

**MINUTES  
SELECTMEN'S MEETING  
GRIFFIN ROOM, TOWN HALL  
TUESDAY, FEBRUARY 18, 2014  
7:00 P.M.**

**APPROVED**

**SELECTMEN PRESENT:** Ballantine, Cebula, Hughes, LaMantia, McManus

**OTHERS PRESENT:** Town Administrator Christopher Clark, John Giorgio, Jeanne McKnight, Peter DeBakker, Anne Stewart, and others

**MEETING CALLED TO ORDER** at 7:12 p.m. by Chairman LaMantia.

**CONSENT AGENDA**

- A. Approve Minutes
  - 1. January 13, 2014 Executive Session
  - 2. January 27, 2014 Executive Session
  - 3. February 3, 2014 Executive Session
  - 4. February 3, 2014 Regular Meeting
- B. Vote to accept various gifts totalling \$50 to be deposited in the Community Center Gift Account
- C. Vote to accept the resignation of Larry Cole from the Cape & Vineyard Electric Cooperative (CVEC) and the Utility and Energy Conservation Commission
- D. Vote to authorize Margaret T. Downey, Compact Chief Procurement Officer, to execute the contract for Municipal Competitive Electric Supply for the Town of Harwich

Mr. Hughes moved approval of the Consent Agenda. Mr. Ballantine seconded the motion and the motion carried by a unanimous vote.

**PUBLIC HEARINGS/PRESENTATIONS** *(Not earlier than 7:00 P.M.)*

- A. Wastewater Implementation Project Finance Recommendations Legal Review - Kopelman and Paige

Attorney John Giorgio introduced Attorney Jeanne McKnight who reviewed the attached letter of opinion she wrote on this topic. She and Mr. Giorgio took questions and comments from the Board.

**OLD BUSINESS**

- A. Warrant Article Review – *discussion & possible votes*  
(articles not funded under Town Administrator's budget)
  - 1. #12 – Vehicle for Animal Control Officer

2. #16 – Carpet and Tile for Fire Department
3. #19 – New Police Positions
4. #21 – HVAC Police Communications Center
5. #25 – Siding on Maintenance Building – Hwy.
6. #31 – Restore Open Days at Library
7. #35 – Cold Brook Nitrogen Attenuation Study
8. #36 – Restore Hinckley Pond

Mr. Hughes moved to remove from the warrant Article #12 - Vehicle for Animal Control Officer, Article #16 – Carpet and Tile for Fire Department, Article #19 – New Police Positions, Article #21 – HVAC Police Communications Center, Article #25 – Siding on Highway Maintenance Building, and Article #36 – Restore Hinckley Pond. Mr. Ballantine seconded the motion and the motion carried by a unanimous vote. Mr. DeBakker spoke in support of Article #35 – Cold Brook Nitrogen Attenuation Study. The Board agreed to hold Article #31 – Restore Open Days at Library and Article #35 – Cold Brook Nitrogen Attenuation Study.

(articles to be considered)

1. #44 – Replenish Police/Fire Trust Fund

Mr. Ballantine moved to include Article #44 – Replenish Police/Fire Trust Fund in the warrant. Mr. Hughes seconded the motion and the motion carried by a unanimous vote. Ms. Cebula moved to support Article #44 – Replenish Police/Fire Trust Fund. Mr. Hughes seconded the motion and the motion carried by a unanimous vote.

2. #45 – Golf Course Tree Removal Program
3. #46 – Golf Course Lightning Detection System

Mr. Ballantine moved to include Article #45 – Golf Course Tree Removal Program and Article #46 – Golf Course Lightning Detection System. Mr. Hughes seconded the motion and the motion carried by a unanimous vote. Mr. Ballantine moved to support Article #45 – Golf Course Tree Removal Program and Article #46 – Golf Course Lightning Detection System. Mr. Hughes seconded the motion and the motion carried by a unanimous vote.

