

IN BOARD OF SUDBURY SELECTMEN
OPEN AND EXECUTIVE SESSION
WEDNESDAY, OCTOBER 26, 2016

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

Special Counsel Richard Holland also present for Executive Session.

The statutory requirements as to notice having been complied with, the meeting was called to order at 9:03 a.m. in the Flynn Building Silva Room.

November 8, 2016 State Election Warrant

Vote to sign the State Election Warrant for posting by the constable no later than November 1, 2016.

Selectman Brown made a motion, seconded by Vice-Chairman Woodard.

It was on motion unanimously

VOTED: To sign the State Election Warrant for posting by the constable no later than November 1, 2016.

Frost Farm Residence Litigation – Executive Session

At conclusion of regular session, 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 as the chair so declares (Frost Farm), pursuant to General Laws chapter 30A, §21(a)(3).

Selectman Brown made a motion, which was seconded.

It was on motion and roll call unanimously

VOTED: To 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 as the chair so declares (Frost Farm), pursuant to General Laws chapter 30A, §21(a)(3).

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).

Chairman Iuliano asked how to proceed with discussing this in open session? Not ready to let Bill Braun know that the RFP will be re-posted (non-renewal of Bill's contract).

Selectman Haarde said we should tell Bill as soon as possible. Step 2 will take a while as it's a large town-owned property in the middle of a development.

Chairman Iuliano asked Attorney Holland how should we proceed?

Attorney Holland replied it's hard to know what they're going to do. Bill's lawyer seems pugnacious though Bill seems reconciliatory. Still believe that they will file a lawsuit. Not sure what will appease or mitigate that, and unsure what Bill wants other than a 10-year agreement.

Chairman Iuliano said Bill Braun is aware that there are major legal issues with the current agreement.

Attorney Holland responded that he doesn't expect that BOS will definitively know what to do with the property within a few days or weeks. Discuss in open meeting what to do with it and vote in open session that the agreement will not be renewed. Caretaker service through procurement process, assuming that permits are finalized and the property is habitable.

Town Manager Rodrigues said there are open permits for construction. There is heat and hot water, so no issues under state sanitary code. Counsel made it clear that the only way to avoid litigation is to grant 10-year extension. How the decision is framed likely won't make a difference.

Selectman Haarde shared that Bill may think we've treated him fairly and we'll give him notice. Perhaps grant a 1-year extension while we decide what to do with property, advertise RFP, etc. We also need to decide what to do with it after it's renovated.

Chairman Iuliano shared that she understood for years that we couldn't sell it due to zoning restrictions. Requested clarification from Town Counsel. Is there a possibility of short-term extension of contract to sort out our long-term plans?

Attorney Holland responded not an extension of the current agreement but rather a license agreement, revocable at will, which is unlike a lease. Recommend that it be clearly a license and not a lease. Also include that agreeing to use and occupancy agreement (not lease) and that if eviction is required, that he pay Town's legal fees, and he releases all claims. The claims that Bill's lawyer is making are frivolous. If extending for a year, these things are reasonable. They will likely fight these things.

Town Manager Rodrigues asked should we require rent for a license? Attorney Holland responded yes, some consideration.

Selectman Brown asked should someone pay taxes for the property? Selectman Simon answered it's Town-owned, so not taxed. Attorney Holland said it's only taxed if leased to for-profit venture, for example, leasing to solar field developer.

Selectman Simon shared that the house has historical value and may have further value to the Town to lease for low or moderate-income families. Intent had been to preserve property and make it habitable. Goals of preventing further deterioration save on demolition costs and make improvements. What changed was that there was more work to be done than met the eye. Ten years on the current lease seems like sufficient time to figure out next steps. Holding a public meeting and letting Bill know that he will be kicked out isn't in the spirit of what the Town intended. We're looking for legal avenue for the Town to retain property, and for it to not become a nuisance, and to not disrespect someone who has done tremendous work for the Town on this and other projects.

Chairman Iuliano said we need to look at issues more comprehensively. We need to look at how a caretaker RFP would work. She's hoping to look at non-renewal and license before moving to an RFP.

Selectman Simon said the current agreement isn't binding, but we want to be clear on all steps. Attorney Holland said we'll try to work with Bill Braun to see if we can work out something that is mutually beneficial and lawful.

Chairman Iuliano said the current contract ends October 2017. We need to give 6 months' notice of non-renewal.

