SPECIAL CITY COUNCIL REMOTE MEETING
November 17, 2020 @ 6:00 P.M.
MINUTES

The meeting was called to order at 6:00 p.m.

Council President LeBlanc announced, "This meeting is recorded by video and audio in accordance with state open meeting law. Consistent with the Governor's orders, suspending certain provisions of the open meeting law and banning gatherings of more than 10 people, this meeting will be conducted by remote participation to the greatest extent possible. The public may not physically attend this meeting, but every effort will be made to allow the public to view and listen to the meeting in real time. Persons who wish to do so are invited to view the meeting and you have the information that was on the posting. If you are calling in on a phone, you can press *9 to request to speak. If you are watching on a computer a device, there is a raised hand button that you can tap or press to request to speak. Please use either these options to be recognized to speak."

Council President LeBlanc stated in order for the City Council to go into executive session, the Council must adhere to Massachusetts General Laws. He stated that as Council President he declared that the July 14, 2020 special meeting of the City Council has been duly posted and has been called to order. The Council is now in open session, and there is a quorum present. Before the Council can vote to go into Executive Session, the purpose of the Executive Session must be stated: "I declare the purpose of the Executive Session as follows is to discuss litigation strategy in a legal matter; and to discuss this in an open meeting may have a detrimental effect on the litigating position of the City. I further declare that it is the intent of the Council will not reconvene into open session after the Executive Session but will adjourn the Special City Council meeting from that point. Motions to go into Executive Session are by roll call vote and require a majority vote of the Council. Therefore, he entertained a motion: That the City Council and its staff go into Executive Session to discuss strategy with respect to an update on ongoing litigation pursuant to MGL Ch. 30A, §21(a)(3)

MOTION: On a motion by Councilor Gilman, seconded by Councilor Holmgren, the City Council by ROLL CALL voted 9 in favor, 0 opposed, to call the City Council and City Council staff, to enter into Executive Session (in accordance with MGL Chapter 30A, §21(a) (3) to discuss litigation strategy with respect to a real estate matter.

The public portion of the meeting adjourned at 6:05 P.M. for the purpose of entering into Executive Session.

Respectfully submitted,

Joanne M. Senos
City Clerk

SPECIAL CITY COUNCIL MEETING
NOVEMBER 17, 2020 @ 6:00 p.m.
Remote Meeting

Present: Council President Steve LeBlanc,; Vice Chair, Councilor Val Gilman; Councilor Melissa Cox; Councilor Jen Holmgren; Councilor John McCarthy, Councilor Scott Memhard; Councilor Sean Nolan, Councilor Jamie O'Hara; Councilor Barry Pett
Absent: None
City Council Staff: Joanne M. Senos, City Clerk
Administration: Chip Payson, General Counsel, Krisna Basu; Asst. General Counsel, Attorney Thomas Mullen

EXECUTIVE SESSION

Council President LeBlanc stated as follows: "I call the Executive Session of the City Council to order at 6:00 p.m. on November 17, 2020. We are conducting this executive session by remote participation. We have a full quorum present and for the record those in attendance include City Councilors, Val Gilman, Melissa Cox, Jen Holmgren, John McCarthy, Scott Memhard, Sean Nolan, Jamie O'Hara, Barry Pett, City Council staff, Joanne M. Senos, City Clerk, General Counsel Chip Payson, Asst. General Counsel, Krisna Basu, and Attorney Thomas Mullen. Further, I state for the record that this executive session was voted by roll call vote 9 in favor, 0 opposed during an open remote session of the special November 17, 2020 Council meeting. I declare the purpose of this executive session as follows: we have convened into executive session to discuss litigation regarding the 116 East Main Street special council permit. As stated in the open session of the City Council, to discuss this in an open meeting may have a detrimental effect on the litigating position of the City. I further declare that it is the intent of the Council not to reconvene back into open session. Any and all motions made during executive session – including the motion to adjourn are by roll call vote. Any documents and other exhibits, such as photographs, recordings or maps used during this executive session, shall, along with the minutes, be part of the official record of the session. The minutes of any executive session, the notes, recordings or other materials used in preparation of such minutes and all documents and exhibits used at this session may be withheld from disclosure to the public in their entirety as long as publication may defeat the lawful purposes of the executive session, but no longer; and unless and until such time as a litigating position is no longer jeopardized by such disclosure, at which time they shall be disclosed unless the attorney-client privilege under Section 7 of said Chapter 4 applies."

