

IN BOARD OF SUDBURY SELECTMEN
EXECUTIVE SESSION
WEDNESDAY, JUNE 29, 2016

Present: Chairman Susan N. Iuliano, Vice-Chairman Charles C. Woodard, Selectman Leonard A. Simon, Selectman Robert C. Haarde, Selectman Patricia A. Brown, Town Manager Melissa Rodrigues and Special Town Counsel Jonathan Silverstein.

The statutory requirements as to notice having been complied with, the meeting was called to order at 9:02 AM in the Flynn Building Silva Room.

Village at Sudbury Station Litigation

Chairman Iuliano opened in regular session, and moved to vote to immediately enter into executive session to discuss strategy with respect to potential litigation because an open meeting may have a detrimental effect on the litigating position of the public body and she so declares, concerning Village at Sudbury Station, pursuant to General Laws chapter 30A, §21(a)(3).

Len Simon seconded the motion.

It was on motion and roll call unanimously.

VOTED: To immediately enter into executive session to discuss strategy with respect to potential litigation because an open meeting may have a detrimental effect on the litigating position of the public body and the Chairman so declared (Village at Sudbury Station), pursuant to General Laws chapter 30A, §21(a)(3). Return to Open Regular Session at the conclusion of executive session.

Selectman Leonard A. Simon: aye, Vice-Chairman Charles C. Woodard: aye, Selectman Patricia A. Brown: aye, Selectman Robert C. Haarde: aye, and Chairman Susan N. Iuliano: aye.

Chairman Iuliano welcomed Special Town Counsel Jonathan Silverstein to the meeting and asked him to provide an update to the Board on his findings regarding the Peter's Way land swap and other matters pertaining to The Village at Sudbury Station application.

Counsel Silverstein provided a recap of his work and what it has yielded. He has retained Marsh Moriarty, Ontell & Golder P.C., a law firm that specializes in title work, to review the title documents pertaining to the Sudbury Station property. He stated that Firm Principal Mike Marsh is a Sudbury resident and his wife is an associate at KP Law. The purpose of the review by Marsh Moriarty was to find any basis upon which to rescind the Peter's Way land swap. The documents have been studied for possible defects in the ownership of the easement, the fee and the surrounding land, and no issues have been uncovered. Mr. Marsh extended the option to perform a full title rundown for all surrounding parcels, which would cost approximately \$3,000-\$5,000, but Mr. Marsh further opined that it would be "an extreme long shot" that this search would yield a useful basis for rescinding the title.

Selectman Simon stated that he feels that the Town should leave no stone unturned in its efforts to thwart the proposed development project and that the full title rundown should be ordered.

Vice-Chairman Woodard explained that it would be practically impossible for the project's developer to obtain a bank loan if there are any title defects on the property, so if there is a defect of any kind, it would be very valuable information for the Town. He further asked if the Town Meeting vote which approved the land swap has been considered a condition on the title and that, if it is considered a condition, that it might be a complication for the title as it is not a simple quitclaim deed.

Counsel Silverstein stated that he will investigate the effect of a Town Meeting vote as potential basis for a misrepresentation claim on the deed. He explained that he has reviewed all the documents that were made available to him and has spoken with Selectman Simon regarding this issue at length. While he does not wish to be a nay-sayer, he believes that, based on his findings, there is not a coverable claim to challenge the validity of the land swap. He further explained that due to the Statute of Frauds in Massachusetts, certain types of frauds cannot be instituted unless there is a contract in writing. Conveyance of real property falls under this statute. Therefore, one cannot institute litigation on a real estate transaction unless the transaction is in writing. There is a quitclaim deed for the property. By definition, once there is a quitclaim deed, all previous deeds are waived. And in this particular deed, there are no stipulations about how the land may be used. Even the Purchase and Sale agreement is waived once there is a deed - all agreements must be included in the deed itself. We have no guarantee from the land owners that they agreed to restricted use of the property. We have meeting minutes where the Town requested this and the property owner said "no" to such a restriction. If we file a claim, there would be an immediate motion to dismiss. This would expose the Town to negative consequences such as counteraction. 40B is nicknamed the "anti-snob zoning law" and this offers insight into how appeals to 40B proposals are viewed by the state. The perception of Sudbury's receptiveness to 40B developments would be damaged.