4. #51 – Lease of Town Owned Buildings
5. #52 – Lease of Town Building for Boat Storage

Mr. McManus moved to support Article #51 – Lease of Town Owned Buildings and Article #52 – Lease of Town Building for Boat Storage. Mr. Hughes seconded the motion and the motion carried by a unanimous vote.

6. #53 – Gift of Parcel on Oak Street

Mr. McManus moved to support Article #53 – Gift of Parcel on Oak Street. Mr. Hughes seconded the motion and the motion carried by a unanimous vote.

7. #54 – Amend Personnel By-Law

Mr. McManus moved to support Article #54 – Amend Personnel By-Law. Mr. Hughes seconded the motion. Ms. Cebula noted that the Board had already voted to include and support this article. The motion carried by a unanimous vote.

8. #55 – Sale of Alcoholic Beverages on Sunday/Holidays
9. #56 – New By-Law for Local Licenses and Permits

Mr. McManus moved to support Article #55 – Sale of Alcoholic Beverages on Sunday/Holidays and Article #56 – New By-Law for Local Licenses and Permits. Mr. Ballantine seconded the motion and the motion carried by a unanimous vote.

10. #61 – Thankful Chase 2 (place holder)

Mr. Hughes moved to remove Article #61 – Thankful Chase 2 from the warrant. Mr. Ballantine seconded the motion and the motion carried by a unanimous vote.

B. Introduction to New Articles – *discussion*

1. #49 – Create Annual Authorization Revolving Fund for the Albro House
2. #71 – Petition Article – Cape Cod Commission Membership
3. #62 – Corrective Property Line for Bank Street Beach (place holder)

Mr. LaMantia introduced the above articles. The Board requested more information on Article #49 – Create Annual Authorization Revolving Fund for the Albro House. No action was taken.

**NEW BUSINESS**

- A. Vote to approve the recommendation of the Recreation and Youth Commission to submit the name of “Veterans Memorial Recreation Complex” for the Multi-purpose Field Complex and to name the new softball field “Bassett Field” and the new baseball field “Crowell Field”

Mr. Sadowski of the Recreation and Youth Commission outlined the request to name the Multi-purpose Field Complex “Veterans Memorial Recreation Complex” and to name the new softball field “Bassett Field” and the new baseball field “Crowell Field.” Chairman LaMantia noted that permission has not been provided from the Crowell family. Mr. Hughes moved to adopt the name of “Veterans Memorial Recreation Complex” for the Multi-purpose Field Complex at 100 Oak Street in Harwich and also the name of “Bassett Field” for the softball field. Ms. Cebula seconded the motion. Mr. McManus stated that the precise request is to name the softball field the “Earle F. Bassett Field” and Mr. Hughes and Ms. Cebula agreed to amend the motion as such. The motion carried by a unanimous vote. Mr. McManus stated that the Board would also need to know which member of the Crowell family the field is being named for.

## **SELECTMEN'S REPORT**

Ms. Cebula stated that she would like to have information on the Monomoy Regional School District and Cape Cod Regional Technical High School budgets in the warrant and the Board agreed.

## **ADJOURNMENT**

Mr. Ballantine moved to adjourn at 8:47 p.m. Ms. Cebula seconded the motion and the motion carried by a unanimous vote.

Respectfully submitted,

Ann Steidel  
Recording Secretary

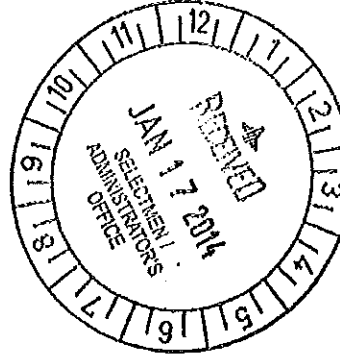


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December 12, 2013

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Jeanne S. McKnight  
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**DELIBERATIVE PROCESS EXEMPTION**

Re: Wastewater Implementation Advisory Committee Project Finance Recommendations

Dear Mr. Lawton:

You have requested an opinion as to whether certain recommendations of the Wastewater Implementation Committee ("WIAC") for funding a wastewater project to serve several sections of the Town, set out in WIAC's Comprehensive Cost Recovery Plan for Wastewater Implementation ("CPWI"), may be implemented under Massachusetts General Laws and court decisions applicable to betterment assessments, water and sewer use charges, and other types of municipal fees.