Chip Payson, General Counsel recounted the following timeline:

- The Bevilaqua Company in 2019 submitted an application for four special council permits, and Attorney Payson described the 4 special permits.
- The City Council held a hearing on the application and voted 5 opposed, 3 in favor, 1 absent. The City Council adopted the written decision on or about October 8, 2020.
- Mr. Bevilaqua and his attorney appealed the decision to Land Court.

Mr. Payson said that he recognized that this would be a difficult case and brought in Attorney Thomas Mullen to assist. The case went to trial on August 4-5, 2020. Attorney Payson noted that this was one of the first cases, if not the first case, to be tried via Zoom due to Covid-19. He reminded the council that from a previous executive session, the standard at trial was a De Novo review. De Novo means anew, and that is when the judge hears new evidence presented to him that was not necessarily included in the record, the city council minutes. Judge Speicher issued a decision on November 2, 2020, which he found against the city, and ordered the city council to award the four permits instead of remanding the matter back to the city council for reconsideration. **Mr. Payson** said they were meeting tonight to discuss this decision and answer any questions the city council may have and decide what next steps the council would like to take. The ultimate question is whether to appeal this or to just award the special permits according to the court's order. Per the council's request, he reached out to another outside attorney, Mark Bobrowski and circulated his

memo to the council earlier this afternoon for their review. Mr. Payson noted a couple issues that need to be considered. Cost is one of them, and as of today they have spent between $15,000-$20,000 on legal fees and costs for this case. Most recently, Mr. Bevilacqua's attorney said that if the city wins any appeal, that his client is going to move forward with the 40B project on the site. **Mr. Payson** turned over the discussion to Attorneys Basu and Mullen to speak on the merits of the decision, talk about any appealable issues that they believe might exist, and take council questions.

Attorney Thomas Mullen conveyed to the council that he was very upset with the decision here because he believed the judge did not follow case law concerning the standard for reviewing the denial of the special permit and also that his decision is inconsistent with the evidence. The judge admitted that the council didn't have to support its denial with any specific factual findings, but then he said you need to consider any arguments not raised in your decision. That is inconsistent in that you cannot have it both ways. He goes through our arguments nonetheless concerning the criteria set forth in the ordinance, and he actually ignores evidence in the record. **Attorney Mullen** recounted the evidence they submitted for this De Novo proceeding. The council must decide whether it is worth appealing. The judge, tried to insulate his decision on appeal by making findings of fact, which the appeals court is sure to be reluctant to second guess. He thought Mr. Bobroski may be a little too pessimistic because he didn't know the evidence that the judge chose not to state in the decision. There's no doubt that appeals are always uphill fights and winning would at best result in a remand to the council to take further evidence and make specific findings. The council has to weigh all this and also the risk of a 40B project should the appeal be unsuccessful.

Krisa Basu, Assistant General Counsel, conveyed to the Council that if they are going to appeal the likely scenario if they were victorious is that it would result in a remand which would mean that the council will review it. It is something that Council has to decide is what the result would be if that She advise they cannot bring any new witnesses. It would just be that appeals court looking at the transcript of the record and of the different case laws they would be making a legal argument. They couldn't add any evidence. It would be the evidence that was presented.

Councilor LeBlanc asked General Counsel what would the cost of an appeal would be. **Mr. Payson** replied that it was hard to say. Attorneys Basu and Mullen have done the bulk of the work, and it is their time and his time. He said it may be another $5,000 or more than that.