A brief recess was taken at 9:20 AM, and the meeting resumed at 9:23 AM.

Selectman Simon stated that he has spoken with Counsel Silverstein regarding the Sudbury Station issue and understands his perspective. He also understands that Town Counsel Saint Andre feels that there is not a case for misrepresentation. He stated that, because both attorneys work for the same firm that it is worth obtaining another legal opinion from outside the firm.

Selectman Brown requested that the matter of acquiring another legal opinion on Sudbury Station be taken up at another time as it was not on the day's agenda.

Chairman Iuliano advised that the Board assesses the options available for evaluation the Peter's Way land swap. She stated that the collateral issue of the transfer has not yet been investigated. The totality of the land swap appears to be fraudulent. The May 2011 Annual Town Meeting Article 27 vote was to authorize a land swap. The Planning Board was to govern the subdivision of the land, according to the vote. The JOC Trust is bound by this vote, regardless of a quitclaim deed.

Selectman Woodard asked to clarify whether the Board of Selectmen did not have the authority to sign the deed because they were not carrying out the agreement from Town Meeting.

Selectman Simon stated that any claim that is to be brought in the matter should be against the JOC Trust for rescission as the Town Meeting vote clearly stated that Planning Board Rules & Regulations would govern subdivision of the land.

Selectman Woodard stated that the Board of Selectmen did not incorporate the Planning Board requirement into the deed. He asked whether it would be possible for the same governing body to try to undo what the previous Board did.

Counsel Silverstein encouraged the Board to obtain another opinion on the matter. He acknowledged that the issue is "weighty" and that he understands the Board's position in seeking all avenues for challenging the application. He offered to suggest attorneys and firms that specialize in real estate litigation. He explained that his current role is as counselor and to give objective advice, and that he would passionately advocate the Board's position if they wished to pursue litigation.

Counsel Silverstein went on to explain that parcels didn't exist when the swap took place, but rather the current parcels were part of larger ones. As he reads the Planning Board requirement, it pertains only to the process of subdividing the land into smaller, identifiable parcels. Counsel Silverstein does not see this as imposing use limitations on the property which would stand up in court. He stated that, while he doesn't have any doubt that Mr. Abrams of JOC Trust misled the Town, this defense is unlikely to hold up in court.

Selectman Woodard asked if the Board of Selectmen's failure as noted previously would be a possible route to pursue.

Counsel Silverstein stated that he is not aware of statutory case law where this could be an argument.

Selectman Simon voiced his agreement with Counsel Silverstein regarding the Selectmen negligence argument. He feels that the best tactic is to pursue the line of reasoning that the Town was told the property would be a one lot parcel. The land swap itself may have been legitimate, but the agreement that Planning Board approval is required in order to use the land was violated. Selectman Simon believes Counsel Silverstein's reading of the Town Meeting article is too narrow, and that, when the JOC Trust accepted the land swap, Planning Board approval was part of the agreement to go forward.

Chairman Iuliano stated that this matter did go before the Planning Board in 2012, and the process followed Town Meeting requirements for subdivisioning.

Selectman Simon responded that immediately after Planning Board approval was granted, the Town was informed that a 40B project was coming onto the property. It appears that the Trust, having obtained the land swap, jumped over the Planning Board approval process and moved forward with a 40B application.

Chairman Iuliano inquired about a Statute of Limitations on such a claim. She asked if the Planning Board approval claim was viable, could we still pursue it?

Counsel Silverstein explained that for Breach of Contract, the Statute of Limitation is 6 years. The Tort limit is 3 years, unless the Town claims "discovery" which is the time when the deception was discovered. In this case, discovery occurred when the 40B application was received earlier this year.

