



Cape Light Compact JPE
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June 17, 2021

BY: Federal Express and Electronic Mail

Board of Selectmen
Town of Chilmark
401 Middle Road
Chilmark, MA 02535

Re: Cape Light Compact JPE

Dear Selectmen:

The purpose of this letter is to inform the Town that the Governing Board of the Cape Light Compact JPE (the "Compact") intends to vote on certain proposed amendments to Compact's First Amended and Restated Joint Powers Agreement dated as of December 13, 2017 (the "JPA"). The vote to adopt the proposed amendments will take place at the July 21, 2021 Governing Board meeting, or at a later date if the Governing Board decides that a later date is more desirable or appropriate.

While the power to amend the JPA generally lies with the Governing Board, the Members are required to be given advance notice under Article XV of the JPA which provides for at least thirty (30) days advance written notice prior to taking a Governing Board vote to adopt such amendment(s).

The Governing Board is proposing to amend Article V(D), Manner of Acting and Quorum of the JPA. The specific text of the proposed amendments is set forth below. The proposed amendments are a response to the June 15, 2021 expiration of Governor Baker's pandemic Executive Order Suspending Certain Provisions of the Open Meeting Law (the "Order"). As you know, the Order expressly permitted members of a public body to participate in a meeting remotely. While the Order was in effect, all members of the Compact's Governing Board have been able to participate in meetings remotely and the Compact has been able to consistently achieve a quorum with nearly 80% of member towns participating remotely on average. Prior to issuance of the Order, obtaining a physical quorum was challenging, as the Compact has a large board consisting of one board member representing each of its twenty-one towns, and one representing Dukes County. The distance required to travel in order to attend board meetings in person is significant, especially for the seven Martha's Vineyard representatives who, even in good weather, need to devote an entire day to attend a two and a half hour meeting because of the required car and ferry travel. Winter storms often make in-person attendance impossible.

Working Together Toward A Smarter Energy Future

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During the months prior to the end of the emergency Order, the Board discussed options to continue its very successful remote participation practice. Recognizing that effectuating changes to the Open Meeting Law was out of its immediate control, the Board looked at its governing document, the JPA, for possible options to continue to allow Board members to participate remotely. Compact legal counsel, BCK Law, presented the Board with the option of changing the current quorum requirements of the Governing Board, Article V(D) of the JPA (see attached June 4, 2021 memorandum from legal counsel). Counsel proposed that a simple majority of the Executive Committee must be physically present to attain a quorum to satisfy the OML requirements. However, in order for a meeting of the Governing Board to convene and take action, additional Governing Board members equal to or greater than a simple majority of the Municipal Members of the Governing Board must be physically present or participating remotely. As set forth in the memorandum, Compact counsel is of the opinion that amending the JPA as set forth below will actually have the effect of increasing Governing Board member participation and thus eliminate (or at least significantly reduce) the need for the Executive Committee to meet in place of the full board, and thus, the amendments, when implemented, should expand Municipal Members' rights as their appointed Directors on the Governing Board should be able to participate in and vote virtually at all Governing Board meetings. Yesterday, the Governor signed legislation which extends the ability of members of public bodies to continue to participate remotely in public meetings through April 1, 2022. However, the Governing Board still intends to take a vote on the proposed amendments at its July board meeting.

The specific language of the proposed amendments to Article V(D) are as follows (**red text** is proposed new language, ~~strikeout text~~ is for suggested deletions, **blue text** has been moved:

A simple majority of the members of the Executive Committee (including the Chair or, in the Chair's absence, the person authorized to chair the meeting) must be physically present to attain a quorum. In order for a meeting of the Governing Board to convene and take action, additional members of the Governing Board equal to or greater than a majority of the Municipal Members of the Governing Board must be physically present or participating remotely (the "Additional Participating Governing Board Members"). By way of example, if the Governing Board has a total of twenty-one Municipal Members, and five members of the Executive Committee (including the Chair or, in the Chair's absence, the person authorized to chair the meeting) are physically present, an additional six Governing Board members must participate in person or remotely in order for a meeting to convene. If there are not enough Additional Participating Governing Board Members to attain a majority of the Governing Board, the provisions of Article V(C) (Executive Committee) shall apply to convening and taking action at a meeting to the meeting.