Councilor Homlgren said she just wanted to clarify that the council could spend tens of thousands of dollars or more on an appeal that will probably not be a success or maybe it will. If it is an unsuccessful appeal, they will have spent all that money, and Mr. Bevilacqua will build a 40B by right. She asked if that was correct. **Ms. Basu** replied that they are saying they might do that, and yes that could be possible. **Mr. Payson** noted that defining what a win here would look liked, they thought a win would be a remand back for reconsideration. There's next to no chance that the appeals courts are going to overturn this and agree with the city council. They think what it would mean, it comes back down to council for reconsideration. If we lose at the appeals stage, then Mr. Bevilaqua is probably going to build this eight unit building. If it comes back down on remand or reconsiders it and Council votes it down again, then he's looking at his options with a 40B.

Councilor LeBlanc asked **Mr. Payson** when he said it comes back for Council to reconsider for reconsideration, is there another public hearing or starting from scratch, because they have two councilors that weren't on the Council with the last decision? **Mr. Payson** replied that given the fact that the council record here was a little bit deficient, he would suggest that it would mean starting from scratch. One of the points Attorney Bobrowski made was that there are a lot of moving pieces here. You have four special counsel permits with different standards and under those standards, such as 1.8.3, you have six elements under that standard. There are a lot moving pieces here that that weren't really touched on too much in the public hearing that you would need go through those in depth. He suggested it would be reasonable restarting the whole matter. **Councilor Cox** asked if that is only if they win the appeal, and Mr. Payson replied yes. **Councilor Cox** asked if the likelihood of winning would be 50/50. **Attorney Mullen** replied that he thought it is got to be rated less than 50/50. First as the reasons stated by Attorney Bobrowski, and second, on average only a quarter of all appeal cases that go to the appeals court result in any kind of victory for the appellant. Third, the judge again tried to insulate his very deficient decision by reporting his actual findings. The appeals court does not like substituting its judgement with the actual findings of a trail judge. **Council Cox** asked Mr. Payson what would a 40B look like versus what was proposed and what would Mr.

Bevilacqua be allowed to do. **Ms. Basu** replied that Mr. Bevilacqua's attorney explained that his client paid $600,000 for this property. If he cannot do the eight units that was originally proposed, he is not going to go with two or three units, which other people had hoped and that he would probably go with the 40B application as of right. **Ms. Basu** said that she wouldn't know what that would be but his attorney said it could be as high as twenty units. Mr. Payson commented Gloucester is below the ten percent threshold, and we are vulnerable to 40B's and that takes a lot of the decision making away from the city. **Councilor Cox** commented that she thought Mr. Bevilacqua is still limited in what he can provide. He cannot put a hundred houses on a lot because it is a 40B. Mr. Payson agreed but thought there are certain limitations to what he can do just by the nature of the size of the property. The question would be can he do more than eight. **Mr. Payson** replied he didn't know the answer to that but his suspicion would probably be yes. **Councilor Memhard** commented that Councilor Cox raised his basic question, which was what a 40B project would look like on the site, and if that is advantageous or disadvantageous to their ultimate goal here for the neighborhood. It sounds like it's something what would address our low income housing needs, but in a way that would be esthetically worse than what's being proposed here, which the neighbors objected to. **Councilor Memhard** didn't have another question but an observation that was made by Mr. Payson, Attorney Mullen and also by Mark Bobrowski, in that our basic problem here is that our process was deficient. We did not do a good job of presenting and supporting the decision that council made. Even though this is a challenge to that, it seems like we're unfortunately in a very weak position at this point in terms of any further steps forward other than accepting the judge's decision. **Mr. Payson** commented that these are always painful educational opportunities. After the Lindquist decision, this council really buttoned down and did a great job going through the standards and making determinations.

