TOWN OF LUDLOW PLANNING BOARD
EXECUTIVE SESSION MINUTES OF
October 13, 2022
Pending Litigation
JLL Real Estate, LLC v. Planning Board of the Town of Ludlow, et al.

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PLANNING BOARD MEMBERS
Joseph Queiroga – Chairman (Present)
Raymond Phoenix – Vice Chairman (Present)
Christopher Coelho (Present)
Kathleen Houle (Absent)
Joshua Carpenter (Present)
Joel daSilva, Associate Member (Present)

Mr. Carpenter: I make a **MOTION** to go into executive session at 7:44 p.m. and to return to open session when we are finished.
SECOND Mr. Phoenix.
Mr. Queiroga: All those in favor?
Mr. Phoenix: Oh, we missed one piece of that motion. We didn't say why, I don't think. Did you say pending litigation?
Mr. Carpenter: No, I can rescind my motion if you want. I will rescind my motion and I will make a new **MOTION** to go into executive session for the discussion of pending litigation and to return to open session when we are done at 7:45 p.m.
SECOND Mr. Coelho.
4-0 in Favor.
Roll call vote: Mr. Phoenix – yes; Mr. Coelho – yes; Mr. Carpenter – yes; Mr. Queiroga – yes.

Executive session began at 7:44 p.m. in the Selectmen's Conference Room.

Attorney Jesse Belcher-Timme was present for the Executive Session.

Atty. Belcher-Timme: --- Belcher-Timme. I am handling this lawsuit that was filed by JLL Realty. You've all been sued. Congratulations. Fortunately, it's pretty low stakes. I think Doug said you guys haven't had too much of this lately, so I can do a little bit of background of sort of what goes on now, and then we can talk about the specifics. Basically, they were denied a special permit, they now get to appeal that. They have filed suit in superior court. The process for that is kind of strange. The judge, if this ever goes to trial, the applicant will make a full presentation like they did here. They can add stuff, they can take stuff out. We can offer evidence if we particularly care to, but then the judge will have to --- universal facts to determine whether or not, essentially, a reasonable board could have voted to deny. --- all new facts --- to the board. It's a very unique structure for litigation --- review and it makes it quite cumbersome, but generally moves smoother than that in practice. So, it's not the kind of thing where there's

likely to be discovery. You know, these cases don't usually have depositions ---. You wouldn't testify at trial. That part, at least, is relatively painless for all of you. The situation here, I received a call and Doug got an email from the applicant's counsel. They are very interested in trying to work to find out if there's a middle ground here. They think, long story short, it sounded like maybe their regular lawyer wasn't here for the hearing and didn't really think that you had given them a whole shot is one of the things they might be willing to compromise on. So, they're interested in seeing if the board is interested in discussing this further which is sort of a unique procedural thing. They can't just come back here. We would have to agree for a judgement where the judge would remand it formally to a board for some sort of reconsideration. You wouldn't be obligated to obviously allow a special permit. You could deny it again. And if that happened, it would just be, it would go right back out to where it is now. So, the real, there's a couple ways we can do this. One, you know, their lawyer basically said if it's a situation where no one's ever gonna allow these storage units where they are, that's fine, we'll just litigate, but if we can, you know, we're willing to compromise on size and location and buffering and fencing and all of that. And we propose either that if there's interest they'd come back, you know, they'd have to re-notice it with a new public hearing, the whole nine yards, and come back or we could do an intermediate step where you could designate your chair or one member and we could have an informal meeting with opposing counsel and the applicant and sort of see if whatever they're proposing is something that the one individual representative thinks might satisfy the rest of you with, of course, the understanding that with that ever present open meeting law it's not like we can all chat and say --- I would vote yes, so. The one representative is sort of in the dark about what they're talking about, but having been to the hearings, I think you kind of all know what the issues were. I haven't watched the hearing recordings or anything like that.

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Mr. Phoenix: It's a fun time and I've done it more than once.

