

IN BOARD OF SUDBURY SELECTMEN
WEDNESDAY, OCTOBER 5, 2016
EXECUTIVE SESSION

Present: Chairman Susan N. Iuliano, Vice-Chairman Charles C. Woodard, Selectman Patricia A. Brown, Selectman Robert C. Haarde, Selectman Leonard A. Simon, Town Manager Melissa Murphy-Rodrigues, Town Counsel Barbara Saint Andre, and Attorney Richard Holland from KP Law.

The statutory requirements as to notice having been complied with, the meeting was convened at 4:35 p.m. in the Silva Conference Room, Flynn Building, 278 Old Sudbury Road.

Selectman Robert Haarde arrived at 4:38 pm.

Chairman Iuliano read aloud the first item:

- Open in regular session, and vote to immediately enter into Executive Session regarding strategy with respect to potential litigation if an open meeting may have a detrimental effect on the bargaining position of the public body and the chair so declares (Frost Farm), pursuant to General Laws chapter 30A, §21(a)(3).

Seconded by Selectman Simon, all eye.

Chairman Iuliano also read aloud the second agenda item:

- Also discuss strategy with respect to potential litigation if an open meeting may have a detrimental effect on the litigating position of the public body and the chair so declares (Eversource), pursuant to General Laws chapter 30A, §21(a)(3).

(Selectman Brown will leave the meeting to recuse herself at this point.)

Seconded by Selectman Simon, Selectman Brown abstained, all (majority) eye.

The issue of recording the minutes came up. Town Counsel Barbara Saint Andre is not in favor. Len feels the impact would be minimal. It would be protective of the Town's interest not to record. Susan asked the Board their opinion. She moved that we not record the minutes. Majority in favor – eye – Selectmen Simon not in favor.

Barbara Saint Andre introduced Attorney Rick Holland of KP law. He is an expert on construction, contracting. Ms. Saint Andre spent a lot of time on the Frost Farm issue, and Mr. Holland agreed to take over.

Chairman Iuliano shared that Selectman Brown asked for more information on the Frost Farm. Chairman Iuliano shared that she was a reference for Bill Braun and did not remember that. Therefore, she filed the 23b form (Conflict of interest form) with the Town Clerk today, and she shared copies with the Board.

Attorney Rick Holland started to give a brief overview. He's been an attorney for 20 years, focusing on procurement, construction. When this issue was raised it was whether or not the Town should extend the 10-year agreement to Mr. Braun. Now we're looking into whether the initial procurement was flawed in any way.

Attorney Holland formed the opinion that the initial procurement was indeed flawed. His reasons are as follows. The state has several procurement laws. Ones here are CH149 of general laws – public building bid

law. The other statute is CH30B – the uniform procurement act. This generally applies to goods and services and also acquisition of interests and real property. The RFP issued by the Town was for the purpose of rehabilitating Frost Farm, and for an individual to occupy the property. CH149 generally requires a sealed bid process, generally in excess of \$25K. CH30B is a lease agreement, and requires a user RFP. The Town wasn't interested in placing the property on the rental market, but through rehabilitation via RFP. Mr. Braun submitted a proposal which offered rental income of \$2,200 dollars/month, provided payment of that rent would be not paid for 8 years because he was doing rehabilitation work. It is true that it's been 10 years without any rent paid by Mr. Braun. He has done a lot of work at the property. He anticipated it would be in excess of \$200K. The rental payments would approximate the amount put into the property. The problem is that Massachusetts procurement statutes do not suit themselves for this type of arrangement. When Mr. Braun proposed \$2,200 month and was not paid, the foregone rental payments are essentially funds for the Town. The statute states that it must be procured under CH140. At the time of Mr. Braun's proposal, the work was anticipated to exceed \$200K, and that would be subject to stringent requirements of CH149. The initial procurement seems to be flawed. Now what should we do? Maybe extend for 10 years at the Town's discretion. Attorney Holland is confident that there's a problem with procurement. An option is to not extend and look at other options.

Town Manager Melissa Murphy-Rodrigues stated that in January 2016 she and Selectman Brown met with Bill Braun. She asked Jim Kelly, Combined Facilities Director, and Mark Herweck, Building Inspector, to inspect the property. Mr. Braun replied in May when he could let them do the inspection. She couldn't understand how we could extend within the confines 30B.

Selectman Woodard stated that Mr. Braun has made a huge financial and personal commitment, and we should not pull the rug out from under him (not extend the contract). We need to document the value of what was done – the materials put into it, his hours extended. We're getting a good deal to maintain the property. He personally doesn't like this, and feels it's not a good way to do business.

