

**January 23, 2017**  
**Executive Session #1**  
**Town Hall, 1 Avenue A, Turners Falls**  
**8:15 PM**

**Present:** Present were Selectpersons Chris Boutwell, Michael Nelson, Rich Kuklewicz, Town Administrator Steven Ellis, Executive Assistant Wendy Bogusz,

**RE: Executive Session under G.L. c 30A, Section 21 (a)(3) to discuss potential litigation, Regarding Penta Corporation**

**Documents and Exhibits:** None

Ellis: We were not able to come to a mediated resolution last week. The thing that was most striking to Bob and I is that the offers we've received to date in terms of settlement would total approximately \$60,000 across two different insurance companies. There's Penta, and then there's Van Dyke. Van Dyke's insurance company, which I believe is Liberty, which is a notoriously difficult insurance company to deal with, said \$50,000 is the max cap and Penta wanted to kick in another \$10,000. Penta came to this with a statement that there was an undocumented change order in field that replaced common fill as a specification around these pipes to pea stone, or to 3/4-inch gravel because of the issues of trying to do compaction around a huge bank of fragile pipes. Bob Macdonald had his own thoughts about what kinds of things might be approved through informal field orders, but the folks from CDM have some pictures that appear to show that it was done with common fill. Now since that time, CDM has produced other pictures that show some common fill, but we don't believe it's the same area that we're talking about. And there's some change order conversation document by people at Penta that again may not apply to this area. The sense that Bob and I came away with is that going in with a drop-dead figure of \$185,000, which is the figure you gave me as the lowest negotiating point, may be counterproductive, that this is going to get very confusing. In Van Dyke, we have a company that is essentially disbanded because its proprietor got sick, or might've died. It's like a barely functioning company. Van Dyke was the subcontractor. Penta has liability, but the contract that we had with them clearly makes them liable. Layered on top of this is the question of whether CDM is culpable. That was part of the mediation conversation, that if we go into litigation, understand that there's not going to be four parties to this. It's the Penta lawyers who are making that declaration. Our case is good on a moral basis. The Town was not adequately protected through the work and/or through the supervision of the work. I don't know that we're going to get past \$100,000, and I don't know that if we do get to \$185,000 that it's not going to cost \$50,000 or \$60,000 in legal fees to get there, and we'll risk getting nothing.

Kuklewicz: So far the only ones that have told us what this would cost to remediate were CDM.

Ellis: We did receive a quote, but it was not a complete quote in any stretch. At the last minute this came in from Penta, but it only covered electrical work, and it was for \$60,000 or \$70,000.

Kuklewicz: It didn't cover the excavating.

Ellis: It didn't cover project management, there were no contingency fees, no design work.

Kuklewicz: CDM wants to make another \$40,000 or \$50,000 on engineering and management of this project. They should waive their fees. In my opinion, we've let CDM skate in this town far too long.

Ellis: We have a new superintendent. I think we're going to have legitimate bid processes to get the best possible construction management and design people in here. I think that frankly we're trying to use CDM to argue our case because it's in their interest, and they're willing to do it free, and walk away with as much as we can.

Kuklewicz: Do you think we could get \$100,000 out of this?

Ellis: I would hope that we could get \$100,000 out of this. We're already close to it. It depends. If Penta shows up with better and more solid evidence that it was filled with pea stone, we have to almost take what we can and get out. But Bob and I would like to shoot for more than that, \$100,000 to \$125,000, and that may or may not be enough.

Kuklewicz: One could argue, how much more is this going to settle? So the other option is you find your contractor, you stick with those pipes, you do local excavation by hand, you replace the pipes, put some better expansion joints in, and re-pull the wires and use those existing pipes - how much more is it going to settle in two years? So you cut the pipes back, go underground a little bit, cut them back, do what you have to do, and then pull the wires out and leave the existing conduits under the ground that are there with the thought that they've settled what they're going to settle.

Ellis: I would think that there must be ways that an engineer could define whether further settling is likely by doing some core sample -

Kuklewicz: You just want to be careful where the pipes are because that's where you want to do the core sample. But maybe there's a way to do a radar or some nondestructive-to-the-ground test.

Ellis: Our next mediation date is February 3rd, which is a Friday at 2:30 in the afternoon. It's going to be done by phone because the guy from Penta is coming from Maine. We will probably see this next Monday, and Dave Doneski from KP, who's our lawyer in this, will probably participate in the conversation in executive session again next week when he has more information.

Kuklewicz: There are things to consider. All those came out of the ground and go into junction boxes for the most part, so if you put expansion joints in, to put conduit in you require the contractors to leave extra wire, you monitor the area, put a mark on the conduit and a mark on the wall that anybody could see, this pipe used to be here and now there's this red line and now it's here, you're saying, "Oops, something's cooking," you're settling some more, going to make sure you have extra wire or what, do what you have to do. We might be able to get way with it without ripping all the pipes out of the ground. It's not going to continue to settle forever. But that might be a way to mitigate the cost if we can't get as much money as we'd like to rip the whole thing up. And then if you rip the whole thing up, you have the risk of it settling again anyway. I saw a picture showing gravel, and then they put sand on it, because I remember asking at a meeting, "What did you put between the gravel and the sand?" and they said, "Nothing."

Ellis: At the very bottom of these conduit trenches was drainage with gravel, then there was common fill. At the level of the pipe just below it would be where the question is, did they in fact use that 3/4-inch gravel or not? What I found in this room was that the ground shifted under people several times, that people presented evidence essentially that was new. And immediately after the meeting, this secondary set of pictures. And in the end, they can call our bluff. They can say, "This town's not going to sue us over \$150,000. It's going to cost them another \$100,000." So flexibility is going to be important.

Kuklewicz: Maybe we should think of other ways to remediate it when we get to that point. Bring some contractors in, maybe bring in the electricians that did the job, and have a discussion with them. The challenge that has happened with CDM is that they've done a lot of work for the town, and so they know us, we know them. But I don't know that there's a tremendous love lost between CDM and the Highway Department. I've not heard the most positive feedback from Tom Bergeron about CDM. When I see what we pay CDM, it's not like they're giving us any big deal. I think it's in the best interest of our taxpayers to talk to other engineering firms.

*Kuklewicz makes a motion to adjourn the Penta discussion. Boutwell seconded, unanimously approved. Nelson - Aye. Boutwell - Aye. Kuklewicz - Aye.*

Approved:

Boutwell

Kuklewicz

Nelson

Release to the Public:

Yes

Not Yet

4/2/18 Date

Date Released to the Public: 4/3/18