

Town of Brookline  
Advisory Committee Minutes

Sean Lynn-Jones, Chair

Date: February 11, 2016

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Present: Carla Benka, Clifford M. Brown, Carol Caro, Lea Cohen, John Doggett, Dennis Doughty, Harry K. Friedman, Janet Gelbart, Amy F. Hummel, Systke Humphrey, Jennifer Goldsmith, David-Marc Goldstein, Neil Gordon, Alisa G. Jonas, Janice S. Kahn, Steven Kanes, Bobbie Knable, Fred Levitan, Robert Liao, Pamela Lodish, Sean M. Lynn-Jones, Shaari S. Mittel, Lee L. Selwyn, Charles Swartz, Christine Westphal

Absent: \* Kelly Hardebeck, Angela Hyatt, Mariah Nobrega, Michael Sandman, Stanley L. Spiegel

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The meeting was called to order at 7:30 PM.

Also in attendance Joslin H. Murphy, Town Counsel; Gary McCabe, Chief Assessor; Sandra DeBow, Director of Human Resources; Melissa Goff, Deputy Town Administrator

**1. TOWN COUNSEL RESERVE FUND TRANSFER REQUEST IN THE AMOUNT OF \$120,000 FOR THE LEGAL DEPARTMENT GENERAL COUNSEL SERVICES ACCOUNT AND \$45,000 FOR THE LEGAL DEPARTMENT LITIGATION ACCOUNT**

Lee Selwyn reviewed the Town Counsel's RFT request and the subcommittee's report and recommendations regarding same. Although the subcommittee recommended approval, they noted some misgivings especially regarding the \$90K. The request doesn't earmark specific amounts of monies for specific cases. Funds can be used at the legal department's discretion for these or potentially other cases. The fact that things like this crop up consistently suggests that there should be other options considered going forward – for example, include a contingency fund in the budget which may be a more appropriate approach instead of a RFT request.

1. Gary McCabe, Chief Assessor noted that an estimated \$30,000 is needed for property tax appeal litigation currently underway. The Town has joined with the cities of Boston, Newton and Cambridge in a property tax appeal matter brought by Verizon and RCN. Verizon and RCN are contesting the taxes levied by Brookline (and the other cities) on the poles, wires and conduit (business personal property) for the years 2012-2015. The potential exposure for the Town is \$938,607 plus 8% interest. Outside counsel has been jointly retained by Brookline, Boston, Cambridge and Newton to represent their interest in this case. An allocation formula based on each town or city's size was used to determine the percentage of legal fees each participant is responsible for. Brookline's share is approximately \$20,000. The remaining \$10,000 of the request will be used for other pending cases

including an NStar claim disputing assessment. This case has long lasting implications on future Town revenue, and the Town expects to prevail.

Joslin Murphy, Town Counsel: Point well taken about contingency in terms of budget moving forward. The remaining \$90,000 is being sought for outside counsel for two cases being tried in Federal Court (McDonald v. Town of Brookline and Gerald Alston v. Town of Brookline) and the Town of Brookline, et al v. Residences of South Brookline being tried in Land Court. Feel strongly that the McDonald case should not be settled but go to trial. Attorneys in our office have a tremendous amount of experience litigating in federal court but the attorney litigating this case does not, so we have retained outside counsel to assist us.

The estimated costs for representation in the 2 cases being tried in US District Court is \$75,000 (\$30,000 for the McDonald and \$45,000 for the Alston case). The remaining \$15,000 is for outside counsel Krokidas and Bluestein to represent the ZBA in the conflict of interest question raised in the Hancock Village 40B Comprehensive Permit case being heard in Land Court.

Town Counsel provided background and updates on the three pending cases.

She note that the \$45K request is for the Litigation account for expenses associated with conducting deposition and legal research, paying stenographers, etc. for all matters presently in litigation.

Q: Can you estimate the cost in the next FY for the Hancock Village case?

A: This case is being handled almost entirely in house save for the conflict of interest issue.

Q: Typically when we see you, it is to request money to settle a case. How did you decide to litigate rather than settle the McDonald case?

A: Many things to consider, the Town doesn't have liability in this case; important to pursue this in court.

Q: How many attorneys are in the office?

A: Four (4) full time attorneys presently.

Q: Do you anticipate never needing outside counsel?