Attorney Holland recommend that we tell Bill Braun we will not renew, and will grant 1-year license. We will try to involve Bill in the process as much as possible in the RFP process. He can communicate to counsel what we expect will happen (i.e. non-renewal vote), so they don't hear of it for the first time when the vote comes out. Lease and occupancy will be negotiated after the Board votes. We need to figure out cost and needs in order to close our permits.

Selectman Haarde shared that we should recognize work that he's done and say that we're offering the license in light of this.

Selectman Simon asked is the portion dealing with the expiration and notice date of the current invalid contract something we're bound to?

Attorney Holland responded that the court would tell us if it's valid or not, so we should follow it in case it is valid. Generally, if the construction work was subject to Chapter 149 and advertisement requirements, etc. were not followed, it's not valid. Still better to follow contract rules. If it's over \$35,000, you will need to follow procurement practices. After lease expires, license would begin.

Selectman Haarde asked could Bill sue because the contract was not valid in the first place?

Attorney Holland responded they can argue that Bill should receive fair value for his services. This has been raised more in construction context than any other. For public context, public treasury gets priority protection, so for invalid public construction contracts, courts usually say that the Town is not liable. Mr. Braun had no reasonable expectation, in the eyes of the law, that doing extra work would grant a contract extension.

Chairman Iuliano said we didn't pay prevailing wage for Bill's work.

Selectman Brown asked since there are open permits, could he sue if he gets injured?

Attorney Holland responded he's doing the work, so should not expect successful suit on these grounds. The issue of construction could be addressed in the license. Bill is concerned about how long it will take him to relocate, but letting him know now and giving him till Oct. 2018 should be sufficient notice. The Use & Occupancy agreement is reasonable.

Selectman Simon said the Town is liable for \$100,000 if there is an injury. Town Manager Rodrigues asked are we (the Town) negligent for letting Bill live in the house?

Attorney Holland suggested release of all claims language for license. Any language prior to use and occupancy should be invalidated.

Selectman Woodard asked why would they agree if we can kick them out at any time (within a day)?

Attorney Holland responded the agreement will be styled like a license but will be structured like a lease in many ways. If value of lease is less than procurement threshold (less than \$35,000), we can style license like a lease. Three bids are not required.

Selectman Brown stated that if you're in excess of \$10,000, the vendor must have OCA training. Does Bill have this? Chairman Iuliano responded that Bill will not be doing any more Chapter 149 work, so this won't be a concern.

Attorney Holland will notify counsel in advance of meeting vote and start license negotiation.

Attorney Holland confirmed that the Board is asking him to communicate that a vote will be taken and that we'd like to negotiate use & occupancy agreement for a year. "Notify lawyer that vote will be non-renewal in open session. Lawyer is willing to negotiate use & occupancy one year beyond expiration date of lease."

Selectman Woodard made the following motion:

VOTE: Instruct Special Counsel Richard Holland to notify the counsel for Frost Farm house tenant Bill Braun that it is expected that the Board of Selectmen will vote for non-renewal of the current contract at an upcoming open session meeting of the Board. Counsel Holland to further communicate that the Board recognizes and appreciates the years of work that Mr. Braun has put into the property and the Board will offer a use and occupancy license to extend one year beyond the expiration date of the current contract.

Selectman Haarde seconded the motion. Chairman Iuliano called for a vote.

It was on motion unanimously, all aye

Discussion continued on this topic whether to vote non-renewal at next meeting or a later one. Some Board members feel that we already know what we're going to do and should move forward. Others think that we should hear from Bill, in case of surprise reactions. In light of this discussion, vote could be scheduled for Nov. 15, and add an executive session if necessary.

Town Manager Rodrigues shared there's a human element beyond legal aspects. The Board recognizing Bill's work will ease transition. Bill may not win when the project goes out to bid. He may have been given certain expectations by town staff, including a former Town Manager.

Town Manager Rodrigues shared that the Town does have other occupancy leases, for example, Loring Parsonage, LS Credit Union. Not sure if there are other caretaker type leases.

Attorney Holland said there are two ways to structure a caretaker lease under 30B: 1. straight lease under section 12; or 2. RFP for caretaker services under section 6, along with use and occupancy agreement. Get statements of qualifications and prices.

Chairman Iuliano said we'd need to sort out our approach in the future, but would definitely exclude Chapter 149 work. Could we have Chapter 149 work done to house, as long as it's safe?