Councilor Gilman put forward that she had three things she wanted to bring up. Number one, she directed at Attorney Mullen, in regard to diminishing the view on Pilot's Hill, in which Dan Oppenheimer was crossed-examined where he admitted that the view was blocked from Pilot's Hill, would this be an opportunity to go back the same judges if they do appeal it? **Mr. Mullen** replied that an appeal from this trial judge would be to the Mass Appeals Court. They would be heard by a three judge panel, which would read their briefs and hear their oral arguments. **Mr. Mullen** agreed with Councilor Gilman that they scored on what he thought was a clear win on the issue of view obstruction, because the only expert provided by the plaintiff conceded to Ms. Basu, that yes views would be obstructed and that is definitely something he would bring up on appeal. It is a different question from is it worthwhile to appeal, which is your bailiwick and not his. **Councilor Gilman** noted that the only thing she was troubled by was that the judge discredited that they could not use information from the housing production plan. In her discussion in terms of why she changed her vote that night when they were deliberating and Councilor Gilman read her comment that the judge disqualified. She shared that several days after this decision, she was talking to some of the attorneys that are very astute and they thought that her comments that night were very appropriate and based on requisite criteria. This judge didn't seem to be giving her any credit at all for having come up with the requisite criteria and felt that her comment was kind of not brought up in the way she thought it could have been. She asked if Mr. Payson or Ms. Basu or any members of the Council would like to comment on this. **Councilor LeBlanc** replied that she felt that way because she was part of the process and didn't think it was single handedly what she said. It was more the way the meeting was handled and the discussion. It was a poor meeting that was held that night. Councilor Gilman agreed and that she was trying to see if they had any concrete reason to continue.

Councilor Holmgren commented that first of all, she agreed with Mr. Payson that the process is much better now. That is thanks to Councilor Gilman's leadership that has steering them in the right direction, and she really appreciated that. She said that the housing production plan calls for more units of housing, but that was one hand-picked piece of that enormous housing production plan. This proposed development is on a major artery, and that housing production plan is extremely comprehensive and it calls for more units of housing.

Councilor Pett put forward that he thought everyone on the legal side has explained that the decision that came down by this judge seems to be, somewhat lopsided or almost prejudiced against us. Probably due to and again no ill comments towards any of the councilors, because they did a poor job of making the presentation going forward. The question comes if we go to new appeal that's a three judge court that's going to listen and look at the facts, number one, we can't add anything new to it. Second, from what he's seen or heard, the appellate courts are somewhat unlikely to go against the judge's decision and not as is how he answered, but the fact that he stated they're not going to go back

against that. He's given his interpretation and didn't think they're going to argue with it. At this point, if that's the case, it seems if you look at all the opinions as to how successful we could be, this seems like that we would be spending money to go somewhere that the chances of our appeal, whether we thought we were in the right or not, is very unlikely. He is not sure that it would make sense to spend that money at this point. Unless the legal team here can convince him otherwise, he would just prefer at this point to say what the council did was done. The decision was made, move forward and try to do the best. Councilor Gilman has led the way on future projects and let's learn.

Councilor Nolan put forward that he would like to hear the answers from Mr. Payson of Councilor Gilman's questions. This is a very important meeting tonight, it is not just a $5,000 situation and it is an actual neighborhood. He would really appreciate it, if they could answer Councilor Gilman's questions. **Councilor LeBlanc** replied he will circle back, and wanted to get to all of the questions.

Councilor McCarthy put forward his question to Mr. Mullen, Mr. Payson and Ms. Basu. When they vote to bring this to appeal, the three panel judges in our appeals court are going to judge on points of law. The only thing that keeps coming back to him is that this trial was supposed to be DeNovo. When he read the judge's ruling on this, it seems like he didn't abide by the DeNovo, and is that something that would be considered by the three judge panel as a point of law that wasn't followed? **Mr. Mullen** replied that absolutely would lead the argument that they would be making. The judge was canny about the way he tried to insulate his decision from appeal. The judge began by saying that he didn't have to consider the arguments that are raised for the first time in this trail, which Mr. Mullen thought he was wrong about. The judge said but even if I did, here is what I find when he went through and he tried to argue against each of the positions that they were taking. As Mr. Mullen said before, in some cases, he did so in a way that he thought is pretty attackable. As Ms. Gilman mentioned, he completely ignored the fact on the issue of views. The plaintiff's expert agreed with them, and as he said earlier, there are a couple of other points where he thought he just ignored facts that are in the record and pretended they didn't exist. He reiterated again, it is always an uphill fight to try to win an appeal, and whoever it was earlier who brought up the point about judges not wanting to reverse their brethren is entirely right. Mr. Mullen noted that he has been involved in a lot of appeals when he represented the appellee, the person who has won, and he has always won. When he represents the appellate, it is an uphill fight. He has won sometimes, but it is difficult.