In my opinion, a few of the recommendations are not only unauthorized under current law, but even if authorized by special legislation, they may violate Massachusetts constitutional principles relating to proportionate taxation. Alternatives that are either available under current law, or could be authorized by special legislation, may achieve the same or nearly the same objectives. Some of these alternatives were not recognized because of misunderstandings of the laws pertaining to the assessment of betterments. In this letter, I've addressed your particular questions and analyzed all of the recommendations as to lawfulness under current law or feasibility under special legislation.

**PARTICULAR QUESTIONS**

Apparently spurred by concerns raised by Robert J. Ciolek, a consultant to the Cape Cod Water Protection Collaborative, as outlined in an e-mail to you dated November 12, 2013 from Selectman Larry Ballantine, you particularly asked about the validity of a proposed annual flat fee that would be imposed each year for ten years upon all real property that is not exempt from local taxation, irrespective of assessed valuation (Section 1.3.3.2 of the CPWI). You also asked about the validity of water bill surcharges sought to be imposed upon all water users, not only those water users who connect to the sewer, the income from which is to be used to defray wastewater system capital costs (Section 1.3.3.3 of the CPWI). In my opinion, both the proposed annual flat fee and the water bill surcharges (if to be imposed upon non-users of the sewer system), are not authorized under Massachusetts General Laws, so would require special legislation. Even if authorized by a special act, however, I am concerned that the annual flat fee would be perceived as a tax rather than

Mr. Robert C. Lawton, Jr.  
Acting Town Administrator  
December 12, 2013  
Page 2

a fee, under the so-called Emerson College test discussed below, because the property owners would not be voluntarily paying the fee. Perceived as a tax (as was the "fee" the City of Boston imposed upon Emerson College under a special act), the annual flat fee would likely fail the test under the Massachusetts Constitution that all taxes must be proportionate, which generally means, as to real property taxes, proportionate to the value of the real property being taxed. In contrast, a surcharge upon the real property tax rate, if authorized by special act, would not have this constitutional flaw. Likewise, if property owners required to pay a water bill surcharge to pay for wastewater do not obtain a special benefit from the wastewater system, it is likely that the water bill surcharge will be deemed invalid as a disproportionate tax.

Selectman Ballantine's e-mail also sought advice on a few additional recommendations that he reported Mr. Ciolek thought would be "legal" but would need legislative action to implement. He particularly noted that a special act would be needed to implement impact fees (Section 1.3.7 of the CPWI), and noted that the impact fees will most likely need to be based on real documented expenses. I agree with this comment, but also caution that there needs to be a "nexus" between the impact fee, which I understand is to be used for wastewater system capital costs, and the activity that triggers the fee, here new private construction, so that the fee does not exceed the impact of the new construction upon the Town's infrastructure. That "nexus" is not clear in this impact fee proposal, where it is recommended that the impact fee be imposed upon new construction before the sewer system is available (when the property is presumably using a subsurface sewage system for disposal) and perhaps (or at least it is not clear) upon new construction that is never intended to be provided with sewer service.

Selectman Ballantine also noted that a special act could authorize a period of time of longer than twenty years for repayment of apportioned sewer betterment assessments, twenty years being the maximum apportionment period permitted under G.L. c.80, §13. I agree that this can be done by special act, and I have seen several municipalities seek special legislation to extend the repayment period for betterments, to ease the burden upon property owners or to more closely approximate the debt repayment period for wastewater projects (typically thirty years under G.L. c.40, §7 (1)).

