

IN BOARD OF SUDBURY SELECTMEN
EXECUTIVE SESSION
FRIDAY, SEPTEMBER 9, 2016

Present: Chairman Susan N. Iuliano, Vice-Chairman Charles C. Woodard, Selectman Leonard A. Simon, Selectman Robert C. Haarde (arrived late), Selectman Patricia A. Brown, Town Manager Melissa Murphy-Rodrigues and Special Counsel Donald Pinto (Pierce Atwood LLC).

The statutory requirements as to notice having been complied with, the meeting was called to order at 10:04 AM in the Flynn Building Silva Room.

Village at Sudbury Station Litigation

Chairman Iuliano opened in regular session and voted to immediately enter into Executive Session to 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 (Village at Sudbury Station), pursuant to General Laws chapter 30A, §21(a)(3) and not to return to executive session.

Vice-Chairman Woodard 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 if an open meeting may have a detrimental effect on the litigating position of the public body and the chair so declares (Village at Sudbury Station), pursuant to General Laws chapter 30A, §21(a)(3) and not to return to executive session.

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

It was discussed whether it would be permissible to create an audio recording of the meeting. The members present consented to creating an audio recording which would be destroyed after the minutes were complete.

Chairman Iuliano welcomed Special Counsel Donald Pinto 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 Pinto provided a recap of his work and what it has yielded. He stated that he has been tasked with finding any legal theories or causes of action that could lead the land swap to be undone or the proposed development to be thwarted. After considering a number of possibilities, he concluded that, at this time, the approach with the most promise and best chance of success would be to focus on Town Meeting and what Town meeting thought it was doing when it voted on Article 27. The court may choose to vindicate the intent of Town Meeting voters. On the other hand, the deed transaction was completed and undoing it would undermine the expectations of the deed holders.

He continued that there is a doctrine that states that the Board of Selectmen, when acting on behalf of the Town, can only do what they've been authorized to do by the legislature (in this case, the Town Meeting voters). Thus, the approach would be to argue that the Board was not permitted by Town Meeting to convey land to another party in such a manner that would allow a large housing development to be constructed on the site. It is clear that voters understood the "one building lot" language to mean a single-family home rather than a building that would consist of many units. He noted that there are several steps to this approach. It is established that the Selectmen have no authority to take this action without Town Meeting. The first hurdle is

that the Town Meeting article language must be found to be ambiguous. That would open the door to other evidence of intent (i.e. what was said at Town Meeting and what the voters actually believed). The language of applications put before the Planning Board must also be found ambiguous. A rather harsh common law doctrine asserts that people who deal with a municipality do so at their own peril – that private parties must be sure that the body that they’re dealing with (in this case, the Board of Selectmen) has the authority to perform the action that they take. This was loosened in the 1970s when it was deemed that private parties could indeed rely on the validity of a municipality’s action as long as the individual was acting “in good faith.” He believes it readily apparent that the JOC Trust did not rely on deed in good faith, and that the 40B development was likely part of long-term plan for the property all along. If this can be proven, and we can show an absence of good faith on the part of JOC Trust, then the title didn’t pass as the Board of Selectmen didn’t have the authority to grant it, and the deed should therefore be rescinded, as it was never valid.

Vice-Chairman Woodard noted that it seems odd for the Board to try to sue themselves five years after taking an action, based upon their own poor performance. He stated that he would have more confidence in this approach if a resident brought the case forward.

Counsel Pinto clarified that the Board would not be suing itself, but rather rectifying a wrong that was committed. Chairman Iuliano concurred that it would be enforcing the Board’s original intent.

Selectman Simon stated that it could be viewed as mutual error: The Board of Selectmen erred in not putting proper requirements and protections in deed, and the Trust exploited the Board’s oversight and erred in trying to do so. Counsel Pinto responded that there is a lot of overlap between the “mistake” analysis and the “authority” analysis.

Selectman Simon asked whether there was an application for a single-family home on the property.

