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December 15, 2017

Holley Navarre Water System, Inc.

Attention: Paul Gardner, General Manager
8574 Turkey Bluff Road
Navarre, Florida 32566

RE: Legal Opinion on Issues and Questions Related to Brian Kelly

Dear Mr. Gardner:

I have been contacted by you requesting my legal opinion regarding questions the corporation has related to Brian Kelly. This letter serves as my legal opinion on the various questions.

As you know, the corporation had me analyze its Articles of Incorporation, Bylaws, Policies and other relevant documents to determine what constitutes a "member" and the requirements of eligibility of a "member" to serve on the Board of Directors. I provided the corporation a letter of my legal opinion on each of the currently serving seven Board Members on November 20, 2017. My legal opinion regarding Brian Kelly's eligibility to serve on the Board was that he was not eligible to serve on the Board in that he failed to present current documents showing he owned the property at his address on his Membership Certificate at 7616 Chablis Circle, Navarre, Florida 32566, or provide evidence of leasing the property. His failure to provide this proof resulted in his inability to satisfy the requirement that the "subscriber have reasonable accessibility to the source and a need for water services" in order to serve on the Board of Directors. This requirement is also necessary to receive a Membership Certificate.

On December 9, 2017, at the meeting of the Board of Directors, Brian Kelly's Membership Certificate was rescinded/terminated for the same reason.

The following questions had been presented to me for my legal opinion:

- 1. Is Brian Kelly a Member?** Brian Kelly has failed to demonstrate he has "reasonable accessibility to the source of and who is in need of service provided by the water system or other services operated by the corporation . . ." as required in Article V, Section 1 of the Bylaws of Holley Navarre Water System, Inc. (hereinafter referred to as BL). Therefore, he is ineligible to hold a Membership Certificate. The Board of Directors on December 9, 2017 rescinded/terminated his Membership Certificate per Article V, Section 4 (BL). Therefore it is my opinion that Brian Kelly is no longer a member.
- 2. Did Brian Kelly show proof that he met the requirements for membership?** I have never received a current lease or ownership document of Brian Kelly for his alleged address at

7616 Chablis Circle, Navarre, Florida 32566. Therefore, I have not been shown proof that Brian Kelly meets the requirements for Membership.

3. **Was Brian Kelly ever a Member?** I was presented with a Membership Certificate Number 000007 for Brian Kelly dated October 17, 2017 and signed by President Bien May and Secretary/Treasurer Gaius M. Bruce. Therefore, it appears he was a Member at that time, but I am unaware of what proof Brian Kelly presented to the Board to obtain said Membership Certificate.
4. **How may Brian Kelly be removed as a Board Member? Does removal of Brian Kelly require a special meeting of the Board or a meeting of the Members (the general public Members)?** Article VIII, Section 2 BL provides that “If the office of any director becomes vacant by reason of death, resignation, retirement, disqualification or otherwise, except by removal from office, a majority of the remaining directors, though less than a quorum shall, by a majority vote, choose a successor who shall hold office until the next regular meeting of the members of the corporation at which time the members shall elect a director for the unexpired term.”

In that Mr. Kelly is ineligible for a Membership Certificate and his previous Membership Certificate was rescinded/terminated by the Board of Directors in the December 9, 2017 regular meeting of the Board of Directors, Mr. Kelly is no longer eligible to serve on the Board. Therefore, a reasonable interpretation of the BL is Brian Kelly’s office as a director became vacant because of disqualification. There is no provision in the Articles, Bylaws or Florida Statutes that address additional actions required of the corporation when the office of a director has become vacant by reason of disqualification.

The Board of Directors nor the Membership are attempting to remove Brian Kelly as a director for “cause”. Therefore, the requirements of Article VIII, Section 6 (BL) and Florida Statutes Chapter 607.0808 “Removal of Directors” would not be applicable in regards to Brian Kelly’s vacating the office of director of the corporation.

