

SUDBURY BOARD OF SELECTMEN
TUESDAY, NOVEMBER 3, 2015
6:00 PM, FLYNN BUILDING - THOMPSON ROOM
EXECUTIVE SESSION (6:00 PM – 7:10 PM)

Present: Chairman Patricia A. Brown, Vice-Chairman Susan N. Iuliano, Selectman Charles C. Woodard, Selectman Leonard A. Simon, Town Manager Melissa Murphy-Rodrigues, Attorney Peter Mello, Petrini & Associates (Town Counsel), Jody Kablack, Director of Planning and Community Development

Conservation Commission members present: Beth Armstrong, Tom Friedlander, Mark Sevier, Charlie Russo, Dave Henkels, Bruce Porter, and Debbie Dineen, Conservation Coordinator.

Absent: Selectman Robert C. Haarde

Executive Session

At 6:00 pm, Chairman Brown opened the meeting in regular session and immediately voted to enter Executive Session in the Silva Room to discuss strategy with respect to litigation (Abrams vs. Conservation Commission) if an open meeting may have a detrimental effect on the litigating position of the public body and the chair so declares, pursuant to General Laws chapter 30A, §21(a)(3). Joint meeting with Conservation Commission.

Vice-Chairman Iuliano made the motion; Selectman Woodard seconded.

It was on roll call unanimously

Chairman Pat Brown, aye, Selectman Charles C. Woodard, aye, Vice-Chairman Susan N. Iuliano, aye, Selectman Leonard A. Simon, aye.

Chairman Brown turned the discussion over to Attorney Peter Mello. Mr. Mello stated that this is a continuation of the Abrams case. There are two layers of approval - bylaw and wetland protection act. The last time we met the superseding order was pending. Instead of using the word "cutting" or "clearing", the Town is allowed to trim as necessary to continue. Under state regulations, the party has a right to appeal the superseding order within 10 days. Can the Town proceed with the work due to the fact that no appeal was filed? No administrative appeals are pending. There is nothing to prohibit the Town with continuing. The Town's intent is to proceed with the work and only trim. The plaintiff Mr. Abrams wasn't interested in appealing the superseding order of conditions.

Tom Friedlander, Conservation Commission member, expressed concern to Attorney Mello that the Conservation Commission hasn't discussed this. He felt it is disrespectful to Mr. Abrams in the process if the Town's risk is minimal. Attorney Mello shared that there is nothing in the order of conditions to prohibit the Town from proceeding with the work. Once the superseding order was issued, he spoke to Mr. Abrams, who would be amenable to a solution for a new order of conditions that some area affecting his property would be protected.

Bruce Porter, Conservation Commission member, joined the meeting at 6:10 pm., and approved the Executive Session. He felt that the Conservation Commission can decide what our next move should be depending on risk involved. If it affects personal property we'll take one view; even if the Town is not at risk, what is the benefit to the Town?

Selectman Woodard asked if the Town takes care of a committee member if a lawsuit is filed. Asking a basic question - are we personally liable or does the Town assume liability? Attorney Mello responded that this would require research to give an answer. Chairman Brown shared that we're not voting on this tonight.

Beth Armstrong, Conservation Commission member, said there are two ways to proceed in this process; (1) a state order that allows the Town to do trimming, or (2) we can wait until the resolution of the superior court case.

Selectman Simon stated that there are two separate legal matters (1) Appeal of the order of conditions to DEP which has granted approval for trimming and not broad-cutting. Mr. Abrams did not appeal that. The DEP matter is finished; (2) Superior court case. The paper has been filed with the court, and there is no action by a judge that you can or cannot do anything. Mr. Abrams hasn't asked for monetary damages or injunctive relief.

Beth Armstrong's concern was that the average person would want to resolve this issue due to a superseding order; however, that's not the case with Mr. Abrams.

Chairman Brown asked if there are personal legal risks for members of Town committees. Mark Sevier, Conservation Commission, was concerned that members' names were listed. Dave Henkels, Conservation Commission member, asked if there's anything on the agenda about the Bruce Freeman Rail Trail. What is the \$100,000 request for CPA funds for the BFRT for? Ms. Kablack answered that it's to continue design. Mr. Henkels asked what's the hurry regarding March 10 (the date for hearing the case in Superior Court) if this funding is put off?

Selectman Simon said the intent was to delay the BFRT. Waiting additional months results in a longer delay and the schedule is pushed back. The first study was voted at Town meeting (25% study); the 75% design needs to get done. The rail trail won't get on the TIP program if delayed. Chairman Brown shared that the 25% design is currently in progress.