The Governing Board shall act by vote of a majority of the Directors of the Municipal Members present and voting at the time of the vote. Directors may participate in meetings remotely in accordance with applicable laws regarding remote participation, including the regulations of the Office of the Attorney General governing remote participation, 940 C.M.R. 29.10. [moved up and edited slightly] Unless altered by the Governing Board in accordance with this Agreement, each Municipal Member shall be entitled to select one (1) Director whose vote shall be

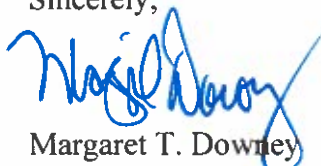
~~equal in weight to the Director of any other Municipal Member, except as expressly set forth in the succeeding paragraphs. Directors may participate in meetings remotely in accordance with the regulations of the Office of the Attorney General governing remote participation, 940 C.M.R. 29.10. [moved up] In accordance with 940 C.M.R. 29.10 and the Open Meeting Law, G.L. c. 30A, §§18-25, a simple majority of the Directors of the Municipal Members must be physically present to attain a quorum.~~ County Representatives shall not count towards a quorum as they have limited participation rights. Directors abstaining from voting shall be counted for meeting quorum purposes, but their votes shall not count with respect to the matters they abstain from voting on. By way of example, if ten (10) Directors from the Municipal Members are present and four (4) abstain from voting, and the remaining Directors split their votes four (4) in favor, two (2) against, the motion would pass.

While a quorum is present *plus the Additional Participating Governing Board Members*, unless another provision is made by law, this Agreement or by the Cape Light Compact JPE's own rules, all business shall be determined by a majority vote of the Directors of the Municipal Members then present and voting. *Directors participating remotely are to be considered present and may vote.* Notwithstanding the foregoing, any vote involving a matter concerning issues which would or could bear in a direct and material fashion on the financial interests of the Municipal Members shall be taken by a weighted vote in which the vote of each Director shall be weighted in the same proportion as the population of the Municipal Member such Director represents bears to the whole population of the Municipal Members of the Cape Light Compact JPE, such population as determined, in the case of Barnstable County, by the most recent federal census, or decennial census, and, in the case of Dukes County, by the most recent data available from the Martha's Vineyard Commission. In case of a dispute as to whether a vote shall be taken on a weighted basis as set forth in this paragraph or on a one (1) town, one (1) vote basis as set forth in the preceding paragraph of this subsection, the determination shall be made by weighted vote as set forth herein. Exhibit B sets forth the population for each Municipal Member, and provides an example of a vote taken in accordance with weighted voting procedures.

Members having any comments on the proposed amendments are being asked to provide them to their Director in advance of the July meeting. Compact counsel is also available to answer questions from your town counsel.

Please let me know if you have any questions.

Sincerely,



Margaret T. Downey
Cape Light Compact JPE Administrator

Enclosure

Cc: Tim Carroll, CLCJPE Director, via email
Robert Hannemann, Alternate CLCJPE Director, via email



ATTORNEYS AT LAW

The firm has attorneys admitted to practice in Massachusetts, Idaho, Vermont, District of Columbia and New Hampshire (Inactive)

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MEMORANDUM

TO: Cape Light Compact JPE Governing Board and Administrator
FROM: BCK Law, P.C./EMO
DATE: June 4, 2021
RE: Quorum Issues/Amending the JPA

I. BACKGROUND

The purpose of this memorandum is to provide the Governing Board of the Cape Light Compact JPE (the "Compact") with background information regarding the quorum requirements under the Open Meeting Law ("OML") and the Compact's First Amended and Restated Joint Powers Agreement dated December 13, 2017 (the "JPA"), and make recommendations regarding amending the JPA quorum provisions.

II. DISCUSSION

A. Applicable OML Provisions and New OML Bills

Under the OML, a quorum is defined as "a simple majority of the members of the public body, unless otherwise provided in a general or special law, executive order or other authorizing provision." G.L. c. 30A, § 18. The remote participation regulations promulgated under the OML separately require a quorum be physically present. 940 CMR 29.10(4)(b) provides as follows: "[a] quorum of the body, including the chair or, in the chair's absence, the person authorized to chair the meeting, shall be *physically present* at the meeting location, as required by M.G.L. c. 30A, § 20(d.)" (emphasis added.)

