

SUDBURY BOARD OF SELECTMEN
TUESDAY, NOVEMBER 3, 2015
6:00 PM, FLYNN BUILDING - THOMPSON ROOM
EXECUTIVE SESSION (6:00 PM – 7:10 PM)

Present: Chairman Patricia A. Brown, Vice-Chairman Susan N. Iuliano, Selectman Charles C. Woodard, Selectman Leonard A. Simon, Town Manager Melissa Murphy-Rodrigues, Attorney Peter Mello, Petrini & Associates (Town Counsel), Jody Kablack, Director of Planning and Community Development

Conservation Commission members present: Beth Armstrong, Tom Friedlander, Mark Sevier, Charlie Russo, Dave Henkels, Bruce Porter, and Debbie Dineen, Conservation Coordinator.

Absent: Selectman Robert C. Haarde

Executive Session

At 6:00 pm, Chairman Brown opened the meeting in regular session and immediately voted to enter Executive Session in the Silva Room to discuss strategy with respect to litigation (Abrams vs. Conservation Commission) if an open meeting may have a detrimental effect on the litigating position of the public body and the chair so declares, pursuant to General Laws chapter 30A, §21(a)(3). Joint meeting with Conservation Commission.

Vice-Chairman Iuliano made the motion; Selectman Woodard seconded.

It was on roll call unanimously

Chairman Pat Brown, aye, Selectman Charles C. Woodard, aye, Vice-Chairman Susan N. Iuliano, aye, Selectman Leonard A. Simon, aye.

Chairman Brown turned the discussion over to Attorney Peter Mello. Mr. Mello stated that this is a continuation of the Abrams case. There are two layers of approval - bylaw and wetland protection act. The last time we met the superseding order was pending. Instead of using the word "cutting" or "clearing", the Town is allowed to trim as necessary to continue. Under state regulations, the party has a right to appeal the superseding order within 10 days. Can the Town proceed with the work due to the fact that no appeal was filed? No administrative appeals are pending. There is nothing to prohibit the Town with continuing. The Town's intent is to proceed with the work and only trim. Mr. Abrams wasn't interested in appealing the superseding order of conditions.

Tom Friedlander, Conservation Commission member, expressed concern to Attorney Mello that the Conservation Commission hasn't discussed this. He felt it is disrespectful to Mr. Abrams in the process if the Town's risk is minimal. Attorney Mello shared that there is nothing in the order of conditions to prohibit the Town from proceeding with the work. Once the superseding order was issued, he spoke to Mr. Abrams, who would be amenable to a solution for a new order of conditions that some area affecting his property would be protected.

Bruce Porter, Conservation Commission member, joined the meeting at 6:10 pm., and approved the Executive Session. He felt that the Conservation Commission can decide what our next move should be depending on risk involved. If it affects personal property we'll take one view; if not at risk, what is the benefit to the Town?

Selectman Woodard asked if the Town takes care of the committee if a lawsuit is filed? Are we personally liable? Attorney Mello responded that this would require research to give an answer.

Beth Armstrong, Conservation Commission member, shared that there are two ways to proceed in this process; state order that allows the Town to do trimming, or we can wait until the resolution of the superior court case.

Ms. Armstrong's concern is that the average person would want to resolve this issue due to a superseding order, however, that's not the case with Mr. Abrams. Mark Sevier was concerned that Mr. Abrams listed all commission members' names? Where is he going with this?

Selectman Simon stated that there are two separate legal matters (1) Appeal of order of conditions to DEP and approval for trimming and not broad cutting. Mr. Abrams did not appeal that. The DEP order is finished. (2) Superior court case with paper filed in court - no action by a judge that you can or cannot do anything. Mr. Abrams hasn't asked for monetary damages or injunctive relief.

Dave Henkels, Conservation Commission member, asked if there's anything on the agenda about the Bruce Freeman Rail Trail (BFRT)? What is the \$100K for? Jody Kablack answered that it's to continue design. Mr. Henkels asked why the hurry regarding March 10 if it gets put off? Selectman Simon stated that the intent was to delay the BFRT. Waiting additional months results in a longer delay and the schedule is pushed back. The first study was voted at Town meeting (25% study); 75% design needs to get done. The Rail Trail won't get on the state's TIP program if delayed. Chairman Brown shared that the 25% design is the first part, and is in process.

