

**BOARD OF HEALTH MEETING MINUTES
EXECUTIVE SESSION
MAY 3, 2010**

Marie O'Rourke, Chair, called the Executive Session to order at 7:00 p.m. Also in attendance were Sandra Giroux, Secretary, Fred Kenyon, Dan Kane, Richard Berube, Director, and Joanne White, Recording Clerk. Robert Reader was absent. Also present was Kristin Harris from Brody, Hardoon, Perkins & Kesten, LLP Attorneys at Law and Daniel Nucci, MIIA Senior Claims Representative.

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. Kenyon made a motion to enter into an Executive Session.

Mrs. O'Rourke explained the reason the Board was going into Executive Session was to discuss strategy for a pending litigation.

A Roll Call Vote was taken.

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

Mr. Reader was absent at this time.

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

Mr. Berube explained that a copy of the settlement agreement with Mr. Mitza has been provided to the Board. Mr. Mitza has some disagreement with the Board's order. He wants to settle this matter however he is not in full agreement with the order that was issued by the Board. Mr. Berube explained that he visited the property and Mr. Mitza explained how he was going to resolve the problem. He wants to disconnect the old pipe and reroute it into his back yard. He plans to use the discharge to irrigate his lawn. It will not affect the neighboring properties because of the slope. Mr. Berube explained that he looked at the existing pipe and the majority is underneath the pool deck so there is no other access unless you tear up all the concrete around the pool.

Mrs. O'Rourke asked where is the pipe located.

Mr. Berube explained the location of the pipe in front of his fence and shrubbery. The majority of the pipe is underneath the pool deck.

Mrs. O'Rourke stated so Mr. Mitza won't have to dig up much of his front yard.

Mr. Berube explained that Mr. Mitza does not want to dig up his front yard because there is only short piece of the pipe sticking out, most of the pipe is underneath the pool.

Mrs. O'Rourke asked where does Mr. Mitza want to cap the pipe off.

Mr. Berube explained that Mr. Mitza is going to cut the pipe before it goes underneath the pool deck and plug it with cement so it can't be used again. Then he is going to reroute the discharge pipe into his back yard.

Mrs. Giroux stated so there won't be any discharge in the front yard.

Mr. Berube replied yes, that is what the Board ordered. The discharge will not be coming out to the cul-de-sac and causing a problem.

Mrs. O'Rourke asked if any of the Board Members had a problem with that.

Mrs. Giroux stated that she did not have a problem as long as Mr. Mitza meets the intent of the Board's order, cuts the pipe, plugs it with cement so that there is no drainage in the front yard and makes it so that the pipe can't be used again and reroutes the discharge out into his back yard. That seems reasonable.

Mrs. O'Rourke asked Mr. Kenyon and Mr. Kane if they had a problem with that.

Mr. Kenyon and Mr. Kane replied that it is reasonable and they agree with that resolution.

Mr. Berube stated that the settlement meets the intent of the order. Mr. Berube explained that if we have to go to court this could drag on for a long time and the outcome would be uncertain. Mr. Mitza would be able to do anything he wanted until this matter is resolved and it could end up in his favor. With this settlement agreement it would satisfy the Board's order.

Mrs. Giroux stated this resolution will meet the Board's order, however will it meet what the Frawley's are looking for?

Mr. Berube explained that the settlement is going to meet the intent of the Board's original order.

Mrs. O'Rourke asked does Conservation have a problem with this resolution

Mr. Berube replied that Conservation is not involved in this matter.

Mrs. O'Rourke stated that they are listed on the memo.

Mr. Berube explained that Mr. Mitza has made an issue of where the Frawleys are pumping their pool water and he got the Conservation Commission involved with the Frawleys. Mr. Berube explained that he would talk to the Conservation Commission and make sure that this isn't going to be an issue.

Mrs. O'Rourke asked if the Board votes to agree with this settlement and Conservation does not want Mr. Mitza to do this type of work will that stop Mr. Mitza from satisfying the Board of Health's order.