#### MISUNDERSTANDINGS OF BETTERMENT LAW

Some of the WIAC recommendations attempt to address objectives that can be addressed by the assessment of betterments under G.L. c.83, §§14-15B & 17-24 & 27 and G.L. c.80. The CPWI reflects at least three misunderstandings of current betterment assessment law.

**Assessment of Tax-Exempt Properties:** The CPWI states that betterments may not be assessed upon tax-exempt properties, but, in fact, tax exempt properties (other than state or town-owned properties) such as churches or private schools must be assessed a betterment under current law, if they benefit from the project for which the betterment is assessed. It is not necessary, as

Mr. Robert C. Lawton, Jr.  
Acting Town Administrator  
December 12, 2013  
Page 3

suggested on page 28 of the CPWI, that the Town adopt the Massachusetts Model Water and Sewer Commission Act, G.L. c.40N, to be able to assess betterments upon tax-exempt properties. Although G.L. c.40N, §9(c) expressly exempts from betterment assessments only state and municipal real property, implying that tax exempt property may be assessed (also see G.L. c.40N, §1 referring to tax exempt properties paying their fair share of the costs of water and sewer services), betterment assessments under G.L. c.83 and c.80 may, indeed must, under applicable case law, be assessed against tax exempt property in my opinion – only state and municipal property is exempt from assessment.

**Pre-Construction Assessments:** The CPWI states that no betterment can be assessed until project completion, but current law provides that 50% of the amount of design and construction contracts that a town has entered into may be assessed on a preliminary basis so that the town begins collecting some income from betterments during construction. Furthermore, I have seen municipalities obtain special legislation to increase the percentage to as high as 90% and to allow a percentage of all estimated project costs to be assessed on a pre-construction basis, not merely design and construction contracts that have been entered into.

**Assessing Cost of General Benefit Facilities such as Wastewater Treatment Plant:** The CPWI states that only the cost of local-area sewer mains and pump stations may be assessed as betterments. Betterments are not so limited – a percentage of the cost of central system components such as treatment plants and high-pressure mains may be assessed when each area is sewered, reserving another percentage of the central components to be assessed upon additional areas as they are sewered.

In the remainder of this letter, I will review each recommendation as to consistency with current law and outline how any inconsistency can be addressed by a special act. If there appears to be a constitutional problem that cannot be validly addressed by a special act, I will point that out. I will also mention alternative means of addressing the issue that is the subject of the recommendation, particularly if it can be addressed alternatively under applicable existing statutes.

#### **BETTERMENT ASSESSMENTS**

**Betterment Assessment Methods:** Betterment assessments for sewer projects are covered by Sections 14-15B and 17-24 and 27 of General Laws Chapter 83 (also see Section 1D discussed below in the section on sewer systems established under a Comprehensive Wastewater Management Plan). Section 14 is the basic provision – any person who enters his particular drain into a common sewer shall pay to the town a proportional part of the charge of making and repairing the same, and of the charge, not already assessed, of making and repairing other common sewers through which the same discharges. Section 15 of Chapter 83 provides that a town may provide that assessments under Section 14 shall be made by a fixed uniform rate (that is, by frontage on the way in which the

Mr. Robert C. Lawton, Jr.  
Acting Town Administrator  
December 12, 2013  
Page 4

sewer is located or by area within a certain depth of the way or by a combination of frontage and area) or a rate based upon a uniform unit method (typically based upon "units" calculated by the anticipated sewage flow under Title 5 of the State Environmental Code from buildings on a particular lot based on zoning then in effect – often expressed in terms of multiples of the sewage flows from a single-family home – thus "equivalent dwelling units" or EDU's). The CWPI proposes that assessments for single-family homes would be made based on anticipated costs that a single family home with a sewer would avoid over a 20-year period versus having a Title 5 septic system. A similar analysis is proposed for multi-family and commercial property, which might be based on the cost of an Innovative Alternative septic system rather than a Title 5 septic system.

