

**TOWN OF GREAT BARRINGTON
SELECTBOARD'S MEETING MINUTES
MONDAY, AUGUST 22, 2016
6:00 P.M. – REGULAR SESSION
6:10 P.M – EXECUTIVE SESSION
TOWN HALL, 334 MAIN STREET**

PRESENT: ED ABRAMS
DANIEL BAILLY
STEPHEN BANNON
BILL COOKE
SEAN STANTON

JENNIFER TABAKIN, TOWN MANAGER

1. CALL TO ORDER: Chairman Sean Stanton called the meeting to order at 6:01 PM.

- A.** A brief Review of Department of Public Utilities Rate Setting Process.
Mr. Stanton reviewed briefly the DPU's rate setting process.
- B. Motion:** Mr. Bannon to Convene into Executive Session – Town Manager's Conference Room M.G.L. c30A, 21(a)(3) – To discuss strategy with respect to pending litigation matter – Housatonic Water Works Rate Increase Petition to Department of Public Utilities, D.P.U. No 15-179 and to reconvene into Open Session.
Second: Dan Bailly

Roll call vote: Cooke: Yes Abrahams: Yes Bailly: Yes
Bannon: Yes Stanton: Yes

RETURN TO REGULAR MEETING

2. APPROVAL OF MINUTES:

August 8, 2016 Regular Meeting.

MOTION: Steve Bannon to approve the August 8, 2016 Regular Meeting Minutes.

SECOND: Dan Bailly

VOTE: 5-0

3. SELECTBOARD'S ANNOUNCEMENTS/STATEMENTS:

- A.** Open Meeting Law Complaint – Acknowledge receipt of August 10, 2016 complaint from Eileen Mooney alleging improper use of executive session to discuss pending litigation at Board's August 8, 2016 meeting; consider possible responses thereto, and vote to resolve the same. (Discussion/Vote)

Mr. Stanton read a letter from KP Law regarding the Open Meeting Law Complaint, as per attached.

MOTION: Mr. Bannon moved that the executive session held on August 8, 2016 was in compliance with the open meeting law and the complaint filed by Eileen Mooney on behalf of the Newsletter is in need of no remedial action.

SECOND: Dan Bailly

VOTE: 5-0

B. General Comments by the Board.

Dan Bailly requests to have an economic discussion in the near future and discuss the bid for downtown. Steve Bannon proposes that the Board has this discussion at the second meeting in September.

C. SB – to sign Notes (BANS) for 2017 Capital Equipment Projects.

Town Manager Tabakin said that projects have been approved by Town Meeting, the money will be borrowed on a temporary basis and will be permanently invested in bonds in the future.

4. TOWN MANAGER'S REPORT:

A. Housatonic School Report.

Town Manager reported that this summer has been busy putting together marketing materials such as flyers and a power point presentation. Interns, Ted Nappo and Taylor Fox have worked diligently on a presentation of future options for the school. We are showing the building to potential buyers and are exploring listing it on some local real estate sites. We are very interested in addressing the public parking situation by adding more spaces. Our goal for the site is to keep the school as an integrated part of the community and a functional part of the Housatonic Community Center.

Ken Schumacher said that he has written a letter to Microsoft, they would like a location here but one of the SB members would have to draft a letter to request this location.

Town Manager is in support of this idea because it would bring better Internet to Housatonic.

Town Manager gave update on Castle Street. The interior gas and electric have been completed and Tighe & Bond have been retained to consult on environmental issues. The Town Manager is getting regular updates on the project. Mr. Stanton asked what is the timeline? Town Manager said a bid has been placed for a retaining wall and we are working on getting a full time design team on board.

B. Town Applications for CPA funds. (Discussion/ Vote)

The first application is for Phase One of the Lake Mansfield Project for \$75,000. This is a multi year engineering project to enhance the road, and boat launch area, and wildlife management.

The next application is for the municipal affordable housing trust fund for \$50,000 for a local Housing Trust to allow local housing authorities to collect funds dedicated to affordable housing purposes.

The Town Hall roof replacement application is seeking CPA funds of \$250,000. The existing roof needs to be completely replaced and asbestos removal works needs to be done.

