

Selectmen's Executive Session
Wednesday, January 15, 2014
Bourne Town Hall
Town Administrator's Office
8:45 a.m.

Members Present: Selectmen Zuern, Meier, Pickard and Ellis

Others Present: Town Administrator Guerino and Attorney Sabatt

Motion by Selectman Meier, seconded by Selectman Ellis to go into Executive Session for the purposes of real estate transactions.

Role Call Vote: Meier – yes
Ellis – yes
Pickard – yes
Zuern – yes

Atty. Sabatt cited the reason for the meeting was for discussion and thoughts on a potential settlement in the case presented from the applicant's attorney, Gus Wagner.

Atty. Sabatt explained that the approach taken was to appeal the decision of the Building Inspector from the issuance of the building permit. He said an argument can be made that the building permit should be revoked and he feels certain that the zoning board of appeals could find that the building permit should be revoked and that would end the matter.

The Board of Selectmen, in his view, were completely correct in their assessment that his Special Permit should never have been issued.

If the Selectmen prevail at the meeting, the applicant will probably take an appeal to superior court where he may or may not win. It may also go to the appeals court. If the Board of Selectmen lose tonight, then a decision needs to be made on whether to go forward with an appeal.

Atty. Sabatt thought they had strong grounds to stand on at the meeting, but did have a couple of problems:

He said there is generally orientation of all boards of appeals to support the building commissioner.

In this case, it is not an instance where the Building Inspector made a controversial judgment call or a case where he was asked to enforce a zoning bylaw and he made the determination that there was no violation. This case is more a difference of opinion.

Atty. Sabatt said he needed to persuade 4 members of the Board of Appeals to overturn the Building Inspector and that that was always a struggle.

He suggested that even though they (BOA) may think he (Sabatt) is right that it is an unlawful use of this lot for parking; it should have been addressed through an appeal from the Special Permit Granting Authority.

He thinks they are right on the substance of the law. He has spoken with Atty. Wagner and has an idea where he is coming. He thinks he is wrong on his approach. He stressed that it is not going to be easy to overcome this.

This is an issue that has become very divisive within the administration. It may not be bad for parking to occur on this site. It may be worthwhile to try to resolve this not only for the overall scenario, but also from the standpoint on how much energy and money may be needed for appeal.

They have offered a tentative proposition. He presented a sketch from Attorney Wagner. He said his client would allocate the back portion of the lot either by conveyance, easement, or perpetuity for exclusive use of the town for parking and that he would be willing to build a wall across the lot so it will be closed off for his use and used only by the town.

He was proposing 16 spaces for the town. He said his client would have been willing to move the house anywhere needed at his expense, but that offer was now off the table. He said moving the house to the back of the lot was a possibility, but he could not commit as to who would pay for the move and it would have to be negotiated.

Atty. Sabatt noted that the Chairman of the ZBA will be away until mid March/April. He said he is willing to continue until the Chairman returns, but said the applicant may not be willing to wait that long.

Atty. Sabatt feels that they should try to resolve the case. The bylaw allows a parking lot across the street within 350 feet as long as the street is not more than 60 feet wide (it is not). A concern of the Board of Selectmen is the medical center patients having to cross the busy road to get to the facility. He felt that the Planning Board probably should have said this was too busy a thorough fare for this to be allowed, too much traffic, and too many potential problems. The Planning Board allowed it and felt it good planning.

Selectman Zuern indicated that area was zoned residential and would have to be changed to a commercial area.

There are 123 parking spaces on the site and 36 parking spaces within 350' of 9 Sandwich Road the applicant could only afford to lose 2 spaces. The only way for him to pick up spaces is to move the house. Atty. Sabatt is not sure how many spaces they will pickup even without the house there. This is a settlement offer that could fall stillborn because the applicant would not be able to do that without a variance to allow fewer than 157 spaces and he does not think the Board of Selectmen will be inclined to support that.

If they negotiate and have him move the structure to a lot 400 feet way, at his expense, and give the town the spaces in the back, it can be settled. The substance of the settlement is going to be difficult, but if there is a way to resolve it.

