

TOWN OF LUNENBURG

Office of the Planning Board

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Minutes
Executive Session
June 18, 2018

Meeting Posted: Yes
Place: Town Hall, 17 Main Street, Lunenburg, MA
Time: 6:00 PM

Present: Gregory Bittner, David Prokowiew, Tanner Cole, Adam R. Burney
Absent: Kenneth Chenis, Matthew Allison
Also Present: Select Board members J. Toale, P. Luck, K. Adams, D. McQuaid, R. Ebersole, Town Manager H. Lemieux, Town Counsel Adam Costa, and former Town Counsel Attorneys Joel Bard and Deborah Ecker, KP Law.

Select Board Chair James Toale requested a Motion to enter Executive Session pursuant to G.L. c. 30A, § 21, to discuss strategy with respect to litigation, namely O'Brien Homes Inc. v. Emerick R. Bakaysa, et al, (Planning Board of the Town of Lunenburg and Town of Lunenburg), Land Court No. 13-MISC-477878 to 13-MISC-477887-KCL, where an open meeting may have a detrimental effect on the litigating position of the Town, not to enter back into Regular Session. D. McQuaid made the Motion to enter Executive Session, Seconded by P. Luck, Roll Call Vote, K. Adams, aye; P. Luck, aye; D. McQuaid, aye; J. Toale, aye; R. Ebersole, aye.

Planning Board Chair Gregory Bittner requested a Motion to enter Executive Session pursuant to G.L. c. 30A, § 21, to discuss strategy with respect to litigation, namely O'Brien Homes Inc. v. Emerick R. Bakaysa, et al, (Planning Board of the Town of Lunenburg and Town of Lunenburg), Land Court No. 13-MISC-477878 to 13-MISC-477887-KCL, where an open meeting may have a detrimental effect on the litigating position of the Town, not to enter back into Regular Session. D. Prokowiew made the Motion to enter Executive Session, Seconded by T. Cole, Roll Call Vote, D. Prokowiew, aye; T. Cole, aye; G. Bittner, aye.

The Select Board and the Planning Board received notification from KP Law that the Land Court ruled in favor of O'Brien Homes that the ten subdivision plans were not subject to Section 5.6. of the Zoning Bylaw.

J. Bard provided a summary of the letter cited above. This case is referred to as "O'Brien 2". "O'Brien 1" was the challenge to Section 5.6, which was filed 10± years ago. At that time, the Planning Board denied the application and O'Brien Homes went to Land Court to have Section 5.6. of the Zoning Bylaw declared invalid. This was based on testimony of then Planning Director, Marion M. Benson. The Court quoted extensively from oral arguments and its Decision stated that Section 5.6. did not apply. The other case against O'Brien Homes dealt with enforcement to prevent him from doing further work. In that case, the Land Court ruled against the Planning Board. That was overturned by the Appeals Court. Attorney Bard opined that with the Judge declaring Section 5.6. invalid, this allows O'Brien Homes to come back to the Board with the same plan.

D. Ecker noted as part of the original complaint there is a bad faith component to "O'Brien 2", which is still active. In the May 23, 2018 Decision from the Land Court, the judge states, "...while I make no findings at the present time as to whether the Board acted in bad faith...Board and other town officials did not reciprocate O'Brien's efforts to progress through the approval process and that this delayed O'Brien's submission". The Decision directed Counsel to schedule a status conference to discuss

whether O'Brien Homes desired to pursue the bad faith claim. O'Brien Homes' Counsel did not wait for the status conference; instead sending an email to the court clerk stating that they intended to pursue the bad faith claim. D. Ecker anticipates the judge will find some bad faith. As M. Benson has passed away, the judge has allowed O'Brien Homes to state what they believe M. Benson said during conversations. As the trial has taken approximately 2 ½ years in court, there is no way to anticipate how much of a monetary amount O'Brien Homes will claim. J. Bard noted there were extensive costs in this case, e.g. deposition transcripts, attorney fees.

There is also a motion for sanction (O'Brien 3"), as a result of discovery of individual Board member emails. Some Planning Board members were communicating via their personal emails and some of the emails were detrimental. O'Brien Homes has indicated to the Court Clerk that the sanction motion is to continue. D. Ecker is of the opinion that if Lunenburg does not appeal, the sanctions and the bad faith claim may go away. If Lunenburg appeals, she feels the judge will not be happy.

If the bad faith claim moves forward, there will be additional discovery. J. Bard noted that O'Brien Homes needs to decide if they want to wait until their bad faith claim has been completed prior to coming before the Board with the subdivision plan.

D. Ecker recommended the Board find out what O'Brien Homes is looking for in compensation regarding bad faith and sanctions; then either negotiate a settlement or take the sanctions that the court decides at trial. The bad faith would require a trial.

A. Burney clarified to the Board that it will have to approve the subdivision under the Rules and Regulations Governing the Subdivision of Land that was in place at the time of filing.

A status conference will be scheduled. D. Ecker recommended that prior to that conference; the Boards decide whether or not they plan to appeal so she can represent that to the judge. She will also attempt to get the demands of O'Brien Homes prior to the conference. This will assist the Board in making its decision whether or not to appeal.

A. Costa noted to the Board that it needs to consider the enforceability of the bylaw and the strength of arguments of an appeal, and compare it to what can be achieved for Lunenburg through a resolution.

B. Ebersole made Motion to ask for information regarding settlement demands, Seconded by. P. Luck, Roll Call Vote, K. Adams, aye; P. Luck, aye; D. McQuaid, aye; J. Toale, aye, B. Ebersole, aye.

D. Prokowiec made Motion to adjourn Executive Session, not to enter Regular Session, Seconded by T. Cole, Roll Call Vote, D. Prokowiec, aye; T. Cole, aye; G. Bittner, aye.

Adjourned 7:20 PM.

Documents used at Executive Session:

KP Law Letter Dated May 29, 2018, Re: O'Brien Homes Inc. v. Emerick R. Bakaysa, et al. (Planning Board of the Town of Lunenburg and Town of Lunenburg), Land Court No. 13-MISC-477878 to 13-MISC-477887-KCL

Commonwealth of Massachusetts, The Trial Court, Land Court Department, Decision, dated May 23, 2018