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December 11, 2009

Lent Township
Attn: Town Board
33155 Hemingway Ave.
Stacy, MN 55079

Re: Legal Opinion Regarding Actions Taken at the Special Town Meeting

Dear Town Board:

I am writing to provide the Lent Town Board with my opinion regarding the legal effect of the actions proposed to be taken at the special town meeting petitioned for and scheduled to be held in the Town on December 14, 2009. As you are aware, during the Town Board's regular meeting on November 20, 2009 the Town Clerk was handed an envelope containing a petition calling for a special town meeting. Shortly after the envelope was submitted, a request was made to immediately set a date for the special town meeting. However, I indicated the petition would need to be reviewed in order to determine whether it was legally sufficient before setting a date.

I spoke to the Town Clerk regarding the need to review the petition signatures to confirm they were actually from Town electors and constituted at least 20 percent of the number of voters at the last general election as required by Minnesota Statutes, Section 365.52, subdivision 1. The Clerk confirmed the petition did in fact appear to be signed by the required number of town electors. I confirmed the petition was accompanied by the statement required by statute which describes the reasons why the meeting was being called, the particular business to be transacted, and that the interests of the Town require the meeting.

The petition indicated that the following business is to be transacted at meeting:

1. To openly and publicly review and discuss the final draft of a Development Agreement by and among the Town of Lent and Sunrise River Energy, LLC prior to any official vote of the Lent Township Board of Supervisors to approve and/or sign said Development Agreement; and

2. To present and vote on a resolution requiring a public referendum on the question of approval or disapproval of any Development Agreement by and among the Town of Lent and Sunrise River Energy, LLC prior to any official action or vote of the Lent Township Board of Supervisors to approve and/or sign said Development Agreement; and
3. To present and vote on a resolution requiring the Lent Township Board of Supervisors to comply with the results of said referendum when taking any action or vote to approve and/or sign said Development Agreement.

The statute allowing a special town meeting to be called indicates a “special town meeting may be held to conduct any lawful business.” Minn. Stat. § 365.52, subd. 1. In my opinion, the Town is not required to hold the special town meeting because, as will be explained below, the business proposed to be conducted at the meeting does not fall within the powers of the town electors. However, rather than engage in an argument over that point in light of various threats of litigation made to the Town following the meeting, I recommended the Town provide notice of the special town meeting and allow the meeting to be held.

Prior to making my recommendation, I had a telephone conversation with Travis Stottler, the attorney representing at least some of the petitioners, during which he indicated the petitioners simply want a forum to be heard regarding the proposed power plant. I pointed out there has been ample opportunity for the public to provide input at the two public hearings that have been held on this matter, the multiple Town meetings at which the public has offered comments, and through the Town’s solicitation of written comments from the public regarding the Development Agreement. However, if the intent was to have one more opportunity for the public to present its comments before the Town Board acts on the development agreement, I indicated I would recommend the Town allow the special town meeting. During the conversation, I did let him know the special town meeting does not give the electors the authority to require an election on this issue or to control the Town Board’s vote on the agreement.

The special town meeting is scheduled for 7:00 p.m. on December 14, 2009 and notice of the meeting was published and posted in accordance with Minn. Stat. § 365.53. The fundamental question to be answered is what effect, if any, do the actions taken at the meeting have on the Town Board and its authority to act on the agreements?

The “township” or “town” form of government is unique in that the legislature has structured town law to provide electors a role in how a town board carries out certain items of town business. This “grassroots” form of government allows electors more direct input, particularly with respect to the levy, than in other forms of local government. However, the authority the legislature has vested in the electors regarding the lawful conduct of town business is limited.

Because towns are considered creatures of the legislature, they can only exercise those powers given them by the legislature. Powers are conveyed by statute and they generally come in one of three forms: (1) those given exclusively to the town board; (2) those given exclusively to the town electors; and (3) those given to both the town board and the town electors to be exercised

with mutual consent. Electors only have a direct say in the town board's exercise of a particular power if the statute conveying the power expressly says so. In such cases the legislature has essentially limited the power of the town board by either giving a particular power directly to the electors or by requiring elector authorization before the town board can act. There is no mechanism under law for the electors, through the calling of a special town meeting or otherwise, to alter how the legislature has structured the exercise of a particular power. In other words, the electors cannot move powers from one category to another. Doing so would exceed their authority and constitute a prohibited re-delegation of authority. The same restriction applies to a town board. If a power is delegated exclusively to a town board, it cannot attempt to re-delegate the exercise of that power to the town electors.

The powers given to the town electors to exercise at an annual or special town meeting are largely contained in Minn. Stat. § 365.10. The electors have a right to exercise these powers at a town meeting only because the legislature has expressly made the exercise of those powers subject to elector input. Just as a town board can only exercise those powers provided it by the legislature, the electors can only play a direct role in the exercise of town powers to the extent the legislature has expressly provided them that authority. This is not to say the electors cannot speak to issues before a town board, it is simply they do not have the authority to vote on or directly control the Town Board's exercise of that power.

