Town of Rowe – FY2010
Board of Selectmen
Minutes – Wednesday, April 14, 2010 – 5:00pm

Call to order: The meeting was called to order at 5:00pm by Chair Bill Loomis.

Present: Selectmen Bill Loomis and Paul McLatchy III; Town Coordinator Ellen Miller

Planning Board FY2011 Budget: At the previous meeting (April 7) Danette Reynolds-Gallaghar of the Planning Board submitted a memo with requests for next year's Planning Board budget. At that meeting she agreed that it would be a good idea for both boards to meet to discuss the matter, and agreed to extend the Selectmen's invitation to the Planning Board to attend this evening's meeting to discuss the Planning Board's budget requests. Ms. Reynolds-Gallaghar, and Planning Board members Ann Foshay and Jodi Brown, did attend this evening's meeting, but Chair David Roberson did not show up. Selectman McLatchy was disappointed that Chair Roberson did not show up. See previous minutes for more information, and correspondence from Town Counsel concerning appointment of town counsel. Ms. Miller presented a copy of an email from a DOR attorney concerning the matter. A copy of the email will be provided to Ms. Gallaghar.

Veterans' Memorial Plaque: The new plaque has been delivered and will be installed by Levin Hardison with DPW crew help.

Special Town Meeting Warrant: The Selectboard will meet on April 26th to review and sign the warrant for the upcoming Special Town Meeting on May 10th. The Finance Committee will meet before 4/26 to make recommendations on the articles.

Real Estate Tax Refunds: The Selectboard voted unanimously to approve two 2010 Real Estate Tax Refunds, both for overpayment of taxes. Refunds approved: Alan & Marsena Field - $10.44; Marjorie Morse - $9.89.

FY2011 Chapter 90 Funds: Correspondence was received from the Governor's office stating that Rowe's c.90 funds for FY2011 will be $114.441.

Donation to Goal Post: The Selectboard voted unanimously to accept a $25.00 donation to the Rowe *Goal Post* in memory of Marion Avery from Barbara Purinton.

Dog Complaint: At the previous Selectmen's Meeting on April 7, 2010, Richard Quinn of 16 Hazelton Road attended that meeting to hear of status of his March 18 dog complaint. Dog Officer Russ Powers did visit the dog owner Lisa Bryant of 11 Hazelton Road. She was advised that dogs need to stop nuisance barking. Chair Loomis stated he had invited Lisa Bryant to tonight's meeting through her partner Jim White. She did not show up. He also asked Mr. White to have Ms. Bryant call him, but she never called. As stated at the April 7 meeting, the Selectboard are seeking the adoption of a non-criminal disposition bylaw to address nuisance dogs. (See minutes of April 7, 2010 meeting.)

Police Monthly Time Log: Log for month of March 2010 was reviewed.

Adjournment: The Selectboard voted unanimously to adjourn the meeting at 6:20pm.

Respectfully submitted,
Ellen B. Miller, Town Coordinator

Approved:

William A. Loomis, Chair

Paul McLatchy III

Sept 20, 2010
Date Approved

[Vacant]

Documents:

- Agenda
- DOR Email re appointment of town counsel dated April 9, 2010
- FY2010 Real Estate Tax Refunds
- FY2011 c.90 letter from Governor's Office
- Police Dept Monthly Time Log – Mar 2010

From: Hinchey, Christopher M [mailto:hinchey@dor.state.ma.us] **On Behalf Of** DOR DLS Law
Sent: Friday, April 09, 2010 12:22 PM
To: Ellen Miller
Subject: RE: Town Counsel

We've generally been skeptical of town departments' authority to hire their own legal counsel in the absence of statutory authorization, charter provisions, or special circumstances such as a conflict of interest on the part of town counsel. See the attached letters (Our File No.95-1060 and Our File No.96-931).

It would make sense to contact the planning board and ask them what authority they rely on to hire their own counsel, and to put them on notice of your intention not to approve bills for payment if they cannot provide satisfactory justification for their decision to hire their own attorney.

Chris Hinchey Tax Counsel
Bureau of Municipal Finance Law
PO Box 9569
Boston, MA 02114-9569
617-626-2400
dlslaw@dor.state.ma.us

This e-mail response is intended to provide general information about the application of municipal tax and finance laws and Department of Revenue policies and procedures. It is not a public written statement, as defined in 830 CMR 62C.3.1, and does not state the official position of the Department on the interpretation of the laws pertaining to local taxes and finance. It should be considered informational only.

From: Ellen Miller [mailto:admin@rowe-ma.gov]
Sent: Tuesday, April 06, 2010 2:04 PM
To: DOR DLS Law
Subject: Town Counsel

The Rowe Selectboard has appointed Kopelman and Paige as Town Counsel (and has for many years).

Our Planning Board has hired their own town counsel. Can they do that?

If they cannot do that, is our only recourse to not approve/pay invoices submitted by their counsel? Could we have answer soon. Need info for town meeting.