The application for Housatonic School is also seeking a grant of \$50,000 through CPA for the preservation of the building. The school is a potential National Historic Building. We would use the CDBG funding for design and enhancement of the streetscape surrounding the Housatonic School.

MOTION: Steve Bannon moves to support the step one applications for CPA funds, Lake Mansfield Project, the Municipal Affordable Housing Trust Fund, the roof replacement for Town Hall, and the Housatonic School.

SECOND: Dan Bailly

VOTE: 5-0

5. PUBLIC HEARINGS:

- A.** Selectboard and Great Barrington Fire District Prudential Committee Tax Classification Hearing to Determine the Tax Allocation for FY 2017 for the Town of Great Barrington. (Discussion/ Vote)

GB Prudential Committee Members present: Walter F. Atwood III, Robert Avery, Robert Hammer, Jr. and Kenneth Schumacher.

- a. Open Public Hearing

MOTION: Steve Bannon moves to open the public hearing

SECOND: Dan Bailly

VOTE: 5-0

- b. Explanation of Project

Chris Lamarre spoke on behalf of the Fire District Prudential Committee. We are proposing a single tax rate. We are asking the SB to decide how to allocate the access levy due to Great Barrington's substantial community growth this past year.

- c. Speak in Favor/ Opposition

Mr. Stanton mentioned that we need to keep in mind that this type of growth is not exponential and we will not experience this same growth year after year.

Sharon Gregory, Hollenbeck Ave. Great Barrington. The overall new growth of the community is taking up due to new students. community has an effect on what the school is allocated each fiscal year. And with the new student enrollment factored into that allocation sometimes the new growth

- d. Motion to Close Public Hearing

MOTION: Steve Bannon moves to close the public hearing

SECOND: Dan Bailly

VOTE: 5-0

- e. Motion re: Findings

- f. Motion re: Approval/ Denial/ Table

MOTION: Steve Bannon moved to adopt a single tax rate of \$14.60 for all classes of property for fiscal year 2017

SECOND: Dan Bailly

VOTE: 5-0

MOTION: Walter Atwood moved to adopt a single tax rate of \$1.10 for all classes of property for fiscal year 2017

SECOND: Robert Avery

VOTE: 4-0

- B.** Special Permit application of Diamond Family, LLC. Jeffrey A. Diamond, Manager, to legalize the existing nonconforming six-unit multifamily residential use at 59-61 Taconic Avenue, Great Barrington, MA in accordance with Sections 3.1.4, 8.3 and 10.4 of the Great Barrington Zoning Bylaw. (Discussion/ Vote)

Chairman Stanton is recusing himself from this hearing due to that he was not able to attend the site visit.

a. Open Public Hearing

MOTION: Steve Bannon moves to open the public hearing

SECOND: Dan Bailly

VOTE: 5-0

b. Explanation of Project

Attorney Nick Arienti spoke on behalf of the Diamond Family, LLC. Requesting a special permit from the board to legalize the existing use of the building. No physical changes to the site are intended.

d. Motion to Close Public Hearing

MOTION: Steve Bannon moves to close the public hearing

SECOND: Dan Bailly

VOTE: 5-0

e. Motion re: Findings

See Exhibit A attached.

Motion: Steve Bannon moves to approve the Findings of Fact for Special Permit #857-16 for Diamond Family, LLC, referenced as Exhibit A.

Second: Dan Bailly

Roll call vote: Cooke: Yes Abrahams: Yes Bailly: Yes

Bannon: Yes Stanton: Yes

f. Motion re: Approval/ Denial/ Table

Motion: Steve Bannon moved to approve, in view of the approved Findings of Fact, Special Permit #857-16 for Diamond Family, LLC, Jeffrey A. Diamond, Manager, to legalize the existing nonconforming six-unit multifamily residential use at 59-61 Taconic Avenue, Great Barrington, MA, in accordance with Sections 3.1.4, 8.3 and 10.4 of the Great Barrington Zoning Bylaw, and to grant the requested waivers from requirements 1-4, 7, and 9 of Section 8.3, with the following conditions:

1. The property layout and parking shall be as shown on the Site Plan submitted with this application.
2. A maximum of six dwelling units is permitted, with five units in the main house, shown as #59 Taconic Avenue on the Site Plan submitted with this application, and one unit in the former barn, shown as #61 Taconic Avenue on the Site Plan.
3. The rights of the 1987 permit granting the use of the former barn for one dwelling unit remain in effect.
4. In the event the plans and rights of the 1987 permit conflict with this permit, the Site Plan and rights of this permit shall govern.
5. This special permit does not obviate compliance with any applicable requirements or codes enforceable by the Board of Health or Building Inspector.