Mr. Coelho: I don't think, I think the applicant could have given us the Taj Mahal there and the NIMBYs still wouldn't allow people to vote for it.

Mr. Phoenix: Well, NIMBYs are NIMBYs and they're gonna exist no matter where you go. The bottom line for me wasn't so much opposition from the neighborhood, the bottom line was we ran through what our requirements are, and it fell short on a number of counts. And I had said a couple sessions before the end of it that if they could adequately deal with the criteria of the bylaw, I called out a few of those specifically, that I'd be able to in good conscience vote in favor of it. And then they went through the rest of the hearing process without addressing any of those issues. And quite frankly the letter that we got after the hearing was closed, I read that afterwards, and I don't know that there was much in that letter that really addressed the concerns. I think there may have been room for more discussion or maybe finding middle ground or something along the way, but ultimately from my perspective, the rules are there, the bylaw's written. That's what they're supposed to be following. That's what was in the bylaw book when he bought the piece of property and wanted to put the business there. That's the rules he agreed to play by. So, if they can give us a proposal that meets those, I would be more than happy to sign off on it.

Mr. Queiroga: Are you aware of where this site is?

Atty. Belcher-Timme: Not specifically, but I know it's relatively in a neighborhood area, but yeah.

Mr. Queiroga: As you go up off our main drag here, as you cross Chapin Street, ok, there is a street that goes off to the, with two offices there, and then after that on the way down. It basically is a residential neighborhood until you get down to opposite Randall's. There is a couple of offices. I know one of the biggest things in my mind was, I mean, they wanted to put 180 units of the storage which was using every square inch of that property.

Atty. Belcher-Timme: Right.

Mr. Queiroga: And it's fairly heavy duty. It's in a basically 80% residential area, and a lot of the fencing was to be done by buildings. You're using the buildings as your, basically as your fence to fence in the thing. And 180, the land comes up, as I said, they're gonna knock down every tree ---. So, I ---.

Atty. Belcher-Timme: Yeah, this lines up with what their lawyer told me which was basically, I think he felt like he did not take the chance, or maybe his colleague, I don't want to throw anyone specific under the bus on his behalf, but they did not maybe exercise as much effort as they should have in trying to satisfy the bylaws and trying to satisfy the Planning Board, so I think that's sort of where they are now. And again, I can go back to him and say no, it's not gonna happen or I can say they're willing to have you come back and you can make another pitch and we can remand it or we can do something in the middle where one person can meet with me and the applicant and the lawyer and see if it's ---. The things that were thrown out to me --- preservation of the trees, reducing number of units, but I don't know if their plan is willing to go from 180 to 175 or if they're willing to go another 90. You know, I have no idea of what they're specifically offering. You know, from your perspective, the only harm of any of this is a delay, but there's no real damage to you. He's got no permit, so the longer, it just takes a longer time to do more public hearings then it's just more time that he's got.

Mr. Queiroga: In my other life I had paved an area that this applicant in West Springfield that he had done at some similar project in my previous employment company. I'm surprised they paid $725,000 for that property and they didn't put that as a caveat.

Mr. Coelho: Mr. Chairman, with all due respect, I don't think we're here to argue the value of the land or anything like that. I think his billable hours might be a little too much to go down this road. None of that's our business.

Mr. Phoenix: I think ultimately really what it comes down to for me…

Mr. Queiroga: He didn't do his homework.

Mr. Coelho: That doesn't matter.

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Mr. Phoenix: A lot of people don't. If everybody did their homework, we wouldn't hear half the things that come in here. It's just the reality of it.

Mr. Coelho: If we go to trial what's gonna happen? What do you think in your best professional opinion?