Selectman Zuern had quite a few concerns. She said the rear of the property is a recreational area and if the house were moved there, you will be using up space with no access to the back lot. She said even though the town owns it, there is no road and it will still have to go before town meeting.

Atty. Sabatt said he would have to condition it upon the ability to get some type of easement which may be difficult to negotiate.

Selectman Pickard questioned Atty. Sabatt's on the success from the ZBA...what the level of success was, what the percentages for winning or losing are, and what is anticipated of what Superior Court reserves should be to fight this legal action. The town may not have a choice on going to Superior Court, it may be the applicant.

Atty. Sabatt said percentages were hard to give. At this point he feels that the Board of Selectmen are more likely to lose than win. They have the uphill struggle before them. In Superior Court you can control to some extent how much you want to do on this matter. They will probably spend \$50,000 to start. This applicant has the war chest with the attorney and if it goes forward, they will seek depositions and beat the Board of Selectmen into the ground. The discoveries have to be responded to and depositions defended.

Selectman Zuern, a former member of the Board of Appeals, said they had to adhere to the law and feels they have a very good case. She said it was a violation of the bylaw and that can be shown.

Attorney Sabatt said he had to get the Board of Appeals around the fact that the Special Permit was issued and not appealed. He agrees that this should never have been allowed.

Selectman Zuern referenced the request and failure to change from residential to commercial zoning at a town meeting. She was feeling confident on going forward. She does not think this is of any value to the Michienzi's.

Town Administrator Guerino addressed the Town Meeting issue and the Town Meeting authorization of \$250,000 to acquire the property and house. They can show as a town that it was voted not to authorize the zoning change. They will be able to show that the town had interest in this property for a parking lot as well.

Atty. Sabatt asked if they were open to the accusation that this is vindictiveness and an effort to force Michienzi's to give the parking lot or land to the town.

Selectman Zuern responded "no".

Selectman Pickard said he is on the outside of this group. He has thought it was and has all along vindictiveness. He said if you listened to Ms. Zuern she was saying that the Building Inspector has 40+ years experience and is wrong. If you listen to Mr. Ellis, it is not about the house, but the safety of the people and about the zoning. He wanted to know why they were entertaining this. He would like to see this go forward all the way and can hardly wait for the depositions to start.

Selectman Ellis asked if a Conflict of Interest could be brought up during the depositions.

Attorney Sabatt said it goes both ways. There are no dirty linens on our side of the table. On their side, he has picked up on signals that bear examination and if it comes to litigation, those things may come to light. If they do, it is going to be problematic.

Selectman Pickard suggested that there was a Conflict of Interest with a member of the Board of Appeals being the Chairman of the Historic Commission and that she would have to recuse herself.

Atty. Sabatt explained a settlement discussion in this matter. Settlement discussions are not to be used against one side or the other. If they discuss either moving or preserving the house as part of the settlement and it falls flat and they end up before the Board of Appeals they cannot show that the Town was trying to get the house, or that they were discussing this.

Selectman Zuern stated she had no vindictiveness. She was not thrilled about putting a parking lot there. The people made the discussion about buying that lot and preserving it. She knew there were a lot of problems with the house and it may not have been able to be preserved. That was not a priority. She was picturing 8 or 10 parking spaces in the back, not cutting down all the trees and making a full parking lot in a historic area. This is not getting back at a builder or anything. The Building Inspector should not have given that permit. It is just a violation of the zoning bylaw. It sets a bad precedence and the changes must go before town meeting ...the Building Inspector nor the Planning Board could not make those decisions.

Atty. Sabatt agreed that this has created precedence where you extend commercial uses in less restricted zoning districts.

Selectman Ellis said he is not sure if either the Historic Commission or Preservation Society is even interested in this house.

Town Administrator Guerino did not think the house should be part of this discussion. The discussion should center on whether they want to negotiate for parking and allow the business to go forward, or go forward with the zoning bylaw violation. The house is currently being rented and no demolition permit has been pulled. He is not opposed to historic preservation but does not know how the town can watch over and maintain, or who's going to pay to move it.

