

**LUNENBURG PLANNING BOARD
TOWN OF LUNENBURG**

Emerick R. Bakaysa, Chair
Joanna L. Bilotta, Vice-Chair
Thomas W. Bodkin, Jr., Clk.
Robert J. Saiia, Mbr.
Nathan J. Lockwood, Mbr.
Marion M. Benson, Planning Director



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Minutes

Executive Session
April 13, 2010

Time: 5:45 PM

Joint meeting with the Board of Selectmen

Attendance: Board of Selectmen, Planning Board, Town Manager, Planning Director, Attorneys Joel Bard and Brian Winner, Kopelman & Paige.

Each Board opened its meeting; Roll Call Planning Board members, Chair Bakaysa, aye, Ms. Bilotta, aye, Mr. Saiia, aye, Mr. Bodkin Jr., aye, Mr. Lockwood, aye.

Attorney Bard spoke on the status of the litigation between O'Brien Homes, 18 Cassimere Street, Andover, MA 01810, and the Lunenburg Planning Board. Noted the preparation work, Deposition of the Planning Director, and amount of legal fees.

The Planning Board stated it acted on the advice of Counsel, which had told the Director to accept the Plan, get a peer review and state the other reasons for disapproval of Mr. O'Brien's plan.

The settling of the Lawsuit was discussed in detail. Chair Bakaysa read the Decision made by the Planning Board in its April 12, 2010 Executive Session, which said that the Board was not interested in pursuing the Conceptual Plan presented by Mr. O'Brien as it was basically the same. The Planning Board was surprised to know that the presentation was a settlement offered. This was not made clear by the Attorneys. Also noted was that the Attorney pre-reviewed the Plan presented and did not take a position or note to the Developers that the Plan that was to be presented did not meet the expectations of the Planning Board.

Further financial discussion was held pertaining to future costs. The consensus of the meeting was that the Planning Board would not accept the above noted Plan, but would review any new concept that could be determined to be in the intent of the Bylaw.

It was stated that judgment would take four to eight months.

Minutes/executive 2010/4-13-10

~~WE ATTACH~~

WE INCORPORATE THE BOS MINUTES OF
4/13/10 ATTACHED HERETO TB

EBR
RJS
DAB
MJZ

BOARD OF SELECTMEN
EXECUTIVE SESSION
4/13/10

The Board of Selectmen met in Town Hall as scheduled with Thomas Alonzo, Paula Bertram, Steven M. deBettencourt, Thomas Mason, Dave Matthews and Town Manager Kerry Speidel present. Recessed Regular Session at 6:43 P.M. and opened Executive Session by roll call vote; Steve aye, Tom A. aye, Paula aye, Tom M. aye and Dave aye, at this time for the purpose of discussing contract deliberations when having in open session would be detrimental to the town's negotiating strategies, MGL Chapter 39, §23B (3). Chairman announced that the Board would be returning to Regular Session

1. Litigation Strategies – Members of the Planning Board Toby Bakaysa, Joanna Bilotta, Tom Bodkin, Nathan Lockwood and Robert Saiia and Planning Director Marion Benson present as well as Town Counsel Joel Bard and Brian Winner, to discuss the O'Brien lawsuit regarding what course of action the board wanted to take.

Joel noted that the farms in question were under 61A and the developers keep bringing up that in the background that the town has an ulterior motive. The town's contention is that the proposed project completely ignored section 5.6 of the Protective Bylaw. This case requires the court to schedule a trial within 12 months and it doesn't seem that we're going to have a trial within the 12 months time period. Noted, however, that the litigation has been moving along rapidly on one half of the case. The opposing counsel's case so far has been about avoiding Section 5.6., which is the essential issue. The attorney's (K&P) needed to develop a factual record in the case and this is what has created the large amount of expense. This is an extremely thorough process which is basically all of the town's planning efforts. Marion has been deposed on three occasions to dredge out all the facts on the case. Both sides have written their briefs. In late February we had a summary judgment for the validity of Section 5.6 and should have something from the court before the end of June. Basically, it will be between 4 and 12 months before we get an answer on summary judgment. If we get a win on summary judgment then we basically win, although they can appeal. If we lose we can look at the wetlands issues, the issue of being able to perk 135 sites. If this were to happen, would be another significantly costly event, reviewed the process that the town would have to go through in defending an appeal which would be a detailed trial. Another legal issue that hasn't been addressed is whether the Planning Board could require that they see every site perk. Joel believes that we're in pretty good shape, although hasn't researched the perk issue. Certainly puts them at a point where they'll have to do a lot of work. In terms of Section 5.6, aware of the concern of the litigation costs, or about settling as the developers have met with the Planning Board 3 – 4 weeks ago. The alternative is they can come in and show a series of 25 acre subdivisions on the property. What they brought was something less than the original plan, reduced by 4 houses. They essentially have proposed the refined plan and proposed building it out in 25 acre subdivisions. We wanted the developers to give it their best shot to the Planning Board to pitch their plan. Toby informed the developers through Marion that he was very clear that he was not willing to entertain the developers with anything other than the 25 acre subdivision and is critical of town counsel for entertaining that piece. Per Joel, we told them what you wanted to see and this is what they came back with. Counsel still felt that it was important for you to see what it was they proposed, we will go the extra mile for the developer, we are not on their side. We'd rather make the mistake that we made than hold something back from you and will be happy to look at their proposals. That is what they came back with and we will go back to them, that the Planning Board will not accept this type of plan. Not interested in continuing to pursue the conceptual plan but are interested in pursuing a plan that is in accordance with Section 5.6.

