

**Westborough Board of Selectmen
Meeting Minutes
December 13, 2011
6:00 p.m. – 7:55 p.m.**

Present: Chairman Goldblatt, Vice Chairman Dodd, Selectmen Emery, Thompson and Johnson

Also Present: James J. Malloy, Town Manager; Kristi Williams, Assistant Town Manager; Gregory Franks, Town Counsel

Request to Approve the Board of Selectmen's Meeting Minutes

Selectman Dodd's motion to approve the minutes of November 8, 2011 was seconded by Selectman Thompson. Vote: 5-0

Selectman Dodd's motion to approve the minutes of November 29, 2011 was seconded by Selectman Thompson. Vote: 5-0

Open Forum

None

Selectman Goldblatt announced that she will not be running for reelection to the Board of Selectmen and that it has been a privilege and an honor to serve the Town.

Public Hearing to Consider Rescinding Site Plan Approval for 25 Brigham Street/18 Cottage Street / Richard Pedone

Attorney David Manoogian, representing R&D Realty LLP, Richard Pedone, the owner, and Building Commissioner Tin Htway appeared before the Board. Mr. Htway informed the Board that no work has been done regarding the site plan and that Mr. Pedone need for the site plan approval was to provide a tenant with retail space on his property. Mr. Pedone was able to provide his tenant with another smaller space on the property which did not need site plan approval, the tenant has received his Certificate of Occupancy and the business is operational. Mr. Htway requested that the Board rescind the site plan without prejudice should Mr. Pedone wish to reapply.

Selectman Emery's motion to rescind said site plan without prejudice effective immediately was seconded by Selectman Johnson. Discussion: Attorney Manoogian stated that while Mr. Pedone received the notice regarding the meeting tonight, it was constitutionally invalid as it gave no reason for the request to rescind and they were unable to adequately prepare their comments. Attorney Manoogian hoped that Mr. Htway's reasons are not retaliatory due to the fact that they have filed an appeal with the Zoning Board in another case for a determination that Mr. Htway made on this same building and was suspicious as this came up after the appeal was filed. Mr. Malloy stated, for the record, that Mr. Htway came before the Board four to six weeks ago to request that this be on the agenda, which was before their appeal was filed. Attorney Manoogian reviewed what the Board can do under Section 1244 of the Zoning Bylaws and there is nothing that says once the site plan is granted there is a time limit or that the Board can rescind it. He informed the Board that his client has spent \$15,000 preparing plans and trying to get tenants for

the building and explained that the Town is still protected as Mr. Pedone cannot apply for a building permit until he complies with the agreed conditions attached to the site plan review.

Mr. Pedone informed the Board that he has had several conversations with Mr. Htway, that he has installed a handicap ramp, provided space for his tenant and has never been asked about his progress regarding meeting and working toward the site plan review. He has expended \$15,000 toward work required by the site plan conditions.

In response to Attorney Franks' question Mr. Htway explained that all the conditions, #1 to #13 have not been followed and would need to be completed before a building permit is issued. Attorney Franks stated that if the conditions are not being followed, under common law, the Board has the right to rescind the site plan approval.

Selectman Thompson questioned whether there is a time frame for the completion of the work and Attorney Franks stated that there is not. Mr. Htway explained that his motivation to rescind stems from Mr. Pedone's urgency in March that he would lose a tenant if he did not receive approval and was given special consideration by the Board when they granted approval out of order so he could get his tenant in by June. In response to Selectman Emery's questions Attorney Franks commented that if conditions of a site plan are not being followed the Board's remedy is to rescind and that the December notice without a reason could be a problem and the hearing could be rescheduled for a later date. Mr. Htway stated that the Town has never approved a site plan out of order in response to Selectman Dodd's question. He also asked Mr. Pedone if he plans to complete the project and Mr. Pedone explained that he does expect to finish, he has been a property owner, active in the community and a resident of the Town since 1970 and the Board has never rescinded any of his site plans. Mr. Pedone is currently working toward the project conditions, has had financial hardships and is talking to prospective tenants. He informed the Board that it was not explained to him that it the approval was a special consideration. Selectman Johnson asked Mr. Htway to clarify the process and he explained that typically the conditions would have been presented to the various departments for the approval before the site plan came before the Board and an exception was made for Mr. Pedone, which Mr. Htway did discuss with him.

The Board discussed with Mr. Pedone and Mr. Manoogian a time line for the completion of the work. Selectman Thompson suggested an eighteen month extension from the March 22, 2011 approval date or until December 31, 2012. Attorney Manoogian countered with an eighteen month extension from today. Mr. Htway stated that the work can be completed by September 22, 2012. Selectman Emery expressed concerns regarding the notice without reason that Mr. Pedone was given and asked that the Board address this issue first; setting a precedent regarding the time frame; and that the Board has to accept the consequences for approving the site plan out of order.

