

From: Margaret O'Neal [<mailto:selectboard@worthington-ma.us>]
Sent: Friday, April 01, 2016 1:27 PM
To: Joel Bard
Cc: Joe Boudreau; Charles Rose; Dick Wagner; Evan Johnson
Subject: Assistance please

Hello Joel,

*Below you will find a draft letter from Selectboard Chair Dick Wagner requesting your judgment and direction on all things **MLP**...;*

Thank you for your help in this matter,

Peg

Dear Joel,

This correspondence is seeking opinions and guidance with regard to the Town's establishment of a Municipal Light Plant for the purposes of bringing broadband services into Worthington. Below please find specifics with regard to actions already taken, actions not taken, and the guidance/opinions needed.

In February and May of 2011 the Town acted in accordance with MGL Ch. 164s36 to establish a Municipal Light Plant as authorized under MGL Ch. 164s47C. The votes were 72 to 5 on February 15th, and 78 to 2 on May 7th.

On May 14, 2011 the Town notified the Department of Public Utilities that it intended to exercise this authority to form a "cooperative" to construct and operate a Fiberoptic telecommunications system as authorized under section 47E of the same statute.

Early guidance from the leadership of WiredWest, to which the Town belongs, was for the Selectboard to then name themselves as the MLP board. The Selectboard did not follow this guidance which, in any case, was later disavowed by WiredWest legal counsel as inaccurate.

Nonetheless, on July 19, 2011, in accordance with other WiredWest instructions, the Selectboard took the following actions:

- Established the name of the MLP as the Worthington Telecommunications Department;
- Appointed a manager for the MLP and authorized him to execute any documents necessary to effectuate the purposes of prior votes;
- Designated a delegate and alternate delegate to WiredWest.

None of the original incumbents remains in their respective offices, and no amending paperwork was ever filed with any agency of the Commonwealth. Additionally, the remaining governance issues, namely the designation of an MLP board, appear never to have been resolved.

Our initial reading of the MLP legislation cited in organizing (MGL Ch164s47C (re: cooperatives) along with s55 and s56 (re: MLP boards) and actions (or lack thereof) by the Town therefore leads us to believe that the Town currently may have no legal entity that can enter into a contract for Fiberoptic services with regard to the so-called 'Last Mile'. **We ask for an opinion confirming or refuting this conclusion** based on our prior actions.

A basic issue is whether the governance of the MLP is ruled under s47C (e) or under s55. Regardless, both MGL CH164s47C (e) (as regards cooperatives) and s55 (as regards a municipal light board) specify that the directors must be elected by members of the cooperative. However, we note that the board of the Leverett MLP, often cited as model example of successful enactment, was appointed by the SelectBoard with an overlap of two members, so **we request guidance on the manner(s) in which an MLP board may be legally constituted and voted upon and under which section of the statute.** Must they be elected by the cooperative? If so, who constitutes the cooperative in the absence of actual contracted services with memberships? Can the MLP board be elected at a special town meeting/special election? Annual town meeting/annual election? What are the specific steps that need to be taken?

Given the above, it is not clear that the SelectBoard, rather than an appropriately authorized MLP board, had the authority to appoint a manager. Do s55 and s56 cede this authority to the SelectBoard in the absence of an MLP board or does some affirmative action authorizing the SelectBoard to act in this capacity need to be taken? All this is further complicated by the fact that the current Selectboard does not have the same composition as was true at the time the MLP was authorized. We therefore **request an opinion as the legal ability of the Selectboard to act in lieu of an MLP board both with regard to appointments and with regard to contractual obligations.** Our current presumption is that the Selectboard has no such authority unless enabled through some process.

A citizen initiated petition requiring that town meeting, rather than an MLP or the Selectboard, determine the method of operation of the completed network (e.g., regional cooperative versus town-owned and run) was submitted and verified in early March. It further seeks to restrict the ability of the Selectboard or an MLP from executing any contracts related to Fiberoptic services until the Town has so decided. The warrant article resulting from the petition is to go on the next Special Town Meeting agenda, currently scheduled for May 14, 2016. Given the above, **we therefore request guidance on whether Town Meeting has the legal authority to bind a MLP board given that it is a separately enabled governance body.** If not the Town, can the membership of the cooperative (see above) bind the MLP board?

In short, we would like guidance as to the best, and variety if any, way(s) we may establish or affirm an authority within the Town with the legal capacity to contract for and manage fiberoptic services for telecommunications purposes, including internet, cable television, and VOIP telephone services. We recognize that you may need to redistribute this request within the firm based on staff professional expertise. Guidance, particularly any guidance best acted upon at Annual Town Meeting on May 7th, would be appreciated by April 12th.