On March 12, 2020, in response to the pandemic, Governor Baker issued an Executive Order Suspending Certain Provisions of the Open Meeting Law (the "Order"). Among other things, the Order expressly permits all members of a public body to participate in a meeting remotely, and it suspended the Open Meeting Law's requirement that a quorum of the body as well as the body's chair be physically present at the meeting. The Governor is ending the pandemic emergency orders on June 15, 2021, though there are efforts to extend the OML Order

through September 1, 2021. New bills have also been introduced to permanently permit remote participation for all members of public bodies under the OML (H.B. 3213 and S.B. 2104), and hearings on these bills were held on June 1, 2021.

B. JPA Provisions Regarding Quorum

As noted above, under the OML, a quorum is defined as “a simple majority of the members of the public body, *unless otherwise provided in a general or special law, executive order or other authorizing provision.*” G.L. c. 30A, Section 18 (emphasis added). On the mass.gov website, there is a page for FAQs about the OML and it states “[t]he Open Meeting Law does not define what constitutes an ‘authorizing provision,’ but where a general or special law sets a body’s or type of body’s number of members or quorum requirement, no other provision can set a different number or requirement.” See <https://www.mass.gov/service-details/frequently-asked-questions-about-the-open-meeting-law-public-bodies-quorum-and>). In BCK’s view, the “authorizing provision” could be the Joint Powers Statute, or the JPA, or both. In 2017, the OAG agreed that the JPA could establish OML quorum requirements in communications with BCK.

In order for the Compact to address the difficulty in obtaining a physical quorum, it will need to lower the quorum to a number which is less than a majority of the Governing Board members. The current quorum requirement is as follows:

Art. V(D) Manner of Acting and Quorum.

The Governing Board shall act by vote of a majority of the Directors of the Municipal Members present and voting at the time of the vote. (emphasis added). Unless altered by the Governing Board in accordance with this Agreement, each Municipal Member shall be entitled to select one (1) Director whose vote shall be equal in weight to the Director of any other Municipal Member, except as expressly set forth in the succeeding paragraphs. Directors may participate in meetings remotely in accordance with the regulations of the Office of the Attorney General governing remote participation, 940 C.M.R. 29.10. In accordance with 940 C.M.R. 29.10 and the Open Meeting Law, G.L. c. 30A, §§18-25, a simple majority of the Directors of the Municipal Members must be physically present to attain a quorum. (emphasis added). County Representatives shall not count towards a quorum as they have limited participation rights. Directors abstaining from voting shall be counted for meeting quorum purposes, but their votes shall not count with respect to the matters they abstain from voting on. By way of example, if ten (10) Directors from the Municipal Members are present and four (4) abstain from voting, and the remaining Directors split their votes four (4) in favor, two (2) against, the motion would pass.

While a quorum is present, unless another provision is made by law, this Agreement or by the Cape Light Compact JPE’s own rules, all business shall be determined by a majority vote of the Directors of the Municipal Members then present and voting. Notwithstanding the foregoing, any vote involving a matter concerning issues which would or could bear in a direct and material fashion on the financial interests of the Municipal Members shall be taken by a weighted vote in which the vote of each

Director shall be weighted in the same proportion as the population of the Municipal Member such Director represents bears to the whole population of the Municipal Members of the Cape Light Compact JPE, such population as determined, in the case of Barnstable County, by the most recent federal census, or decennial census, and, in the case of Dukes County, by the most recent data available from the Martha's Vineyard Commission. In case of a dispute as to whether a vote shall be taken on a weighted basis as set forth in this paragraph or on a one (1) town, one (1) vote basis as set forth in the preceding paragraph of this subsection, the determination shall be made by weighted vote as set forth herein. Exhibit B sets forth the population for each Municipal Member, and provides an example of a vote taken in accordance with weighted voting procedures.

C. Role of Executive Committee

The Executive Committee has acted in lieu of the full Governing Board many times when the Governing Board failed to meet quorum requirements. This happened twice in 2019 (April and June meetings).

Art. V(C) Executive Committee.

