

BOARD OF SELECTMEN  
EXECUTIVE SESSION MINUTES

16 NOV 17 4:06PM

July 20, 2009

ORLEANS TOWN CLERK

Approved on October 14, 2009

An Executive Session meeting of the Orleans Board of Selectmen was held on Monday, July 20, 2009 in the Nauset Room of the Town Hall for the purpose of discussing litigation. Present were Chairman Jon R. Fuller, Vice-Chairwoman Margie Fulcher, Clerk Sims McGrath Jr., Selectman David M. Dunford, and Selectman Mark E. Carron, Town Administrator John Kelly, Parks and Beaches Superintendent Paul Fulcher and Orleans Town Counsel Michael Ford.

Chairman Fuller called the meeting to order at 4:00 pm.

**On a motion by Mrs. Fulcher, and seconded by Mr. Dunford, the Board voted to meet as Park Commissioners. The vote was 5-0-0.**

**On a motion by Mr. Dunford and seconded by Mrs. Fulcher, the Board voted by way of roll call to enter into executive session for the purpose of discussing litigation. The vote was 5-0-0, with Mr. McGrath, Mr. Dunford, Mr. Fuller, Mrs. Fulcher and Mr. Carron all voting aye.**

Orleans Town Counsel Michael Ford, updated the Board on a complaint that was filed in Barnstable Superior Court against the Board of Selectmen acting as Park Commissioners, by Winkler Crane Company Inc. Mr. Ford explained to the Board that he had appeared on behalf of the Park Commissioners in regard to legal action pending against the Board of Selectmen in their capacity as Park Commissioners. Mr. Ford provided the Board with a revised list of conditions from the Massachusetts Division of Fisheries and Wildlife. In light of the revised list of conditions, and the acknowledgement in open court that the excess cost incurred for the use of bird monitors will be paid by the contractor, Mr. Ford recommended that the Board reconsider their previous decision to not allow the crane to be removed from the Nauset Beach.

Mr. Fuller asked if Mr. Ford could request that a clause be added to the order of conditions that the Town of Orleans would be held harmless for any incidents or accidents that might occur while the crane is being moved through the ecologically sensitive area of Nauset Beach. Mr. Fuller also asked Mr. Ford to verify that the contractor is insured against damage that may occur to the beach should the crane fall over and spill hydraulic fluid, or some similar catastrophic occurrence.

Mr. Carron pointed out that the letter outlining the order of conditions from Massachusetts Division of Fisheries and Wildlife indicates that Parks and Beaches



Superintendent Paul Fulcher may use his judgment regarding the removal of the crane from the beach.

Mr. McGrath pointed out that the last paragraph of the order of conditions does take into consideration unforeseen outcomes, such as an abandoned nest. Mr. McGrath asked if the litigation were to be dismissed, would there be an opportunity in the future for the contractor to sue the Town for damages.

Mr. Ford explained that he would ask that contractor to sign a stipulation of dismissal "with prejudice" that would preclude any actions for damages in the future.

Mr. Kelly suggested that the Board revisit their previous vote and establish a protocol for future requests of this nature. These actions would allow the Town of Orleans better leverage in the future for regulatory action.

Chairman Fuller announced that the Board would recess until 4:45 pm.

At 4:45 pm the Executive Session reconvened.

Town Counsel Michael Ford reported to the Board that he had spoken to Winkler Crane Company Inc.'s attorney William Riley. Mr. Riley agreed to provide the Board with a certificate of insurance for the contractor, Winkler Crane Inc. Mr. Riley also acknowledged that the indemnification clause would be a condition of a favorable vote, and that the pending complaint against the Board of Selectmen acting in their capacity as Park Commissioner would be dismissed with prejudice. Mr. Riley also agreed that contractor would pay the reasonable cost incurred for the removal of the crane.

On a motion by Mr. Fuller, and seconded by Mrs. Fulcher, the Board voted to authorize Town Counsel to resolve the pending litigation, Winkler Crane Company Inc. (Plaintiff) v. Town of Orleans Board of Selectmen acting as Park Commissioners (Defendant). The vote was 5-0-0 with Mr. McGrath, Mr. Dunford, Mr. Fuller, Mrs. Fulcher and Mr. Carron all voting aye.

On a motion by Mr. Fuller, and seconded by Mrs. Fulcher, the Board voted to return to open session. The vote was 5-0-0, with Mr. McGrath, Mr. Dunford, Mr. Fuller, Mrs. Fulcher and Mr. Carron all voting aye.

Transcribed by:  
Kristen Holbrook

  
Sims McGrath Jr., Clerk

Released on: 10/6/10

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