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BOARD OF SELECTMEN
JOHN BLADON
STEVEN J. CORREIA
THOMAS J. FAY
JOSEPH F. NOLAN
SUSAN W. POPE

Board of Selectmen Executive Session Minutes March 28, 2012

Attendance: John Bladon, Steven Correia, Thomas Fay, Joseph Nolan, Susan Pope

Also Present: Town Administrator Fred Turkington, Town Counsel Mark Lanza (via telephone, arrived in person at 9:55 p.m.), Facilities Director John Moynihan, Wastewater Management District Commission Members Fred Knight (via telephone), Sam Potter, David Schofield, Executive Assistant Bill Prendergast, Secretary MaryAnn DiNapoli

Purpose: The session was called at 8:50 p.m. in the Selectmen's Meeting Room, Wayland Town Building, by unanimous roll call vote (YEA: J. Bladon, S. Correia, S. Pope, T. Fay, J. Nolan. NAY: none. ABSTAIN: none. ABSENT: none. Adopted 5-0) of the Board of Selectmen in open session as permitted by Massachusetts General Laws Chapter 30A, Section 21(a)(3) to discuss strategies with respect to litigation between Twenty Wayland LLC and the Town of Wayland and the Wastewater Management District Commission as filed in court because the conduct of the hearing in an open meeting may have a detrimental effect on the litigating position of the Board.

Discussion: T. Fay said the case of Twenty Wayland LLC v. the Town of Wayland and the Wastewater Management District Commission is scheduled for a summary judgment on April 12. The suit alleges breach of contract, and an adverse judgment could set the town up for substantial damages. He said the town needs to convince the court that there are material facts in dispute. F. Turkington discussed the summary by Town Counsel of a recent meeting with the DEP. He said he wanted the DEP to understand that time is of the essence. T. Fay said the permit must be submitted quickly, so it can be reported to the judge, and therefore he requested this meeting to bring the parties together for a joint solution. [REDACTED]

[REDACTED] S. Potter asked if the DEP would understand that they are causing the town a hardship, and move the trigger point to require certification of the alternative discharge point to 90% or 95% of capacity. [REDACTED]

[REDACTED] F. Turkington said the town has more lead time than it would normally, because the building is in phases. S. Potter said that he and T. Fay have reached a compromise solution. T. Fay said it is his understanding that the wastewater statute obligates the users, not the town; but notwithstanding, the town has exposure in a lawsuit, and on that basis, he has agreed that the town could contribute towards construction of the outflow pipe, if it has to be built. He said he feels the chance that the town will have to pay for this is less than 20%, but it still must be considered. J. Moynihan said the current outflow pipe to the river is west of Route 20, through Twenty Wayland's property. S. Potter said this compromise is fair to all parties. F. Turkington asked him to define fairness. S. Potter said the town will get the benefit of the town

center project. He also said the town contributed to the problem, because without the town center project, there would be no need for expanded capacity. T. Fay said the benefit is to the users; S. Potter said no, the benefit of the town center is being a Wayland resident, not a wastewater user. J. Moynihan said the town NPDES permit is for less flow than the previous one. D. Schofield said it is effectively more; he said the town should pay because all the residents will benefit. T. Fay said he felt his opinion was being misrepresented. S. Potter said that while the Wastewater Management District Commission is picking up the majority of the cost, the town needs to make a large contribution. T. Fay agreed that the town will pay 50%, with a cap of \$250,000. M. Lanza asked how such an agreement would work. S. Potter said both the town and the Wastewater Management District Commission would submit a settlement proposal to the court. If it becomes the judgment of the court, there is a thirty-day right of appeal, and then the judgment will stand with no town approval needed. Both parties waived any conflict in dealing with Town Counsel Mark Lanza.

At 9:30 p.m., members of the Board of Selectmen moved to a separate conference room to consider the proposal of the Wastewater Management District Commission that the town share in the cost of a future settlement of the case. T. Fay argued that some amount was appropriate and could be justified, given the potential exposure to the town if a court ruled the general fund should finance some of the cost of settlement. F. Turkington reminded the Board that the Wastewater Management District Commission is a utility for which all expenses must be borne by users, and cautioned that the scope of obligation wouldn't be fully known until DEP circulated conditions that would be included in an administrative consent order. T. Fay advocated for discussions with Twenty Wayland in an effort to have them contribute to any settlement. Town Counsel Mark Lanza joined the discussion at 9:55 p.m. S. Correia expressed concern about the perception of a court-ordered resolution that would effectively bypass town meeting or other public processes for implementing settlement terms. J. Bladon expressed concern that the Wastewater Management District Commission was trying to leverage town participation because of the pending summary judgment motion hearing on April 12. It was the consensus of the Board to conditionally offer up to \$150,000 toward the cost of settlement, based on cost avoidance of litigation, pending DEP consideration of the permit application and receipt of the draft ACO (Administrative Consent Order).

The Board returned to joint session with the Wastewater Management District Commission at 10:12 p.m.

T. Fay presented the Board's position. S. Potter expressed his disappointment that the Selectmen were not more receptive to the position of the Wastewater Management District Commission on the fairness argument as a justification for greater participation in the settlement. S. Correia reminded S. Potter that the Wastewater Management District Commission was asking the Selectmen to risk litigation over the issue of town participation in the cost of a remedy that would be the responsibility of the WMDC. F. Turkington reminded the WMDC that submitting a permit application for a supplemental groundwater discharge in no way obligated the commission to proceed with an ACO or to settle the litigation. He pointed out that they had authorized up to \$35,000 in engineering fees to prepare an application; if so, why wouldn't the commission authorize its submission? T. Fay agreed to continue discussions with Twenty Wayland in an effort to find a resolution acceptable to the Wastewater Management District Commission. M. Lanza said he will work with F. Turkington and J. Moynihan to gather information that will help him prepare a response to the motion for summary judgment by April 6.

Adjourn: By motion of S. Correia, seconded by S. Pope, by roll call vote, unanimously voted to exit executive session at 10:47 p.m. and return to the Large Hearing Room to continue the meeting in public session. YEA: J. Bladon, S. Correia, S. Pope, T. Fay, J. Nolan. NAY: none. ABSTAIN: none. ABSENT: none. Adopted 5-0.

**Items Distributed for Information and Use by the Board of Selectmen at the March 28, 2012,
Meeting**

1. None