Such an alternative basis for sewer assessments is not permitted under G.L. c.83, §15A, in my opinion, but could be allowed by special act, provided the resulting assessments are proportionate. The basic test of proportionality for any betterment assessment is the increase in the value of each property due to the availability of the new public improvement. When a sewer project is to serve an area that includes single-family residential, multi-family residential and commercial properties, the uniform unit method usually results in a more proportionate assessment (proportionate to the increase in the value of the property) than does the frontage/area method, and is more commonly used for sewer projects. It is possible that a formula based on saved costs as compared with Title 5 or AI systems would be proportionate to the increased value of the several properties from the provision of sewer service.

**Percentage of Project Costs to be Assessed as Betterments/Assessing Tax Exempt Properties:** In presenting its rationale for a formula based on saved costs, WIAC said that a disadvantage of betterments is that many system beneficiaries will pay nothing. Perhaps what was meant is that there is a general benefit to the entire Town of having a sewer system to handle the waste from some areas, and those who live outside the served area should pay something. Perhaps what was meant is that town-owned properties are exempt from betterment assessments. One way of addressing both issues is to assess less than 100% of project costs as betterments, having the taxpayers bear the remaining percentage of project costs. If this concern is based on a misunderstanding that private tax-exempt properties such as churches or non-profit schools or museums are exempt from betterment assessment, that is not the case – they are assessed, and the Town will have a lien upon tax-exempt properties to secure the repayment of the betterment, just as if they were taxed.

**Dividing Project Costs into General Benefit and Special Benefit Facilities:** WIAC also said a disadvantage of betterments is that assessments may vary significantly from service area to service area and assessments may not be used for the cost of constructing wastewater treatment facilities. While it may be inevitable that there is some variance in per-unit cost from one service area to another, I want to make sure the Town realizes that G.L. c.83, §15 provides that in assessing sewer betterments, a bylaw may provide that project costs be divided into general benefit facilities



**KOPELMAN AND PAIGE, P.C.**

Mr. Robert C. Lawton, Jr.  
Acting Town Administrator  
December 12, 2013  
Page 5

(such as wastewater treatment plants, pump stations that serve several service areas, trunk and force mains) and special benefit properties (such as the particular service area sewer mains and pumps). In undertaking to sewer the first service area that may necessitate the construction of a general benefit facility, only a portion of the cost of the general benefit facility need be assessed on the properties in that service area, with the remainder reserved for assessment when other service areas are constructed.

**Fees and Betterments not Tax Exempt:** WIAC mentioned that, unlike local *ad valorem* real property taxes, betterment assessments are not tax deductible. This is correct - water and sewer use charges, fees and betterment assessments are not deductible from state and federal income taxes, presumably on the theory that a use charge or fee payer gets value equivalent to the use charge or fee that is paid, and the property assessed a betterment has increased in value in proportion to the betterment that is assessed.

**Assessing Commercial Properties under Uniform Unit (EDU) Method:** WIAC presented the view that if the uniform unit method based on EDU's were used "commercial betterments on Cape Cod could be confiscatory." I don't know the basis for this view, but there are ways to soften the blow on commercial properties. One is to assess developed properties based on the current use and extent of development, rather than on some speculative future development for a more highly water-consumptive use, and to assess vacant commercial properties conservatively as to potential future use (for example as a retail store or office building rather than a restaurant), reserving a portion of total project cost to be assessed later as privilege fees, as permitted under Sections 17 and 20 of Chapter 83, if a more water-consumptive use is developed. While there is some risk to the Town that the possible future development will not occur, so the income from privilege fees will not materialize, making such a reservation reduces the amount of the initial assessments upon commercial properties, and also provides the potential for assessing a privilege fee upon properties that are developed for a more water-consumptive use that is not allowed under current zoning, such as multi-family properties developed under G.L. c.40B. The City of Newburyport assessed betterments for its Low Street project, serving a developing highway-interchange commercial area, in this manner.