Attorney Holland responded that if it's habitable and work is outstanding, can't waive "habitability and quiet enjoyment" in MA, and work may interfere with that. If Bill is still there while work is being completed, we would want that addressed in the use & occupancy agreement. Ideal to have work done before next person moves in.

Chairman Iuliano said no matter what path we pursue, we could look into home rule petition simultaneously. Selectman Simon asked to elaborate on home rule petition requirements.

Attorney Holland responded it will need vote at Town Meeting. Specify properties, not people. Specify procurement process. The legislature still may not pass it.

After some discussion, there was general agreement not to pursue the home rule petition at this time.

Attorney Richard Holland left the meeting at 10:23 a.m.

Selectman Brown recused herself from the next topic (Eversource) at 10:23 a.m.

Eversource Litigation

Discuss setup and logistics for tonight's Community meeting with Eversource at LSRHS. Discussion of Susan's opening remarks including that BOS opposes MBTA Row options. We've asked Eversource to look at street options, with preference for Route 20. We're been discussing this in executive session.

Residents will have questions for BOS, not just Eversource. What work is being done? Public statements from representatives and senators may not be consistent with BOS position.

Eversource has removed all cost numbers from presentation, which were present last time.

The Hudson resident group is dwindling. Hudson Light & Power has stated their support for need of project.

Ed Markey letter is being circulated by Protect Sudbury. Town Manager Rodrigues has requested a signed version so we can do a press release, etc.

Nov. 7 is Hudson's meeting date. Eversource will likely file in November or December.

Discussed the Protect Sudbury postcard, which makes it seem like the Selectmen want residents to come and show opposition. It's really a BOS meeting that should be a discussion and opportunity to hear from Eversource and residents.

Eversource strategy seems to continue to be that this project will give the Town a rail trail. Doesn't resonate with Sudbury residents. Also, DCR only considers the underground option to be viable.

New and different perspectives will likely be heard tonight. Want to be sure that we can hear from as many people as possible.

Streets option is new; plenty of organized opposition to MBTA ROW, but nothing organized for streets.

Litigating position may ultimately be saying to the siting board that Eversource didn't provide viable options that the Town suggested – putting the project on Route 20 entirely.

Selectman Haarde shared that from the start, he was concerned our attorney hadn't been before the siting board. With Sudbury Station additional counsel worked well.

Town Manager Rodrigues said not any one person is a "star" of the siting board. George Pucci is aggressive (in meetings with Eversource) and has the interest of the Town in mind. The title report came back, George is meeting with Protect Sudbury, and working on memo for Board regarding this and environmental and fiscal impacts. We could get counsel to compliment his work.

Selectmen Woodard and Simon stated that we need someone to give us options for reaching our goals. Hoping for better, clear direction on what next steps to take. George could assist other counsel which would lead litigation.

Town Manager Rodrigues said Hudson is using Attorney Greg McGregor. Very few successful suits before the siting board, so there aren't many lawyers to choose from. Protect Sudbury wanted to sue before filing on grounds that project isn't needed. Have experts to demonstrate that project isn't as necessary as ISO stated. Seven or eight towns will have increased reliability due to this project, however, Sudbury is not one of them.

Chairman Iuliano shared that we have cost expert, but still waiting on report. Title search completed and it doesn't help us. Environmental expert found a great deal. Hudson has come more in line with our point of view, but they're not yet arguing that reliability won't improve. We need to identify the best alternative and we need to be in agreement with Hudson before going to siting board with this.

Selectman Simon said we need to see numbers for the 3 options they're now proposing, especially since the siting board is likely to choose the least expensive option, regardless of other factors. When we look back 20 years from now, we want to be sure we made the right decisions to get the best outcome. Best strategy is to be united with Hudson.

Town Manager Rodrigues shared that Hudson does benefit from the project while we do not. We may need to make concessions to maintain their agreement. Their resident group is mostly relying on protect Sudbury. She will talk with Tom Moses, Hudson Town Administrator, to set up a joint Board of Selectmen meeting for Sudbury and Hudson.

Selectman Simon moved to adjourn, and Selectman Haarde seconded.

Vote to end Executive Session and not reconvene in Open Session.

It was on motion and roll call unanimously

There being no further business, Executive Session adjourned at 11:32 a.m.

Attest: _____
Melissa Murphy-Rodrigues
Town Manager-Clerk