Nevertheless, if a court would construe Brian Kelly’s “disqualification” as a removal for “cause”, then those procedures outlined in Article VIII, Section 6 (BL) and Florida Statutes Chapter 607.0808 would need to be followed. I attach that portion of the Articles and the copy of the Florida Statutes to this letter and mark it as Attachment “A”. I do not think it is reasonable to interpret a disqualification as a removal for cause. Either you are a member or you are not a member. The BL treat “disqualification” differently from a removal for “cause”(see Article VIII, Section 2 BL).

In my legal opinion, a reasonable procedure to follow by the Board would be the procedure outlined in Article VIII, Section 2 BL and the majority of the Board of Directors would choose a successor and that person would hold office until the next regular meeting of the members of the corporation at which time the members would elect a new director for the unexpired term. That next regular meeting is in January of 2018.

5. **Based upon the documents provided to me, was there any fraud committed by Mr. Kelly or Mr. Caulkins to insure that Brian Kelly met the requirements to become a member?** The elements of actionable fraud in Florida are:

1. A false statement concerning a material fact.
2. Knowledge by the person making the statement that the representation is false.
3. The intent by the person making the statement that the representation will induce another to act on it.
4. Reliance on the representation to the injury of the other party.

I do not believe I have enough evidence and am not aware of sufficient facts to form an opinion as to whether Brian Kelly and James Caulkins knew that they were trying to represent that Brian Kelly was owner of 7616 Chablis Circle, Navarre, Florida 32566 or was even leasing said property. Their representations appear to have been more directed toward demonstrating that Brian Kelly had reasonable accessibility to the source and was one in need of the services provided by the water system. More evidence would need to be presented in my opinion as to what statements/representations they were making and whether they knew those statements/representations were indeed false in order to demonstrate fraud.

6. **Is it safe to remove Mr. Kelly's name from the election documents, in order to meet the time deadline for the 2018 elections?** In that Mr. Kelly has had his Membership Certificate rescinded/terminated and has otherwise failed to satisfy the eligibility requirements to serve as a member of the Board of Directors, his name may be removed from the election documents.

In regards to Mr. Kelly making a proxy vote for a member, Florida Statutes Chapter 617.0721 (2) "Voting by Members" provides "A member who is entitled to vote may vote in person or, unless the articles of incorporation or bylaws otherwise provide, may vote by proxy executed in writing by the member or by his or her duly authorized attorney in fact. Notwithstanding any provision to the contrary in the Articles of Incorporation or Bylaws, any copy, facsimile transmission, or other reliable reproduction of the original proxy may be substituted or used in lieu of the original proxy for any purpose for which the original proxy could be used if the copy, facsimile transmission, or other reliable reproduction is a complete reproduction of the entire proxy. An appointment of a proxy is not valid after 11 months following the date of its execution unless otherwise provided in the proxy." I attach a copy of Florida Statutes Chapter 617.0721 for your reference as Attachment "B".

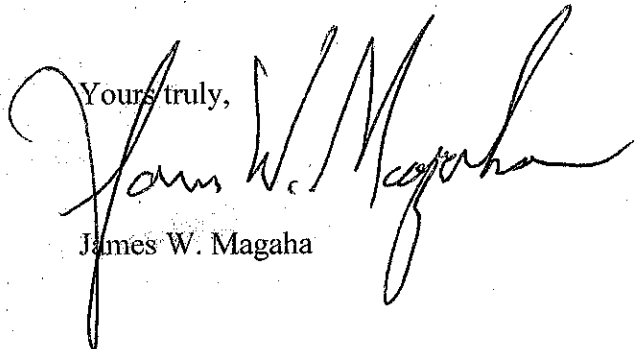
If a member wishes to have Brian Kelly act as their proxy, the member must execute a power of attorney and such document must be signed by the principle and by subscribing witnesses and be acknowledged by the principle before a notary public as required by Florida Statute 709.2105. However, a member can vote by proxy as to particular issues as long as the vote is executed in writing by the member for his duly authorized attorney in fact.

