



ORLEANS TOWN CLERK

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PLANNING BOARD

SEPTEMBER 9, 2008 – EXECUTIVE SESSION MINUTES

A meeting of the Orleans Planning Board was called to order at 6:30 p.m. in the Nauset Meeting Room at the Orleans Town Hall. **Present:** **Chairman:** John Fallender; Kenneth McKusick; Sims McGrath; **Associates:** Gary Guzneau; John Ostman. **Planning Department Staff:** George Meservey. **Also Present:** Attorney Michael D. Ford (Town Counsel). **Absent:** **Vice-Chairman:** Seth Wilkinson; **Clerk:** Paul O'Connor.

The chairman, John Fallender requested that John Ostman and Gary Guzneau vote at this meeting as regular members in the absence of Seth Wilkinson and Paul O'Connor.

TOM'S HOLLOW LANE LITIGATION

MOTION: On a verbal roll call, and motion by **Sims McGrath**, seconded by **Kenneth McKusick**, the Planning Board voted to enter into an Executive Session for the purpose of discussing strategy with respect to pending litigation for Tom's Hollow Lane.

VOTE: 5-0-0 The motion passed unanimously.

SUMMARY OF COURT CASE

Attorney Michael Ford (Town Counsel) explained the status of the court case for Tom's Hollow Lane (Tom and Patricia Kennedy) for an appeal of a Planning Board decision to deny a Modification of a Definitive Subdivision in November of 2007 which has been remanded back to the Planning Board by Judge Trombly at the Boston Land Court for further clarification of the reasons for the Planning Board denial. Attorney Ford stated that Judge Trombly will handle all aspects of the case and he is very deliberative and knowledgeable in land use. Attorney Ford stated that the basis of the Plaintiff's complaint is that the Planning Board erred in not granting the waivers they requested in order for the plan to comply with the Subdivision Rules and Regulations and Orleans Zoning Bylaws. The Plaintiff has appealed the Planning Board's decision as arbitrary and capricious and not based on legally tenable grounds. Attorney Ford stated that the burden is on the Kennedys to put their case in again under the rules of evidence and any witnesses the Town of Orleans chooses to call and then the judge will make a determination of whether the town of arbitrary and capricious in denying the waiver requests. Attorney Ford stated that a preliminary conference was held with Judge Trombly at which time a Preliminary Statement was a jointly adopted by the Plaintiffs and Defendant in this matter. Attorney Ford stated that it was agreed that Discovery (taking of Depositions, Interrogatories and requests for documents) would be completed by the end of the summer (by September) and Dispositive motions (Motions that either side could bring that would obviate the need for a trial) would be brought this fall (no later than October) and a pre-trial conference will be set sometime this fall and ultimately tried in the Spring of 2009. Attorney

Ford stated that all of the abutters and residents on Tom's Hollow Road have been deposed, and the Plaintiff's Attorneys have stated that they intend to depose all of the Planning Board members, Jenny Wood (Conservation Agent), Jon Fuller (Board of Selectmen Liaison) and George Meservey (Planning Director) and other town officials as they deem necessary, which they acknowledge would greatly increase the cost of the litigation. Attorney Ford gave an explanation of arguments presented by the Plaintiff and Defendant of why the individual Planning Board members would be deposed regarding the reasons for the denial of the Modification of the Subdivision and Judge Trombly eventually decided to remand the decision back to the Planning Board for clarification of why the Planning Board denied the Modification of the Subdivision as well as some of the waiver requests for Tom's Hollow Lane. Attorney Ford stated that the Planning Board will have to file a Supplemental Decision with the reasons for the previous denial.

Attorney Ford stated that the lead counsel for the Kennedys has suggested the possibility of a compromise from two additional lots down to one additional lot and Attorney Ford agreed to present that option to the Planning Board in case there is any interest in reopening the hearing to consider a revised plan that creates less than two lots. Attorney Ford stated that he feels that the Planning Board has a strong case for the denial of the waivers that would have been needed for the proposed subdivision and it was the Kennedys burden to show that the waivers were in the public interest. Attorney Ford stated that through the discoveries and depositions, he has noted that the Planning Board acted appropriately at all times. Attorney Ford noted that it is the Planning Board's decision whether they would entertain a subdivision of less than two lots and he would wait for further instruction.

DISCUSSION WITH TOWN COUNSEL

The Planning Board discussed the issue of a smaller subdivision of less than one additional lot. McGrath stated his opinion that when the original subdivision was created in 1975, the Planning Board put limitations on it for specific purposes and McGrath stated that he does not see any good reason to change those limitations at this time. McGrath stated that he would be adverse to negotiating a single additional lot, as that would fly in the face of the original decision, and it would fly in the face of the adequacy of access which is already challenged. McGrath stated that if the access is insufficient now, he cannot in good conscience create a situation where more traffic is using the already insufficient access. The Planning Board discussed the issue of what is in the best interest of the public. Attorney Ford noted that Planning Boards are asked to consider what is in the best interest of the public when they are asked to approve subdivision waivers.

CONSENSUS: There was a vocal consensus of the Planning Board that they are not willing to consider the issue of a request for a "subdivision of less than two lots" for Tom's Hollow Lane at this time.

McGrath questioned how broad the issue of "best interest of the public" would be regarding waiver requests, and Attorney Ford responded that it could include abutters, surrounding neighborhood residents who use the infrastructures and the town residents at large. Attorney Ford stated that it is the responsibility of the Planning Board to consider the reasons for the subdivision regulations such as safety, affect on the environment, stormwater and drainage issues. Attorney Ford noted that the Planning Board referred to the provisions of the subdivision decision that was originally made in 1975 for Tom's Hollow Lane when trying to decide whether to grant the requested waivers and whether they would be considered to be in the best interest of the public. Ostman noted that a Planning Board member from 1975 (Robert Wilkinson) came in and talked to the current Planning Board about the intentions of the Planning Board in 1975 to limit further subdivision activity on this road.

McGrath noted that the Subdivision Rules and Regulations (Chapter 192-1, Section E) references waivers and under what conditions they may be granted. Attorney Ford suggested that the Planning Board reference their discussion when trying to expound on the reasons for the denial decision made in November 2007 on Tom's Hollow Lane. Attorney Ford suggested that at the public meeting, the Planning Board acknowledge the Remand Order from the court and explain what the Planning Board has been directed to do by the court, and go through the deliberations for the waiver requests for the Modification of a Definitive Subdivision for Tom's Hollow Lane. Attorney Ford stated that each of the supporting reasons for the denial must be clearly stated in the Supplemental Decision to be submitted to the court. On Attorney Ford's recommendation, the Planning Board agreed to instruct the Town Planner, George Meservey, to prepare a Supplemental Decision based on the findings of the Planning Board.

MOTION: On a motion by **Sims McGrath**, seconded by **John Ostman**, the Planning Board voted to adjourn the Executive Session of the Planning Board for pending litigation on Tom's Hollow Lane at **7:29 p.m.** on September 9, 2008.

ROLL CALL VOTE: 5-0-0 The motion passed unanimously.

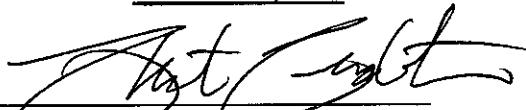
ADJOURNMENT

The Planning Board Executive Session adjourned at **7:29 p.m.**

DATE APPROVED: October 14, 2014

DATE RELEASED: October 14, 2014

SIGNED:


(Chet Crabtree, Clerk)