Councilor LeBlanc circled back to Council Gilman's questions that she was asking earlier.
Councilor Gilman put forward regarding her third question which is something that was a hole in their motion to adopt where, because they are coached on doing their motions in the positive. **Councilor Gilman** read the motion and what it said that they did on the city council that night was their vote was binding. What they didn't do in the motion to adopt was they didn't state that it was not in harmony with the intent and purpose of the zoning ordinance. The judge caught that and that was quite a big part of his evaluation. The question is when the motion to adopt, they should have changed the word to say that it was not in harmony with the intent and purpose because their vote was three in favor, five opposed. She is inquisitive to understand if that was messed up in that they should have modified their motion to adopt that night to be in the alternative sense if it wasn't in harmony. **Ms. Basu** replied and mentioned a decision where it was clearly outlined of every step of the ordinance, all the criteria and what the city council thought. Going forward, that should be the model, as they talked about tonight, especially when the council is going to deny something. It is important to not have that language saying that is in keeping with neighborhood character and that it isn't detrimental because that's actually not what they are finding, something that she thought probably shouldn't be part of the motion itself. When you get into that double negatives kind of the findings of the council, she thought it is confusing, and thought court did call attention to that in this case. **Mr. Payson** put forward to put a positive point on that. He thought that specific language, perhaps moving forward, and motions should be modified. However, it is his understanding of Robert's Rules that motions are made in the in the positive and that is the standard practice. Councilor **LeBlanc** put forward how would they know what the outcome of a vote is without making the motion and with that language in there? That is the whole point when they got themselves into trouble is to disclose why they they didn't feel it is in

character or in harmony with the neighborhood. That is their typical language of the motions that they have before the vote. For them to put in a negative before the vote that is the whole reason for the discussion or debate and asked if was that correct. Mr. Payson replied yes and there may be a way to omit that small section. As a learning experience from this judge, it is an analysis that they can take a look at the motions, to the form of motions going forward to see if there is a way to slightly amend them to take any wind out of any judge's sails any time they are up in front of them again. Hopefully, not again, but in this kind of situation. **Mr. Mullen** suggested they are not limited to taking one vote. They have four different special permits and multiple criteria under each and they should make findings. They can, when they are done listening to everybody who wants to offer their two cents, proceed through a list of the criteria. When they get two views, for example, they can say, is there a motion to make a finding about whether there should be a diminution in views? Yes, moved, seconded and then vote is what it is. You end up with a package of findings of fact, and they can then make a final decision based on those. It's unlikely that all of them are going to be positive or are all going to be negative. But if you made specific findings of fact, you give your attorneys a lot more to hang their hat on a trial. **Mr. Payson** commented that that is an important point. What they have been doing since 105 Wingaersheek and Linquist appeal is an omnibus vote. He spoke with Mr. Mullen and Ms. Basu about this earlier and there is nothing wrong with an omnibus vote. He gave an example for Sec. 1.8.3 that they could go through each one of those and take individual findings and vote on each one of those six criteria. In a public hearing like this, they are looking maybe 12, 15 votes, given all of the criteria for the different permits. They're looking for four of them, but this is another way to do it.

Councilor Gilman put forward that in her first comment about what Dan Oppenheimer said about the view where he actually admitted that the view was impaired, does that have that have credibility in the appeal process? Mr. Mullen replied yes, absolutely that would be a crucial piece of any appeal. He addressed her second question about the housing production plan, but he thought that the particular section that she referenced, it came out at trial that actually it had to do with utilities. They were not able to make the case that the utilities here are inadequate for another eight units. **Councilor Gilman** commented that was a weak argument because we were not able to validate the point with that and asked Mr. Mullen if that was correct. **Mr. Mullen** replied that was correct. **Council Gilman** said she hated to see them held hostage by the developer as a threat to doing what they should do if they feel as a council, if they should appeal it. A threat of a 40B shouldn't distract to what's in front of them that should they appeal this based on the reasonableness of that we could win an appeal and is it worth the money.

