

SUDBURY BOARD OF SELECTMEN
TUESDAY, DECEMBER 22, 2015
8:26 AM, FLYNN BUILDING
SECOND FLOOR, SILVA ROOM

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

Chairman Brown called the Executive Session to order at 8:26 am.

Vote to enter into Executive Session to consider strategy with respect to litigation where an open meeting may have a detrimental effect on the town's litigating position and the chair so declares, pursuant to General Laws chapter 30A, §21(a)(exception 3) and with respect to the following pending cases: Lieberman v. ZBA, and Sudbury Station (potential litigation).

Chairman Brown turned this part of the meeting over to Town Counsel Barbara Saint Andre. (Selectman Haarde recused himself for this part of the discussion.) Ms. Saint Andre said this refers to the cell tower at the DPW site which the Town leased to Varsity Wireless. The Zoning Board of Appeals (ZBA) voted in favor of the bylaw. Neighbors have appealed the determination of the ZBA both by special permit and variance. It's best to try to approach the neighbors before going into litigation. The abutters complaint was due to esthetics and if are there other possible locations possible on the DPW site.

Vice-Chairman Iuliano asked Ms. Saint Andre if she would be part of these conversations, and she answered yes. Selectman Woodard said this was involved with line of sight of transmitter. Selectman Simon asked what was the height of the tower? Ms. Saint Andre answered that it was proposed for 140 ft, and granted at 130 ft. Town Manager Rodrigues said the top 5 ft. belongs to the Town.

Chairman Brown asked if we are empowering Town Counsel Saint Andre to talk to neighbors before litigation. Ms. Saint Andre answered yes. Selectman Simon asked overall how successful would the Town be in winning this. Ms. Saint Andre responded that due to the variance, it can be difficult. A special permit is easier case to defend, and we have to rely on the telecommunications aspect.

It was asked whether or not a vote was required? The response was no, just a sense of the Board that Town Counsel may proceed.

Selectman Haarde was asked to return to the room, and he rejoined the meeting. Jody Kablack, Director of Planning & Community Development, entered the room and also joined the meeting.

Chairman Brown mentioned we're moving on to discuss Sudbury Station. The motion was read as follows:

Vote to enter into Executive Session to consider strategy with respect to litigation where an open meeting may have a detrimental effect on the town's litigating position and the chair so declares, pursuant to General Laws chapter 30A, §21(a)(exception 3) and with respect to the following pending cases: Lieberman v. ZBA, and Sudbury Station (potential litigation).

Barbara Saint Andre spoke on this item. When the Town was exchanging property with the landowner, the Town asked the landowner if they could put a provision on the deed for one building lot; they did not.

Selectman Simon referred to a letter from Mr. Robert Abrams dated May 10, 2002 - one frontage for one house on 36 acres of land.

Ms. Saint Andre said that in 2002 there was an application for subdivision on that property. The subdivision application had to show how many lots were to be constructed, and the subdivision isn't restricted to one lot. The

ZBA has authority to act as the Planning Board for subdivisions. The property owner is now going to the Planning Board for a change after the 40B development.

Selectman Simon said they're jumping over the prior step of going to the ZBA. He referred to the May 2011 ATM warrant, Article 27, "Exchange of Land off Peter's Way with Abutter", and he read it aloud. That's when the property owner was asked about this. Ms. Kablack said they did receive subdivision approval after the ATM 2012 meeting vote. Selectman Simon said this appears to be a land swap of two acres for one. Can they show intent?

Vice-Chairman Iuliano asked Ms. Saint Andre if these arguments can be made, and the response was what she understands is "no". Ms. Saint Andre did look at the ATM minutes that Len referred to. Maybe the Selectmen felt this would be a one-lot subdivision? There has been no representation from the landowner to the Town to restrict this property to one single-house lot. Selectman Haarde was on the Board at that time, and asked for a deed restriction for one lot. This landowner has a history of agriculture, not housing.

General comments were made by the Board. They always knew this could happen said Selectman Haarde. It's unfortunate, but not out of the blue. Chairman Brown was on the Planning Board in 2012. She asked Ms. Kablack if an extensive plan was approved? Ms. Kablack responded that they approved the plan for frontage of their lot. That cul-de-sac had a dead-end street limitation. Selectman Simon would like to know what was on the minds of the Planning Board as they went through this.

Chairman Brown asked if a second legal opinion is needed? Vice-chairman Iuliano felt that we need to take a step back with anything we can argue, or a question /cost benefit analysis, and why should we put money into it?

Selectman Simon opined that residents are strongly opposed to this development, and it wouldn't hurt to get a second opinion on this. The stakes are high; the cost would be worth it. Is this what was understood/intended in 2002 or 2011? This was a transfer which the Town didn't expect at that time.

Town Counsel Saint Andre shared that the intent of the Town is not a legal cause of action, but whether there was fraud or misrepresentation by the landowner. We'd have to prove that the defendant misrepresented the facts. She hasn't seen any misrepresentation by the landowner to the Town. The real estate transaction is when the deed is signed and recorded at the registry, and everything is included in the deed. It's difficult to go back, and the deed doesn't say only one lot. She hasn't seen any misrepresentation.

Selectman Simon said that we need to look at the timeline after 2011 Town Meeting and investigate more; we'd be remiss not to get a second opinion. He urges the Board to ask for second opinion to review this case again. Vice Chairman Iuliano asked if it's worth getting a second opinion or pursuing legally?