Sincerely,

(Dick Wagner)

From: Joel Bard [<mailto:JBard@k-plaw.com>]
Sent: Tuesday, May 03, 2016 12:10 PM
To: 'Margaret O'Neal'
Subject: RE: Assistance please [MLP questions]

Dear Members of the Select Board

I have constructed a narrative below responding the various questions you have posed. I offer opinions on these questions based on my interpretation of the language in the relevant sections of G.L. c.164. It is my opinion that the relevant language is clear. I should add that I am not aware of whatever guidance may or may not have been offered to the Town (or to towns generally) by WiredWest or other sources so I will not comment on reports of advice given.

You state that that the Board did not name itself the MLP Board, but did establish the name of the MLP as the Worthington Telecommunications Department, appointed a manager for the MLP, authorized the manager “to execute any documents necessary to effectuate the purposes of prior votes”, and designated a delegate and alternate delegate to WiredWest. As I understand your questions, your fundamental concern is that these steps were not proper and that the “the remaining governance issues, namely the designation of an MLP board, appear never to have been resolved.”;

It is my opinion that neither the Town nor the Select Board is required to formally designate an MLP board. I believe there is a misunderstanding based on confusion as to whether the language governing cooperatives in G.L. c. 164, s.47C governs the actions of a town. Section 47C does not govern towns, in my opinion. Sections 55 and 56 of c. 164 are the relevant sources of regulatory authority for towns. Section 55 authorizes towns to vote to elect a municipal light board, stating that a town which has established an MLP “may elect a municipal light board” (emphasis added). The word “may”, of course, signifies that the creation of a municipal light board is not mandatory. Section 56 gives a board of selectmen (or a municipal light board) the authority to appoint a “manager of

municipal lighting”. That manager, “shall, under the direction and control of the mayor, selectmen or municipal light board, if any, and subject to this chapter, have full charge of the operation and management of the plant,” I quote this language, in part, to highlight the phrase, “or municipal light board, if any”. In my opinion, that phrase pointedly makes clear that there is no need to create a municipal light board, consistent with the preceding language which gives a board of selectmen authority to hire a manager who would have full control of the operation of a municipal light plant.

Accordingly, in response to your concern that “the Town currently may have no legal entity that can enter into a contract for Fiber optic services with regard to the so-called ‘Last Mile’ ”, it is my opinion that the Town does indeed have such an entity, namely the Select Board. The fact that the Board evidently named the MLP the Worthington Telecommunications Department and appointed a manager for the MLP does not diminish the Board’s authority. I understand the sequence of events as follows: Town Meeting created an MLP; in the absence of a Town vote formally establishing an independent “municipal light board” – which has not occurred – the Select Board functions as the MLP. The fact that the Board gave it a different name is of no legal consequence. The Town may call it the “WTD”, but as a legal matter, it is Worthington’s MLP.

You ask if the Select Board had the authority to appoint a manager. Despite that fact that the Town has not created a Municipal Light Board, G.L. c. 164, s.56 clearly states that a board of selectmen has the authority to appoint a manager of “municipal lighting”.

I trust the above answers your fundamental question:

We therefore request an opinion as the legal ability of the Selectboard to act in lieu of an MLP board both with regard to appointments and with regard to contractual obligations. Our current presumption is that the Selectboard has no such authority unless enabled through some process.

It is my opinion that, under G.L. c. 164, s. 55 and 56, the Town does not need a municipal light board and that, in the absence of a municipal light board, the Select Board has the full authority to operate the MLP (through its manager if it chooses to fill that position). Accordingly, the Select Board has the authority to enter into those agreements or contracts necessary to carry out the functions of the MLP, including those related to managing fiber-optic services for telecommunications purposes, including internet, cable television, and VOIP telephone services.

You have informed me that the citizens’ petition has not yet been scheduled for a Special Town Meeting. I will address those questions specifically when I have received a copy of the petition. As a general proposition, it is my opinion that Town Meeting, the Town’s legislative body, does not have the authority to direct the executive functions of the Town, which in this instance, concern the operation of the

municipal light plant and the functions related to the construction and management of a fiber-optic network in the town.

Please let me know if you have further questions.

Thank you.

Joel

Joel B. Bard, Esq.

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On May 3, 2016, at 4:12 PM, Dick Wagner <rwagner54@verizon.net> wrote:

Not all questions as forwarded are yet answered. This is all received thus far..... dw

Dr. Richard A. Wagner (dw)
Worthington, Massachusetts
413.238.4221
rwagner54@verizon.net

From: Joe
Date: May 3, 2016 6:19:30 PM
Subject: Re: Assistance please [MLP questions]
To: Dick Wagner <rwagner54@verizon.net>

Dick I am in Westhampton and about to be in the Fincom meeting so I don't have much time to try to type this on my phone. The jist of what I can read is he did not answer the question relative to the petition..... Can town meeting decide the method of operation or only the BOS. Can you follow up with him on that? Sorry I need to go

Sent from my iPhone

From: Dick Wagner [<mailto:rwagner54@verizon.net>]
Sent: Wednesday, May 04, 2016 2:39 PM
To: selectboard@worthington-ma.us
Subject: Fwd: Re: Assistance please [MLP questions]

Peg,
We still need the specific answers to the questions related to the petition. dw

From: Margaret O'Neal [<mailto:selectboard@worthington-ma.us>]
Sent: Wednesday, May 04, 2016 7:15 PM
To: Joel Bard
Subject: FW: Re: Assistance please [MLP questions]

Hello Joel,

I sent the petition article Monday but am sending it again so you don't have to look any further...;

Both the Chair of the Selectboard (Dick Wagner) and Chair of the Finance Committee (Joe Boudreau), have unanswered questions (see highlighted text below) they would like your opinion on.