Second: Dan Bailly

Roll call vote: Cooke: Yes Abrahams: Yes Bailly: Yes

Bannon: Yes Stanton: Yes

C. Application of MEGJAKE, INCORPORATED d/b/a GB EATS, Pierre Cum, Manager for a Change of d/b/a from The Neighborhood Diner to GB EATS and for a Change in License

Type from Common Victualler Wine and Malt Restaurant Liquor License to an All Alcoholic Restaurant Liquor License at 282 Main Street, Great Barrington, MA 01230. (Discussion/ Vote)

a. Open Public Hearing

MOTION: Steve Bannon moves to open the public hearing

SECOND: Dan Bailly

VOTE: 5-0

b. Explanation of Project

The applicant said that they are not intending to have a full bar but would like to incorporate liquor.

c. Speak in Favor/ Opposition

d. Motion to Close Public Hearing

MOTION: Steve Bannon moves to close the public hearing

SECOND: Dan Bailly

VOTE: 5-0

e. Motion re: Findings

Completed application was submitted to the Selectboard on July 11, 2016.

Public Hearing was properly advertised in the Berkshire Record for two (2) consecutive weeks on August 5 and August 12, 2016. No notification to abutters was required.

Public Hearing is scheduled for August 22, 2016 @ 7:00 PM at Town Hall, 334 Main Street, Great Barrington, MA 01230.

No impediments were disclosed as to the approval or denial of the application of MEGJAKE, INCORPORATED d/b/a GB Eats, Pierre Cum, Manager for a Change of dba from The Neighborhood Diner to GB Eats and for a Change License Type from Common Victualler Wine and Malt Restaurant Liquor License to an All Alcoholic Restaurant Liquor License at 282 Main Street, Great Barrington, MA 01230

Motion: Steve Bannon moved to approve the Findings of Fact for MEGJAKE, INCORPORATED d/b/a GB Eats, Pierre Cum, Manager for a Change of dba from The Neighborhood Diner to GB Eats and for a Change License Type from Common Victualler Wine and Malt Restaurant Liquor License to an All Alcoholic Restaurant Liquor License at 282 Main Street, Great Barrington, MA 01230.

Second: Dan Bailly

Vote: 5-0

f. Motion re: Approval/ Denial/ Table

Motion: Steve Bannon moves to approve the application of GB Eats, Pierre Cum, Manager for a Change of dba from The Neighborhood Diner to GB Eats and for a Change License Type from Common Victualler Wine and Malt Restaurant Liquor License to an All Alcoholic Restaurant Liquor License at 282 Main Street, Great Barrington, MA 01230.

Second: Dan Bailly

Vote: 5-0

- C. Application of The Meat Market, LLC, Jeremy Stanton, Manager on the Common Victualler All Alcoholic Restaurant Liquor License, as follows: add new d/b/a Camp Fire Restaurant; alter premises to include Unit 2 in addition to the Unit 1 that already exists and include seasonal outdoor seating for 39 at 389 Stockbridge Road, Great Barrington, MA 01230. (Discussion/ Vote)

Chairman Stanton recuses himself from the hearing due to that his family member is the applicant.

- a. Motion to open Public Hearing

MOTION: Steve Bannon move to open the public hearing

SECOND: Dan Bailly

VOTE: 4-0

- b. Explanation of the Project

Attorney Kathleen Jackson spoke on behalf of The Meat Market, LLC. They are seeking approval for outdoor seating.

- c. Speak in Favor/ Opposition

- d. Motion to close the Public Hearing

MOTION: Steve Bannon moves to close the public hearing

SECOND: Dan Bailly

VOTE: 4-0

- e. Motion Re: Findings

Completed application was submitted to the Selectboard on July 21, 2016.