Tom Friedlander asked why are we waiting for the superseding order? What about waiting for the superior court action before the first phase begins? Jody Kablack answered that the decision is to proceed with the small amount of risk with superior court; town officials should be 100% on board. She hasn't given approval yet for the consultant to begin due to superior court case. Is there any risk?

Bruce Porter asked about the legal risk to members of the Conservation Commission. Is it small, negligible? This person is trying to delay this project. Is the Town standing behind the Conservation Commission members? They win if we take the cautious route. Selectman Simon read aloud Attorney Mello's email regarding superseding order of conditions. Attorney Mello responded that the likelihood of personal liability to any commission member is very small. Jody Kablack shared that this is the perfect time to proceed. Susan Iuliano shared that pleadings are not filed individually, but rather as acting in their capacity. Attorney Mello said he had never seen this come up in a case. If we lose, the court would have to find that the Commission's decision is arbitrary, with no evidence to support the decision. He doesn't see this occurring, but he can't give a formal opinion on the spot.

A Conservation Commission member asked if we can move forward with a yes or no vote. Can we instruct Jody Kablack to proceed? Dave Henkels asked when can we access TIP funding? This depends on when you get in line once the 25% is done. Chairman Brown shared that completing the 25% design doesn't put you on the list. If we do decide to go forward, should we notify the abutters of the cutting. Jody Kablack shared there is only trimming the right of way, not on private property.

Conservation Commission members were polled. Beth Armstrong felt waiting until the court case can be heard in March is a long period of time to wait to start. We shouldn't give permission to 'skip steps.' We need to do the work under the wetlands protection act. She felt that there's no risk individually, and we should proceed. Dave Henkels agrees the SOC (superseding order of conditions) is within the bylaws, but is concerned about perception of favoritism of one board over another. Charlie Russo abstained from the vote, but agrees with the process. Mark Servier agreed to go ahead with the survey, and Bruce Porter also agrees. Tom Friedlander has no objection with a slight reservation.

The Conservation Commission approves conditionally to proceed; therefore, the Selectmen need to instruct Jody Kablack to proceed.

Chairman Brown shared that by proceeding under the SOC we're not violating anything. If we approve proceeding with the surveying, we should tell Mr. Abrams that we're going ahead. We need to come back with an opinion for Conservation Commission as to what's their individual liability. Selectman Woodard asked as committee members are we individually liable? Attorney Mello responded that he's pretty confident that ConCom members aren't liable; it depends on claims.

Selectman Simon made a motion to proceed with permissible surveying and other conditions. After a brief discussion, he withdrew his original motion.

Revised motion: Vote to notify Mr. Abrams that the Town is proceeding with the surveying.
All Selectmen voted in favor – unanimous

The Conservation Commission voted to exit Executive Session and adjourn, and not reconvene in open session. All in favor - unanimous - motion to adjourn. All Conservation Commission members exited the meeting.

Town Manager Rodrigues suggested it may be worthwhile to have a Trespass Bond which could give somewhat more leverage.

Chairman Brown moved to the next item and read the following motion:

Discuss strategy with respect to litigation (S.F. Holdings, LLC vs. Planning Board) if an open meeting may have a detrimental effect on the litigating position of the public body and the chair so declares, pursuant to General Laws chapter 30A, §21(a)(3). At the conclusion of Executive Session, vote to reconvene in Open Session in Lower Town Hall.

Chairman Brown invited Attorney Mello and Jody Kablack to join discussion on this item. The litigant sued the Planning Board and now wants to file a motion to dismiss. The Board of Selectmen needs to act, and the Planning Board voted to accept this stipulation to dismissal. Jody Kablack shared that the appeal period is over; they can't come back to appeal. Chairman Brown shared there is a pretrial conference on Nov. 12. If we approve this, the plaintiff said they're willing to let this go. If we don't agree, the assumption is the trial moves forward. The desire is to get a decision on this tonight.

Vice-Chairman Iuliano made the motion to approve the dismissal of this case without prejudice.

It was on roll call unanimously
Chairman Brown aye; Vice-Chairman Iuliano aye; Selectman Chuck Woodard aye; Selectman Simon aye;

Move to adjourn Executive Session and reconvene in Town Hall.

It was on roll call unanimously
Chairman Brown aye; Vice-Chairman Iuliano aye; Selectman Chuck Woodard aye; Selectman Simon aye;

There being no further business, the meeting adjourned at 7:10 p.m.

Attest: _____
Melissa Murphy-Rodrigues
Town Manager-Clerk