Chairman Brown disagrees with Len's opinion. Whenever Town Counsel provides an opinion, it shouldn't be ignored.

Selectman Woodard opined that we could consider a second opinion, but not in this case. The Board of Selectmen approved this before Town Meeting, and the request was before Town Meeting. He referred to the Selectmen's meeting minutes of January and February 2011, and does not support a second opinion.

Selectman Simon made the following motion:

Based on documents he reviewed, including the May 2002 letter from Atty. Abrams, the 2011 ATM warrant, Art. 27, and other documents, he feels there needs to be legal discovery to determine the actual intent of Laura Abrams' two-acre land swap. The Board should receive a second legal opinion regarding this land swap.

Selectman Simon made a motion to ask for a second opinion; Chairman Brown seconded. The Board voted, and it did not pass.

Selectman Simon is in support of legal action to block this particular development; it's not what the Town intended back in 2011. Vice-Chairman Iuliano asked is there any advantage to pursuing this, or other strategic reasons?

Town Counsel Saint Andre has handled many 40b cases. She shared that we can appeal to the courts. The ZBA makes the decision. The applicant can appeal to housing appeals court. If the developer/BOS/Town/abutter wants to appeal the ZBA decision, you go directly to court. Ms. Kablack suggested maybe the Selectmen could work with the ZBA.

Selectman Woodard asked Ms. Saint Andre when she had cases similar to this? The answer was one case in Braintree, a large development which was denied by the HJC. She also referred to one in Dennis (open space) which was so congested and was no open space for residents. It's possible to win at HJC; the Board may choose to take a position and send a letter to ZBA.

Selectman Haarde said we couldn't do this because we were prejudicing the application. Can we vote beforehand? Ms. Saint Andre replied that we've seen the preliminary application and issued a letter opposed to the project. When the application comes in, there's no problem saying they are opposed to this. Individual Board members cannot be pressured individually; this must be done in a public forum. You have a right to appeal to courts after decision is made. These issues could be raised during the ZBA process.

Chairman Brown asked if a letter was sent to MassHousing, and Ms. Kablack replied affirmatively. Selectman Simon asked if can we send another letter reiterating the previous letter? Ms. Saint Andre answered that it's better to send a stronger letter once the application comes in.

Vice-Chairman Iuliano proposed that we not pursue an appeal of the project eligibility letter. Ms. Saint Andre responded that according to appeals court, we need to wait until after the hearing.

Selectman Simon asked about Ms. Saint Andre's case regarding Brookline vs. Mass Development. Can we challenge the ZBA ruling not the MassHousing ruling? Ms. Saint Andre responded that it can't be challenged until after the ZBA makes their decision.

Selectman Haarde asked Ms. Saint Andre if she ran the 40b practice at KP Law? She answered yes, and our best strategy is to go through the court process, and appeal the process. Selectman Simon's suggestion is costly and we could lose the case.

Vice-Chairman Iuliano made a motion not to appeal the project eligibility letter, which was seconded by Chairman Woodard. There was no discussion.
Majority voted in favor – aye; Selectman Simon - no.

Jody suggested should the Town offer to purchase the property? Are there any discussions with the developer? It's on the Town's Open Space Plan, and the price will be high like Johnson farm.

Selectman Woodard asked if the developer inquired about selling to Town. The land isn't foreclosed. Ms. Kablack shared that the more the developer goes into the plans, the higher the cost will be. Chairman Brown asked what is the process? Ms. Kablack answered that we need to empower Melissa to discuss this with the developer. Purchasing land is a Selectmen's decision, a Town Meeting vote, and a debt exemption.

Vice-Chairman Iuliano suggested scheduling another Executive Session to continue this discussion. The date of January 5 at 6:30 pm was suggested, and all agreed.

Ms. Kablack was asked about the subsidized housing obligation in 2020 and 2030. An analysis has been done. Another 267 units are projected for 2020, and this increases to 325 units in 2030. We need another 125 units to get to the 2030 amount.

Selectman Simon asked about housing potential at the Raytheon property. Ms. Kablack responded that it's a 1.5 acre piece, and part of the Avalon lot possibility. Can we ask for units on Raytheon property to get on safe harbor for 2020? Do we put more density on Raytheon? Ms. Kablack responded that the denominator changes at the 10-year census. The Board could request more units. Ms. Kablack also shared that there were 10 DEP citizens' appeals regarding the Raytheon property.

Selectman Woodard shared that there's another potential risk in Sudbury Station with 80% financing for construction. Maybe financing would be an issue.

Chairman Brown directed the discussion to the next agenda item.

Vote to enter executive session to comply with the requirements of and act under the authority of any general or special law per G.L. c. 30A, 21(a)(7) and Suffolk Construction v. DCAM, as to whether to approve that the Board of Selectmen waive the Town's attorney-client privilege with respect only to the December 14, 2015 email opinion from attorney Barbara Saint André (and/or including all attached emails) concerning the Bruce Freeman Rail Trail, and publicly release it.

A Board member asked why this was this requested. Town Counsel Saint Andre answered that it was requested by Conservation Coordinator Debbie Dineen. The reasons are confidential.

Ms. Saint Andre said she has no issue with releasing this opinion.

It was on motion unanimously

VOTED: To release this opinion of Town Counsel.

It was on motion unanimously

VOTED: To end Executive Session and not reconvene in Open Session.

There being no further business, the meeting adjourned at 9:50 a.m.

Melissa Murphy-Rodrigues, Esq.
Town Manager-Clerk