*At such time as there are more than five (5) Municipal Members, there shall be an Executive Committee composed of no less than five (5) Directors elected by the Governing Board from among the Directors appointed by the Municipal Members. The Executive Committee shall be selected by majority vote of all of the Directors of the Municipal Members. **In addition to the delegation of powers set forth in Article V(A) (Powers of Governing Board), the powers of the Governing Board shall be delegated to the Executive Committee in the following circumstances: (i) when a quorum of the full Governing Board is not present for a regularly scheduled meeting; and (ii) exigent circumstances require Governing Board action, and there is insufficient time to convene a regular meeting of the Governing Board.** (emphasis added.)*

The Executive Committee shall conduct its business so far as possible in the same manner as is provided by this Agreement by the Governing Board. A majority of the Executive Committee shall constitute a quorum. The Executive Committee shall keep records of its meetings in form and substance as may be directed by the Governing Board and in accordance with the Open Meeting Law, G.L. c. 30A, §§18-25, and other applicable law.

Any Director who is not a member of the Executive Committee may attend and participate in Executive Committee meetings, but may not vote. Attendance may be in-person or by telephone.

From time to time upon request and at each meeting of the Governing Board, the Executive Committee shall make a full report of its actions and activities since the last meeting of the Governing Board.

If two (2) members of the Executive Committee object to the affirmative action taken by the Executive Committee, they may appeal such decision within forty-eight (48) hours of such action or vote by requesting a special meeting of the Governing Board in accordance with Article VI(C) (Special Meetings) which must occur as soon as possible

but no later fourteen (14) days after the Executive Committee action if the original Executive Committee action was necessitated by exigent circumstances. At such special meeting, the Governing Board may overturn the action or vote of the Executive Committee by a two-thirds vote of the Directors. A vote by the Executive Committee to take no action cannot be appealed.

D. Proposed Amendments to JPA

BCK proposes to amend the quorum provisions in the JPA to address the difficulties that the Compact has had in achieving a quorum of the full Governing Board. BCK recommends that a simple majority of the members of the Executive Committee (including the Chair or, in the Chair's absence, the person authorized to chair the meeting) must be physically present to attain a quorum to satisfy OML requirements. However, in order for a meeting of the Governing Board to convene and take any action, additional Governing Board members equal to or greater than a simple majority of the Municipal Members of the Governing Board must be physically present or participating remotely.

The specific language of the proposed amendments to Art. V(D) Manner of Acting and Quorum are as follows (**red text** is proposed new language, ~~strikeout text~~ is for suggested deletions, **blue text** has been moved):

A simple majority of the members of the Executive Committee (including the Chair or, in the Chair's absence, the person authorized to chair the meeting) must be physically present to attain a quorum. In order for a meeting of the Governing Board to convene and take action, additional members of the Governing Board equal to or greater than a majority of the Municipal Members of the Governing Board must be physically present or participating remotely (the "Additional Participating Governing Board Members"). By way of example, if the Governing Board has a total of twenty-one Municipal Members, and five members of the Executive Committee (including the Chair or, in the Chair's absence, the person authorized to chair the meeting) are physically present, an additional six Governing Board members must participate in person or remotely in order for a meeting to convene. If there are not enough Additional Participating Governing Board Members to attain a majority of the Governing Board, the provisions of Article V(C) (Executive Committee) shall apply to convening and taking action at a meeting to the meeting.

The Governing Board shall act by vote of a majority of the Directors of the Municipal Members present and voting at the time of the vote. Directors may participate in meetings remotely in accordance with applicable laws regarding remote participation, including the regulations of the Office of the Attorney General governing remote participation, 940 C.M.R. 29.10. [moved up and edited slightly] Unless altered by the Governing Board in accordance with this Agreement, each Municipal Member shall be entitled to select one (1) Director whose vote shall be equal in weight to the Director of any other Municipal Member, except as expressly set forth in the succeeding paragraphs. ~~Directors may participate in meetings remotely in accordance with the regulations of the Office of the Attorney General governing remote participation, 940 C.M.R. 29.10. [moved up]~~ In accordance with 940 C.M.R. 29.10 and the Open Meeting

~~Law, G.L. c. 30A, §§18-25, a simple majority of the Directors of the Municipal Members must be physically present to attain a quorum.~~ County Representatives shall not count towards a quorum as they have limited participation rights. Directors abstaining from voting shall be counted for meeting quorum purposes, but their votes shall not count with respect to the matters they abstain from voting on. By way of example, if ten (10) Directors from the Municipal Members are present and four (4) abstain from voting, and the remaining Directors split their votes four (4) in favor, two (2) against, the motion would pass.