Mr. Berube replied the Conservation Commission is not involved with 6 Hearthstone Circle. They are involved with 13 Hearthstone Circle where the Frawleys live.

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Mrs. O'Rourke explained that it is not clearly stated in the letter.

Mrs. Giroux stated that maybe the Conservation Commission will say that they want to look at 6 Hearthstone Circle as well.

Mr. Berube explained in the letter it states that Mr. Mitza is concerned with the method used by the Frawleys to discharge their pool water. That is what the Conservation Commission is concerned with.

Mrs. O'Rourke replied that is not our problem.

Mr. Berube explained that the Conservation Commission is already addressing that problem. The Conservation Commission has asked the Board of Health to check it out as well.

Mrs. O'Rourke stated that she does not agree that the Town of Billerica should have to pay \$3,500.00 for Mr. Mitza's legal fees. Mr. Mitza is fixing something that the Board of Health issued an order for him to do.

Mrs. Giroux asked can someone explain why the Town is paying that amount of money.

Kristin Harris, Brody, Hardoon, Perkins & Kesten identified herself. Ms. Harris explained that this law firm has been assigned to handle the litigation that was filed by Mr. Mitza. Mr. Mitza filed a lawsuit in Superior Court seeking judicial review of the Board's order that was issued in February 2010. He also alleged that his constitutional civil rights were violated as well in the judicial review. Ms. Harris introduced Dan Nucci, the representative from MIIA who is handling the case for the Town of Billerica.

Mrs. O'Rourke asked how come MIIA is involved.

Mr. Reader joined the meeting at 7: 15 p.m.

Mr. Nucci explained because of the allegations that Mr. Mitza has made. There are two scenarios that we look at the first is this something we can resolve short of litigation or is this something that we want to try such as capping the pipe and rerouting the discharge. It made sense for us to consider his legal fees in preparation to pursue litigation.

Mrs. O'Rourke stated how did you come up with the fee of \$3,500.00.

Mr. Nucci explained the actual amount was \$3563.00 and Mr. Mitza agreed to \$3,500.00.

Ms. Harris explained that Mr. Mitza had to pay a retainer fee to his attorney and some additional charges. He is only looking to recover the retainer fee that he has paid his attorney, which MIIA has agreed to cover as part of the settlement agreement. He also paid a filing fee in Superior Court and he is not looking to recover that. He did file the case and he does dispute the findings but he is trying to resolve the problem. He is trying to satisfy the intent of the Board's order by capping off the pipe and filling it with cement and rerouting the discharge pipe. Mr. Mitza agrees that the work has to be inspected and approved by the Board in order to satisfy the order. If Mr. Mitza does that work it would satisfy the intent of the Board and the case would be dismissed. That would put an end to the litigation.

Mr. Kenyon stated it appears that we will be setting precedence for the Frawley's.

Mr. Nucci explained the way we determine the best solution is by risk analysis. Is it better to pay Mr. Mitza \$3,500 now or pay \$5,000 or \$6,000 in litigation fees with the risk of losing the case before a judge.

Mr. Reader asked why would we lose or how could we lose.

Ms. Harris explained that is the risk of going to court. It is not a guarantee that you would win and that the court would uphold your decision. The court could decide the decision was wrong and his civil rights were violated and Mr. Mitza could win the case and be awarded his attorney fees anyway. You don't know what is going to happen.

Mr. Reader stated he could then continue to backwash his pool into the street anyway.

Ms. Harris explained then the Board could get an injunction and force him to comply with the order anyway while the case is pending and the Board would have to go to court to fight that. It can become a long messy process. Mr. Mitza will agree to the settlement although he does dispute the findings and does not feel that he is violating any Board of Health Regulations. Mr. Mitza will agree to the intent of the Board's order.

Mr. Reader commented that Mr. Mitza does not think he is violating any Board of Health Regulations.