A: For special cases that require a specific area of expertise – communications technology, environmental issues, etc. outside counsel is needed.

Q: The town is being asked to spend money on the alleged racist acts of some of its employees. Hope something is done to insure that employees can work in a safe environment and that this type of behavior is not tolerated.

A: Appreciate your comment. Don't disagree and yes, every employee should work in a safe environment but we have to protect the Town against the claim that this is institutionalized racism going back to the 1800s.

A: Relevant to the overall budget question – annually budgeted 80K for our outside attorneys. Would like to say we won't have that much litigation but need to be realistic about the possibilities. We were operating at a staff of 3 attorneys for the past 2 years and we were pretty frugal, notwithstanding that we were understaffed for the past 2 years.

Comment: Difficult to prognosticate when you can't tell what is coming down the pike.

Settlements are paid through the Legal Department's settlement account. Has some other type of configuration been considered? In the case of potholes for example, why shouldn't settlement funds come from DPW budget?

Q: Employment cases – why don't we have someone in-house with employment law expertise? Why wouldn't we want someone for routine grievance procedures, etc.

A: Town Counsel and HR are in discussions about coordinating cases better, however, some cases are so inextricably combined with collective bargaining and contracts that it makes sense to have outside legal counsel with that area of expertise.

Q: Is there ever any recovery of attorney fees when the Town wins a case?

A: It depends on the statute. The opportunity is provided by statute.

Comment: Troubled by a RFT that fills a pot vs individual items that we can wrap our arms around. I would like to have a future, further discussion around this.

A MOTION was made and seconded to approve \$30,000 RFT for property tax appeal litigation.

**Vote:** With a vote of 23 in favor, 0 opposed and 1 abstention the transfer is approved. Robert Liao abstained due to his employment with Verizon.

A MOTION was made and seconded to approve \$90,000 RFT for outside counsel.

**Vote:** With a vote of 24 in favor, 0 opposed and no abstentions the transfer is approved.

A MOTION was made and seconded to approve \$45,000 RFT to the Litigation account.

**Vote:** With a vote of 24 in favor, 0 opposed and no abstentions the transfer is approved.

## **2. HUMAN RESOURCES RESERVE FUND TRANSFER REQUEST IN THE AMOUNT OF \$200,000 FOR OUTSIDE LABOR AND EMPLOYMENT COUNSEL**

Janet Gelbart, Personnel subcommittee chair, reviewed the outcome of their meeting earlier in the evening. The RFT request is due in large part to the costs of litigation for two employees (one in DPW and one in IT). Although one settled in December, saving some future litigation costs, the other continues to move forward as the demands to settle are unreasonably high and our offers to mediate have been rejected. They have also had an atypical number of arbitrations regarding employee discipline resulting in higher costs; the two firefighters who were terminated earlier this year have each filed for arbitration and we arbitrated several cases that had been moved from FY 15 into FY 16.

The Director was unable to break down the costs case by case but offered an estimated number of hours required. HR plans to work with Town Counsel to see what can be brought in house in the future.

The Subcommittee voted 4-0 to approve RFT request.

Sandra DeBow, Director of Human Resources explained that the case going to court will require 80 to 100 hours to litigate although they are trying to settle it.

3 termination arbitrations require a total of 330 hours

A consultant 30 hours

Negotiating a new contract requires between 50-100 hours (although HR has already spent about 30 hours of this). Contract negotiations for the Library, School, Traffic Supervisors, Engineers and Teamsters come up to about 250 hours at \$210 /hour. There is also an issue going on with Recreation which will be another estimated 20-100 hours . Unclear what the grievances are and still not clear what the goal is.

Total of between 800-900 hours of legal time.

Q: Is this a higher than average year? I know they go up and down? Is it increasing each year?

A: I think there is no question that we need to look at how much my office is being funded for contract negotiations, outside labor counsel, etc. There needs to be a general bump up in the overall budget which hasn't been increased since 2011. The two cases that are driving us over budget are employment law cases that we couldn't give to Town Counsel. Too messy cases difficult to settle from an employee supervisor standpoint. Unusual and protracted for different reasons.

Q: Will this set a trend if employees see this as way to get increased compensation?

A: That is one reason why we didn't want to settle one recent case in particular but managed to get the award lowered. In another instance, we chose not to set a precedent for difficult employees who engage in questionable conduct. You cannot allow them to stay. We can't settle because it would set a precedent.