Councilor Nolan put forwarded that when they did 35 Fuller Street it was excellent. They mentioned Sec. 1.8.3 and went through the characteristics, it was worth the time, and they wouldn't be back here for a second meeting. On the issue of 116 East Main Street, even if the findings were found to be just by the court, the applicant would still be able to do 40B and asked if that was the truth. **Mr. Payson** replied yes. **Councilor Nolan** said that they should still do due diligence like they have been trying to do. But the end result is until they have a housing plan with over ten percent, 40B is still a realty for any contractor that is bringing anything forward in the City of Gloucester. **Mr. Payson** replied that is correct.

Councilor Pett put forward that he didn't get an answer back from any of their legal counsel here when he made the comment questioning: (1) if the appeals court is going to sort of favor or just sort of like dissing the judge on his decisions, even though he may have ordered them to sort of get by, and we may not agree with it. But if that's the case and then (2) is the I agree with Councilor Gilman that I absolutely don't like the threat at all of someone saying that if you don't do this, I'm going to do that. But at the same time, I think we do have to look at the reality that if our chances of success on appeal are, you know, if it's 10 percent, if it's 20 percent or something, then we decide to go with that, then the likelihood may be that indeed we're going to deal with a 40B project, which may be less appealing to neighbors who they are trying to represent here.

Ms. Basu said she could try to answer that in a different way. She explained that if they go to the appeals court and they argue that the judge was incorrect in saying that he didn't have to look at the evidence that wasn't in the city council's decision, which is against the case law. The case law says that he can look at anything that they brought up at the trial even if it wasn't before the City Council. The next step for the appeals court would be to say, if he did look at it, what he would find. Because the land court judge did look at it, then he said the wrong standard, put the wrong sentence, then he did go on to look at some of the other things that they raised like more detail about the view; and the fact that there was too much density, because when you look at the other buildings in the neighborhood and those kinds of things; and on the school issue

fiscal impact. The court, he dismissed it, but then he did go on to say, well, even if I looked at it, I still don't buy it. If her explanation made more sense, but that's what makes the appeal difficult, and not that the appeals court would necessarily just kind of want to decide in his favor. But even if they did take that next step in saying he was wrong and saying he couldn't look at the other factors, he did look at them to an extent. **Councilor Pett** thanked Ms. Basu. **Mr. Payson** added that Mr. Mullen had said based on his experience that when in a situation like this, they are looking at perhaps a quarter of these types of appeals are successful and Mr. Mullen agreed. **Mr. Payson** said they are looking at a twenty-five percent chance.

Councilor LeBlanc asked if there were any other questions from the Councilors. Seeing none, he entertained a motion to not appeal the ruling from the court. It was moved by Councilor Holmgren, seconded by Councilor Gilman.

Discussion:

Councilor Cox said she was not in favor for an appeal. She is somewhat biased because she voted for the proposal, but that the possible rate of return on this didn't seem high. If they did win the appeal, it's not a guarantee that they were going to rehear the case. The applicant could go forward with a 40B, which she did recall some of the numbers were much higher than the eight units, and let the chips fall where they may be.

Councilor Nolan said he is going to vote to not go forward on this and he feels bad for East Gloucester. He felt they were at fault on some characteristics to how they voted on this. The upside knowing that if we don't do this properly, it could end up being 40B, which may make it more complicated for East Gloucester in that area. He wished they had more than 10 percent housing stock or affordability in the area, but they don't and hate to see 20 units. He is not in support of this and will vote to not appeal it.

Councilor Memhard agreed and said he is not in favor of trying to appeal this. It is putting good money after bad at this point. He thought they really have their tail between their legs in terms of how they conducted their process on this particular project and they are paying a price for it. He didn't think there's any going back in a constructive way. This particular project, he thought which several of the councilors pointed out that there's room to improve going forward and lessons learned. This is his ward in his neighborhood and there'll be a lot of very unhappy folks. He is afraid that the alternatives to what Mr. Bevilaqua has proposed here could easily be much worse, and be spending good money after bad He is not in favor of appealing at this point.

