

Date: September 30, 2013

Date Minutes Approved: January 27, 2014

BOARD OF SELECTMEN MINUTES

Present: David J. Madigan, Chair; Theodore J. Flynn, Vice-Chair; Shawn Dahlen, Clerk

Absent: None

Staff: Rene' Read, Town Manager, Susan Kelley, Executive Assistant, C. Anne Murray, Administrative Assistant

CONVENED IN OPEN SESSION

The meeting was called to order at 7:00 PM in the Mural Room.

VOTE TO ENTER EXECUTIVE SESSION

Upon convening the meeting, the Chair entertained a motion to enter Executive Session.

Mr. Dahlen moved that the Board enter Executive Session in order to discuss strategy with respect to pending litigation, regarding North Hill Country Club a/k/a Johnson Golf, since an open meeting may have a detrimental effect on the Town's negotiating and/or litigating position, and then to re-convene in Open Session.

As Chair, Mr. Madigan declared the need for Executive Session since an open meeting may have a detrimental effect on the town's negotiating and/or litigating position, and then to re-convene in Open Session. Second by Mr. Flynn. Roll Call Vote: Mr. Madigan - aye; Mr. Flynn - aye; Mr. Dahlen - aye.

RECONVENED IN OPEN SESSION

The Executive Session was adjourned and the Open Session meeting reconvened at 7:35 PM after the public entered the room.

DISCUSSION PERTAINING TO OPEN LEGAL MATTERS

Present for the following discussion: Town Counsel Arthur Kreiger, Anderson & Kreiger

Mr. Madigan stated that during the executive session, the Board discussed North Hill Golf Course Case. The decision was made by the Board to file the notice of appeal noting that filing directly to the Supreme Judicial Court is an option.

Attorney Arthur Kreiger was present to discuss the status of current litigation. He summarized the cases as follows:

- 1) **George Cook:** Included for completeness - No claim against the Town. This is a case where an employee was hurt at the transfer station by a pallet falling off a truck owned by a private company. The company had been given permission to deliver pallets to the transfer station – the pallets were not secured properly. There is a potential claim (3rd party) against a trucking company.
- 2) **Duxbury v. Troy, No. 2012-0864-A (Plymouth Superior Court):** This malpractice case is pending in Plymouth and arose out of, although not necessarily limited to, Johnson Golf. Mr. Troy and his

attorney moved to disqualify Attorneys Lenny Kesten and Art Kreiger, which motion has been denied. Attorney Bob Troy has appealed that decision and Attorney Kreiger just received notice that the appeal will be argued in November.

- 3) **Duxbury Wine & Spirits (Hall's Corner Store):** Included for completeness. Anderson & Kreiger is not doing anything with this case - it is an administrative appeal to the ABCC.
- 4) **Johnson Golf Management, Inc. v. Duxbury, No 08-04641 (Middlesex Superior Court):** This case was discussed in executive session. Judgment was entered on the 23rd and there are 30 days to file the appeal (due October 23).
- 5) **Duxbury v. Johnson Golf Management, Inc., Civil Action No. 1059 SU 95 (Plymouth District Court):** Johnson Golf's motion for summary judgment on a counterclaim was served on September 26th. This counterclaim for various things including the value of the lease. There is a hearing scheduled for October 17th.
- 6) **Lilienthal v. Duxbury Planning Board, No. 473482 (Land Court):** Done – added because it was recently settled. Case against Planning Board for restoration order after the clearing of a large number of trees. The case has been settled.
- 7) **McCluskey v. Murphy, No. PLCV2010-00732 (Plymouth Superior Court):** case is against Dennis Murphy regarding comments he made about a 40B affordable housing application financial qualifications and propriety. Mr. Murphy was chair of the Zoning Board at the time. This case is being handled by Attorney John Cloherty at Peirce, Davis who took over for Attorney Daniel Scrip. Trial was to take place on September 9, 2013 but was postponed; no new date yet.
- 8) **McLaughlin v. Duxbury Conservation Commission Np PLCV2010-00950B (Plymouth Superior Court):** case of a pier application denied by Conservation Commission. Superior Court remanded it on certain issues. McLaughlin came in with a new Notice of Intent -Superior Court remanded. Paul Driscoll, McLaughlin's attorney, took position that George Hall of Anderson & Kreiger should be disqualified because of former association with the Friends of the Bluefish River and the Palmers prior to becoming Town Counsel. The Palmers have been active in opposing the proposed pier. Driscoll claims that the advice given by George Hall to the Conservation Commission has been biased because he was favoring his former clients. Anderson & Kreiger decided that giving Mr. Driscoll the benefit of any doubt, Art would handle the case instead of George Hall. Art disagrees that the firm of Anderson & Kreiger is biased in this case as any chain of connection to the Palmers has been long broken.
- 9) **Verizon New England, Inc. v. Duxbury, No SUCV-00759G (Suffolk Superior Court):** this case is being handled by Mike Leedberg at Pierce Davis (assigned by MIIA). Discover is open until February 2015. This is a small case regarding damage to a Verizon line during digging by town water department personnel. Settlement has been proposed – the Town hopes to hear back soon.
- 10) **Dennenberg:** This is a new, small claims case against Rene' Read by a non-resident seeking a refund for a beach sticker as he was not able to access the beach. (Application states parking is not guaranteed.) Anderson & Kreiger participated only because Art did not know if other cases would be coming related to beach sticker refunds and he wanted to be sure this one was handled correctly. Decision will be rendered this week.