7. **Brian Kelly has filed an appeal to his removal, how does the Board handle this appeal? Does he have grounds for an appeal?** In accordance with the Article V, Section 4 BL, the Board has only rescinded/terminated his Membership Certificate and therefore Brian Kelly may not appeal the action of the Board of Directors to the members at their next regular or special meeting. This does not mean Brian Kelly could not otherwise become a member of the corporation at a later date upon proper proof of meeting the requirements set forth in the Bylaws and Articles of Incorporation. By virtue of his Membership Certificate being rescinded/terminated and failing to satisfying the eligibility requirements to sit on the Board of Directors, his position as a member of the Board of Directors has become vacant. The Board has not sought to remove Mr. Kelly for cause. Therefore, Mr. Kelly is simply disqualified to vote as a Board Member in that his position has been vacated.
8. **If Brian Kelly ran and won the election under fraudulent pretenses and has had his membership rescinded/terminated, was he ever actually a member or ever a legitimate Board Member? Would his vote have to be reviewed and redone?** In my legal opinion, since a court has not ruled that he committed fraud, it would not require the votes to be redone in that he was serving as a Board Member at the time of his voting.
9. **Should we have included Brian Kelly in Board communications in special meetings invites after we rescinded his membership?** His office was vacated because of disqualification by losing his membership certificate and therefore he would not be entitled to the communications.
10. **With a rescinded membership certificate, can Brian Kelly cast proxy votes for the members (does he need to be removed from the proxy)?** He should not be listed on the ballot as an eligible person to be elected to the Board. As to his eligibility to cast proxy votes for other members, see paragraph two of question 6 above. He may cast proxy votes for other members only to the extent an attorney in fact could under a properly executed power of attorney authorizing him to do so.

This letter serves as my legal opinion on the questions presented. Unfortunately, the Articles of Incorporation, the Bylaws and the statutes do not address specifically all the questions presented and therefore may be subject to a different interpretation or court construction.

Thank you for allowing me to assist.

Yours truly,

A handwritten signature in black ink, appearing to read "James W. Magaha". The signature is fluid and cursive, with a large initial "J" and "M".

James W. Magaha

ARTICLE VIII

Directors and Officers

Section 1. The Board of Directors of this corporation shall consist of 7 members. The directors named in the Articles of Incorporation shall serve until the first annual meeting of the members and until their successors are elected and have qualified. Two directors shall be elected for a term of one year; two directors for a term of two years; and three directors for a term of three years. At each annual meeting thereafter, the members shall elect for a term of three years the number of directors whose terms of office have expired.

Section 2. The Board of Directors shall meet within ten days after the annual election of directors and shall elect a President and Vice President from among themselves and a Secretary-Treasurer who need not be a member of the Board of Directors, each of whom shall hold office until the next annual meeting and until the election and qualification of his successor unless sooner removed by death, resignation or for cause.

Section 3. If the office of any director becomes vacant by reason of death, resignation, retirement, disqualification or otherwise, except by removal from office, a majority of the remaining directors, though less than a quorum shall, by a majority vote, choose a successor who shall hold office until the next regular meeting of the members of the corporation at which time the members shall elect a director for the unexpired term.

Section 4. A majority of the Board of Directors shall constitute a quorum at any regular meeting of the Board.

Section 5. Compensation of officers may be fixed at any regular or special meeting of the Board of Directors. Directors shall receive no compensation for their services as such.

Section 6. Officers and directors may be removed from office for good cause in the following manner: Any member, officer or director may present charges against a director or officer by filing them in writing with the Secretary-Treasurer of the corporation. If presented by a member, the charges must be accompanied by a petition signed by ten per cent of the members of the corporation. Such removal shall be voted on at the next regular or special meeting of the members present. The director or officer against whom such charges have been presented shall be informed, in writing, of such charges five days prior to the meeting; the person or persons presenting such charges shall have the opportunity at such meeting to be heard in person or by counsel and to present witnesses and the person against whom the charges are made shall have the same opportunity. If the removal of a director is approved, such action shall also vacate any other office held by the removed director in the corporation. A vacancy in any office thus created shall be filled by the directors from among their number so constituted after the vacancy in the Board has been filled.

