

BERLIN ZONING BOARD OF APPEALS

EXECUTIVE SESSION MEETING ADMINISTRATIVE MINUTES

MEETING DATE/LOCATION: Wednesday, July 18, 2018, Room 227, Town Hall Building, 23 Linden Street, Berlin, MA 01503

TOWN OFFICIALS (& OTHERS) PRESENT:

MEMBERS PRESENT:

R/A				
R	Lynn Ryan, Chair	P		
R	Dennis Bartlett	P		
R	Pat Jackson	P		
R	Jim Royer	P		
R	Ginny Zukatynski	P		
A	Sue Roberts	P		

Regular/Alternate

Sitting/Present/Absent

Chris Keefe, Selectmen; Peg Stone, Selectmen; Lisa Wysocki, Selectmen; Susan Reguera, Board of Health, Paul Mikelk, Board of Health; Robert Wheeler, Board of Health; Joseph Atchue, Building Inspector; David Lichwell, Fire Marshall; Amy Kwesell, Town Counsel

BOS & BOH confirmed that they have properly noticed a meeting.

Chairman Ryan opened the meeting at 7:00pm with a full Board in attendance. Chairman Ryan offered to entertain a motion to go into executive session to discuss strategy with respect to litigation regarding The Capes of Berlin LLC v. Town of Berlin Zoning Board of Appeals HAC Docket No: 2017-15, declaring that discussing the matter in open session may have a detrimental effect on the litigating position of the Board.

Motion was made by Board Member Bartlett that the Board go into executive session with the Board of Health and the Board of Selectmen to discuss strategy with respect to litigation regarding The Capes of Berlin LLC v. Town of Berlin Zoning Board of Appeals HAC Docket No: 2017-15, because the Chair declared that discussing the matter in open session may have a detrimental effect on the litigating position of the Board, with the Board returning to open session. The motion was seconded by Board Member Royer, and the motion passed 5-0 with a roll call vote.

Executive session began at 7:03pm with guests Attorney Kwesell, Town Counsel; Christine Keefe, Selectmen; Lisa Wysocki, Selectmen; Peg Stone, Selectmen; Paul Mikelk, Board of Health; Sue Reguera, Board of Health, Bob Wheeler; Board of Health; Dave Lichwell, Fire Marshall; and Joe Atchue, Building Inspector. Discussion ensued regarding strategy regarding litigation for The Capes of Berlin. Alternate Board Member Roberts arrived at 7:08pm.

Attorney Kwesell informed all present that nothing discussed in executive session can be relayed outside of executive session and upon completion of litigation; minutes of executive session may be released if approved by a vote.

Attorney Kwesell updated those present that the Board of Appeals had approved the Comprehensive Permit with conditions and denial of some waivers requested. The Petitioner then appealed the Board's decision with the Housing Appeals Committee and after a Conference of Counsel, mediation was ordered. Mediation took place with the Petitioner, his attorney and engineer and two members of the Board of Appeals, Board of Health Chair, Board of Selectmen Chair, Fire Chief, and Building Inspector. As a result of mediation, the Petitioner was asked to supply additional information regarding earth removal and specific waivers being requested from the Board of Health. Fire suppression issues were resolved in meditation with all in agreement each home would contain a 13D sprinkler system (minimum required by law). A cistern would not be required, as there would be tanks in each home to supply the water for the sprinklers. David Lichwell, Fire Marshall, confirmed that a bond is no longer required for the cistern as it will be non-existent.

Joseph Atchue, Building Inspector, stated the Petitioner will be required to submit sprinkler plans for each dwelling unit designed by a fire protection engineer, and all building permit applications will require this as part of the package submittal. A permit will not be issued until all plans have been reviewed and approved.

The Petitioner is estimating a net export of 10,660 cubic yards with the exported materials to be utilized at the Green Acres site located off Dudley Road and with the trucking route to remain the same as previously identified on the Comprehensive Permit plans. Attorney Kwesell recommends the Board seek a recommendation from the Board of Selectmen regarding earth removal, as the Board of Selectmen is the governing board.

The Petitioner has completed additional soil testing at the site, as required by mediation, to confirm estimated seasonal high groundwater levels to determine if restrictive soil horizon exists at a depth greater than prior excavations. The Petitioner has submitted specific waivers of Board of Health regulations, as required by mediation, and are listed in a letter to the Board of Health dated June 19, 2018. A representative of the Board of Health stated this site would typically house only three conventional single family homes, and the Board does not grant waivers for new construction.

Attorney Kwesell explained if the Board of Appeals were to again deny waivers being requested, the case would go back to the Housing Appeals Committee in which case the HAC would most likely overturn the Board's decision and grant the Comprehensive Permit. The Town would then have the option of appealing and proceed to trial in which pre-filed testimony from three experts would be required at a cost of upwards of \$75,000 plus legal fees. Chairman Ryan asked if the Board of Selectmen would support spending the necessary money to go to trial. The Board indicated they were inclined to support, however, discussion with other town committees/employees would need to take place to determine if this would be viable. Attorney Kwesell stated only one case in the past 5-10 years has succeeded in blocking an affordable housing development on environmental grounds by the Supreme Judicial Court in the town of Stow. Attorney Kwesell confirmed the suit was brought forward by abutters.

Chairman Ryan asked if there were anything the Board could do to improve the Board's position. Attorney Kwesell indicated the Board could request a peer review of the new septic plans that were submitted.

The question as to whether the fact the Town is now at the required 10% SHI is a factor to which Attorney Kwesell replied it is not, as the Town was not at the 10% when the permit application was filed.

It is Attorney Kwesell's opinion the best case scenario would be for the Town to purchase the land or for the abutters to file a suit.

Motion was made by Board Member Bartlett to close executive session with no action taken. The motion was seconded by Board Member Royer, and the motion passed 5-0 by roll call vote with executive session ending at 7:55pm.

Respectfully submitted by: _____

Liane Leahy, Clerk for Berlin Zoning Board of Appeals