Tom Friedlander asked are we waiting for the superseding order? What about the superior court action before the first phase begins? Jody Kablack answered that the decision is to proceed with the small amount of risk with superior court.

Bruce Porter asked what is the Conservation Commission's risk? Small, negligible? This person is trying to delay this project. Is the Town standing behind the commission? They win if we take the cautious route.

Selectman Simon read aloud Attorney Mello's email regarding superseding order of conditions. Attorney Mello responded that the likelihood of personal liability to any commission member is very small. Jody Kablack shared that this is the perfect time to proceed.

Selectman Iuliano asked what's the risk if we lose? Attorney Mello answered that the court would have to find that the commission's decision is arbitrary, and there was no evidence to support the decision. He doesn't see this occurring, and he can't give a formal opinion on the spot.

Tom Friedlander asked if can he poll the Commission for a vote to instruct Jody to proceed? If we do decide to go forward, should we notify the abutters of the cutting? Attorney Mello is not aware of any expressed order. Jody Kablack shared this is only trimming the right of way - no private property.

Selectman Iuliano asked what should we do for next steps? The ConCom was polled for a vote:

Beth Armstrong felt this was a lengthy period of time to wait to start. We shouldn't give permission to 'skip steps.' Do the work under the wetlands protection act. There's no risk individually per her opinion. We should proceed. David Henkels agrees the SOC (superseding order of conditions) is within the bylaws, but is concerned about perception of favoritism of one board over another. Charlie Russo abstains, but agrees with the process. Mark Sevier agreed to proceed with survey. Bruce Porter agrees 95%; Tom Friedlander has slight reservation but no objection.

The ConCom voted conditionally to proceed. The Selectmen need to instruct Jody to proceed.

Chairman Brown said we should tell Mr. Abrams that we're going ahead, and we need to come back with an opinion for ComCom. What's their individual liability? Selectman Woodard asked if as committee members are

we also individually liable? Attorney Mello responded that he's pretty confident that ConCom members aren't liable.

Selectman Simon made a motion to proceed with permissible surveying and other conditions. After a brief discussion among other board members, he withdrew his original motion.

Revised motion: Vote to notify Mr. Abrams that the Town is proceeding with this survey.
All Selectmen voted in favor – unanimous

The Conservation Commission voted to exit Executive Session and adjourn, and not reconvene in open session. All in favor - unanimous - motion to adjourn. All Conservation Commission members left the meeting.

Chairman Brown asked Attorney Mello these are specific circumstances of ConCom, and is there general language for appointed boards and committees. Town Manager Rodrigues suggested that it may be worthwhile to have a Trespass Bond which may provide some leverage.

Chairman Brown moved to the next item and read the following motion:

Discuss strategy with respect to litigation (S.F. Holdings, LLC vs. Planning Board) if an open meeting may have a detrimental effect on the litigating position of the public body and the chair so declares, pursuant to General Laws chapter 30A, §21(a)(3). At the conclusion of Executive Session, vote to reconvene in Open Session in Lower Town Hall.

Chairman Brown invited Attorney Mello and Jody Kablack to join discussion on this item. The litigant sued the Planning Board and now wants to a file motion to dismiss. The Planning Board is ok with this, however, the BOS needs to act. The Planning Board voted to accept this stipulation to dismissal. Jody Kablack shared that the appeal period is over. Chairman Brown shared there is a pretrial conference on Nov. 12. If we approve this, the plaintiff is willing to let this go. If we don't agree, the assumption is the trial moves forward. The desire is to get a decision on this tonight.

Vice-Chairman Iuliano made the motion to approve the dismissal of this case without prejudice.

It was on roll call unanimously
Chairman Brown aye,; Vice-Chairman Iuliano aye; Selectman Chuck Woodard aye; Selectman Simon aye;

Move to adjourn Executive Session and reconvene in Town Hall.

It was on roll call unanimously
Chairman Brown aye,; Vice-Chairman Iuliano aye; Selectman Chuck Woodard aye; Selectman Simon aye;

There being no further business, the meeting adjourned at 7:10 p.m.

Attest: _____
Melissa Murphy-Rodrigues
Town Manager-Clerk