Atty. Belcher-Timme: I mean, it's, I haven't done a --- on this. I think the decisions, you know, it's a little bit vague on sort of what was and wasn't missing from it the way it's worded. I know that a lot of that is in the notes and the minutes where this is what we felt this was short. You know, honestly, probably the most likely outcome is it gets remanded to you guys to make another decision which is just gonna waste all of your time, but I certainly, it's not a slam dunk on either side. This is not one where I can predict where it goes, but the trial part for you guys, the only skin off your nose as the town is, hey at least it's trial, right? I mean, it's not a scenario where somebody's doing, for him it's a longer delay, it's less time without building, whatever, which is why I think he wants to try to work this out now instead of wasting a year and a half litigating this and trying to get it remanded for a new hearing then or what have you, so.

Mr. Coelho: Is there an instance where the judge would say, listen the planning board sucks, go ahead build your thing.

Atty. Belcher-Timme: Almost never will they give the special permit, but they will sometimes, I've got one going right now where I'm just waiting for the judgement that's gonna come down and say, you couldn't deny it for the reasons you denied it, I'm sending it back to you and basically rubber stamp it. I've taken away every possible argument that you have, but they still need the formality of granting a special permit. And that definitely happens, and that's definitely possible here. I wouldn't say that's an impossibility at all.

Mr. Stefancik: If it's remanded back to the board, is it the same project all together, or is it a project that can be revised and reduced?

Atty. Belcher-Timme: It typically comes back as it originally was, but just like when they first applied, they can modify it when they're before you, so they can do something else. They could get to that point and decide, oh you know what, if it'll get all the yes votes we'll make 140 units or we'll, you know, do some other fencing or screening or something. So, I think the thing is we can do an intermediate step or we can simply, if the people here are not opposed to any storage units on that site, that we could, I can tell Attorney Reidy that the board is open to having them take another shot at this as long as he can comply with the bylaws and meet all the requirements and we'll hear it again. Again, there's no, you guys can hear him again and say no, we deny it again. That's based on the bylaws, there's a reason for it. We'll be right back in line at the court where we are now.

Mr. Coelho: The only --- denial, I'm all for that. I don't like the selecting one person off the board to be an intermediary.

Atty. Belcher-Timme: Yeah, that's fine.

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Mr. Coelho: I don't like that idea personally. It doesn't matter what I like, it's what the board likes, but I don't think that's the right way to go in my mind. It's either trial or give them another shot at it. Politically giving them another shot at it could be trouble for people, I don't know, you know, but, that doesn't matter.

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Mr. Phoenix: I don't understand that comment.

Mr. Coelho: We give them another shot at it and it passes, we're gonna be hypocrites.

Mr. Phoenix: But are we?

Mr. Coelho: As far as the people that came in this room and are so much against it that they're willing to say that you're gonna ruin the bee population because of this development? Yes, absolutely we will be.

Atty. Belcher-Timme: Well, I think, first of all, reconsidering doesn't mean it'll get approved the second time. And I think also, what they're contemplating is modifying their proposals, so I don't think they will come back with the same proposal. And I think if they do, I would expect the vote will probably land the same way. I mean, to the extent that is there is something that satisfies the other members of the board, I would assume it would be different than what they were last here with, but it will certainly be, it's reopening the public hearings, and you'll have all the same people here, I'm sure. It'll be another fun night.

Mr. Phoenix: So now, obviously there's emotional differences --- like that, but procedurally in the real world, what we'd be doing, we'd have to listen to the whole pitch from scratch or does it kind of just reopen the public hearing from when we left off and we just pick up the pieces there?

Atty. Belcher-Timme: So, it would be the latter. What I'm contemplating it sort of depends on what we agree to do, but I mean, I would certainly suggest is what we want is a remand order to reconsider and reopen the public hearing so that we can. Again, this would be between the two parties and then the judge has to approve it so I can't say for sure that that's how they will agree to do it, but that's certainly what I would propose, and I think the court would agree to. So, you don't have, I mean you can hear from everybody again, I expect people will come and want to speak again. And to the extent that it's a different application this time, where if they were modifying it, it's probably worth it to hear from them for reconsideration ---.

