

**BOARD OF HEALTH MEETING MINUTES  
EXECUTIVE SESSION  
MARCH 1, 2010**

Marie O'Rourke, Chair, called the Executive Session to order at 7:00 p.m. Also in attendance were Robert Reader, Vice Chairman, Sandra Giroux, Secretary, Fred Kenyon, Richard Berube, Director, Joanne White, Recording Clerk and Jena Caruso Muñoz, Town Counsel.

Mrs. O'Rourke stated that she would like to have a roll call vote of the Board of Health Members to enter into an Executive Session.

Mr. Reader made a motion to enter into an Executive Session to discuss with Town Counsel the pending litigation and/or further enforcement action against McFarland Cascade.

A Roll Call Vote was taken.

Mr. Reader, yes, Mrs. Giroux, yes, Mr. Kenyon, yes, Mrs. O'Rourke, yes.

Mr. Kane was absent at this time.

Mrs. O'Rourke asked Mr. Berube if he would like to begin.

Mr. Berube explained that he contacted the Department of Environmental Protection (DEP) and requested that they review the results of the on-site sampling that was collected on December 1, 2009. In the Board's package is the response from Steve Spencer, DEP. The response from Steve Spencer states what DEP's position is at this time. DEP does not think there is sufficient evidence to support any action against McFarland Cascade and they would prefer to wait and see what the results are of the testing that is going to be done in the spring. DEP will then review the results of the May air sampling and decide if they will be taking any action along with the Board of Health. The residents are concerned about the results of the air sampling. I also included an e-mail from Lynne Santos and Mark Sampson. They have some valid arguments however they do not know the interpretation of the laws. They can pursue this issue themselves as a citizens group if they feel as though the Board is not taking strong enough action. The Board issued an order back in November, 2009 to do air sampling and I think we should follow through with that order. McFarland Cascade has been cooperating with us. They have done everything that we have requested. At the last meeting the Board requested that McFarland Cascade provide a relocation plan and they are working on that. The relocation plan is actually asking them to shutdown their operation and move. The response from Chris Davis indicates that they are working on the relocation plan. They have asked for additional time. Mrs. Giroux gave McFarland Cascade thirty (30) days or at the next meeting to present their relocation plan. I think it is fair to grant them a postponement so that they have enough time to come up with a feasible plan. When the air sampling is done in the spring it will provide the Board with all the answers so that they can make a final decision. The Board can then decide where they want to go with this case. If the judgment

is rushed we may end up in litigation, which could drag on for two (2) to three (3) years and the outcome may not be what the Board desires. I think as long as McFarland Cascade is continuing to work with the Board we should proceed along that path. I think we should continue to work with McFarland Cascade and see this through.

Mrs. O'Rourke stated the fact that they are looking to relocate leads me to believe that there must be some validity to pentachlorophenol being in the air. If McFarland Cascade truly believes they are right and the odor isn't coming from the poles, they would say do what you have to do. We are not moving.

Mr. Reader commented that moving would be helpful.

Mrs. O'Rourke explained if there is no evidence of pentachlorophenol in the air when the air sampling is done in Brunswick Estates and McFarland Cascade has relocated, the Board will look silly.

Mr. Kenyon stated there is no way to prove that even if the pentachlorophenol smell goes away, that the odor will be gone. Do we know what level of pollution they are breathing in with pentachlorophenol in the air?

Mrs. O'Rourke stated that after one of the meetings Ms. Muñoz told me that DEP is ready to take this project over. What happened?

Ms. Muñoz explained that DEP would need proof that there is an issue before they would take this project over. They would step in if you had test results that indicate there is a problem in the area.

Mrs. O'Rourke commented there is a problem in the area.

Mr. Reader asked if the Board forces McFarland Cascade out of town and it is found that they are not the source of the problem could they sue the Town of Billerica because the problem still exists.

Ms. Caruso replied if they are cooperating and working with you and they voluntarily move out of town on their own that is different.

Mr. Reader asked what if the Board orders them to move out of Town.

Ms. Muñoz replied if they were going to challenge the order then they would appeal it and take it to the next level. Their obligation is to mitigate their own damages. If they were to move out of town and then say that the Board made them move out and now we are going to bring the Town to court. A judge would say you could have stayed and appealed the order. However, they can sue the Town for anything they want.

Mrs. O'Rourke asked if Mrs. Giroux made the right motion asking them for a relocation plan.

