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**BOARD OF SELECTMEN**  
**Executive Session Minutes**  
**Joseph F. Bilotta Meeting Room, Town Hall**  
**September 18, 2018**

**Board of Selectmen:** Jamie Toale, Chairman; Robert Ebersole, Vice Chairman; Damon McQuaid, Clerk; Phyllis Luck, Member; Katey Adams, Member

**Also present:** Heather Lemieux, Town Manager; Adam Costa, Town Counsel

The meeting commenced at 9:52 p.m.

Attorney Costa reported this is the second round of litigation that pertains to the subdivision applications that were made by O'Brien Homes to the Planning Board. The first application was made for a single subdivision of over 100 homes and the Planning Board denied it. O'Brien Homes appealed to the Land Court. Judge Long heard the case and went to trial and decided post-trial in favor of the Town. During those proceedings there was discussion back and forth between the Judge and Attorney Bard (who represented the Town at the time) and the Judge asked Attorney Bard if O'Brien Homes could just create multiple subdivisions instead of the one. Bard's answer wasn't expressly yes. He noted the idea behind Article V, Section 5.6 (Cluster Development) was the Town was advocating for smaller self-contained subdivisions operating as smaller communities as opposed to this much larger development of 100 plus homes on the same swath of land. The case proceeded and Judge Long ruled in favor of the Town.

O'Brien Homes then proceeded to divide the one large subdivision into ten smaller subdivisions and came again before the Planning Board with fewer homes than proposed previously, but still having a substantial number. Only a couple of these subdivisions could function separately with actual frontage and access from the main road. The others were built onto the other subdivisions and O'Brien said this is what Attorney Bard said we could do and now we are doing it. The Planning Board said no, this is still not the purpose and intent of Section 5.6 and denied O'Brien Homes again. O'Brien Homes appealed and it went back to Land Court. The case was again assigned to Judge Long as is often the case when you get repeat related cases in the Land Court. Judge Long went through the discovery process and there were some issues with documentation and information that was requested from the Town. Not all that information was produced, searches that were undertaken were not extensive enough. Outside experts and consultants got involved, internet servers and private computers were analyzed and additional documentation was produced. That was a source of great frustration for O'Brien Homes and their legal counsel. It caused some frustration in Land Court with Judge Long.

One Planning Board member who is not named in the lawsuit because he was not present at the vote, circulated an email to at least one member of the Board of Selectmen and the Planning Board stating we should really just sock it to O'Brien. That was the baseline that became a part of the litigation. Judge Long decided in 2016 that he would bifurcate the case. This is a case that involves multiple counts and some can proceed more quickly than others.

Judge Long stated we've gone through this lengthy discovery period which is the Town's fault due to failure to produce the requested information. He decided to go to trial as to whether the Town acted properly and if we need to get to the bad faith claim. It will be up to O'Brien Homes on whether they want to pursue the bad faith claims, if needed.

When we last met in early June, we had just received the decision from the court which took two years, that ruled in favor of O'Brien Homes; stating the Board was wrong to deny these ten subdivision approvals. The question that was put to O'Brien Homes in that decision was "What do you want to do with the bad faith claims?" As we had suspected O'Brien Homes said they were going to pursue the bad faith claim. We had a status conference with Judge Long on July 24<sup>th</sup>; he established a schedule for additional discovery to occur. After some back and forth between the parties, we were required to identify our potential witnesses several weeks back. Don Borenstein, the attorney representing O'Brien Homes, is requiring we identify those witnesses by tomorrow. He had a deadline of a couple of weeks ago to submit a memo to the court that summarized his

basis for these bad faith claims. He submitted a three-page document and is claiming three types of damages; legal fees and expenses, expert witness fees and expenses and holding and delay costs. Attorney Costa stated what that tells him is that the monetary damages are going to be substantial. He stated we made MIIA aware of the claim a couple of months ago and they concluded due to a number of exceptions in their policy, they don't believe there is coverage. That means your legal expenses are not covered and if you get hit with monetary damages, those won't be covered.

Separate and final judgment was issued 26 days ago and you have a 30 day appeal period. You have a decision to make whether or not you want to appeal the portion of the case that has been finally decided for which final judgment has been issued which reversed the Planning Board's denial of the ten subdivisions.

Attorney Costa was reluctant to advise not to exercise the Town's appellate rights because although he did not think by any means you have a slam dunk case, he had some general concerns with the Town's litigating position. If you appeal to the Appeals Court and you win, not only do you overturn the Land Court and not have a 100+ unit subdivision, you also move the bad faith claim, because how can there be bad faith if the decision was properly rendered to deny the subdivision?

The strongest argument the Town has is that O'Brien Homes had ten subdivisions and just sliced up what existed before and only two of these subdivisions have the adequate frontage and can sort of exist independently. The others were built off those subdivisions and would not have frontage or access other than through the other subdivisions and would require those other subdivisions to be built. If you believe Judge Long's interpretation of Section 5.6 and the context of these ten subdivisions, you are essentially nullifying Section 5.6. If anyone can come in and slice up subdivisions, then what does Section 5.6 stand for?

The sequence in terms of pursuing an appeal is we have 30 days from the date of final judgment, which is this Friday, to file a very simple notice of appeal. That gets filed with the Trial Court of the Land Court. The Land Court then assembles the record which it sends up to the Appeals Court. They send Attorney Costa notification that the record has been assembled and transmitted and that puts him on a ten-day clock to officially docket the appeal. Then he has 40 days to draft and file his brief. Usually assembling the record takes months, but Judge Long is retiring early next year and he wants to wrap all open cases up before he leaves. Discussion ensued on the bad faith claims as well as what would happen if the appeal was won or lost.

**Motion: R. Ebersole**

**2<sup>nd</sup>: K. Adams**

**To appeal the final judgment**

**Vote: Ms. Adams- aye, Ms. Luck- aye, Mr. McQuaid- aye, Mr. Ebersole- aye, Mr. Toale- yes**

Mr. Costa will contact MIIA again in regards to their denial of coverage. There are clear monetary implications in regards to the bad faith claim and that is what they protect against. He has not had a conversation with Attorney Joel Bard about why notice was never given to MIIA back in 2016. The second claim on the ten subdivision denials was structured differently and did not include separate bad faith claims. He will send MIIA the three-page memo from Attorney Borenstein that better summarizes their claim.

Mr. Costa stated he had broached the subject of coming to a settlement with O'Brien Homes with Attorney Borenstein a week and a half ago, but has not heard back from him.

**Motion: R. Ebersole**

**2<sup>nd</sup>: D. McQuaid**

**To adjourn from Executive Session**

**Vote: Ms. Adams- aye, Ms. Luck- aye, Mr. McQuaid- aye, Mr. Ebersole- aye, Mr. Toale- yes**

The meeting adjourned at 10:28 p.m.

Respectfully submitted,



Elaine M. Peterson

Executive Assistant to the Town Manager