sole role is to make recommendations to Town Meeting, or (c) committee otherwise not “supervised” by the BOS. (Even if § 21A were construed to prohibit a situation in the first instance, § 21A would allow the Town, at each annual town meeting, to authorize any town board to elect or appoint its own members to serve on these standing committees).

### 3. **Appointments Made before Election of the Appointee to the BOS**

Finally, it is not uncommon for a person who has already been serving the Town in an appointed capacity (e.g. the Planning Board) to run for a seat on the Board of Selectmen. (Town employees appointed by the BOS may also be elected to the BOS.) Section 21A expressly limits the eligibility of a person who is already a member of the BOS from being appointed by the BOS to another position under its supervision. It is not a *per se* violation of § 21A for a person who was appointed to another board before he or she was elected as a member of the BOS to continue to serve on the other appointed board for a period no longer than the remainder of the existing term.

However, there are several cautions for any BOS member so inclined:

- The BOS member is not eligible to be re-appointed for a new term on the other board once the original term expires.
- If there is a substantial amount of time left on the term of the prior board appointment, the newly elected BOS member should resign from the appointed board position rather than serving out the full remaining term. The reason for this is that, according to the State Ethics Commission, in § 21A, “by erecting this appointment bar **the Legislature has once again sought to address the potential for abuse whereby selectmen could acquire or continue to hold a subordinate position by virtue of their incumbency in the office of selectmen.**” EC-COI-93-19 (emphasis added). The longer the BOS member holds on to the other prior appointment, the more the “potential for abuse” is exacerbated.
- The BOS member is not eligible to be “promoted” from an associate or alternate member to a regular member on the appointed board as this would constitute a new appointment. (Similarly, full-time or part-time employees of the Town are not eligible to receive promotions while on the BOS, as this would be considered a new appointment to a different position.)
- When participating in matters on the appointed board, the BOS member “shall not purport to represent the board [of selectmen] or exercise the authority of the board [of selectmen] except when specifically authorized by the board [of selectmen] to do so.” See Charter § 4-1(b).
- When a matter is under the jurisdiction of both the BOS and the appointed board, the potential for conflict exists between the member’s responsibilities in his or her different capacities. It may therefore be necessary for the member to recuse himself or herself from acting in one or the other capacity. (Section 20 requires this of an appointed employee.) Even if there is a situation where recusal is not specifically required, it is often the prudent course to protect the member and the boards on which he or she serves from unwarranted criticism.
- The time requirements for effectively discharging responsibilities on the BOS may as a practical matter make it difficult or impossible to effectively discharge the duties on the appointed board.

To the extent the newest member of the BOS was appointed as an alternate member of the Design Review Board before her election to the BOS, she may – subject to these caveats – continue to serve for a reasonable period on the Design Review Board. Whether and for how long it is wise for her to do so is something for her to consider in consultation with her fellow BOS members.

Finally, to address such issues going forward, the BOS may want to consider (a) the adoption under the Charter “of policy directives and guidelines which are to be implemented by officers and employees appointed by or under its authority,” or (b) the proposed adoption of a Town Bylaw on the issue. However, this area is quite complicated and further consultation and research would be required before the BOS should head in this direction.

If you have any questions regarding this matter, please feel free to call me.

Steve

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