Public Hearing was properly advertised in the Berkshire Record for two (2) consecutive weeks on August 5 and August 12, 2016. Notification to abutters was mailed on August 12, 2016.

Public Hearing is scheduled for August 22, 2016 @ 7:00 PM at Town Hall, 334 Main Street, Great Barrington, MA 01230.

No impediments were disclosed as to the approval or denial of the application of The Meat Market, LLC, Jeremy Stanton, Manager on the Common Victualler All Alcoholic Restaurant Liquor License to add new d/b/a Camp Fire Restaurant; alter premises to include Unit 2 in addition to the Unit 1 that already exists and include seasonal outdoor seating for 39 at 389 Stockbridge Road, Great Barrington, MA 01230

- f. Motion Re: Approval/ Denial/ Table

- g. **Motion:** Steve Bannon moved to approve the Findings of Fact for The Meat Market, LLC, Jeremy Stanton, Manager on the Common Victualler All Alcoholic Restaurant Liquor License, as follows: add new d/b/a Camp Fire Restaurant; alter premises to include Unit 2 in addition to the Unit 1 that already exists and include seasonal outdoor seating for 39 at 389 Stockbridge Road, Great Barrington, MA 01230

Second: Dan Bailly

Vote: 4-0

6. LICENSES OR PERMITS

- A. **Continued-** Catherine A. Tzelis/ d/b/a Ena at the Cove for 2016 Annual Common Victualler License 109 Stockbridge Road. (Discussion/ Vote)

MOTION: Steve Bannon moved to approve the CommonVictualler License.

SECOND: Dan Bailly

VOTE: 5-0

- B.** Caitlin Graham/ Graham Farmhouse, LLC for One Day Beer and Wine Liquor License for September 11, 2016 from 10:00 A.M – 4:00 P.M at the Great Barrington Fairgrounds, 659 Main Street. (Discussion/ Vote).

MOTION: Steve Bannon moved to approve the One Day Beer and Wine Liquor License

SECOND: Dan Bailly

VOTE: 5-0

- C.** Robin and Will Curletti/ FMST, LLC d/b/a Fuel for Amended 2016 Common Victualler License (Change of location from 286 Main Street to 293 Main Street, Great Barrington MA. (Discussion/ Vote).

MOTION: Steve Bannon moved to table the license approval until applicant is present.

SECOND: Dan Bailly

VOTE: 5-0

- D.** Jeremy Stanton/ The Meat Market, LLC d/b/a Camp Fire Restaurant for an Amended 2016 Common Victualler License to extend the premises to include **Unit 2** at 389 Stockbridge Road. (Discussion/ Vote).

MOTION: Steve Bannon moved to approve the Amended 2016 Common Victualler License.

SECOND: Dan Bailly

VOTE: 5-0

- E.** Nicole Blum and Jonathan Carr/ Carr's Ciderhouse for One Day Beer and Wine Liquor License for September 11, 2016 from 10:00 A.M – 4:00 P.M at the Great Barrington Fairgrounds, 659 Main Street. (Discussion/ Vote).

MOTION: Steve Bannon moved to approve the One Day Beer and Wine Liquor License as is with the insurance.

SECOND: Dan Bailly

VOTE: 5-0

- F.** Robin Vickery/ Great Barrington Fish and Game for One Day Beer and Wine Liquor License for September 11, 2016 from 11:00 A.M – 7:00 P.M at the Great Barrington Fish and Game Clubhouse, 338 Long Pond Road for American Legion VFW benefit. (Discussion/ Vote).

MOTION: Steve Bannon moved to approve the One Day Beer and Wine Liquor License.

SECOND: Dan Bailly

VOTE: 5-0

7. OLD BUSINESS:

- A.** SB – Housatonic Water Works (HWW) Settlement – Housatonic Water Works Rate Increase Petition to Department of Public Utilities, D.P.U. No 15-179 (Discussion/ Vote).

Chairman Sean Stanton read a statement to the public.

Eileen Mooney, The Newsletter asked if the Board was satisfied with the agreement?

The Board noted that they were satisfied with the agreement.

Chair said that this was not the end of the opportunities to discuss this topic.