While a quorum is present *plus the Additional Participating Governing Board Members*, unless another provision is made by law, this Agreement or by the Cape Light Compact JPE's own rules, all business shall be determined by a majority vote of the Directors of the Municipal Members then present and voting. *Directors participating remotely are to be considered present and may vote.* Notwithstanding the foregoing, any vote involving a matter concerning issues which would or could bear in a direct and material fashion on the financial interests of the Municipal Members shall be taken by a weighted vote in which the vote of each Director shall be weighted in the same proportion as the population of the Municipal Member such Director represents bears to the whole population of the Municipal Members of the Cape Light Compact JPE, such population as determined, in the case of Barnstable County, by the most recent federal census, or decennial census, and, in the case of Dukes County, by the most recent data available from the Martha's Vineyard Commission. In case of a dispute as to whether a vote shall be taken on a weighted basis as set forth in this paragraph or on a one (1) town, one (1) vote basis as set forth in the preceding paragraph of this subsection, the determination shall be made by weighted vote as set forth herein. Exhibit B sets forth the population for each Municipal Member, and provides an example of a vote taken in accordance with weighted voting procedures.

BCK believes that amending the JPA as set forth above will actually have the effect of increasing Governing Board member participation and thus eliminate (or at least significantly reduce) the need for the Executive Committee to meet in lieu of the full board. **Thus, the amendments when implemented should expand Municipal Members' rights as their appointed Directors on the Governing Board should be able to participate in and vote virtually at all Governing Board meetings.** Given current participation rates in the pandemic, Governing Board attendance should significantly improve from historic pre-pandemic rates if the proposed amendments are implemented. Of the 12 meetings held from April of 2020 through April of 2021, 9 meetings had 15 or more Governing Board members in. This is especially true for the Directors representing the towns on Martha's Vineyard. Should this trend continue, it may no longer be necessary to notice every meeting as both an Executive Committee and Governing Board meeting.

E. Power to Amend Quorum Provisions in JPA

In 2017, Jonathan Sclarsic, Esq. at the OAG told BCK that while there is no case law on point, the OAG takes the view that a board cannot set its own quorum requirements for public policy reasons. Therefore, if the Compact were to adopt his view, new quorum requirements would need to be approved by the JPE's Municipal Members. This opinion is not legally binding on the Compact, and Jonathan Sclarsic is no longer with the OAG. There are multiple

OML determinations that state the following standard for reviewing complaints: “[t]he Division of Open Government is charged specifically with reviewing complaints to determine compliance with the Open Meeting Law, G.L. c. 30A, §§ 18-25. The Division does not review for compliance with a public body’s own policies and procedures.” OML 2021–20; 2019-85 (“Our Division only has jurisdiction to evaluate Open Meeting Law violations and therefore we decline to review any allegations relating to Board regulations or municipal ordinance.”; 2013-162; OML determination dated 9/4/12 (Cambridge Historical Commission). In BCK’s opinion, because the proposed amendments will actually expand Municipal Members’ rights under the JPA, and the JPA only provides for Member approval of JPA amendments dealing with eligibility for membership/addition of Members (see Article XV of the JPA), liability of members and termination of the Compact, approval of the Municipal Members is not legally required.

III. RECOMMENDATIONS/NEXT STEPS

If the Governing Board wants to consider amending the JPA, we recommend lowering the threshold of the Governing Board quorum to a quorum of the Executive Committee (including the Chair). While this is a small number and thus could appear to be a drastic change, in reality the current practice is that when the Compact is unable to obtain a physical quorum of the full Governing Board, the meeting then becomes a meeting of Executive Committee. We are recommending adding a requirement that additional members be present (remotely or in person) to attain a majority of the full board before the Governing Board can convene and take action. In practice, this should mean that it is far less likely that the Executive Committee would need to be used in lieu of the full board and thus have the effect of increasing Municipal Members’ voting rights.

The Governing Board will need to decide if it wants to (i) follow the OAG’s guidance on requiring the Municipal Members to approve the amendments, or (ii) take the position the OAG has no authority over JPE governance and move forward with the Governing Board amending the JPA without seeking Municipal Member approval. If Municipal Member approval is sought, we recommend drafting a short memorandum explaining the necessity of the amendments, reaching out to KP Law, and offering to have a Zoom call with other Municipal Members’ town counsel to answer any questions regarding the proposed amendments. If the Governing Board decides to proceed with the board taking up the amendments, amending the JPA can be accomplished in a matter of a few months (30 days’ advance notice to members is required under Article XV of the JPA.)