Also, under Section 13A of Chapter 80 of the General Laws, the board making the assessment order upon land that is not built upon (whether residential or commercial) may extend the time of payment of the assessment until it is built upon or for a fixed time (but interest at the rate of 4% per annum must be paid).

Another option is to obtain a special act similar to that obtained by the Town of Provincetown for its multi-phase sewer system, which permitted a checkerboard pattern of assessments so that only those properties who were under a Board of Health order to connect to the new sewer were required to connect, and others had a choice to connect (in which case they would

**KOPELMAN AND PAIGE, P.C.**

Mr. Robert C. Lawton, Jr.  
Acting Town Administrator  
December 12, 2013  
Page 6

be assessed a betterment) or not to connect and not to be assessed (in which case they would have no future right to connect). If they were allowed, in the discretion of the Water and Sewer Board or due to unanticipated public health issues, to connect at a later time, they were assessed a privilege fee.

**Pre-Construction Betterments:** WIAC stated (page 23 of the CPWI) that betterments may only be assessed when a sewer project is complete and the sewer line is ready to serve the abutting properties. This is not entirely correct. Final betterments based on total project cost may not be assessed until the properties are provided with service, but Section 15B of Chapter 83 provides for the assessment of estimated sewer assessments up front so that income is received during the construction phase. Under Section 15B, such estimated assessments cannot exceed one-half of the Town's liability under all contracts it has entered into for the design and construction of the sewer facilities. Some towns have by special act increased that percentage – West Boylston increased it to 90% - and have been allowed to base estimated assessments on total estimated project cost (including land/easements acquisition, legal, allocated staff) not just on design and construction contracts.

**Assessing Treatment Plants and other General Benefit Facilities:** It is not clear if the statement in the CPWI that the cost of treatment plants may not be included in total project costs is based on an expectation that treatment plants will be shared with other towns, and may even be located in other towns. In my opinion, however, the capital costs borne by the Town of Harwich for such shared treatment plants may be included in total project costs and assessed as betterments, and a portion of such capital costs may be reserved for assessment as a general benefit facility with a proportionate share assessed upon each service area as it is built.

**SEWER CONNECTION FEES**

The CPWI on page 24 refers to sewer connections averaging \$4,424 each. I suppose what are referred to here are the particular sewers to be constructed from the common sewer (sewer main) to the boundary of the way in which the sewer main is located. Section 24 of Chapter 83 does permit the Town to include such particular sewers in its project, and to assess the estimated average cost of such particular sewers to each property owner. Section 24 provides that a town may require the owner to pay that amount up front at the time of connection. In my opinion, however, the Town may allow the property owner to pay such cost over the same or lesser period of time as the betterment assessment and may charge interest as it would with a betterment assessment. The CPWI suggests that is the WIAC's recommendation (20 years at 5%).

Mr. Robert C. Lawton, Jr.  
Acting Town Administrator  
December 12, 2013  
Page 7

IMPACT FEES

In Emerson College v. Boston, 391 Mass. 415 (1984) the Massachusetts Supreme Judicial Court set out a four-part test to determine the validity of any fee. First, the fee must be based on some particular service provided to the person paying the fee. Second, the person paying the fee must do so voluntarily. Third, the fee must be related to the cost of providing the service. Fourth, the fee must reimburse the Town for the cost of providing the service for which the fee is assessed and not go into the general fund of the Town. It is not clear to me how the proposed impact fee to be used for sewer system capital costs meets these tests if the properties paying the fee are not enjoying a particularized benefit from the sewer system. In Denver Street LLC v. Town of Saugus, 462 Mass. 651 (2012), the SJC approved an infiltration/inflow fee that enabled property developers to connect to a sewer system that was close to capacity, where the funds were used to reduce I/I and thus reduce flows into the system, but in that case those paying the fee obtained the benefit of connecting to the existing sewer system which was otherwise under a no-new-connections order.