Chairman Iuliano polled the Board on whether they wished to conduct the additional title search mentioned by Counsel Silverstein earlier in the meeting. Selectman Brown stated that while the search seems like a "long shot," it should be conducted. Town Manager Rodrigues stated that funds are available if the Board wishes to move forward with the additional search.

Chairman Iuliano moved to ask Town Counsel to conduct an expanded title search.

Vice-Chairman Woodard seconded the motion.

It was on motion and roll call unanimously.

VOTED: To ask Town Counsel, with the assistance of the consultant, to conduct an expanded title search concerning the other parcels involved in The Village at Sudbury Station.

Selectman Leonard A. Simon: aye, Vice-Chairman Charles C. Woodard: aye, Selectman Patricia A. Brown: aye, Selectman Robert A. Haarde: aye, and Chairman Susan N. Iuliano: aye.

Chairman Iuliano asked Counsel Silverstein if there are any other avenues that can be pursued with regards to the application.

Counsel Silverstein responded that several lines of research have been exhausted and that, aside from preparing creative arguments if the Town litigates, he does not currently see other avenues to pursue at this time.

Chairman Iuliano inquired about the broader ZBA application process and asked what the Board may publicly discuss.

Counsel Silverstein replied that the end of the ZBA process is approaching as only one more ZBA meeting remains, after which the ZBA will have 60 days to render a decision. If the Board of Selectmen wishes to discuss litigation, it should be done in executive session. He stated that he does not want to presume what the ZBA will do and explained that they have three options: 1. Approve the application as is, 2. Approve the application with conditions or 3. Deny the application. He is not certain whether the ZBA will deny the application outright or approve it with conditions. If they grant approval with conditions, the main condition would likely be to reduce the density. He stated that the State will rarely uphold outright denial of a 40B permit. If the ZBA does deny the application, then the Board of Selectmen could use litigation to support the Zoning Board. If the ZBA approves with conditions, then the Board of Selectmen can appeal Zoning's issuance of the comprehensive permit. He said to keep in mind that the Board of Selectmen would not be appealing simply as the Town's governing body, but as an abutter since the Town owns the cemetery and park land adjacent to the property. He stated that he could not guarantee that court would uphold such an appeal. He explained that an abutter appeal goes before the superior court, not the Housing Appeals Committee (HAC) and that the Board of Selectmen will have 20 days from the ZBA's decision to file an appeal not 30 days, as allowed for appeals to HAC.

Selectman Simon opined that it would preferable if the Zoning Board reject the application outright and sited Harwich, Mass as an example of a successful denial.

Counsel Silverstein explained that an outright denial is reviewed by HAC and that it falls on the ZBA to prove that the local burden of the proposed development is greater than regional housing need; HAC has rarely upheld such denials. He further explained that with conditional approval, the burden is on the applicant to succeed in convincing HAC that the need for the condition(s) issued by the ZBA is too burdensome. He stated that in either case, the prospects before HAC are not very good. He opined that the timeline to issue an appeal combined with the applicant's skill in running out the clock would make it difficult to allow enough time to investigate potential issues, such as hydrology.

Selectman Brown inquired whether, since the ZBA decision will be made shortly after Labor Day, it would make more sense to conduct a hydrology review now, rather than waiting till after the decision.

Counsel Silverstein explained that an appeal to the ZBA's decision would demonstrate that the Board of Selectmen believe that the ZBA made a mistake, and it is not necessary to have hydrology reporting in place when the appeal is filed.

Chairman Iuliano stated that the ZBA is considering hydrology a factor in their decision but have not received density results from the applicant, thus there is no drainage calculation upon which to base a hydrology study. She asked if there is a reason to expedite hiring a hydrologist.

Counsel Silverstein responded that hiring a hydrology consultant now might make it possible to obtain results from the consultant by August 25th, which could help shape ZBA's decision. He estimated that a ballpark figure for hydrology consulting would be between \$5,000-\$10,000.

Chairman Iuliano asked if the Board is ready to take steps towards hiring a hydrologist and whether everyone is ready to move to open session to make the decision.

