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TO: GREGORY JOHNSON, TOWN ADMINISTRATOR
ANDREW SCRIBNER-MACLEAN, ASST. TOWN ADMINISTRATOR

FROM: KATE FEODOROFF, TOWN COUNSEL
LISA MEAD, TOWN COUNSEL

RE: CITIZENS' PETITION
SALE OF WATER & WASTEWATER SERVICES

DATE: OCTOBER 3, 2018

Introduction

Reference is made to the above-captioned matter. You have requested an opinion as to whether the Citizens' Petition regarding the sale of water and wastewater services is binding on the Town if voted affirmatively by Town Meeting. For the reasons more fully set forth below, this measure is a non-binding measure. The Board of Selectmen remains authorized to determine whether such a sale would be appropriate, and to negotiate and execute an Intermunicipal Agreement or an agreement with a developer or resident of another town.

The Petition

As presented, the Citizens' Petition provides as follows:

A vote to prohibit the sale of the Town of Maynard water and services to other Towns, developers, and communities; not located within the boundaries of the Town of Maynard. A YES vote would not allow the town to sell water and sewer services. A NO vote would allow the town to sell water and sewer services.

Executive Authority

While it is the job of the legislative body to create and enact laws, certain restrictions are placed on that power. *See Anderson v. Board of Selectmen of Wrentham*, 406 Mass. 508 (1990) A legislative body cannot compel the executive when the executive is acting within its exclusive power. *Id.* (Selectmen not bound by town meeting vote purporting to set the Town's rate of contribution for group insurance benefits). In fact, this proposition is well-settled. *See Russell v. Canton*, 361 Mass. 727 (1972) (town meeting could authorize the board of selectmen to take land by eminent domain, but could not direct how much was to be taken); *see also Breault v. Auburn*, 303 Mass. 424 (1939) (town meeting vote directing the board of health to hire an employee was ineffective because it was a power conferred on board); and *Lead Lined Iron Pipe v. Wakefield*, 223 Mass. 485 (1916) (town vote directing the board of selectmen to hire an engineer was void); and *Board of Public Works of Wellesley v. Board of Selectmen of Wellesley*, 377 Mass. 621, 630-31 (1979) (town meeting vote to authorize the payment for legal fees incurred by the counsel representing the board of public works was invalid because the town bylaws conferred this power exclusively to the board of

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selectmen). Per Maynard's charter since 1991,¹ all executive authority is vested with the Board of Selectmen by the Charter, which has the full force of state law. Consequently, Town Meeting cannot compel the Board to act regarding the sale of water or wastewater.

Intermunicipal Agreements

Here, pursuant to G.L. c. 40, s. 4A, the Board of Selectmen is the executive authority with the authority to enter into intermunicipal agreements. ("The chief executive officer of a... town... may... enter into an agreement with another governmental unit..."). In anticipation of the legal argument that the word "may" divests the Board of full authority to act, please be advise that the Court previously has determined the use of the word "may" does not result in divestiture. Specifically, in construing G.L. c. 111, s. 27, the Court stated "[w]hile the word 'may' is used in said section 27, we think that the power therein conferred, although leaving much to the board's discretion, is one which is vested **exclusively** in the board and is to be exercised without reference to the approval or disapproval of the defendant." *Breault v. Town of Auburn*, 22 N.E.2d 46, 48-49 (Mass. 1939). Thus, Town Meeting does not have the authority to usurp the authority given to the Board of Selectmen to enter into an IMA with the Town of Acton to provide water or sewer services. Similar provisions exist in G.L. Chapters 83² and 40³ regarding wastewater and water respectively.

Individual Agreements – Property Owners or Developers

Further, if the proposal requested a contract between the Town and a developer or property owner, the authority to enter into such a contract is again vested with the Board of Selectmen⁴, not Town Meeting. Specifically, G.L. c. 83, s. 3, governing wastewater, provides: "The board... having charge of the repair and maintenance of sewers may, upon request of the owner of land and payment by him of the actual cost thereof, construct a particular sewer from the street line to a house or building." This provision does not distinguish on the basis of the development's location.

If a project is wholly in another community and which does not abut the Town, there may be legal reasons to enter into an IMA ~ sovereign rights and liening authority. That said, it is my understanding that the project prompting the Citizens' Petition lays partly in Maynard; and consequently, the connection to the sewer system may be made within Town limits (thus, not requiring an IMA). Either way, this decision is at the sole discretion of the Board.

¹ See footnote 4.

² "A Town... may make contracts with any other town for the operation... of sewers and drains." G.L. c. 83, § 1.

³ "Any municipal corporation, by its water department, may make such a sale or enter into such a contract to supply water to a city or town." G.L. c. 40, § 38.

⁴ A review of the legislative history of the Town shows decisions related to water and sewer are vested with the Board of Selectmen. The Town originally had separate Water (established 1888) and Sewer (established 1916) Commissions. Then, in 1952, the Board of Public Works was created to replace these (and other) commissions. Thereafter, through the approval of a new Charter in 1991, the Board of Selectmen assumed the duties of the Board of Public Works. Further, all executive authority is vested with the Board of Selectmen by the Charter, which has the full force of state law. The Charter provides: "The executive powers of the Town of Maynard shall be vested in the board of selectmen which shall be deemed to be the chief executive office of the town.... The board of selectmen shall have all of the executive powers it is possible for a board of selectmen to have and to exercise."

Conclusion

Consequently, while the vote may indicate to the Board the desires of Town Meeting, it may not serve to prohibit the Town, by and through its Board of Selectmen to enter agreements to provide water or sewer services to neighboring Towns, developers or property owners.