Furthermore, the Supreme Court of the United States has weighed in on developer exactions, suggesting criteria that would be applied to impact fees. In Koontz v. St. Johns River Water Management District, decided on June 25, 2013, the Court reiterated its position on development exactions as articulated in Nollan v. California Coastal Commission (1987) and Dolan v. City of Tigard (1994), requiring a "nexus," that is, a connection between the impact of the particular development and the exaction, whether land or funds, that the municipality requires the developer to provide, and "proportionality," that is, a rough equivalence in value between the burden imposed by the development on the public infrastructure, and the land or funds that the developer is required to pay. The required nexus and proportionality between the impact fee to be paid by those undertaking new development in Harwich, and the burden of the new development upon the sewer system, is not clear, particularly if the development is not able to connect to the sewer system.

I understand the nexus concept for Harwich is that new developments using subsurface sewage disposal may add to nutrient loading of ground water and surface water, and that the new sewer system is designed to reduce nutrient loading and thus preserve or improve drinking water quality by eliminating the use of many existing subsurface sewage disposal systems, but I notice that existing single-family homes to be provided with sewer service are proposed to be assessed a betterment of merely \$7,000 per dwelling, but new construction of single-family homes that are not to be connected to the sewer system are proposed to be assessed an impact fee of \$18,000 per dwelling (new homes that are to be connected to the sewer are proposed to be assessed both the \$18,000 impact fee and the \$7,000 betterment). This could be problematic both as to the "nexus" and to "proportionality." It may appear that the Town is attempting to shift to new construction a burden that should be borne proportionately by all property owners, a strategy that was disapproved by the SJC in a case involving sewer connection fees Berry v. Danvers, 34 Mass. App. Ct. 507 (1993).

## KOPELMAN AND PAIGE, P.C.

Mr. Robert C. Lawton, Jr.  
Acting Town Administrator  
December 12, 2013  
Page 8

### ALL-PARCEL FLAT FEES

As I discussed in the section on PARTICULAR QUESTIONS above, in my opinion, the proposed annual flat fee of \$250 to be imposed annually for ten years on all taxed parcels, irrespective of assessed valuation, is not authorized under Massachusetts General Laws, so would require special legislation. Even if authorized by a special act, however, I am concerned that the annual flat fee would be perceived as a tax rather than a fee, under the so-called Emerson College test discussed above, because the property owners would not obtain a particularized benefit from the sewer system the fee is intended to be used for, above the general benefit, and would not be voluntarily paying the fee. Perceived as a tax (as was the "fee" the City of Boston imposed upon Emerson College under a special act), the annual flat fee would likely fail the test under the Massachusetts Constitution that all taxes must be proportionate, which generally means, as to real property taxes, proportionate to the value of the real property being taxed. In contrast, a surcharge upon the real property tax rate, if authorized by special act, would not have this constitutional flaw and could, in my opinion, be allowed by the legislature notwithstanding the provisions of Proposition 2 ½ so called. I do warn, however, that the legislature will be very reluctant to approve a special act that adds a surcharge to tax rates notwithstanding Proposition 2 ½ - this will a difficult route that should not be counted on.

### WATER BILL SURCHARGES

Likewise, if property owners required to pay a water bill surcharge to pay for wastewater do not obtain a special benefit from the wastewater system, it is likely that the water bill surcharge will be deemed invalid as a disproportionate tax. Water bill surcharges are allowable, in my opinion, to pay for water system capital costs, and would be allowable as additional means of paying for sewer system capital costs if imposed only upon those who are connected to the sewer system.

### NON-PROPERTY-TAX INCREASES

The WIAC proposes increases in the hotel/motel room occupancy tax, which can be accomplished by Town Meeting vote without special legislation. The WIAC also proposes to increase the local meal tax above what is currently allowed under General Laws, and realizes that will require special legislation; I do not see a constitutional problem with such an increase, although it will likely be controversial.