MOTION: Steve Bannon moved to approve the settlement of the rate increase.

SECOND: Dan Bailly

VOTE: 5-0

8. NEW BUSINESS:

- A. SB - Approve the Heavy Commercial Vehicle Restriction for Lake Mansfield Road.
(Discussion/ Vote)

MOTION: Steve Bannon moved to approve the heavy vehicle restriction.

SECOND: Dan Bailly

VOTE: 5-0

- B. SB – Approve the Community Aggregation Plan. (Discussion/ Vote)

MOTION: Steve Bannon moved to approve the Community Aggregation Plan.

SECOND: Dan Bailly

VOTE: 5-0

9. CITIZEN SPEAK TIME:

The Berkshire Record, did you have access to DPU company finances? SB- yes, there was an extensive process of looking into DPU's profit.

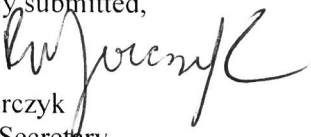
10. SELECTBOARD'S TIME: Nothing to report.

11. MEDIA TIME: The Berkshire Eagle wants clarification on Fuel's Liquor License. They will have to wait until the next Selectboard meeting when the applicant is present.

12. ADJOURNMENT:

On a motion by Steve Bannon, seconded by Dan Bailly, the Board adjourned its meeting at 8:40 P.M.

Respectfully submitted,


Rebecca Jurczyk
Recording Secretary

Dear Jennifer,

As you are aware, Mrs. Eileen Mooney filed an Open Meeting Law complaint with the Selectboard on August 10, 2016. The complaint alleges that the Selectboard violated the law by meeting on August 8, 2016 in executive session to discuss the status of the Housatonic Water Works Company Rate Increase Petition to the Department of Public Utilities, D.P.U. No 15-179 ("Housatonic/DPU matter"). Mrs. Mooney asserts that such a matter is not sufficient to allow the use of executive session. She alleges further that the violation was intentional.

In my opinion, the Selectboard may properly meet in executive session consistent with the Open Meeting Law to discuss the status of pending litigation. Where the Housatonic/DPU matter constitutes "litigation" for purposes of the Open Meeting Law, in my further opinion, the use of executive session at the August 8, 2016 meeting of the Selectboard was consistent with law and no violation of the Open Meeting Law occurred.

Facts

The Selectboard met on August 8, 2016 to discuss the status of a petition pending before the Massachusetts Department of Public Utilities, which Department functions in a quasi-adjudicatory capacity to address the rights and responsibilities of the parties appearing before it. In this case, it is my understanding that the notice for August 8 meeting was posted prior to the minimum 48-hour deadline set by statute, and included thereon an item indicating that the Board would meet in executive session, pursuant to G.L. c.30A, §21(a)(3) to discuss pending litigation, and listed the particular matter, i.e., "Pending litigation matter – Housatonic Water Works rate increase petition to Department of Public Utilities, D.P.U. No. 15-179." I also understand that the vote taken during open session to enter executive session repeated all the information that appeared on the meeting notice, and further indicated that an open meeting would have a detrimental effect on the litigation position of the public body. As you are aware, the petition filed by the Housatonic Water Works Company in December 2015 started a process that, if not settled, culminates in a formal, adversarial proceeding held before a hearing officer at the DPU. The Town is an intervenor to the case, which is pending, and, any final decision on the matter would include an adjudication of the Town's rights.

The Law

As you know, the Open Meeting Law requires that meetings of public bodies take place in open session, except in specific instances as outlined in the law. See G.L. c.30A, §21(a). One such reason is to, "discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and the chair so declares." G.L. c. 30A, § 21(a)(3). As Attorney Gregg Corbo indicated during his recent Open Meeting Law presentation to Town officials, the use of executive session to discuss "litigation" is not open ended, but instead, must be restricted to those situations in which litigation has actually been commenced, or is clearly or imminently threatened or demonstrably likely.

The provisions of the Open Meeting Law and its implementing regulations require that a meeting notice be posted not less than 48 hours prior to the meeting and list the topics to be discussed at the meeting. The standard for the list of topics is addressed by 940 CMR 29.03 and states, in relevant part, "The list of topics shall have sufficient specificity to reasonably advise the public of the issues to be discussed at the meeting."