Ellen B Miller, Rowe Town Accountant
321 Zoar Rd, PO Box 462, Rowe MA 01367
Ph 413-339-9944 - Fx 413-339-5316

Please consider the environment before printing this email.

April 4, 2010

Janet Pumphrey
Jhpumphrey@k-plaw.com

Ellen Miller, Town Coordinator
Town of Rowe
321 Zoar Road, P.O. Box 462
Rowe, Massachusetts 01367

RE: Planning Board Outside Counsel Line Item

Dear Ms. Miller:

You requested that I follow-up my opinion from September, 2009 on the issue of whether the Planning Board may hire its own attorney who would perform "consulting services" for the Planning Board.

Massachusetts case law is well-settled that a municipal department or board lacks the authority to hire its own counsel. In the leading case of Board of Public Works v. Board of Selectmen of Wellesley, 377 Mass. 621, 624 (1979), the Supreme Judicial Court reiterated the fundamental principle: "It is conventional learning that a municipal department is not permitted to bring suit for the town without specific authorization from the town or from agents entitled to act for it unless, indeed, there is governing legislation conferring the power on the department. . . The rule serves to prevent confusion or conflict in the direction and management of municipal litigation."

In another more recent ruling, Town of Rehoboth, et al. v. Roger Breault, et al., Land Court Misc. No. 09-405262-CWT, a Land Court judge, based upon the Wellesley case, ruled that counsel could not appear to defend the Town of Rehoboth zoning board of appeals where the appropriate officials in that community (the board of selectmen) refused to appoint counsel for the board. The Land Court ruled, "the Board of Appeals is

without the executive authority to direct the legal interests of the Town of Rehoboth, whether Town funds are expended or not."

In Rowe, Article III of the Bylaws explicitly provides that the "Selectmen shall be the agents of the Town to initiate, prosecute and defend any and all claims, actions, suits and proceedings to which the Town is a party, or in which the interests of the Town are or may be involved..." Rowe Bylaws, Article III, section 3. In addition, the "Selectmen shall act as town agents and have the authority as agents and officers of the Town to appoint and employ a town counsel, **who shall act as attorney and counsel for the Town and the various officers and boards** thereof except where otherwise provided by law." Rowe Bylaws, Article III, section 2. Therefore, the Town's own Bylaw specifies that the Rowe Town Counsel acts as the attorney for the various boards.

The Planning Board is not a body separate or distinct from the Town of Rowe. While the Planning Board exists pursuant to state law, G.L. c.40B, the Planning Board, like many other municipal boards, is not an independent body for the purpose of hiring counsel in circumstances where the Board of Selectmen has determined that counsel should not be provided. *Compare* Middleborough v. Middleborough Gas & Electric Dep't., 422 Mass. 583, 585 (1996) (whether a suit may lie between a town and a municipal body within it "depends on whether [the municipal body] and the town are sufficiently distinct as financial and political entities to support a suit by" one against the other). The Planning Board is an administrative body in Rowe. Like those entities, absent specific authorization, such a body has no authority to engage counsel, except as permitted by the municipal authority designated to appoint counsel, in Rowe, the Board of Selectmen.

It would be extremely detrimental to the management and functioning of municipal government in Massachusetts if every local board or official were allowed to retain counsel whenever the board or official disagrees with the position of the entity possessing the power to determine when and if the municipality will be represented in litigation. The basic control by the designated municipal officials to conduct public business would be severely undermined. The public interest is protected when the public authorities vested with the power to appoint as counsel are vested with the discretion to determine when, if, and whom to appoint as counsel to represent the municipality.

Towns do sometimes hire consultants who happen to be attorneys to advise them with respect to discrete tasks, such as the drafting of zoning or personnel bylaws. These consultants can be planners, employment specialists, or attorneys with expertise in drafting bylaws and ordinance. Kopelman and Paige is often hired as Special Counsel to perform such services for towns seeking expert help in redrafting their zoning, personnel or other regulations.

The question here is whether the Planning Board is seeking its own attorney to perform legal services, such as legal advice and opinions, or for the specific task of re-drafting the zoning bylaw. I would advise that the Board of Selectmen and Finance Committee determine exactly what role the Planning Board intends to have their attorney perform. If that role is at odds with the principles I have set out in the beginning of this opinion – i.e., the Planning Board is retaining counsel when the board disagrees with the position of the Board of Selectmen – then it is my opinion that the Planning Board is precluded by law from having such a line item. But, if the Planning Board can inform the Board of Selectmen and Finance Committee as to the provisions in the Zoning Bylaw which need revision and explain why an outside consultant is required, then it would be up to the Finance Committee to approve that requested line item in the budget.[2]

Very truly yours,

Janet Pumphrey

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[2] General Laws chapter 39, § 16 provides that "In every town having a committee appointed under authority of this section, such committee, or the selectmen if authorized by a by-law of the town, and, in any town not having such a committee, the selectmen, shall submit a budget at the annual town meeting." In Rowe, the Finance Committee submits the budget article for the warrant at the annual town meeting.