### SEWER USER FEES

The WIAC proposes that sewer use charges will be imposed only to cover operations and maintenance of the sewer system, not for recovery of capital costs. In my opinion, it is possible,

## KOPELMAN AND PAIGE, P.C.

Mr. Robert C. Lawton, Jr.  
Acting Town Administrator  
December 12, 2013  
Page 9

under Section 16 of Chapter 83 to increase sewer use charges above the amount needed to cover operations and maintenance, to cover all or part of debt payment for capital costs. It is a policy question, under current General Laws, what portion of sewer capital costs to assess as betterments, what portion to reserve for later assessment as privilege fees, what portion to include in sewer use charges, and what portion the taxpayers in general will bear.

### USING THE TAX LEVY WITH OR WITHOUT DEBT EXCLUSION

If I understand the chart presented on pages 36-38 of the CPWI, the WIAC notes that without the fees and assessments that it recommends, some portion of bond repayment would be borne by the taxpayers (page 38 of the CPWI) but with these fees and assessments, the WIAC does not expect any burden on the taxpayers until 2043 when WIAC anticipates that all capital costs will have been recovered (see Section 5.11 page 11 of the Executive Summary where WIAC recommends that general property taxation be the last source of funds considered to recover capital costs). A debt exclusion is apparently not recommended by the WIAC (see page 38 of the CPWI).

### SEWER ENTERPRISE FUND AND/OR SEWER CAPITAL FUND

The WIAC on page 4 of its Executive Summary recommends the establishment of a "dedicated fund, to hold all capital revenues [i.e., revenue from the betterments, impact fees, etc., discussed above] that cannot be used for other purposes." In my opinion, under G.L. c.44, §53F ½, the Town may establish a sewer system enterprise fund into which shall be deposited "all receipts, revenues and funds from any source derived from all activities of the enterprise." The Massachusetts Department of Revenue interprets the phrase "receipts ... [from] activities of the enterprise" not to include betterment assessment income. Thus, to be able to deposit betterment assessment income in the sewer enterprise fund would require special legislation. Furthermore, special legislation would be needed if the Town wants to establish a sewer capital improvements fund into which would be deposited impact fees and the other fees discussed above (assuming the constitutional validity of such fees and that they are allowable under general or special law).

### CONTROLLED GROWTH SEWER SYSTEM

Not discussed in the CPWI but worth mentioning is the option under Sections 1A through 1H to establish controlled-growth sewer service areas whereby the board acting as sewer commission controls what properties can and cannot connect to a common sewer once installed. These sections must be accepted by Town Meeting vote, and a town is only eligible to set up such a controlled growth system if the municipality has an approved comprehensive water resources management plan (CWMP) as defined by the Massachusetts Department of Environmental Protection. I understand from the CPWI that there is presently a draft CWMP for Harwich, so I suppose proceeding under

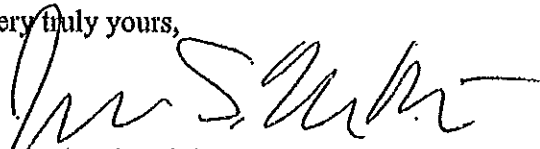
**KOPELMAN AND PAIGE, P.C.**

Mr. Robert C. Lawton, Jr.  
Acting Town Administrator  
December 12, 2013  
Page 10

Sections 1A through 1H is an option for the Town. These sections codify a controlled-growth system that is similar to that established by the Town of Provincetown by special act.

If you have questions regarding these opinions or require anything further regarding this matter, do not hesitate to contact me. I would be happy to meet with the WIAC to discuss the project and financing options.

Very truly yours,



Jeanne S. McKnight

JSM/bp

cc: Board of Selectmen  
Wastewater Implementation Advisory Committee

488087/HARW/0115