Ms. Harris replied that Mr. Mitza feels that he is not violating any Board of Health Regulations that is why he filed for a judicial review but he is not going to fight that anymore. Mr. Mitza would like to resolve this problem and has agreed to cap off the pipe.

Mr. Reader stated that Mr. Mitza wanted to cap the pipe the night of the hearing however there were (28) twenty-eight neighbors that were present at the meeting and were against Mr. Mitza's proposal. Why didn't he cap the pipe before?

Ms. Harris stated that she reviewed the meeting minutes and Mr. Mitza agreed to cap off the pipe. Up to that point he had no order against him. The investigation was in his favor. Before that he had no obligation but he still offered to make the changes. Mr. Mitza has agreed to meet the intent of the order.

Mr. Kenyon asked has Town Counsel reviewed this case.

Mr. Berube replied that Town Counsel did review the case and made the recommendation that MIIA handle the case.

Mrs. Giroux asked are you sure that the fee is \$3,500.00.

A discussion was held on the amount of the fee.

Ms. Harris explained that the cost is high because Mr. Mitza hired McGregor and Associates, Environmental Attorney's. They are experts in that field. Mr. Mitza sent me a copy of the bill as proof of the amount he paid.

Mrs. O'Rourke asked Mr. Berube for his comments.

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Mr. Berube replied that the Board should accept the settlement and have Mr. Mitza do the work as soon as possible before pool season is upon us.

Mr. Reader asked Mr. Berube if he could be present at 6 Hearthstone Circle when the work is ready to be inspected.

Mr. Berube replied that he would let Mr. Reader know when the inspection would take place.

Mrs. Giroux asked what if Mr. Mitza does not do the work as outlined in the settlement.

Ms. Harris replied that he would be in violation of the settlement agreement. If he does not comply with the settlement agreement then the Board can move to enforce the agreement.

Mrs. Giroux asked how long does he have to comply with the settlement agreement.

Ms. Harris replied that the Board could put a time frame on when the work needs to be completed and that the work has to be inspected and approved by the Board of Health. Mr. Mitza informed me that he could do the work himself pretty quickly.

Mr. Nucci stated that it appears there is an issue with the two (2) neighbors.

Mr. Reader stated that it is a neighbor issue and the Board did not handle it properly.

Mrs. O'Rourke clarified that the Board of Health did not handle this case properly from the beginning.

Mrs. O'Rourke asked the Board Members if they had any questions before a motion is made.

Mr. Kenyon asked when is Mr. Mitza planning to do this work.

Mr. Berube replied that when he spoke to Mr. Mitza he mentioned that if the Board reaches a settlement he would do the work the next available weekend.

Mrs. Giroux asked can we make sure he is not paid until the work is complete.

Ms. Harris replied yes. Ms. Harris explained that when she talks to Mr. Mitza she would explain that there is a timeline and the work has to be done as soon as possible before the pool is opened. Once the work has been completed and inspected and approved by the Board of Health, the Town will issue the check.

Mrs. Giroux asked can Mr. Mitza increase the cost or change anything.

Ms. Harris replied once the settlement agreement is signed Mr. Mitza cannot change anything unless he comes back before this Board for approval.

Mrs. Giroux made a motion to accept the settlement agreement with the condition that the work is to be done as soon as possible and before the pool can be opened. Payment will not be made until the work has been completed, inspected and approved by the Board of Health. Mr. Reader and Mr. Berube, Director of Public Health will be inspecting and approving the work.

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Mrs. O'Rourke asked can the Board legally make a motion to withhold the money until the work has been completed and approved.

Ms. Harris replied you are not withholding the money it is just the order of how the settlement is going to work. When there is a settlement the release has to be signed first. Then the work has to be completed before the money is released.

Mr. Berube explained the money will not be released until the work has been completed and approved by the Board of Health.

Mr. Kenyon seconded. Four voted in favor and one vote abstained (Mr. Reader).

Mrs. Giroux made a motion to adjourn the Executive Session.

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

The Board adjourned Executive Session at 7:25 p.m.