Selectman Pickard said that if the house was brought into discussion, Selectmen Ellis & Zuern would look very disingenuous to the public because they have they have said that Mr. Laporte erred and it is only about the zoning.

Selectman Ellis understands that Town Counsel rendered his decision that the Planning Board should have been 350 feet and 8 additional spaces, regardless of the house.

Selectman Zuern doesn't really care what they do with the house anymore; she said he owns it and can do whatever he wants to do.

Atty. Sabatt said the Board of Selectmen can go forward on a settlement saying they are not interested in the house and take that off the table.

There was further discussion regarding the reduction of parking on the site and whether there was any other public parking in the area, i.e., schools, library and on street parking.

Selectman Meier suggested that the applicant could go back to the Planning Board and open up his Special Permit again.

Town Administrator Guerino said he does not understand the wall and what benefit there is to construct it. If they enter into negotiations it is either going to be a parking lot or not. It should be a parking lot for anyone.

Selectman Zuern saw a lot of problems, i.e., how do you determine who uses the 16 spaces for open parking, there is no access to that back lot now and the town would have to spend \$100,000 to build a road.

Town Administrator Guerino said that cutting a right of way and throwing a few tons of tar will not be that expensive.

Selectman Pickard said they were at a point where the board either negotiates or authorizes the Town Administrator and Atty. Sabatt to negotiate parking that will benefit the town or do nothing and see what happens at the Board of Appeals hearing. The other party has deep pockets to hire the law firm.

Depending on the outcome, either party may go to court.

Atty. Wagner thought it was better to resolve with the town and not get into a big fight, but they also did not want a delay.

Selectman Zuern felt if they were coming to the Board of Selectmen to negotiate, they don't have a good case.

Selectman Ellis wanted to know and was told that there is an opportunity to negotiate. Both Selectmen Ellis and Zuern share the same concern for the protection of the bylaw, not the house under Section 3310 for the 8 spaces. If additional spaces are allowed, the town will face this issue in other residential areas.

Selectman Zuern said the bylaws need to be defended.

Discussion on whether or not Board of Selectmen should attend the Appeals Board Meeting.

Town Administrator Guerino asked if the Board of Selectmen wanted to recess this meeting or stay in session.

Atty. Sabatt explained that there may be some benefit in resolving this and trying to wait until the Chairman returns in March or April, but he does not think they will be willing to do that.

Selectman Meier suggested that since the Chairman of the Board of Appeals was going to be away for 2 months, why not considerate an alternate member.

Selectmen Pickard suggested possible remote participation.

Selectman Zuern questioned why not 4 members, it was done before.

Attorney Sabatt said they were in time crunch and he doesn't think they have a lot of choices. His feeling is that the door should be opened to discussions since he doesn't think they will want to wait until the Chairman's return. He explained the process on the hearing with participants.

Selectman Pickard questioned the benefit to the town to seek parking over there. Atty. Sabatt brought up a point on negotiations whereby you can negotiate something without anything relative to the house because..... if the Board of Selectmen prevail the applicant will go to Superior Court and he presumes and if the applicant prevails he presumes the Board of Selectmen will wish to take it to Superior Court at the cost of at least \$50,000. All this needs to be taken into consideration.

Selectman Zuern said they should go forward tonight and see what happens.

Atty. Sabatt reiterated that they can always have negotiations.

Selectman Ellis said there was a misconception; the Board of Selectmen were not in opposition to medical center.

Selectman Pickard made a motion that the Board takes no action on the proposed negotiations by the applicant as presented by Atty. Sabatt in the pending matter of the Zoning Board of Appeals, seconded by Selectman Ellis.

Roll Call Vote:

Don Pickard - Abstain

Peter Meier - Yes

Linda Zuern - Yes

Donald Ellis -Yes

Attorney Sabatt said he will make it clear that the house is out of the mix, that it is not about securing the house, it is not about trying to get parking for anybody and it is not about the medical center.

Motion by Selectman Meier to adjourn Executive Session, Seconded by Selectman Ellis

Selectman Zuern - yes

Selectman Pickard - yes

Selectman Zuern – yes