Mr. Coelho: ---

Mr. Queiroga: Is that a land court judge?

Atty. Belcher-Timme: This was filed in superior court. They could have done either.

Mr. Queiroga: ---

Mr. Coelho: You need the billable hours this year?

Mr. Queiroga: Who's the attorney on the other side?

Atty. Belcher-Timme: So, Ryan O'Hara, Bacon & Wilson is doing the litigation, but Tom Reidy is the one running the project. And he's a straight shooter. He does a lot of this stuff. I think he was here early on in the process, but maybe not at the last hearing, and he was the one who called and said it kind of got away from us before we had a chance to --- show all of our cards.

Mr. Phoenix: So, we're definitely ---.

Atty. Belcher-Timme: Yeah.

Mr. Phoenix: ---

Atty. Belcher-Timme: Yeah.

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Mr. Phoenix: Speaking for myself, if they want to come in and pitch modifications and explain to us how it satisfies the bylaw, I'd be willing to listen to it. But, I think that matches what I told them during the public hearing and matches what I said after the public hearing.

Mr. Coelho: Ray, you might be anal, but you are consistent.

Mr. Phoenix: Better be nice.

Mr. Coelho: Go ahead, it's executive session. I don't care.

Mr. Phoenix: ---

Mr. Coelho: --- I'm not the only one that realizes you're anal. It's not a secret. But, consistency is where your strength is.

Atty. Belcher-Timme: So, this is one of the weird ones where we don't even really need a vote, I really just need, there's no point in agreeing to remand and bring it back here if we aren't gonna give a new application a look. So, I mean, if people are comfortable with that, I can report that to the other side, and we can get a remand order ---.

Mr. Coelho: I think I'd like a vote.

Atty. Belcher-Timme: That's fine.

Mr. Carpenter: Josh?

Mr. Phoenix: I'll make a **MOTION** to ask town counsel to look into doing a remand coming back for additional consideration.
SECOND Mr. Coelho

Mr. Queiroga: All those in favor?

Mr. Carpenter: Discussion. I'd like some discussion. So, if we do this, we're opening up a whole new hearing, everything, and we can still deny?

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Atty. Belcher-Timme: Yes.

Mr. Carpenter: And then it just goes back in a giant circle?

Atty. Belcher-Timme: Yeah, basically when there's a remand order like this, and usually a judge will do it on their own after a trial, they'll say go back to the planning board to consider these three things. When you agree to it or when the judge does it, they retain jurisdiction, so you don't even really need to file a new complaint. The applicant would simply notify the court, this didn't work, we're back in the que and we'll start the clock running there on that. So, by no means is this a promise that anything different is gonna happen whether they change their application or not, that any votes will be different or that any result will be different, it's just that are we willing to, you know. You had a final vote, you closed the hearing, you finished this. They had a chance to meet the bylaws and they didn't for whatever reason, so you certainly are within your rights to say we're closing the door, but it leaves you with just litigation and the possibility that it's back here anyway. So, all you're saying is we're willing to use the judicial system to basically create a reconsideration here. If they think they have something better to tell us, then they can come back. Certainly, proponents and supporters can come and speak their truth, and all of you are free to vote however. You know, it could get us a smaller project and a yes vote could go no. It doesn't matter. None of you are bound by anything you do.

Mr. Carpenter: Long story short, we're gonna save the town a ton of money by doing this.

(multiple people talking)

Atty. Belcher-Timme: Yeah, on that I wouldn't, I wouldn't use that as a factor in this. If you think that there's a version of this project that you think you would be comfortable with and would satisfying the bylaws, I think it's worth it to tack on a bonus hearing, so we can see if it's there. And if you don't think that there's anything they can do, then we might as well go to court now.

Mr. Phoenix: To speak as plainly as I can, I don't know that I would want to be the applicant trying to put together an approvable plan for this, but I believe that I don't have all the answers on how to do that. They might have those answers and they might be able to come up with something that's approvable.

