

TOWN OF LUNENBURG

Office of the Planning Board

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Minutes
Executive Session
January 3, 2019

Meeting Posted: Yes

Place: Ritter Memorial Building, 960 Massachusetts Avenue, Lunenburg, MA

Time: 7:00 PM

Present: Matthew Allison, David Prokowiew, Kenneth Chenis, Tanner Cole, Paula Bertram, Adam R. Burney

Also Present: Town Counsel Adam Costa, Town Manager Heather Lemieux

Joining Executive Session at 8:00 PM: Select Board members- Jamie Toale, Phyllis Luck, Katey Adams

Board Chair M. Allison requested a Motion to enter joint Executive Session with the Board of Selectmen pursuant to M.G.L. c. 30A, §21, #3, to discuss strategy with respect to litigation, where an open meeting may have a detrimental effect on the government's litigating position, and the Chair so declares, namely O'Brien Homes Inc. et al v. Town of Lunenburg et al., Land Court Docket Nos. 13-MISC-477878 to 13-MISC-477887 and O'Brien Homes, Inc. v. Town of Lunenburg Planning Board, et al., Appeals Court Docket No. 2018-P-1520, to enter back into Regular Session. So moved by K. Chenis, Seconded by P. Bertram, Roll Call Vote- P. Bertram, aye; T. Cole, aye; D. Prokowiew, aye; K. Chenis, aye; M. Allison, aye.

A. Costa provided a brief history to the Board. O'Brien Homes Inc. ("O'Brien") originally sought Board approval for a single subdivision. Upon review, the Planning Board determined it did not comply with Zoning Bylaw Section 5.6. and denied the application. O'Brien appealed the Board denial and the Land Court ruled in favor of the Town. O'Brien then reapplied to the Town, taking the single subdivision, dividing it into ten (10) smaller subdivisions and simultaneously filing all ten (10); which the Board again denied. O'Brien appealed, splitting the case into two; one was a bad faith claim and the other was the subdivision. Final judgment was issued on the subdivision in favor of O'Brien; the Town has appealed that Decision to the Appeals Court. The bad faith claim has not yet gone to trial and is still pending in Land Court. The bad faith claim is scheduled for trial in approximately four (4) weeks. A. Costa believed that under the bad faith claim, O'Brien will probably be looking for costly punitive damages.

During a June 2018 joint executive session with the Board of Selectmen and Planning Board, the Board of Selectmen unanimously voted for KP Law (Town Counsel at the time of the Board's two denials) to approach O'Brien's attorney regarding the possibility of discussing settlement. At that time, O'Brien's attorney did not respond. The litigation then transitioned to current Town Counsel. Approached by current Town Counsel, O'Brien's attorney responded that his client desired to pursue the bad faith claim. After sitting through four depositions, A. Costa believes that O'Brien has decided that the Planning Board is not seeking retaliation against him and he is now willing to discuss possible settlement.

Two settlement meetings have been held with the Board being represented by D. Prokowiew and T. Cole. J. Toale represented the Board of Selectmen. A. Costa presented a draft term sheet with possible resolution as follows: The Town drops the appeal and O'Brien drops the bad faith claim. There would be separate and final judgements from the Land Court subject to a remand to the Planning Board. The Planning Board wants to reduce overall size of project and reduce impacts to the Town, e.g., financial, school, environmental concerns. The Board is concerned with the subdivision density close to Mulpus Brook.

On remand, O'Brien will withdraw Subdivision #10 and Subdivision #9. Subdivision #8 will be revised to reconfigure the twelve (12) lots shown down to six (6) lots. This would also involve roadway reconfiguration. As the development contains more than thirty-six (36) units, to meet the 15% affordable threshold, nineteen (19) of the total one hundred twenty-two (122) units would be required as affordable. In addition, 20% of the market rate units would be restricted to 55+ and would be constructed within the first 75% of houses. P. Bertram opined that the soils would not allow for one hundred twenty-two (122) units to be built and questioned if that would change negotiations. A. Costa responded no and elaborated that O'Brien is also of the opinion that he can get the lots to "perc". O'Brien offered to put a conservation easement on property to the rear of the site. During settlement discussions, some options were requested by D. Prokowiec and T. Cole. Those options were for an easement and restrictive covenant for watershed protection, and an easement for passive recreational use and recreational trails connecting existing Town owned parcels; OR that the land be conveyed to the Town for conservation purposes at a Town election. A. Costa added that a phasing plan be provided for construction to avoid overburdening the Town all at once. A bond or other form of security would be provided to the Town to ensure completion of subdivision infrastructure and facilities.

