

Memo

To: Courtney Nicholls, Assistant Village Manager, Shawn Keough, Village President and Councilmembers
From: Tom Ryan, Special Counsel
Date: September 21, 2011
Re: State Boundary Commission

Dear Ms. Nicholls, President Keough and Ladies and Gentlemen:

I have been requested by President Keough to update the entire Council as to the events that transpired yesterday, September 15, 2011, at the Boundary Commission legal sufficiency hearing, relative to the Petition to Incorporate the Village of Dexter as a city.

First of all I will say that after our meeting on Monday evening, September 12th, there was a late flurry of activities concerning the Findings of Fact and Conclusions of Law provided by the Boundary Commission staff and then followed by the filing of an amended agenda, which included as a first item annexation of land in Lodi Township to the City of Saline and then our matter, Docket 10-1-2, Petition for Incorporation of the Village of Dexter.

Our matter basically covered two (2) issues: (1) the release of the Memorandum from the Attorney General to the Boundary Commission as to whether or not that should be made a public document as it had been referenced in the proposed Findings and Fact and Conclusions of Law, and (2) the action on the main issue of the legal sufficiency of the petition effort for and on behalf of the Village.

Assistant Attorney General, George Elworth, was present at the meeting for and in the stead of his associate, Stephen Rideout, who was at the August 18th meeting, and basically Mr. Elworth and the Commission agreed for the purpose of transparency and full disclosure, that the Memorandum, which was critical to the 425 Agreement, should be released to the public. Thereafter, we had requested a copy of the Memorandum and asked the Commission to take a brief recess so that we could actually see what in fact the Memorandum stated and a copy of that Memorandum is attached to this communication.

The Memorandum spends more time addressing the issue of what happens when the 425 Agreement is extinguished if the Village becomes a City, but basically indicates the premise of which we were concerned in that the 425 Agreement does not preclude incorporation. At that point, we were allowed to make a presentation on the Attorney General's Memorandum and we expanded that into a discussion about why we believe the Commission should follow the

Memorandum and in fact that the Memorandum was incorrect about the extinguishing of the Agreement upon the Village becoming a City and actually reading from the 425 Agreement to try to change their minds relative to that issue.

The Township did not really speak much except that they disagreed with the Memorandum and the Commission seemed to be wary of the fact that they were being asked to reargue the matter or reconsider the matter and so they shut off public debate at that point. Next, the Boundary Commission went to the proposed Findings of Fact and Conclusions of Law and with hardly any discussion, moved, seconded and adopted unanimously the proposed Findings of Fact and Conclusions of Law indicating that the Petition was in the Boundary Commission's recommendation, legally insufficient.

One of the changes in the Findings of Fact that I eluded to earlier in this Memorandum, was the fact that apparently the system has been altered in that if a Commission is going to deny legal sufficiency, it is deemed a recommendation to the Director of the Department of Licensing and Regulatory Affairs and it is up to the Director to accept the recommendation of the Boundary Commission or not.

Thus, even though the Boundary Commission took the action that it did yesterday, to deny our Petitions for legal sufficiency until the Director formally rules in writing, the decision is still not final. At the public comment section, I made a motion to ask them to reconsider their decision based upon the fact that it was arbitrary, capricious, and unreasonable that it did not follow the established law and rules, under which the Commission operated, that the reasons stated are not found within the statute. There was no motion made after my request to in fact reconsider the matter. Thereafter the Commission adjourned.

In reviewing this matter prior to going to the Commission, it appears that the Township of Webster has altered their position relative to these 425 Agreements. I will follow up with their attorney, Mr. Fahey, but the Township of Webster's initial position was that (a) the Westridge area and the Cedars area, who have opted to come into the Village, would not be challenged under this 425 Argument, because they have opted in fact to join the Village. It had appeared that the main thrust of the Township of Webster's argument was as to the historical society part of the 425 Agreement, because they have in fact decided not to come into the Village at this point.