There is ample precedent from the Attorney General's Division of Open Government wherein the Division has found that the DPU process constitutes "litigation" for purposes of the Open Meeting Law. In OML 2012-81 the Division concluded that a petition to the DPU "closely resembles traditional litigation," finding that the governing boards of the Cape Light Compact properly entered into executive session pursuant to G.L. c.268A, §21(a)(3) to discuss litigation strategy regarding various DPU proceedings. Similarly, in OML 2012-82, the Division found that an executive session was permitted to plan litigation strategy concerning an appeal to the DPU, which process is "a complex, technical and adversarial process." In OML 2015-51 the Division upheld use of an executive session under G.L. c.30A, §21(a)(3) to discuss "litigation strategy and related power supply issues [related to] DPU 14-69." Further, in OML 2015-103,

the Division held that the DPU Commission meets in a quasi-judicial capacity to act on petitions of the type at issue. The relevant Division of Open Government decisions are attached for your information.

Analysis

In this case, the Selectboard met in executive session pursuant to a properly posted meeting notice listing thereon the fact that an executive session would be held, identifying the statutory citation for the purpose of the session, and listing with specificity the particular topic to be discussed. While the term "litigation" is not specifically defined by statute or case law, the Attorney General's determinations cited above clearly establish, in my opinion, that administrative proceedings before the DPU may be considered "litigation" for purposes of G.L. c.30A, §21(a)(3). Moreover, the cited determinations specifically recognize, in my opinion, that use of executive session for such purposes is essential to protect the interests of a municipality in connection with negotiations about the terms and conditions, and the associated rates, on which water is supplied to its residents by a water company that, if revealed publicly at the time, would place the municipality at a competitive disadvantage.

Thus, consistent with the Open Meeting Law, and with the Division of Open Government's Open Meeting Law Guide and Attorney Corbo's summary thereof, it is my opinion that the Selectboard had authority under the Open Meeting Law to meet in executive session on August 8, 2016, to consider strategy with respect to the Housatonic/DPU matter and no violation of the Open Meeting Law occurred.

Resolution of Complaint

To address these issues at the Selectboard's upcoming meeting of August 22, the Board has included an item therefor on its agenda. When that item is reached, the Chair can acknowledge receipt of the complaint and summarize the substance thereof. It would be appropriate for the Chair or another member of the Board to review the existing Attorney General precedent for the Board's use of executive session to discuss the Housatonic/DPU matter. Any member of the Board may make a motion, or the Chair may solicit the same, similar to the following:

It is hereby moved that the Selectboard acknowledge receipt of an Open Meeting Law complaint from Ms. Eileen Mooney alleging that the Selectboard improperly entered into executive session on August 8, 2016 to discuss the matter of the Housatonic Water Works Rate Increase Petition, currently pending before the Massachusetts Department of Public Utilities ("DPU"), and, in connection therewith, make the following findings:

1. The Selectboard timely posted its August 8, 2016 meeting as required by law;
2. The notice included the following item, which item refers to the statutory basis for entering executive session, includes a description of the general purpose, and states with specificity the matter to be discussed:

12. EXECUTIVE SESSION – Town Manager's Conference Room
M.G.L. c. 30A, §21(a)(3) - Pending litigation matter – Housatonic Water Works rate increase petition to Department of Public Utilities, D.P.U. No. 15-179

3. Rate setting petitions pending before the DPU constitute "litigation" for purposes of the Open Meeting Law as determined by the Attorney General's Division of Open Government in many published decisions;
4. The petition at issue involves a matter currently pending before the DPU, and discussion of the matter in open session on August 8, 2016 would have jeopardized the Town's litigation position;

For all these reasons, the August 8, 2016 meeting of the Selectboard and its use of executive session at that meeting was in compliance with the Open Meeting Law and no remedial action is needed. The Selectboard further authorizes Town Counsel to send a response to the complainant and Attorney General consistent with this vote.

Please let me know if you have any further questions concerning this matter.

Very truly yours,

Lauren

Kopelman and Paige is now KP | LAW

Lauren F. Goldberg, Esq.

KP | LAW

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