Selectman Simon stated that he would also like to vote on the issue of obtaining a second legal opinion on the Sudbury Station matter.

Chairman Iuliano moved to return to open session and reconvene in executive session.

Selectman Woodard seconded the motion.

It was on motion and roll call unanimously.

VOTED: To return to open regular session at the conclusion of executive session, and to reconvene in executive session at the conclusion of the open session.

Selectman Leonard A. Simon: aye, Vice-Chairman Charles C. Woodard: aye, Selectman Patricia A. Brown: aye, Selectman Robert C. Haarde and Chairman Susan N. Iuliano: aye.

Executive session reconvened at 10:53 AM.

Selectman Simon began the discussion regarding hiring additional counsel to represent the Town's interests pertaining to the Village at Sudbury Station. He stated that another perspective from a firm with expertise focused in housing matters would be beneficial.

Town Manager Rodrigues stated that she has reviewed the available documents and agrees with Counsel Silverstein's opinion on the matter. She reiterated Counsel's statement that he will passionately argue in court, if the Board decides to pursue litigation. She has found that Counsel's firm KP Law retains attorneys with every kind of municipal expertise. It seems clear that the Sudbury Station applicant refused to limit the parcel to single family home during Planning Board hearings.

Selectman Brown stated that she disagrees regarding the need for another lawyer on the matter as she is concerned about the potential consequences for the Town if a 40B denial is overturned by the State.

Chairman Iuliano stated that she believes the Board has performed due diligence in having already retained additional Counsel.

Selectman Haarde inquired about the cost of obtaining another legal opinion.

Town Manager Rodrigues replied that it would be approximately \$200 per hour. She said that Counsel Saint Andre's and Silverstein's opinions would need to be released to any other hired counsel.

Selectmen Haarde and Simon agreed that it would be preferable not to release previous opinions to newly hired counsel. Selectman Simon further stated that concerns have been expressed to him by residents about KP Law's dedication to the Sudbury Station case.

Vice-Chairman Woodard stated that he has no confidence in the case and is also concerned about consequences for filing a frivolous case on this theory. He believes it would not be to the Town's benefit to find a third-tier lawyer who is eager to try a long shot case.

Selectman Brown inquired about the cost of hiring counsel expressly to review relevant paperwork and provide another opinion, not necessarily to litigate. Town Manager Rodrigues approximated that the cost would be around \$5,000.

Selectman Haarde stated that he thought it would be worth \$5,000 to get another legal opinion from a specialized law firm on the Peter's Way transaction.

Chairman Iuliano asked if it would be possible to place a limit on the amount the Town would pay so that the review would not exceed a reasonable length of time and cost.

Selectman Simon moved to empower the Town Manager to retain an attorney to review legal questions regarding matters of the land swap pertaining to The Village at Sudbury Station land, and to spend up to \$5,000 on the legal services, without any obligation on the part of the Town to pursue litigation.

Selectman Haarde seconded the motion, asking that "relevant expertise" be added to the attorney qualification.

It was on motion and roll call unanimously.

VOTED: To empower the Town Manager to retain an attorney with expertise relevant to review legal questions regarding matters of the land swap pertaining to The Village at Sudbury Station land, and to spend up to \$5,000 on the legal services, without any obligation on the part of the Town to pursue litigation.

Selectman Leonard A. Simon: aye, Vice-Chairman Charles C. Woodard: aye, Selectman Patricia A. Brown: aye, Selectman Robert C. Haarde and Chairman Susan N. Iuliano: aye.

Chairman Iuliano moved to adjourn the meeting at 11:06 AM.

Selectman Woodard seconded the motion.

It was on motion and roll call unanimously.

VOTED: To adjourn executive session.

Selectman Leonard A. Simon: aye, Vice-Chairman Charles C. Woodard: aye, Selectman Patricia A. Brown: aye, Selectman Robert C. Haarde and Chairman Susan N. Iuliano: aye.

Attest: _____
Melissa Murphy-Rodrigues
Town Manager-Clerk