ARTICLE IX

Duties of Directors

Section 1. The Board of Directors subject to restrictions of law, the Charter, or these by-laws, shall exercise all of the powers of the corporation, and, without prejudice to or limitation upon their general powers, it is hereby expressly provided that the Board of Directors shall have, and are hereby given, full power and authority (to be exercised by resolution duly adopted by the Board) in respect to the matters and as hereinafter set forth:

- a. To pass upon the qualifications of members, and to cause to be issued appropriate certificates of membership.

Attachment "A"

Select Year: 2017

The 2017 Florida Statutes

Title XXXVI
BUSINESS ORGANIZATIONS

Chapter 617
CORPORATIONS NOT FOR PROFIT

[View Entire Chapter](#)

617.0808 Removal of directors.—

(1) Subject to subsection (2), a director may be removed from office pursuant to procedures provided in the articles of incorporation or the bylaws, which shall provide the following, and if they do not do so, shall be deemed to include the following:

(a) Any member of the board of directors may be removed from office with or without cause by:

1. Except as provided in paragraph (i), a majority of all votes of the directors, if the director was elected or appointed by the directors; or

2. A majority of all votes of the members, if the director was elected or appointed by the members.

(b) If a director is elected by a class, chapter, or other organizational unit, or by region or other geographic grouping, the director may be removed only by the members of that class, chapter, unit, or grouping. However:

1. A director may be removed only if the number of votes cast to remove the director would be sufficient to elect the director at a meeting to elect directors, except as provided in subparagraphs 2. and 3.

2. If cumulative voting is authorized, a director may not be removed if the number of votes sufficient to elect the director under cumulative voting is voted against the removal of the director.

3. If at the beginning of the term of a director the articles of incorporation or bylaws provide that the director may be removed for missing a specified number of board meetings, the board may remove the director for failing to attend the specified number of meetings. The director may be removed only if a majority of the directors then in office vote for the removal.

(c) The notice of a meeting to recall a member or members of the board of directors shall state the specific directors sought to be removed.

(d) A proposed removal of a director at a meeting shall require a separate vote for each director whose removal is sought. Where removal is sought by written consent, a separate consent is required for each director to be removed.

(e) If removal is effected at a meeting, any vacancies created shall be filled by the members or directors eligible to vote for the removal.

(f) Any director who is removed from the board is not eligible to stand for reelection until the next annual meeting at which directors are elected.

(g) Any director removed from office shall turn over to the board of directors within 72 hours any and all records of the corporation in his or her possession.

(h) If a director who is removed does not relinquish his or her office or turn over records as required under this section, the circuit court in the county where the corporation's principal office is located may summarily order the director to relinquish his or her office and turn over corporate records upon application of any member.

(i) A director elected or appointed by the board may be removed without cause by a vote of two-thirds of the directors then in office or such greater number as is set forth in the articles of incorporation or bylaws.

(2) A director of a corporation described in s. 501(c) of the Internal Revenue Code may be removed from office pursuant to procedures provided in the articles of incorporation or the bylaws, and the corporation may provide in the articles of incorporation or the bylaws that it is subject to the provisions of subsection (1).

(3) This section does not apply to any corporation that is an association, as defined in s. 720.301, or a corporation regulated under chapter 718 or chapter 719.

History.—s. 42, ch. 90-179; s. 56, ch. 93-281; s. 65, ch. 95-274; s. 85, ch. 97-102; s. 1, ch. 97-230; s. 28, ch. 2009-205; s. 3, ch. 2010-174.

