

EXECUTIVE SESSION MINUTES

Executive Session

Board of Selectmen/Conservation Commission Minutes

June 9, 2015

7:00 pm

Silva Conference Room, Flynn Building

Board of Selectmen Chairman Brown called the meeting to order at 7:00 pm for the purpose of voting to enter into Executive Session to discuss litigation which an open discussion might impair the Town's position.

Conservation Commission Chairman Friedlander called the meeting to order for the purpose of voting to enter into Executive Session to discuss litigation which an open discussion might impair the Town's position.

Roll Call vote:

Selectmen: Susan Iuliano, aye; Pat Brown, aye; Chuck Woodard, aye; Len Simon, aye

Conservation Commission: Thomas Friedlander, aye; David Henkels, aye; Beth Armstrong, aye; Mark Sevier, aye; Bruce Porter, aye; Charlie Russo, aye;

Others Present: Maryanne Bilodeau, Interim Town Manager; Jody Kablack, Director of Planning and Community Development; Deborah Dineen, Conservation Coordinator; Jim Kupfer, Assistant Planner; Peter Mello, Petrini & Associates

Selectman Haarde entered the meeting at approximately 7:10 pm.

Mr. Mello was present to discuss the process for the appeals that have been filed with both DEP and Superior Court on the Conservation Commission's Order of Conditions on the Bruce Freeman Rail Trail. An abutter to the rail trail has appealed both the state WPA permit and the local bylaw permit.

Mr. Mello expressed that it is important for both boards to hear the information since there are 2 legal jurisdictions involved, and procedures in Superior Court have specific requirements that he wants to make sure everyone is familiar with. Mr. Mello referenced Superior Ct, Standing Order 1-96, as well as an alleged trespass in the complaint, but he noted that the Complaint does not seek specific relief for the trespass allegation, and Mr. Mello would argue that this case is limited to the plaintiff's certiorari claim under G.L. c. 249, Section 4. At Superior Court, the decision will be based on the basis of the record of proceedings that was before the Conservation Commission when it issued the underlying order of conditions. There will be no trial or proceedings, and has an expedited, aggressive schedule. Working with Debbie Dineen, the record has already been largely compiled. The Town has 90 days from date of service to produce the record.

Mr. Mello noted that a parallel process with DEP is proceeding as well.

Mr. Friedlander asked what the real issue of the appeal is. Mr. Mello reported that the plaintiff seeks to annul the Conservation Commission decision. However Mr. Mello noted that Superior Court generally applies a favorable standard of review to underlying authorities if there is no egregious violation of the process. Mr. Abrams alleges that there was not sufficient evidence in the record for the Conservation Commission to issue the Order. Superior Court could remand the decision back to the Commission with instructions, could deny the complaint, or could overturn the Commission's decision.

Mr. Mello thinks there is protection in the Order of Conditions because it requires additional approvals prior to the vegetation trimming. Has not completed his legal arguments yet, but this may be relevant.

Mr. Friedlander asked if there would be a way to propose additional conditions to the Plaintiff that might satisfy him so the lawsuit is dropped.

Ms. Dineen stated that VHB's wording of the Notice of Intent created ambiguity. It was also noted that the minutes of the Conservation Commission hearings on the application reflected that the work was very limited and specific.

Board members asked if an amended order can be issued while the lawsuits are on-going, or if the Town could withdraw the order and clarify the request in a new filing? There was discussion over whether this might delay the process further as it would open the possibility of a new appeal of any amended

NOI/Order of Conditions.

Mr. Mello suggested potentially asking the Court for an agreement for judgment if the parties are able to reach a resolution. The Town can submit terms to the Court. This process may require the ConCom to issue a new Order as well.

Ms. Dineen suggested that now that the wetlands are flagged, we consider withdrawing the current NOI and reapplying. They will be able to review flags to make a better determination of the impact on wetlands. This information was missing from the original submission.

Members expressed some interest in having Mr. Mello open a discussion with Mr. Abrams to see if we can move past this phase. Such a discussion might flush out Mr. Abrams concerns. Mr. Mello can also continue creating the record for Superior Court.

Mr. Mello asked if the Boards wanted him to ask DEP to stay proceedings for 30 days while he speaks to Mr. Abrams, as well as the idea to send a letter to DEP discussing the very limited scope of work that was contemplated under the NOI. Members were divided on these actions, and decided to meet again in 2 weeks so Mr. Mello can update them on any conversations he has had with Mr. Abrams.

At the meeting on June 23, there will be more discussion on whether Mr. Mello should communicate with DEP. Ms. Dineen said in her opinion, giving DEP language that is acceptable to Town is usually beneficial, and DEP will usually use such language in its approval.

A Motion was made, seconded and voted unanimously by roll call vote of both boards to: Instruct Attorney Mello to communicate with Attorney Abrams for a potential resolution and to report back on June 23, 2015. The meeting will be scheduled for 6:30 pm in the Flynn Building.

A Motion was made, seconded and voted unanimously by roll call vote of the Board of Selectmen to: leave Executive Session and return to regular session at Town Hall.

A Motion was made, seconded and voted unanimously by roll call vote of the Conservation Commission to: leave Executive Session and return to regular session in the Silva Conference Room at the Flynn Building.