Atty. Belcher-Timme: I know that they were talking about hiring new contractors and getting some new consultants and stuff to try to do a better job and all that, so it may come back as a totally different looking project or it may just be, you know, let's take our ---, I don't know.

Mr. da Silva: ---

Atty. Belcher-Timme: You would hope so.

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Mr. da Silva: ---

Atty. Belcher-Timme: Right, and they know that, and they know what they think they need to do. What they want to make sure is the five of you gonna give it a fair shake or are we just gonna say we already voted no on this, don't waste our time. Then we can save ourselves another night or two of public hearings that we don't have to go through.

Mr. Phoenix: I don't think any of us wants to listen to more ---.

Mr. Coelho: No, no, this has caused me, I almost resigned over this. That makes you happy, doesn't it? I said almost. I mean we have a motion, and we have a second, and we have a discussion.

Mr. Carpenter: And personally, my opinion would be like Chris said, you know, either one of the other, I don't like the arbitrary stuff about being in the middle just because not everybody's gonna agree on the same things.

Atty. Belcher-Timme: It puts a lot of pressure on the one person, they personally have to deal with sitting in the room with me and another lawyer and the applicant, but also, I chair a five member board. I don't, I mean, even when I know how people are gonna vote, I don't really know how they're gonna vote and I certainly don't know why. I don't know what's bothering them before they actually vote, so I understand that completely.

Mr. Coelho: So, Mr. Chairman, we have a motion and a second.

Mr. Carpenter: The motion's to just have them come back for a public hearing, correct?

Mr. Coelho: Yes, extend public hearing via judgement, arbitration. I know you're a baseball guy, arbitration.

Mr. Carpenter: I'm not an arbitration guy though.

Mr. Coelho: So again, there's a motion. You don't have to vote. Nobody's telling you, you have to vote yes.

Mr. Carpenter: I'm gonna abstain.

Mr. Queiroga: You're gonna abstain. Ray?

Mr. Phoenix: I'm gonna vote yes.

Mr. Queiroga: For?

Mr. Phoenix: For the motion that I made.

Mr. Coelho: I don't think Joel gets a vote on this ---?

Mr. Phoenix: He might. Why don't we ask the lawyer because he's…

(multiple people talking)

Atty. Belcher-Timme: I think because it relates to the special permit, again this isn't really a binding vote, this is basically giving me.

Mr. Coelho: Yeah, I want to make sure we do this ---.

(multiple people talking)

Mr. Coelho: --- allowed to vote on it, then fine.

Atty. Belcher-Timme: He is named in the lawsuit.

Mr. Coelho: He is named in the lawsuit, ok.

Mr. da Silva: I vote yes.

Mr. Queiroga: Ok so, just.

Mr. Carpenter: I abstained.

Mr. Queiroga: You abstained.

Mr. Coelho: I don't get a vote?

Mr. Carpenter: You already voted yes.

Mr. Coelho: Aye.

4-0-1 in Favor. (Mr. Carpenter)
Roll call vote: Mr. Carpenter – abstain; Mr. Phoenix – yes; Mr. Coelho – yes; Mr. da Silva – yes; Mr. Queiroga – yes

Atty. Belcher-Timme: So, the process here as I reach out to opposing counsel, figure out the details, then we have to get approval from the court, then we'll get a remand order, and then we'll be back here to try to figure out how to schedule.

Mr. Coelho: And it'll just be a continuation of the public hearing that we closed?

Atty. Belcher-Timme: That's what I'm gonna say.

Mr. Phoenix: So, that's gonna obviously involve legal notice and all that.

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Atty. Belcher-Timme: Yup, abutters notice, all of that. They're gonna deal with everything like it's a new public hearing.

Mr. Phoenix: So, the legal notice part, that's plus or minus three weeks depending on the newspaper. --- legal part in front of that ---

(recording ended)

Executive session ended at 8:10 p.m.

APPROVED:

Joseph Queiroga, Secretary

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