Selectman Emery withdrew her original motion and moved to address the issue of adequate notice by giving Mr. Pedone notice tonight that the Board has these concerns and this be put on a subsequent agenda, which was seconded by Selectman Thompson. Discussion: Selectman Thompson pointed out that the lack of adequate notice is their claim and Mr. Pedone and Mr. Manoogian have the ability tonight to wave any claim of defective notice assuming there is an agreeable remedy; that the Town is business friendly as it did not follow the normal process to accommodate Mr. Pedone's request; the concern that the compliance with the general comment

has not matched up with the compliance of getting the permit issued immediately; and that if Mr. Pedone does not meet the agreed upon date for completion of the items he may still come back and reapply. Attorney Manoogian suggested that the Town give them notice that is correct, they will come back to meet with the Board, and in the interim they will work with Attorney Franks to effect a compromise. He asked that they be provided with a formal written notice. Vote: 5-0

Selectman Thompson's motion that Mr. Franks contact Mr. Manoogian and that this be rescheduled at a future Board of Selectmen meeting for further consideration and that sufficient written notice be provided to Mr. Pedone and Mr. Manoogian was seconded by Selectman Johnson. Vote: 5-0

Selectman Emery commented on the assumption by Mr. Manoogian that Mr. Htway's actions are retaliatory, stating that he is held in the highest regard, his office is a great addition to the Town, she could not image nor would the Board tolerate those types of actions by any department head and asked for an apology. Mr. Manoogian stated that it was not their intent to insult Mr. Htway; it was that they hoped it was not the case. Selectman Goldblatt responded that it is definitely not the case for any department head in the Town. Mr. Malloy questioned the hand painted signs in the front of the facility by the road and asked Mr. Htway to look at them, and Mr. Pedone to speak to his tenants, regarding whether they are in compliance with the Town's sign bylaws. Mr. Pedone explained that he spoke with Mr. Htway last week, that one of the tenants is in violation, and Mr. Htway informed the Board that he is going to wait until after the holidays to enforce it so as not to impede their holiday business.

Request to Award Contract to Forward Enterprises, Inc. for Timber Harvesting at Bowman Conservation Area/Sandra Pond Watershed / Derek Saari

Selectman Goldblatt stated that the bid was opened on November 28, 2011 with Town Counsel present and it is for \$10,664.50. Mr. Saari informed that he has been working on this project since 2003 identifying needs in and around the reservoir. While the dam work was being done, Mr. Saari prepared a 10-year forest management plan for all the watershed lands around Sandra Pond Reservoir. Mr. Paul Davis, President of Forward Enterprises introduced himself. There were several public hearings in 2004 and 2005. Now that the dam work is completed he has remarked the timber to be cut. The forest cutting plan is based upon what is prescribed in the forest management plan and Mr. Saari has the State's approval for the plan. There will be three landing areas where the wood will be taken out and processed and Mr. Saari identified where those areas are on the map. The work may start as early as tomorrow, and it is more prudent to proceed with the project at this time of year as it is used for recreation by residents and it is used the least. The goal is to complete the work by March 1, 2012. Mr. Saari notified the abutters and extended the notification to Bowman Street residents as a courtesy. The closing of the area to the public has been advertised in the newspaper, there are signs posted, and the Westborough Community Land Trust's website has information on all other open trails in Town.

Edward Thompson, a concerned Bowman Street resident, came before the Board and informed them that he has done some research, walked the area and saw all the trees that are going to be cut down. His opinion is that the tree canopy is part of the allure and it will be destroyed as a result of the project. Mr. Thompson also expressed concern regarding Forward Enterprises, which he researched, and discovered issues with previous jobs. He distributed pictures to the Board taken by the Petersham tree warden and was disappointed in the results of the project. Mr. Saari spoke with Mr. Davis regarding this project and it did not have the same goals as a

watershed management project. He also visited some of their other project sites similar to ours and was satisfied with the results. Forward Enterprises was not the highest bidder. Mr. Saari worked diligently on the contract, it was reviewed by Town Counsel and it follows all the required environmental protocol. Mr. Thompson's other concern was that the level of the reservoir was raised because of the dam project there is seepage to north side of the spillway, the area is saturated and heavy equipment should not be allowed there should the dam break. Mr. Saari is aware of this issue. Mr. Thompson pointed out that the trees provide erosion control and a wind and sound barrier.