This completed the summary of Litigation cases, with the exception of Appellate tax cases which Assessor Steve Dunn is handling.

Attorney Arthur Kreiger then proceeded to discuss the status of current non-litigation cases. He summarized the new cases as follows:

- 1) **Erikson - Pine Street Water Main:** this case is resulting from a claim by resident Mr. Erikson that the water main installed across the culvert on Lake Shore Drive impedes access to his property. Mr. Read clarified that Dam Safety would not allow the town to install the pipe in the dam (in the event that the dam broke) or under water (in the event there was a leak, it would be difficult to find).

Installation above ground included the installation of guard rail material with an additional 5-6 feet inside the town's right of way. Mr. Erickson contends that he was unable to bring a lawn mower to his lower yard, but Mr. Read indicated that there was sufficient space to do so. Mr. Erikson was also concerned he was not notified of the work to be done, but our records indicate his wife signed the certified mail notification for the notice of intent.

Mr. Dahlen inquired as to the design process and individuals who approved the location of the pipe. Mr. Read responded that he would be able to provide the information at the next selectmen's meeting and would ask Peter Buttkus to attend in the event there were questions. He also indicated that the pipe was installed in accordance with what the state mandated.

Attorney Kreiger ask how serious the threat was that Mr. Erikson's would sue. Mr. Read responded that while Mr. Erikson mentioned he would be calling an attorney, the Town has not heard from him.

Attorney Kreiger continued with the new cases:

- 2) **Town Counsel Search Committee – OML complaint:** Resolved by Attorney General
- 3) **Aquaculture Regulations:** Anderson & Kreiger is working with the Chair of the Shellfish Advisory Committee to update the regulations
- 4) **Kennel in the Pines:** the ZBA overturned an enforcement order on the play yards at the kennel. Anderson & Kreiger will be meeting with Scott Zoltowski (ZBA) and Scott Lambiase (Dir of Municipal Services) to discuss further enforcement.
- 5) **Cemetery Funding:** no work being done on this for now. Anderson & Kreiger is awaiting the Cemetery Trustees' recommendation for Town Meeting.
- 6) **Pool Fees:** This matter is being worked on with the Recreation Director. Case is all set.
- 7) **Inter-municipal Agreement:** This agreement with Plympton related to the Dispatchers is complete and awaiting signatures.

Mr. Flynn asked about the Duxbury Beach Lease. Attorney Kreiger stated that it was being looked at for the possibility of writing it for a longer term.

Attorney Kreiger continued his review as follows:

- 8) **Facilities Manager – OML question:** has been resolved
- 9) **CPC funds to be used for bike paths:** has been resolved

Not yet on the tracker list:

- 10) Anderson & Kreiger has received a call from counsel inquiring about a burial on a beach lot (waterfront) owned by an individual. Attorney Kreiger has referred that question to the Board of Health and Cemetery Department.
- 11) After Town Meeting, Attorney Kevin Batt met with a group to discuss procedural improvements, things that should be done to streamline future Town Meetings. Some suggestions the Town may not be comfortable with but that is under discussion with Town Manager Rene' Read, Selectman Ted Flynn and Moderator Friend Weiler.

Mr. Read indicated that he is intending to forward a draft Warrant to Town Counsel that is 85%-90% complete. He also indicated that he would meet with citizens who were interested in submitting petitions to offer help as to form and try to see if there were a better route to accomplish their goal, such as a staff route vs. a Town Meeting article. This should save time and effort in the end.

Mr. Madigan added that Finance Committee meetings were open and if people are interested in listening to the discussions, they are welcome to attend. He also stated that budgets will be presented at the Board of Selectmen's meetings for informational purposes.