However, the Township clarified their position yesterday indicating that they in fact objected to any of the 425 area coming into the Village, not just the two (2) areas that have already been joined to the Village pursuant to the 425 Agreement.

By the Commission's actions yesterday, the FOIA issue relative to the Attorney-Client Privilege Memorandum has been removed and the last issue is whether or not a 425 Agreement, specifically written and addressing the aspect of incorporation, can or cannot be included in an incorporation petition, which again I believe it can be included.

I will follow up with the Village President relative to his discussion with the Historical Society. I had a discussion Monday evening after our meeting on Monday evening with Mr. Bishop, which I thought was very enlightening.

Possible Future Action:

The possible options for the Village are to redraw the incorporation petition, not including the 425 areas, or filing an appeal challenging the decision of the State Boundary Commission. The State Boundary Commission statute, MCL 123.1018 states "every final decision by the commission shall be subject to judicial review in a manner prescribed by Act No. 197 of the Public Acts of 1952, as amended, being sections 24.101 to 24.110 of the Compiled Law of 1948." (The statutes in questions have been repealed and re-adopted by Public Act 1969, 306 Section 111, effective July 1, 1970. The Administrative Procedures Act MCL 24.301 states "when a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, . . . the decision or order is subject to direct review by the courts as provided by law".

MCL 24.303(1) states that a petition for review "shall be filed in the circuit court for the county where the petitioner resides or has his or her principal place of business in the state, or in the circuit court for Ingham County".

Subsection 3, "a petition for review shall contain a concise statement of:

- (a) The nature of the proceedings as to which review is sought;
 - (b) The facts on which venue is based;
 - (c) The grounds on which relief is sought;
 - (d) The relief sought;
- (4) A petitioner shall attach to the petition, as an exhibit, a copy of the agency decision or order of which review is sought."

MCL 24.304 states:

"(1) A petition shall be filed in the court within 60 days after the date of mailing notice of the decision or order of the agency . . . "

"(3) The review shall be conducted by the court without a jury and shall be confined to the record . . . the court, on request shall hear oral arguments and receive written briefs."

MCL 24.306 Scope of Review. This has been stated in my September 9, 2011, memorandum so I won't add this to this correspondence for that reason.

Because of the procedure in our matter, we must await final decision of the director of the agency based upon the recommendation of the Boundary Commission. The statutory time period for filing an appeal will not begin to commence until we receive the written decision of the director. The Michigan General Court rules provide for appeals for circuit court be within 21 days of the entry of the order the judgment appeal. While the statute states 60 days, if Council did wish to appeal, I would be inclined to file within the 21 day time period since we are only challenging one issue and I would not want the Boundary Commission or perhaps Webster Township argue that we did not meet our jurisdictional requirements, although I believe we have 60 days to appeal.

It is possible that the director will overrule the Boundary Commission, but we will have to wait until we receive his decision.

I would recommend, if the Council wishes to proceed in this matter, that an appeal be filed in the Ingham County Circuit Court for the reason that the Judges in that court are well familiar with Administrative Procedures Act appeals and to the extent that local issues could cloud the matter would be more detached from those local distractions.

The appeal is based on the record of the proceedings before the Boundary Commission, which record must be provided by the Boundary Commission to the Circuit Court, written briefs would be filed and hopefully oral argument would be allowed.

Fortunately in our matter we have one real issue, which is the issue of law only, as to whether or not the Act 425 Agreements can be included in our petition for incorporation or not. The other "reasons" of the Boundary Commission as to the parties getting together to work it out; or not wanting to cause litigation; or "a deal is a deal" are not valid "reasons" in my view and should be disposed of quickly. I would assume that the Township of Webster would try to intervene in the matter and argue to support the Boundary Commission's action, but since the FOIA issue has been removed from this matter the question comes down to whether or not the Commission made an error of law by refusing to include the Act 425 Agreement properties in our incorporation petition.

I hope the Council finds this memorandum informative.

Again, I am dismayed that the Boundary Commission has taken this course.

Respectfully submitted,


Thomas J. Ryan
Special Counsel for Village of Dexter