Selectman Simon agreed with Selectman Woodard. The previous Town Manager entered into this in good faith as well. If the initial procurement was flawed, can it be fixed retroactively or prospectively?

Attorney Holland answered that he doesn't believe so. CH149 prescribes certain penalties for violations. Going forward, should we continue with an agreement that was a result of this? One of the purposes is to promote competition in procurement. This can't be cured retroactively. The short answer is "no." Procurement was for a certain thing, and we can't change the agreement to what was originally procured.

Town Counsel Barbara Saint Andre asked of Selectman Simon, are you referring to a special act going forward?

Selectman Simon stated that Bill Braun has put in nine years of his own expense and labor. There was a meeting of the minds, a contract in good faith with Mr. Braun. What's more troubling now is what the Town represented to Mr. Braun (via previous Town Counsel) as to the process wasn't right. Selectman Simon's other concern is that when the original agreement was entered into, the Town and Mr. Braun looked at the house and estimated it will take \$20-25K to bring it up to par. The need for renovation was much greater than anticipated. We can't roll the clock back. We have an asset that's been substantially improved, it still needs more work. What's the Town going to do to keep it's end of the bargain? If original agreement isn't valid, what is it? We have someone who's provided a great benefit to the Town. If he kept his end of the bargain, the Town should keep their end of the bargain – including the extension. He's concerned that the Town has not gone through the correct legal process. Town Manager Rodrigues recognized there may be an issue here.

Chairman Susan Iuliano asked of Attorney Rick Holland that he proposed some alternatives such as 30B caretaker lease agreement. Some work needs to be done to trigger CH149. Could he please address that? Attorney Rick Holland responded that the contract says it is a 10-year deal and the Town doesn't have to extend it. His opinion is that Mr. Braun doesn't have a reasonable expectation that the Town has to extend the agreement.

Selectman Simon stated that as the original agreement was written, there was new information that came up. This house is in worse shape than we thought. We need more time and money. How can the Town keep it's end of the bargain?

Selectman Brown stated that when this came up in 2014, she wasn't chair at that time. In the summer of 2015 Bill Braun said he'd like to extend the agreement. We need to do something since the contract ends October 2017. We've known for a year that this needs to be decided. Mr. Braun asked that if we're not going to extend this, please let him know. The new contract has to be legally correct. She has a concern for using Town property in any way that's not by the book. It's a Town asset.

Selectman Haarde stated that he cannot recall the BOS discussing this prior to this year. He remembers seeing a letter with a legal opinion giving the Town Manager authorization for \$50K to Mr. Braun to repair the house, without a vote of the Board. He feels this is a bad agreement; we have to find a solution that works for Bill Braun and the Town.

Selectman Woodard stated the contract was for ten years. Bill Braun has put a lot of money and effort into this, and it's a benefit to the Town.

Selectman Haarde shared that there was a time we considered bulldozing the farm making it a Town green. It's not historic. Residents of Frost Farm thought it was going to be a clubhouse. Some folks think the repairs are being done at a snail's pace. However, Chairman Iuliano and Selectman Simon both shared that they never heard that this was going to be used as a clubhouse. In the signed agreement by the then Town Manager (Maureen Valente) and Bill Braun, it is to be used for 10 years with an option to extend with the Town's approval. Looks like it was the Town Manager's option, not the Board of Selectmen. This was an evolving process, and not set in stone. The agreement doesn't say that work should be completed by a certain date.

Selectman Brown stated that we're nine years into a ten-year contact. Are we receiving monthly rent? Town Manager Rodrigues answered no.

Town Manager Melissa Murphy-Rodrigues stated that we did speak to inspector general and the Attorney General and both said this was not properly procured.

Attorney Rick Holland shared that he doesn't know the value of work from Mr. Braun. He believed the rental value was \$2,200/month. Over 10 years that's \$250K. From a legal perspective, there's no obligation to extend it. Has the value of his work exceeded the contract? This is a question of unjust enrichment. If someone enters into an unenforceable contract, can you sue to get value for your services? This application is entirely different in a public context. This isn't valid in a city/town. You can only be paid on a valid contract. If it turns out that the procurement was flawed, the contract is invalid; he wouldn't be able to recover unjust enrichment. He only saw this in a valid construction contract. Public/private context is completely different. He would not be able to recover quantum merit.

Selectmen Haarde and Woodard both agreed that at some point we need to make this a win-win. We need to treat Mr. Braun fairly.