“The Town meeting has only such powers as are expressly stated in MSA 365.10, plus such other special powers as may be conferred by other statutes” Op. Atty. Gen., 707-A-14 (March 29, 1950). Just as the electors cannot vest themselves with the authority to limit a town board's actions, this Attorney General's opinion pointed out the electors cannot alter or expand a town board's statutory powers. In an earlier opinion, the Attorney General succinctly described the distinction between the powers of electors and those of the town board stating that “[t]he power to raise money for town purposes is vested in the voters thereof. On the other hand, the power to determine on what particular enterprise this money is to be spent is vested in the town board. The electors of the town have no control over the board in the exercise of this power.” Op. Atty. Gen., 1930, No. 377, p. 321.

In the present case, the Town Board has been asked to consider and act on a development agreement and a host fee agreement related to a power plant proposed to be located within the Town. As you know, development agreements are a common tool used by local governments as part of their zoning process to address new development occurring in their communities. The present agreements are different in that they arise not from the Town's zoning procedures, but instead from a condition the legislature placed in the statute granting the plant an exemption from having to pay personal property taxes. Minn. Stat. § 272.02, subd. 92. In fact, the agreements cannot be based on the Town's zoning ordinance as the legislature has expressly exempted large power plants from having to comply with all local zoning, building, or land use rules, regulations, or ordinances. The authority to permit and site such plants is vested exclusively in the state. Minn. Stat. § 216E.10, subd. 1. As such, local governments typically only have an opportunity to speak about such projects as part of the Minnesota Public Utilities Commission (“PUC”) process and do not issue permits for or enter into development agreements related to such projects. However, in this case, given the way the legislature structured the

personal property tax exemption, the Town Board and County Board are in a position of addressing a development agreement related to this proposed project.

The language of the statute requiring the agreements arguably limited the scope of the development agreement with the Town by only referencing noise and visual impacts as required provisions of the agreement. Minn. Stat. § 272.02, subd. 92(a)(10). The statute also indicates the development agreement with the County must contain provisions related to using effluent from a wastewater treatment facility and that the outfall is to be collocated with the outfall of the wastewater treatment facility. Minn. Stat. § 272.02, subd. 92(a)(9). Despite these arguable limitations, the draft development agreement addresses a wide range of issues and includes an agreement by the company to comply with various zoning standards within the Town's ordinance.

While the electors and the others who have attended the multiple public meetings at which the power plant project has been discussed have understandably raised questions and concerns regarding the potential impacts of the proposed plant, the issue before the Town Board will ultimately be whether to enter into a development agreement and host fee agreement with the company as negotiated and presented to the Town Board.

The decision whether to enter into these agreements is vested in and rests exclusively with the Town Board. "The supervisors shall have charge of all town affairs not committed to other officers by law." Minn. Stat. § 365.01, subd. 1. The electors do not have the authority to control the decision of whether to enter into the agreements or to direct the terms of the agreements. Nor do the electors have the authority to require the Town to hold an election on the issue of whether the Town Board should enter into these agreements. Because the Town Board holds the exclusive power to enter into the agreements, any election on the issue would constitute an advisory election which is prohibited under Minnesota law. Again, the Town Board could not call an election on this issue even if it wanted to.

With these points in mind, I will briefly review each of the stated purposes for the meeting. The first speaks of reviewing the most current draft of the development agreement. It appears the intent behind this statement was to ensure the Town makes available the most current draft of the development agreement for the meeting. As was stated at the meeting on December 9, 2009, the goal is to post the most current version of the development agreement on the Town's website by the end of the week. It is important to note the petitioners do not have the authority to compel the creation or production of certain documents for the meeting, but the point is largely moot as the revised document should be posted in time for the meeting. Also, the Town has no obligation to prepare copies of the documents for the meeting.

The second purpose of the special meeting set forth in the petition speaks of acting on a resolution to require a public referendum on the question of approval or disapproval of the development agreement. As stated above, the electors do not have the authority to call for a public referendum on this matter. If such a resolution is adopted at the meeting, it will have no effect and the Town has no authority to call or hold an election for this purpose.

The final purpose of the special meeting stated in the petition speaks of passing a resolution requiring the Town Board to comply with the results of the referendum vote. Again, the electors do not have the authority to adopt such a resolution and, if they do, it will have no effect on the Town Board. This is clearly an attempt to usurp the Town Board's power to determine whether or not to enter into the proposed agreements and would not be controlling regardless of the outcome of such a vote.

It is not uncommon for town electors at an annual meeting to speak to a wide range of issues that are beyond their authority. In most cases, it is impractical, and often serves little purpose, for the moderator to attempt to rule the person out of order for speaking on an issue that is outside the scope of the elector's powers. It is in that same line of reasoning that I recommended the Town proceed with the meeting to allow further public input. However, those who attend the meeting need to know that any actions taken at the meeting, whether for or against the Town entering into the agreements, will have no legal effect on the Town Board. To that end, I recommend that the Town post this letter on its website so those who may wish to attend the special town meeting understand that the meeting will only serve as a public forum to offer comments to the supervisors. It is also important for those who attend to understand the supervisors do not sit as a town board during annual or special town meetings, are not required to answer questions, and are not authorized to take any action as a town board during the meeting. The only town officer with an official role at the meeting is the Town Clerk and that role is limited to calling the meeting to order, conducting the process for the electors to select a moderator, and taking minutes. The moderator does not have the authority to direct the activities of the clerk.

Town officers are welcome to contact me if there are any questions.

Very truly yours,

A handwritten signature in cursive script that reads "Troy J. Gilchrist (pb)".

Troy J. Gilchrist

cc: Lent Town Clerk