Also, Selectboard member/WiredWest Executive Committee member Charley Rose, would like your opinion re: it is not a conflict of interest for him to serve on both boards – in writing.

We are only two days away from Town Meeting – your timely response would be much appreciated.

Thanks, Peg

From: Joel Bard [mailto:JBard@k-plaw.com]
Sent: Friday, May 06, 2016 7:11 PM
To: 'Margaret O'Neal'
Cc: Jeffrey T. Blake; Brian Riley
Subject: RE: Re: Assistance please [MLP questions]

Hi Peg

Citizens' Petitioned Article

In my May 3 email to the Select Board, I said that I would comment on the actual article after I had reviewed it. As a preliminary comment, I noted, “ it is my opinion that Town Meeting, the Town’s legislative body, does not have the authority to direct the executive functions of the Town, which in this instance, concern the operation of the municipal light plant and the functions related to the construction and management of a fiber-optic network in the town.” Having now reviewed the actual article, I reiterate that comment. The article seeks to have Town Meeting “resolve” that: 1) “a vote of Town Meeting shall determine the method operation of the completed network ...”; and 2) the Select Board, MLP Board or any other board or committee “shall not enter into any contract or agreement that would preclude Town Meeting from making any such determination.” In my opinion, Town Meeting does not have the ability to diminish, override or interfere with executive functions which have been expressly granted by the Legislature to the Select Board (or MLP board, if the Town creates one). See G.L. c.164, s.56.

On a practical level, should the Town decide to join WiredWest, these executive decisions will be made by WW.

Conflict of Interest

Selectman Charley Rose has asked if a conflict is created by being a selectman and serving as the Town's representative to WW, serving on the WW Board (which consists of delegates from each town) and serving on the WW Executive Committee, to which he was elected by the WW Board). My colleague Brian Riley is well-versed in conflict of interest issues and I asked him to investigate. In order to answer the question, we needed to learn how the State Ethics Commission classifies WW for purposes of G.L.c.268A, the Conflict of Interest Law. Brian contacted Deirdre Roney, the commission's General Counsel. Her response, received yesterday afternoon, was "I'm not aware that we've given advice on this previously. Based on a fairly quick look at the links, I think we would regard Wired West as a regional municipal entity. Town employees and officials would not be prohibited from serving as delegates to Wired West, but would have restrictions under the sections you mention. " Brian will explore this further but it appears that these relationships will NOT present a conflict and that the "restrictions" referred to by attorney Roney can be addressed by the Select Board. Brian will be providing a complete opinion on this issue.

I believe this addresses the remaining questions but please let me know if there are unanswered or other questions.

Thank you.

Joel

Joel B. Bard, Esq.

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From: jlbourdreau3@verizon.net [<mailto:jlbourdreau3@verizon.net>]
Sent: Friday, May 06, 2016 10:49 PM
To: selectboard@worthington-ma.us; rose.charley@gmail.com; rwagner54@verizon.net; evanjohnson19@gmail.com
Cc: krdoconnor@gmail.com; katrinskaminsky@gmail.com; jlbourdreau3@verizon.net; dunlevyp@yahoo.com; jeffereym@gmail.com; alexlak@aol.com; modestowvuss@verizon.net
Subject: Re: FW: Re: Assistance please [MLP questions]

Yes there are still unanswered questions. The original request for an opinion also asked..... *Can the MLP board be elected at a special town meeting/special election? Annual town meeting/annual election? **What are the specific steps that need to be taken?*** I think the Town will also need those questions answered as well.

On May 6, 2016, at 10:59 PM, Margaret O'Neal <selectboard@worthington-ma.us> wrote:

Man-oh-man...it is always something...;

I am sending this your way in case you know the answer to Joe's (Finance Committee Chair) question off the top of your head...;

From: Joel Bard [<mailto:JBard@k-plaw.com>]
Sent: Friday, May 06, 2016 11:34 PM
To: Margaret O'Neal
Subject: Re: Assistance please [MLP questions]

At your service:

Per G. L. C. 164, s. 55, the members of a municipal light board are "elected". The statute does not specify when the initial members are to be elected but successive members are elected at "each annual meeting thereafter." When the context is electing officials, references to an annual meeting mean the annual town election, not a town meeting. The one open question, in my opinion, is when the original members would be elected. Given the lack of specificity on this point, one could argue that they could be elected at a special election or at the annual election.

My Town Meeting starts at 9 tomorrow. Good night!

Joel

Joel B. Bard, Esq.

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