Chairman Iuliano shared that if we decided to issue an RFP for a caretaker lease, the rent would go into a revolving fund if Mr. Braun ended up as a caretaker. Selectman Simon asked if we can draft an agreement with Mr. Braun going forward outside an RFP to get the house done to current standards.

Attorney Holland answered that the only way is through special legislation. He thinks that some sort of a method of procurement would be required. If we did this, there's no guarantee that any specific person would get the contract.

Selectman Simon asked if we can link special legislation to an individual? Town Counsel Barbara Saint Andre responded by recommending he may wish to speak to a state legislator.

Selectman Brown reiterated that this is a procurement issue. Setting aside everything Bill Braun has done, we are responsible for bidding on Town property properly. If we drift past April, then there's an automatic extension. We have informed Mr. Braun that this isn't a valid contract.

Chairman Iuliano added that we need to follow the procurement laws. We could seek legislation for the process, not the person.

Selectman Woodard stated that can we look at this another way. Maybe Bill Braun created some of the problem himself by not saying how much it was costing him. Maybe he shouldn't have waited nine years to ask for an extension.

Selectman Simon shared that at the end of ten years it didn't call for new RFP. This is a timeline from 2007 to the present. The Town put funds into it, and there were addendums and modifications to the agreement.

Chairman Iuliano shared that a decision needs to be made. Do we seek special legislation to accomplish this? Or use the current procurement laws? Would we enter a caretaker lease? What arrangements would we make with Bill? The legislation question is complex. What do we need to know?

Selectman Woodard is not enamored with special legislation. We need to figure out how to do it within the procurement law. Selectman Brown feels we should have a legal agreement. Put out to bid under the law, not in favor of special legislation. Chairman Iuliano feels we'd need more detail for 30B for caretaker, etc.

Town Manager Melissa Murphy-Rodrigues discussed this at length with Jim Kelly. It's like renting an apartment; not knocking down walls, but taking care of landscaping.

Selectman Simon asked if we can structure this by not ruling out special legislation? He asked Attorney Holland about the lease with Mr. Braun if he continued the building renovations and his labor and materials up to a certain dollar amount. Attorney Holland responded that if you're less than \$10K you can use sound business practices. Between \$10-25K we need request for responses; between \$25-100K it's a sealed bid process. He can anticipate problems with potential bid-splitting.

Selectman Haarde stated that it's now Oct. 5th. We can let Mr. Braun know that the contract isn't legal, then we can go out to bid with legal RFP process, and he can apply, or he may decide not to apply. Selectman Haarde read some responses from dismayed CPC members claiming that the porch and kitchen were not properly restored historically.

Selectman Simon asked the attorneys if they can prepare a memo detailing the two points (1) special legislation, and (2) new procurement. How can the Board move forward on either of those? Do you have a preference on either?

Melissa Murphy-Rodrigues thinks we'll have to go to Town Meeting if this is special legislation – for capital items too.

Chairman Iuliano shared that maybe we can make the case that we're not in the position to extend the current agreement.

Selectman Haarde stated he would like to see the work done so far. Town Manager Rodrigues said that Mark Herweck saw it and said the quality of the work was excellent.

Selectman Brown shared that we need to tell Mr. Braun that he can participate in the public procurement process.

Selectman Woodard stated that in fairness to Bill we should tell him that we can't extend the agreement. We're wrestling with what to do.

Chairman Iuliano asked if we can make a motion to inform Bill Braun that we're not in a position to renew this agreement but we're looking into special legislation or procurement? We're working on a way to be fair to him.

It was voted unanimously

VOTED: Inform Bill Braun that we're not in a position to renew this agreement but we're looking into special legislation or procurement

Town Counsel Barbara Saint Andre stated that we need to do something in open session. If the Board votes not to extend the contract, do we need to vote this in open session?

Selectman Haarde asked if we can give Bill a 1-year agreement before we go out to RFP?

Chairman Iuliano made a new motion that we not communicate this will Bill until we take this to the public.

The attorney stated the vote not to extend the agreement should be in open session.

Selectman Haarde made a motion to rescind the prior vote.

It was voted unanimously

VOTED: To rescind the previous vote.

Selectman Haarde asked if we can communicate our intentions to Bill? It would be good to try to give him as much notice.

Selectman Woodard exited the meeting at 6:05 PM.

It was voted unanimously

There being no further business, the meeting adjourned at 6:07 p.m.

Attest: _____
Melissa Murphy-Rodrigues
Town Manager-Clerk