Kerry questioned if there is any recent court case and per Joel there really isn't, he has been reading these for years noted that there are probably 50 bylaws within the state that still have this language and are volatile to challenge. The reason for entertaining a settlement offer is that the land court hasn't ruled yet, so we could get a reasonable count submitted.

Paula stated that there are a number of reasons why the Planning Board denied, and her understanding is that there has been no perk tests taken on the property and there is no way that the property could support this number of homes. The Board of Health would issue a denial and knowing that there is no information available they could therefore deny the application on that issue alone. Joel stated that would be the basis for our defense going down the road. Tom A., questioned why we pursued the 5.6 case and not the stronger approach with the Board of Health issue. Joel this would not fix the 5.6 issue for him (developer).

Marion has not ever heard this and she was advised to make sure that we had all the other reasons and make sure that they are not denied solely based upon Section 5.6. To which Joel stated that he had to tell the board three times not to deny on only section 5.6, :

Marion what we did was we gave you all the other reasons that were stated, not just 5.6. Joel stated that there are arguments to be made in favor, but needs to tell us that the court may not find in our favor. This is why he's discussing the rationale for settling, if they

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come back with a different plan that comes closer to the 25 acres would suggest that you entertain settling this. Tom Bodkin understands counsels caution, we're in the ambiguity period where no one knows what could happen. Looking at the options, if we did the multiple lots, sees O'brien lawsuit 1, O'brien lawsuit 2. If he came in with a starting point with a number. Agree that the bylaw is valid, let's project ourselves in the future and it's worth trying to see if we could resolve this.

Paula noted that we don't have enough information that will tell us what that site can support for build out. Tom Bodkin, right off the bat he owns 25 acres and this build-out is contingent upon what he can build on this site.

Nathan stated that what they would say is ok would be a project that would best meet what the intent of 5.6 is.

Tom Bodkin we can't just pick a number, in this type of settlement context would be thinking more around 60 as a more global settlement. Don't want to see the same person come back with multiple lawsuits in the future. He (O'Brien) has very competent counsel.

Kerry believes it would be dangerous to talk settlement with this man as he's not going to settle for much less than this board is willing to give him, why turn around and settle. Why did we start this, a point of principle?

Dave noted that he doesn't feel we should be in this position,

Marion the impression that we got was that the other issues would be taken into account and the fact that we needed to support Section 5.6 by bringing in the other issues

Joel the option is do you want to use the hiatus in the case to have a discussion with O'brien; but what he's hearing is that you don't think that he'll be amenable. Counsel will send him a letter and agrees with Paula to add all applicable state and local regulations.

Tom A., noted that we need to have strategy meetings such as this when a case is first at hand.

Paula questioned if it's a requirement that all subdivision plans are forwarded to other departments; does this happen simultaneously or subsequent to the Planning Board and per town counsel, it's subsequent to. One requirement is that it must also be submitted to the Board of Health as part of the planning process. Paula thinks that it's an important component, show us the science and get the Board of Health on board. The whole idea of settling is you won't get 100%; but farther down the road could get the changes that the town needed. Counsel agrees, we would put that in the end. Right now we're in hiatus and hopefully the judge misses his four month deadline, and as soon as we get a decision they'll let us know. If we lose, counsel expects a call from the developer's attorney and then they may work cooperatively and have to go through the Board of Health and the Planning Board.

Marion also noted that he doesn't own the Aro's property, he owns the Levites.

Paula noted and agrees with the Planning Board that hearing this information from counsel is the first that she has heard as well. She thinks that going for a settlement at this point undermines the bylaw and town meeting vote.

Members of the Planning Board left @ 7:50 PM

Being no further business the Board voted by roll call Dave aye, Paula aye, Steve aye, Tom M. aye & Tom A. aye to adjourn Executive Session at 8:10 PM.

Respectfully submitted,

Laura Williams, Chief Administrative Asst.
Board of Selectmen

Voted to be incorporated with regular minutes on: _____