Select Year: 2017

The 2017 Florida Statutes

Title XXXVI

BUSINESS ORGANIZATIONS

Chapter 617

CORPORATIONS NOT FOR PROFIT

[View Entire Chapter](#)

617.0721 Voting by members.

- (1) Members are not entitled to vote except as conferred by the articles of incorporation or the bylaws.
- (2) A member who is entitled to vote may vote in person or, unless the articles of incorporation or the bylaws otherwise provide, may vote by proxy executed in writing by the member or by his or her duly authorized attorney in fact. Notwithstanding any provision to the contrary in the articles of incorporation or bylaws, any copy, facsimile transmission, or other reliable reproduction of the original proxy may be substituted or used in lieu of the original proxy for any purpose for which the original proxy could be used if the copy, facsimile transmission, or other reproduction is a complete reproduction of the entire proxy. An appointment of a proxy is not valid after 11 months following the date of its execution unless otherwise provided in the proxy.
 - (a) If directors or officers are to be elected by members, the bylaws may provide that such elections may be conducted by mail.
 - (b) A corporation may reject a vote, consent, waiver, or proxy appointment if the secretary or other officer or agent authorized to tabulate votes, acting in good faith, has a reasonable basis for doubting the validity of the signature on it or the signatory's authority to sign for the member.
- (3) If authorized by the board of directors, and subject to such guidelines and procedures as the board of directors may adopt, members and proxy holders who are not physically present at a meeting may, by means of remote communication:
 - (a) Participate in the meeting.
 - (b) Be deemed to be present in person and vote at the meeting if:
 1. The corporation implements reasonable means to verify that each person deemed present and authorized to vote by means of remote communication is a member or proxy holder; and
 2. The corporation implements reasonable measures to provide such members or proxy holders with a reasonable opportunity to participate in the meeting and to vote on matters submitted to the members, including an opportunity to communicate and to read or hear the proceedings of the meeting substantially concurrent with the proceedings.

If any member or proxy holder votes or takes other action by means of remote communication, a record of that member's participation in the meeting must be maintained by the corporation in accordance with s. 617.1601.

- (4) If any corporation, whether for profit or not for profit, is a member of a corporation organized under this chapter, the chair of the board, president, any vice president, the secretary, or the treasurer of the member corporation, and any such officer or cashier or trust officer of a banking or trust corporation holding such membership, and any like officer of a foreign corporation whether for profit or not for profit, holding membership in a domestic corporation, shall be deemed by the corporation in which membership is held to have the authority to vote on behalf of the member corporation and to execute proxies and written waivers and consents in relation thereto, unless, before a vote is taken or a waiver or consent is acted upon, it appears pursuant to a certified copy of the bylaws or resolution of the board of directors or executive committee of the member corporation that such authority does not exist or is vested in some other officer or person. In the absence of such certification, a person executing any such proxies, waivers, or consents or presenting himself or herself at a meeting as one of such officers of a corporate member shall be, for the purposes of this section, conclusively deemed to be duly elected, qualified, and acting as such officer and to be fully authorized. In the case of conflicting representation, the corporate member shall be represented by its senior officer, in the order stated in this subsection.
- (5) The articles of incorporation or the bylaws may provide that, in all elections for directors, every member entitled to vote has the right to cumulate his or her votes and to give one candidate a number of votes equal to the number of votes he or she could give if one director were being elected multiplied by the number of directors to be elected or to distribute such votes on the same principles among any number of such candidates. A corporation may not have cumulative voting unless such voting is expressly authorized in the articles of incorporation.

- (6) If a corporation has no members or its members do not have the right to vote, the directors shall have the sole voting power.
- (7) Subsections (1), (5), and (6) do not apply to a corporation that is an association, as defined in s. 720.301, or a corporation regulated by chapter 718 or chapter 719.

History.—s. 36, ch. 90-179; s. 50, ch. 95-274; s. 82, ch. 97-102; s. 54, ch. 2000-258; s. 22, ch. 2009-205; s. 2, ch. 2010-174; s. 1, ch. 2015-97.