DISCUSSION PERTAINING TO POSSIBLE APPEAL OF FEMA FLOOD MAPS

Mr. Madigan stated that Marshfield and Scituate have already filed an appeal and Duxbury is considering joining the appeal.

Mr. Dahlen stated that new maps are being proposed by FEMA. The new maps are making an impact because FEMA is changing the way they are developing the maps, including storm wave run-up analysis and models. When this is added to the waterfront properties, there is a significant impact on the number and depths of the houses being flooded. The towns of Marshfield and Scituate both have in excess of 1,000 properties in the flood zone that were not there before – a very significant impact.

At our projection, Duxbury had 8 new houses in a flood zone, not a large number. Mr. Dahlen indicated that he was tuned into an issue when he received a call from a resident letting him know that they went to a flood zone presentation and the Gurnet Rd area was now considered a flood level 16. The FEMA maps in the Duxbury Planning office, which show potential change, did not indicate that the Gurnet Rd area had changed.

Mr. Dahlen called FEMA and spoke with Julie Graver. It turns out that the FIRM maps shown at the flood zone presentation were more detailed maps than what people had not seen. The maps indicate that from the Marshfield town line to Duxbury Beach, 100 houses (not including those on Cable Hill) will be in an AO2 zone (water across ground @2 ft. deep) and the velocity zone will move from the face of the seawall to 50' back which takes out the front of the houses along the beach. AE zone (still water level) will change from 9' or 10' to elevation 16'. Gurnet Rd is at elevation 8' which means that the water level on the surface of Gurnet Rd. is 8' deep. This would have a significant impact on insurance rates and the devaluing of houses.

From the Town's perspective, we should look to be sure that FEMA is doing their calculations correctly. We should engage a firm to review the information – Marshfield and Scituate have engaged Woods Hole Group in Falmouth and Ransom Consulting Group out of Maine. ASA is a 3rd group that has been reviewing information in some locations. Mr. Dahlen contacted all 3 groups. He stated that the issue before us is that we are in the midst of a 90 day appeal period, 2 ½ weeks before the deadline. Scientific documents must be provided, including proposed revised/substitute maps, prior to the end of the appeal period stating that the Town of Duxbury does not believe the FEMA map is correct for the indicated reasons. Other communities have been successful and are significantly lowering those flood elevations upon review.

Woods Hole Group was the first to send a proposal which will include the review of 1 transect. Mr. Dahlen indicated that they draw a line across one area being flooded and they analyze the hydraulic calculations along that line. Coastal geologists and hydrologists will perform the review. Woods Hole Group indicated that they can meet the appeal deadline of Oct 16th. Their fee is \$3500.

Mr. Read asked if Congressman Keating had recently held a meeting in Scituate in an organized effort to push the deadlines back a year.

Mr. Dahlen stated that FEMA is statutorily required to issue the plans and take back appeals to the plans within the 90 days. When the insurance goes into effect and the plans are adopted is a different time frame.

Mr. Dahlen continued by stating that there is a 1% chance of having a storm that meets the 100 year event shown on the maps – it could happen at any time, not necessarily in 100 years.

Mr. Dahlen noted that the highest water level recorded in the state of MA was at the Boston tide floodgate during the storm in 1978. The water rose to elevation 10.5'. Until that time, many coastal communities, including Duxbury, had flood elevations on the maps of 10'. As a result of the 1978 storm, most of Duxbury was increased to a flood elevation of 11'.

Mr. Dahlen informed the other Board members that the Town will get another proposal for the appeal work. He indicated that the Ransom Consulting Group could not meet the appeal deadline. He spoke with ASA and they will be able to provide a proposal in time.

Mr. Dahlen stated that there is a provision in the appeal process that FEMA will, after an appeal has been made, to allow an additional 30 days to provide scientific data to support the claim.

Mr. Dahlen moved that the Board of Selectmen appeal the FEMA FIRM maps as presented and, at the discretion of the Town Manager, to spend up to \$10,000 to engage one or more consultants to review the information before the appeal deadline. Second by Mr. Flynn. Vote 3:0:0

Minutes prepared by Susan Kelley

ADJOURNMENT

At 8:17 PM, Mr. Dahlen moved that the Board adjourn. Second by Mr. Flynn. VOTE: 3:0:0

LIST OF DOCUMENTS

- 1) Anderson & Kreiger litigation and non-litigation tracking sheets dated September 30, 2013*
- 2) Woods Hole Group proposal re: Evaluation of Draft FEMA FIRMs for the Town of Duxbury dated September 30, 2013*
- 3) Portions of FEMA Flood Insurance Program Map released June 6, 2013*