Selectman Emery's motion to award the contract to Forward Enterprises, Inc. in the amount of \$10,664.10 was seconded by Selectman Johnson. Discussion:

- Selectman Emery expressed her appreciation for Mr. Thompson's concerns, that she respects the work Mr. Saari has done for the Town, and she asked that he explain the reasoning behind the project. Selectman Thompson asked that he also explain why it has to be done and what the risk is if it is not done. Mr. Saari informed the Board that: there are diseased trees that can infect other trees which is why there is a need for uneven age; a major effort was put into the 10-year management plan, it was reviewed by the State forester, and it included a prescriptive for each stand; many trees have died over last few years since they were last marked; the white pines have climaxed and are falling apart; the thinning out of low quality trees will promote regeneration; he has stayed away from the hills due to concerns; and there are trees that are falling into the lower reservoir and are clogging the intake streams.
- In response to Selectman Johnson's concerns Chief Perron stated that there are no issues regarding access in case of fire. There are signs posted in the conservation area parking lot and Mr. Saari can post signs at different access points if needed. Chief Gordon has no issues with the signs.
- John Walden pointed out that this is standard practice with watershed management, he has no record of any maintenance being performed in that area, and it is much needed as all the trees will decline at the same time.
- Mr. Davis explained to the Board that tree cutting is a charged issue and cutting in the Quabbin Reservoir has been shut down as some people are claiming that it is not proper management. This same issue will most likely be brought up here and he explained that the Board should be aware that they will hear from residents for a considerable amount of time, but after a few years it will become more pleasing to the eye.
- Mr. Saari plans to install an educational plaque with pictures and explanation of what was done and why. Mr. Saari will post Mr. Davis' website on the Town's as well as a link to another town that has completed the same project.
- Selectman Emery asked Mr. Saari if any consideration was given to employing a horse-drawn group instead of tractors as it is better for the environment and he stated that it is not applicable for this project due to time constraints.

Vote: 5-0

Discussion of Town Manager's Performance Evaluation / Selectman Thompson and Selectman Johnson

Selectman Thompson explained the process that was followed, which included a review of a compensation summary of twenty-five to thirty Town Managers in similarly situated towns. Mr.

Malloy's current compensation schedule includes a \$5,000 bonus that, because he was newcomer was added as part of a compensation probationary period with regard to his performance. In comparison to other towns, this is highly unusual and he and Selectman Johnson concluded that it should be rolled into his base pay. Many towns offer their Town Manager annuities, whole life insurance which they fund, long term disability insurance that they pay for, and an auto stipend; none of those benefits are offered to Mr. Malloy, which supports Selectmen Thompson and Johnson's recommendation. They also consulted the Town Accountant and Town Counsel. A change was made to the amount of notice that has to be given upon resignation from four weeks to two months. Selectman Thompson stated that the Board feels very strongly and favorably toward the work he has done to date and that Mr. Malloy conveyed to them that he enjoys working for the Town, greatly values the relationships he has developed with the department heads and has great respect for the town employees. Selectmen Thompson and Johnson reviewed other department head contracts, the Board of Selectmen evaluations and the Board unanimously approved their recommendation.

Selectman Johnson informed the Board that in all categories of the evaluation Mr. Malloy received a "Commendable" rating and overall it was "Commendable" as well. Selectman Johnson congratulated him on his commendable performance and stated that Mr. Malloy is agreeable with the terms of the new contract, which is for a three year period. Selectman Thompson asked that the Board vote on the contract tonight and Attorney Franks provided a copy.

Selectman Emery's motion to approve the Town Manager's new contract was seconded by Selectman Thompson. Discussion: Selectman Thompson explained that the amount was arrived at by increasing the base contract by 4% and adding the bonus back into the salary for a new salary of \$141,864 effective July 1, 2012. He and Selectman Johnson agreed that the salary is fair in regards to the services the Town Manager provides to the Town of Westborough and in comparison to what surrounding towns are paying their Town Managers. Selectman Johnson pointed out that the second and third years of the new contract are the same as the previous and the salary will increase the same percentage as the non-union Town employees. Board members thanked Mr. Malloy. Selectman Goldblatt thanked Selectmen Thompson and Johnson for their efforts and commended Mr. Malloy on his performance.

Vote: 5-0

Selectman Johnson's motion that the Board authorizes payment of the \$5,000 bonus to the Town Manager based on the finalization of the review, his performance, and that it is still in effect for this year was seconded by Selectman Emery. Discussion: The bonus award completes Mr. Malloy's current contract and the new contract, which is not in effect until July 1, 2012 no longer includes the bonus. Vote: 5-0

Mr. Malloy thanked Board and stated that he enjoys working for the Town, that it has been a learning experience working for a new town after spending 15 years in the previous community he worked for. It is the fourth community he has worked in, each is unique and he appreciates the opportunity and the Board's evaluation and confidence in him for the next three years.