Counsel Pinto responded that, for a 40B project, an applicant first needs access and then they need subdivision approval, and the JOC Trust followed these steps exactly. He stated that it had always been their intent to do this in requesting the swap. Town Meeting did try to assure that there would only be one house on the property. “One building lot” is considered a single-family home, not one 40B development. If we interview a Town Meeting voter on the stand, they will readily confirm this.

At 10:23 AM Selectman Haarde arrived, and Chairman Iuliano recapped the meeting proceedings for him. She concluded that Counsel Pinto has identified a path for litigation and requested that he provide a likelihood of success.

Counsel Pinto responded that it would be difficult to provide a likelihood of success even for a case that relied on single issue, and in this case, there are two issues:

Issue 1 - The judge must agree that Town Meeting article was ambiguous. If he/she decides that the article was clear, then The Town doesn’t have an argument. However, it seems likely that the argument would succeed given that the integrity of Town Meeting is at stake.

Issue 2 - The judge must agree that the Board of Selectmen didn’t have legal authorization to perform the transaction since it did not carry out the intent of Town Meeting vote, as The Town can only take such action when authorized by Town Meeting. That being said, unwinding a decision can be difficult.

Selectman Simon asked whether there is a statute of limitations on the first part of argument. Counsel Pinto answered that there is no issue for the first part of the argument as it took place in 2011. It is also not an issue for the second part of the argument, as “Authorization” has no statute of limitations.

Selectman Haarde and Chairman Iuliano brought up the Planning Board's involvement in the approval of the Peters Way Extension land swap. Counsel Pinto reiterated that the authorization was for "One building lot" which can technically be used for 40B project, however lay people would not and did not understand this nuance, and they assumed that "One building lot" meant one single house lot.

Town Manager Rodrigues stated that the Zoning Board of Appeals (ZBA) would meet on September 20 to vote on the Sudbury Station Comprehensive Permit application. She asked what litigation should look like timing-wise.

Counsel Pinto asked how the ZBA is expected to vote, and Chair Iuliano responded that they will either deny the application or approve it with changes. Selectman Simon elaborated that the ZBA has asked Town Counsel to draft decisions for either scenario and that, unless there's a drastic change from the ZBA, the decision will likely be appealed by the applicant.

Counsel Pinto responded that, if the ZBA was in strong support of the application, the timing would be different. However, since an appeal of the ZBA's decision is likely, the matter will be tied up in court for a while, which allows for additional time.

Selectman Simon inquired about the benefit of taking the action proposed by Counsel and asking the court to suspend determination until the ZBA decision appeal is resolved. Counsel Pinto responded that it would be viewed as wasteful of everyone's time. Vice-Chair Woodard stated that this is reminiscent of concerns raised by the Town's other counsel. Specifically, that the Court would find the lawsuit to be frivolous and that this could bring negative consequences to the Town.

Counsel Pinto responded that dismissal of the case as frivolous doesn't seem likely. The action is not being brought in "bad faith." He asked if there was shock and dismay on the part of the Town when the application was filed. Board members confirmed that there was. Counsel Pinto asked if this was due to the outcome being contrary to the vote, and the Board agreed that it was. He added that, while courts certainly do help to uphold 40B, they also have an obligation to Town Meeting intent. If, during discovery, it is found that the applicants had planned the development all along, such evidence would tip the scales in the Town's favor.

In response to a question on whether there is a statute of limitations on frauds, Counsel Pinto responded that frauds require all evidence to be in writing and that intent is not important. As an example, he stated that JOC Trust could be asked, "When did you first speak with developer about the possibility of developing the land?" as a means to establish proof that developing the land had always been their intent. He added that with Authority Law, courts try to establish the intent of Town Meeting.

In response to questions about the costs and benefits of litigation and the projected costs over the next 6, 12 and 18 months, counsel Pinto responded that more research would be needed, followed by the drafting of a Land Court complaint along with the Writ of Entry. In response to Chairman Iuliano's question about why Land Court would be the best avenue, Counsel Pinto responded that, while the cause could be brought to General Court, the Town would be best served to have a judge familiar with real estate property law. Thus, Land Court would be the best fit. In response to two other questions, Counsel Pinto stated that Land Court appeals go to the State Appeals Court and that there is no jury in Land Court.