Q: How many arbitration cases do you do per year on average?

A: Maybe three or four. Most recently it has been more over the course of some years, setting higher standards and employees bumping up against that there have been more arbitrations than we anticipated. The labor counsel we use has been with us for a number of years. They know us, they know the field, they know the contracts, they understand the nuances of cases, etc.

Q: Why can't we have in house counsel with expertise in arbitration?

A: One is employment law – MCAD based in employment law not in contracts. Some cases are interwoven, unfair labor practices, arbitration and MCAD complaint. We have employment expertise. When it comes to labor, we could hire a labor attorney but one full time employee couldn't handle all of the cases we encounter. Melissa (Goff, Deputy Town Administrator), Joslin (Murphy, Town Counsel) and I have been looking at it and will continue to explore it. We use 6 attorneys at DW at any one time.

Q: If you agreed to a settlement whose budget does it come out of? The department where the grievance comes from or elsewhere?

A: It does not come out of the individual department.

A MOTION was made and seconded to approve \$200,000 RFT for outside labor and employment counsel to the Human Resources Department.

**Vote:** With a vote of 24 in favor, 0 opposed and no abstentions the reserve fund transfer is approved.

### **3. UPDATE ON PROPOSED 9<sup>TH</sup> ELEMENTARY SCHOOL**

Sean Lynn-Jones, chair of the Subcommittee on Long-Term Planning and Policies provided an overview of and highlighted key points in the subcommittee's report on a potential 9<sup>th</sup> Elementary School.

#### **Discussion:**

Making a recommendation as to whether it makes sense to resubmit to the MSBA.

Members of the School Committee in attendance shared comments: Delighted to continue to try to keep aligned on all the various decisions.

MSBA uses the figure of 100,000 sq. feet for 3 section school. Construction costs may be up to \$500/sq. foot plus 20% soft costs plus acquisition of land on top of that.

There is a huge range of uncertainty about projections and varied methodologies.

The Town is looking at a minimum of roughly \$100 million dollars for the high school.

Where did the money come from for Civic Moxie? "Classroom Capacity" CIP funds

Important to remember that these are all just capital costs and that operating increases go along with Capital projects. Reluctant to think about just the capital investment as the costs of a capital project are paid off over a specific period of time whereas the operating costs are going to continue

Estimate incoming Kindergarten classes of 670 students, assuming 40B projects such as hancock Village 2, and this is the best we can say now, 27 classrooms and many other assumptions and footnotes.

School Committee has a draft document attempting to wrestle with all of this.

Different ways, different departments project number of students coming out of developments. It is an iterative process taking everyone's process and best guesses to come up with something solid.

#### **4. REPORT ON ADVISORY COMMITTEE POLICIES**

***Policy Regarding Notice to Petitioners of Warrant Articles that may be reconsidered by the Advisory Committee:***

*If the Advisory Committee or one of its subcommittees places on its agenda possible reconsideration of its recommendation on a Warrant Article, the petitioner of that Warrant Article will be notified in writing and by telephone at least 48 hours before the meeting at which reconsideration may occur. **If an amendment to the Warrant Article has been submitted in writing, the petitioner will be provided a copy at the same time that he or she is informed of the possible reconsideration or at the same time that the Advisory Committee receives the amendment. If no amendment has been submitted, the petitioner will be advised of the reasons for placing possible reconsideration on the agenda.** This requirement may be waived at the request of the petitioner.*

Sean gave the background on an informal agreement between Harry Bohrs and Regina Frawley regarding 1) providing notice to petitioners when their Warrant Articles are likely to be reconsidered by the Advisory Committee and 2) providing copies of all Advisory Committee recommended motions to the petitioner regarding their Warrant Article. The Subcommittee on Long-Term Planning and Policy would like to recommend and institute as these agreements as policy.

#### **Discussion:**

Would like conditional language because there are some situations where notice is difficult. Use the term, "best efforts" somewhere. Then add details about dealing with exceptions to the 48 hour rule.

Change “in writing” to just contacted. Remove “writing and telephone” – just “notify”

“Will be notified if possible”

We need to make a commitment to have good communication and relationships with our petitioners and it would be disingenuous to move it to other business.

This is a good faith effort to demonstrate that we are an open body with a commitment to communication.