Ms. Muñoz replied yes, they can look into it to see if it is a plausible thing for them to do. McFarland Cascade will explain at the next hearing if it is something they intend to do. Based on the order that you issued at this point litigation would be premature because your order does contemplate additional testing in May. The Board needs to follow through with the original order. If there is cause for alarm or you believe that there is a nuisance or something that requires further action it should be taken at that point. From a legal standpoint, I think it would be slightly premature. I think a judge would look at the Board's order and ask why the Board let them continue the testing in May.

Mrs. O'Rourke stated they have cooperated and done everything that we have asked of them.

Ms. Muñoz replied that is highly unusual. Maybe they believe that there could be something wrong. If they are working with you and following the order that was issued I would see that order through completely before you think about litigation.

Mr. Reader stated that unfortunately the neighbors think we are not doing anything and they don't think McFarland Cascade is doing anything.

Ms. Muñoz replied the neighbors who are affected by this have the right to appeal this order if they didn't believe the order was forceful enough. The time has gone by. The order is in place and no one has appealed the order. My legal advice to the Board is to follow the order through. If something was found in the December, 2009 testing that was completely outrageous and needed to be addressed immediately that would change things. My legal advice is to follow through with this order and take the next step at that point.

Mrs. O'Rourke asked is McFarland Cascade going to be doing anything before May.

Mr. Berube replied no, I think we should ask them to submit a detailed plan on how the air sampling is going to be done so that the Board can make sure the plan meets the intent of the Board's order.

Mrs. O'Rourke asked why we would put them on the agenda if there isn't anything for them to report on.

Mr. Berube asked the Board Members if they wanted McFarland Cascade to come before the Board to talk about their relocation plan.

Mr. Reader asked the Board Members if they were 100% convinced that McFarland Cascade is the problem.

The Board Members replied that they were not 100% convinced.

Mrs. O'Rourke stated that the neighbors think we are not doing enough.

Mr. Reader commented that the neighbors think no matter what we do we are not doing enough. The only thing the neighbors want is for the Board to order McFarland Cascade to move their operation out of Billerica.

Mrs. O'Rourke asked when do you think McFarland Cascade should be rescheduled for. They are requesting a two (2) week but they would prefer a four (4) week postponement.

Mr. Reader asked does it make sense to have them back before June.

Mrs. Giroux stated I don't think the Board should wait until May or June to have them come back. The neighbors want their neighborhood to be odor free.

Mr. Kane arrived at the meeting at 7:20 p.m.

Mr. Berube replied the Board can not guarantee an odor free neighborhood. That is the reason why we need to complete the air sampling. What if there is another source that we have not discovered?

Mr. Kenyon asked how many people live in that neighborhood and how many people actually come to the meetings.

Mrs. O'Rourke replied that there are a lot of people that live in the Brunswick Estates neighborhood. Mrs. O'Rourke asked Town Counsel if McFarland Cascade should be present at the April Board of Health meeting.

Ms. Muñoz asked is there anything the Board would like to know prior to the May air sampling.

Mrs. Giroux replied yes, we need to know where they are going to sample, what they are going to sample and what their relocation probabilities are. Maybe they will decide to move before the air sampling is done in May.

Mr. Berube suggested that the Board ask McFarland Cascade to come to the next Board of Health meeting with their relocation plan. Then the Board can keep the relocation plan in the back of their minds. The Board can also request that they submit a detailed air sampling plan to make sure they meet the intent of the Board's order. After the air sampling is completed they will probably not come before the Board until June or July.

Mrs. Giroux stated she thought they were going to come back before April because they would have to submit the plan for the testing that will be done in May. If they do not come before the Board in April the testing will probably not be done until June or July.

Mrs. O'Rourke stated that McFarland Cascade should come before the Board at the April meeting.

Mr. Reader stated that he thought all the permits from the residents were already taken care of.

Mr. Berube explained that when we come out of Executive Session a motion could be made directing him to send McFarland Cascade a letter stating that they provide the Board with an air sampling plan so that the Board would have time to review the plan before air sampling is done in May and also provide a relocation plan.

Ms. Muñoz stated you could ask them to submit the air sampling plan some specified time prior to the meeting so that the Board would have time to review it before the next meeting. There should not be a problem with that. You will have all the information ahead of time. As for the relocation plan there is nothing that requires them to submit a relocation plan unless the Board issues an order.

Mr. Reader made a motion to adjourn the Executive Session.

Mrs. Giroux, yes, Mr. Kenyon, yes, Mr. Kane, yes, Mrs. O'Rourke yes.

The Executive Session ended at 7:25 p.m.