In returning to the topic of litigation cost, Counsel Pinto stated that it would be about \$4,000 - \$5,000 for the first steps. Hopefully, the applicant would be willing to compromise at the first stage of filing. If not, it would go to Discovery, which would cost somewhere between \$10,000-\$40,000.

As the land that the Town received from JOC Trust in the swap is now part of a Town cemetery, Selectman Brown asked whether any people have been buried in the acquired land. Town Manager Rodrigues stated that she would check on this.

Counsel Pinto stated that, if the case succeeds, the Town would need to return the land to JOC Trust.

Chairman Iuliano asked whether the Board was ready to vote to pursue this approach, and whether \$4,000-\$5,000 is available to initiate the process. Town Manager Rodrigues responded that the amount could be taken from current funds.

Counsel Pinto reiterated that there is not a big rush to file the case prior to ZBA decision as they will not be approving the Sudbury Station application. Once the case is on record, it cannot unilaterally be pulled back, and once the case is filed, The Town may be obligating itself to at additional cost of tens of thousands of dollars.

Chairman Iuliano clarified that the vote would be to authorize Counsel Pinto to do further research and draft the Writ of Entry, but not to file yet. Counsel Pinto confirmed that this would give him an opportunity to “put pen to paper” and further develop the argument. Town Manager Rodrigues stated that requesting funds at Fall Town Meeting would show the Town’s hand in pursuing litigation, so it would be best to hold off until May Town Meeting to request additional litigation funds.

Selectman Brown asked what a reasonable timeline for a Writ would be, and Counsel Pinto responded that approximately two weeks would be sufficient.

Selectman Simon moved to authorize Attorney Pinto to proceed with the additional research that he has indicated and to draft a Land Court Writ of Entry, or other legal documentation as Counsel determines appropriate, for consideration by the Board within the next 2-4 weeks, at a cost of approximately \$5,000 or less.

Selectman Haarde seconded the motion.

It was on motion and roll call unanimously.

VOTED: To authorize Attorney Pinto to proceed with the additional research that he has indicated and to draft a Land Court Writ of Entry, or other legal documentation as Counsel determines appropriate, for consideration by the Board within the next 2-4 weeks, at a cost of approximately \$5,000 or less.

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

Counsel Pinto stated that he will continue to work with Town Manager Rodrigues and Town Counsel Silverstein, as questions arise. Counsel Pinto and Town Manager Rodrigues left the meeting at 11:08 AM.

Executive Session Minutes Approval

The Board opened discussion of the November 3, 2015 Executive Session Minutes. Revisions were provided by Selectman Brown and Vice-Chair Woodard. The Board wished to have the Minutes approved but not released.

Chairman Iuliano moved to approve the Executive Session minutes of November 3, 2015 as revised.

Selectman Brown seconded the motion.

It was on motion and roll call.

VOTED: To approve the Executive Session minutes of November 3, 2015, as amended.

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

The Board opened discussion of the June 29, 2016 Executive Session Minutes. Revisions were provided by Selectman Haarde and Vice-Chair Woodard.

Chairman Iuliano moved to approve the Executive Session minutes of June 29, 2016 as revised.

Selectman Haarde seconded the motion.

It was on motion and roll call unanimously.

VOTED: To approve the Executive Session minutes of June 29, 2016, as amended.

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

Chairman Iuliano moved to adjourn the meeting at 11:24 AM.

Prior to adjournment, Selectman Simon wished to state that obtaining a second opinion on the land swap matter was a good step. Going forward, if two opinions are sought on a matter, it would be good practice to make sure that the two lawyers who provide opinions are from different firms. He added that what the Board heard from Counsel Pinto today vindicates their judgement. Selectman Haarde agreed that there is value in specialized expertise and it makes sense to get a second opinion from an outside firm.

Chairman Iuliano moved to adjourn the meeting at 11:28 AM.

Selectman Haarde 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.

There being no further business, the meeting adjourned at 11:28 AM.

Attest: _____
Melissa Murphy-Rodrigues
Town Manager-Clerk