A MOTION was made and seconded to change “on a Warrant Article, The Advisory Committee will use its best efforts to notify the Petitioner of that Warrant Article,”

**Vote:** With a vote of 19 in favor, 3 opposed and no abstentions the change is approved.

A MOTION was made and seconded to add “This requirement may be waived when reconsideration occurs on the first or subsequent night of Town Meeting.”

**Vote:** With a vote of 18 in favor, 4 opposed and no abstentions the change is approved.

A MOTION was made and seconded to delete “in writing and by telephone”

**Vote:** With a vote of 21 in favor, 1 opposed and no abstentions the change is approved.

A MOTION was made and seconded to approve the policy as amended.

**Vote:** With a vote of 20 in favor, 3 opposed with no abstentions, the policy is approved.

**The new policy as approved follows:**

If the Advisory Committee or one of its subcommittees places on its agenda possible reconsideration of its recommendation on a Warrant Article, *the Advisory Committee will use its best efforts to notify the petitioner of that Warrant Article at least 48 hours before the meeting at which reconsideration may occur. If an amendment to the Warrant Article has been submitted in writing, the petitioner will be provided a copy at the same time that he or she is informed of the possible reconsideration or at the same time that the Advisory Committee receives the amendment. If no amendment has been submitted, the petitioner will be advised of the reasons for placing possible reconsideration on the agenda. This requirement may be waived at the request of the petitioner or when reconsideration occurs on the first or subsequent night of Town Meeting.*

***Policy Regarding Reserve Fund Transfer Requests:***

*No Reserve Fund Transfer request shall be placed before the Advisory Committee for its consideration and potential vote unless (i) the Chair of the Advisory Committee has been notified of such request simultaneously with ~~or prior to~~ the Selectmen and (ii) until an appropriate subcommittee has reviewed such request as to its necessity and timeliness, and has had an opportunity to investigate and evaluate*

*any relevant factual information pertaining to said request. Such subcommittee may request the relevant department head to consider and prepare alternatives to the requested Reserve Fund Transfer including, but not limited to, alternative sources of funding and alternative approaches to accomplishing the same functional objective. The subcommittee may also consider such alternatives and shall provide a written recommendation regarding the Reserve Fund Transfer request to the full committee membership.*

The sooner we know the better, but if they don't tell us, what happens? The wording seems to be implying that we won't consider RFT requests if the process outlined is not followed. The goal is to be sure we are given timely notice of a RFT request. We want to have sufficient notice in order to hold a subcommittee meeting. Focus on what we need as an Advisory Committee as opposed to complaining and being reactive.

A MOTION was made and seconded to eliminate "simultaneous with or prior to the Selectman"

**Vote:** With a vote of 17 in favor, 1 opposed and no abstentions the change is approved.

A MOTION was made and seconded to approve the policy as amended.

**Vote:** With a vote 21 in favor, 0 opposed and 1 abstention the policy is approved.

***Policy Regarding Informing Petitioners and Other Interested Parties of Advisory Committee votes on Warrant Articles***

*Within 48 hours of taking a vote with respect to any Warrant Article, the Advisory Committee will provide copies of the Advisory Committee's recommended motion(s) to the petitioner(s), the chair of the Advisory Committee subcommittee that considered the Warrant Article, and the office of the Town Administrator.*

A MOTION was made and seconded to approve the policy as written.

**Vote:** With a vote of 22 in favor, 0 opposed and no abstentions, the policy is approved.

These policies will be added to the website.

Upon a MOTION made and seconded and voted unanimously, the meeting adjourned at 9:45pm .

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**Documents Presented at Advisory Committee Meeting:**

- A. Town Council Reserve Fund Transfer Request for Legal Services Department (2 pages)
- B. Subcommittee on Planning and Regulation Report on Legal Services RFT Request (2 pages)

- C. Director of Human Resources Reserve Fund Transfer Request for Outside Labor and Employment Counsel (2 pages)
- D. Reserve Fund Transfers FY 1995- FY 2015 (3 pages)
- E. FY16 Reserve Fund Status (1 page)
- F. Subcommittee on Long-Term Planning and Policies Report on a Potential 9<sup>th</sup> Elementary School (8 pages)
- G. Subcommittee on Long-Term Planning and Policies Report on Advisory Committee Policies (3 pages)
- H. Draft Advisory Committee Meeting Schedule (3 pages)