Town Charter and Bylaws / Town Manager

Mr. Malloy explained to the Board that his goal is to review the Town Charter and Bylaws, identify inconsistencies and what needs clarification. Mr. Malloy reviewed only those areas that need corrections, changes or clarification:

- Article 2 – remove requirement that “division heads” attend Town meeting; Mr. Walden pointed out they are now union employees and no longer salary.
- Article 4 – requires that Town Manager be bonded; he does not normally handle money or sign checks, Town Counsel stated that it is not necessary.
- Article 4 – requires that the Town Manager file notice with the Board when he makes Board/Committee appointments, which he hasn’t done yet, and the Board agreed that he should do so.
- Article 4 – Paragraph 1 references the Town’s organizational plan in Section 5-2, but should be Section 5-1b.
- Article 4 – Sub-paragraph 8 refers to the Town Manager keeping all financial records and providing the Board with a report and the Board agreed that the financial report included in the Annual Report is sufficient; the language “and otherwise as the Board may require”.
- Article 4 – Paragraph 10 refers to the Town Manager having full jurisdiction over the rental, use, maintenance and repair of all Town Facilities except school and library buildings and it was agreed to add “except when requested by the school or library department”.
- Article 4 – Paragraph 14’s language is confusing, Mr. Malloy has discussed this with Town Counsel and it was agreed to remove “purchase and service”.
- Article 4 – It was agreed that Paragraph 15’s wording should be clarified to differentiate between 14 and 15 by adding “not requiring a contract” after “service”.
- Mr. Malloy reviewed Section 5-2 and Section 5-3c and that the language in them is contradictory. He questioned if the elected officials that appoint certain department heads responsible for the administrative aspects of the department as stated in Section 5-2 or is the Town Manager as stated in Section 5-3c. Mr. Malloy suggested that this be discussed more thoroughly at a January meeting as all the Charter changes do not have to be addressed at this Town Meeting. The Government Study Committee’s results will be reviewed relative to this issue.

Mr. Malloy stated that since it is getting late, he will summarize the changes and include them in the Annual Town Meeting warrant for those changes that do not require much discussion and will set aside those issues that will require further discussion for a later date.

Town Counsel Report

Attorney Franks reminded the Board about taking the ethics test and will email the memo to them with the information.

Town Manager Report

Mr. Malloy informed the Board that the Westborough Buick GMC dealership has renovated the Cloverleaf property but did not finish the paperwork in time for tonight’s agenda. They are planning on having a year-end sale and would like to advertise, and as the Board will not meet again until January Mr. Malloy asked the Board to schedule a separate meeting for Monday night, December 19, 2011. He will not be here, however Ms. Williams will attend. The Board agreed and a meeting will be posted for 6:00 p.m. with the one agenda item.

Issues and Correspondence of the Selectmen

Selectman Thompson extended his condolences to the family of Firefighter Davis, who perished in the line of duty last week, and to the Worcester Firefighters and the City of Worcester as well and that this demonstrates the real sacrifices that town employees make, especially in the public health and safety sector.

Selectman Emery pointed out how this exemplifies what happens when codes are not adhered to by building owners and the importance of fire inspections, which she commended the Town for the good that they do, and reminded the public to be careful with lighting during holidays.

Selectman Johnson was asked by a resident if there were any chance that the burning season could start earlier. Chief Perron informed the Board that burning season is controlled by the Commonwealth and it will begin January 15, 2012 and end May 1, 2012. Selectman Johnson will inform the resident. Selectman Emery pointed out that residents must obtain a permit and may start burning at 10:00 a.m. and be done by 4:00 p.m.

Selectman Dodd requested from Attorney Franks his written opinion and what the laws are regarding remote participation and access for public meetings. Attorney Franks stated that the Attorney General has issued regulations, however the person not in the room cannot be counted toward a quorum and that he would prepare something for the Board in writing. Selectman Dodd thanked Selectmen Goldblatt and Thompson for serving on the Board.

Selectman Goldblatt reported that the finance team met last week and the Capital Expenditure Committee will meet on Thursday. She asked that the men and women far from home be remembered in everyone's thoughts and prayers.

Adjourn Open Session

Selectman Emery's motion to adjourn at 7:55 p.m. was seconded by Selectman Thompson.

Vote: 5-0

Submitted by Paula M. Covino

Chairman Goldblatt

Vice Chairman Dodd

Selectman Emery

Selectman Thompson

Selectman Johnson