During the first settlement meeting, Board representatives noted to O'Brien that 55+ would be easier on the Town versus the influx of a lot of children into the school system. At the second meeting, O'Brien suggested a complete redesign of the development to include "aging in place" with more clustering and less land. #10 of the draft term sheet notes "...*extension of certain municipal utilities to the property.*" The Board believes this to mean sewer and water; which is not under the authority of the Planning Board.

8:00 PM- Select Board Chair J. Toale requested a Motion to enter joint Executive Session with the Planning Board pursuant to M.G.L. c. 30A, §21, #3, to discuss strategy with respect to litigation, where an open meeting may have a detrimental effect on the government's litigating position, and the Chair so declares, namely O'Brien Homes Inc. et al v. Town of Lunenburg et al., Land Court Docket Nos. 13-MISC-477878 to 13-MISC-477887 and O'Brien Homes, Inc. v. Town of Lunenburg Planning Board, et al., Appeals Court Docket No. 2018-P-1520, to enter back into Regular Session. So moved by P. Luck, Seconded by K. Adams, Roll Call Vote- P. Luck, aye; K. Adams, aye; J. Toale, aye.

A. Costa summarized above portion of Executive Session for benefit of the Select Board.

There was discussion as to the road location to the boundary of the Town Forest land to provide for public access.

Planning Board members requested that "no residents under the age of 19" be added to age 55+.

The Select Board inquired if the Planning Board was agreeable with the concept, taking into consideration environmental impact, density, and tax implication. The Planning Board responded affirmatively, noting that now work needs to be done on the details.

The Planning Board anticipates O'Brien will perc each lot as he prepares to build on it; therefore, both P. Bertram and K. Chenis want the 55+ built in the first 50%, not 75%. This would avoid a possible situation arising in the event O'Brien builds up to 75%, then prepares to build the 55+ and finds that the remaining lots will not perc.

A. Costa summarized changes to the draft term sheet as a result of this Session. #5- change construction of the age restricted homes from within the first 75% to 50%. The Board authorized A. Costa to negotiate between 50% and 75%, if necessary. The Board wants some form of covenant that specifies no resident under the age of 19 for the 55+. #6- that O'Brien cooperate with the Town for location of the access. #7- delete references to restrictive covenant and easement. Board wants land identified to be conveyed to the Town for conservation purposes. #10- to read as follows (changes bolded and underlined): "Following the Planning Board's approval of the subdivision plans becoming final, O'Brien may present proposed modifications to the subdivision plans for consideration by the Town. These modifications may reflect a substantial redesign of the development, utilizing cluster-style design; proposing additional land to be designated open space or for watershed protection and made subject to restrictions; proposing additional homes/units to be age-restricted as described above; and proposing a mix of home styles and building types, utilizing smaller lots and/or attached dwellings; and perhaps requiring the extension of certain municipal utilities to the property. The parties will proceed in good faith, O'Brien to advance and the Town to review, these modifications; provided however, that Lunenburg cannot now opine on or commit to any course of action which may require rezoning or utility extensions where any rezoning or utility extensions can only be accomplished by Town Meeting vote as

well as review(s) and/or approval(s) from various permitting authorities. **Lunenburg is presently without authority to grant and/or review approvals on behalf of these authorities.**

A. Costa stepped away from the Executive Session to place a telephone call to O'Brien's attorney, but was unable to reach him. A. Costa will prepare a formal Settlement Agreement and requested both Boards vote to accept the terms agreed upon during this evening's Session. **D. Prokowiec made Motion to accept the changes discussed this evening and to empower Town Counsel to make any necessary adjustments on behalf of the Town, K. Chenis Seconded, Roll Call Vote- P. Bertram, aye; T. Cole, aye; K. Chenis, aye; D. Prokowiec, aye; M. Allison, aye.**

P. Luck made Motion to accept the changes discussed this evening and to empower Town Counsel to make any necessary adjustments on behalf of the Town, K. Adams Seconded, Roll Call Vote- K. Adams, aye; P. Luck, aye; J. Toale, aye.

P. Bertram made Motion to adjourn Executive Session and return to Regular Session, D. Prokowiec Seconded, Roll Call Vote- T. Cole, aye; P. Bertram, aye; K. Chenis, aye; D. Prokowiec, aye; M. Allison, aye.

Adjourned 9:03 PM

Documents used at Executive Session:
Draft Term Sheet
Draft Subdivision Plan