Councilor Holmgren agreed and said she will not be voting in favor of an appeal. She believes it would be an immense amount of money that they need to spend in other ways. She wanted to thank their attorney team, and especially Counsel Mullen. She thanked him for being so willing to step up and defend them. She knew very well that a 40B was a possibility on this property, and she was not sure if she said that her my arguments when that public hearing took place. She would much rather see this development go forward than cause even more disharmony in the neighborhood and that is her vote.

Councilor Gilman said she is going to vote in support of the motion because she believes that they should appeal it. If they were to appeal, that they should come up with a maximum amount of money that they were willing to spend. She asked Councilor LeBlanc to repeat and motion and offered an amendment to the motion as follows: To amend the motion and cap the expenditure to the maximum of $5,000. The motion was not seconded and Councilor Gilman withdrew her motion. To back up her desire to appeal it, she believed what she brought up that Dan Oppenheim brought up that does have substance. There were a number of holes in this that they brought up that Mr. Mullen articulated at the beginning of the meeting. She agreed with what everyone said that they didn't do a stellar job at all that night. It was a late night. By the time they got to that point in discussion, they were just tired, and they all learned a lesson. But she is just going to vote in support of this because I think it sets a terrible precedent and would to at least give it a try. It was obvious she didn't have the support of the councilors, and she respected, but personally felt it would be worthy to try.

Councilor LeBlanc said he is not going to support an appeal. It is throwing good money after bad at this point and chalk it up to a lesson learned. Councilor Gilman stepping up and setting some new standards for them to move forward with this so this doesn't happen again was one of the positive things that came out of this.

Councilor McCarthy said that he thought it is important that they listen to their attorneys He has worked with Mr. Mullen, Mr. Payson and Ms. Basu. We asked for an outside opinion, and Mr, Bobrowski, who is intimately associated with the land court, didn't give them a lot of hope going forward. The city shouldn't be spending money with the thoughts that we're going to somehow overturn this, and he is not going to support to appeal.

Councilor Pett said his same basic argument is what Councilor McCarthy just expressed. He added he is in agreement with what Councilor Nolan said. He is really upset if "someone" is threatening me with a 40B. It is a reality that if it was to go in that direction, he thought it would be worse for the neighborhood. He would not support moving forward for all those reasons.

Councilor O'Hara said he welcomed appealing this but the numbers are just not in their favor in that they would be successful. With that said, he thought we would be foolish to appeal it. He is more interested in learning, because they have some very important special permits coming before them that they need to learn the proper path to travel so that they do not end up in this predicament again. He will not be supporting going forward with an appeal.

MOTION: On a motion by Councilor Holmgren, seconded by Councilor Gilman, the City Council voted by CALL 8 in favor, 1 opposed (Gilman) to not appeal the ruling of the court regarding SCP 116 East Main Street.

MOTION FOR RECONSIDERATION: On a motion by Councilor Holmgren, seconded by Councilor Gilman, the City Council voted by ROLL CALL 1 in favor (Gilman), 8 opposed to reconsider to not appeal the ruling of the court regarding SCP 116 East Main Street.

Motion Fails.

Councilor Gilman asked to how do they communicate what came out of this meeting to the public? **Councilor LeBlanc** replied that they would need to wait for General Counsel to give them a written statement and it has to go through the due process. They cannot say anything that happened tonight because they are under executive session. Mr. Payson asked if they could have 24 hours. There are some things that need to be done: (1) They need to likely alert the other side that they are not going to appeal; (2) They need to set a date for the council to award to vote in favor of the special permits and issue the permits. At the same time, they can put together a statement that they can send out to the council for them to consider. **Councilor LeBlanc** replied that Mr. Payson would send out an email and letting them know when it is ready so that he will have enough time to prepare everything so that they are not jumping the gun and doing something that they are not supposed to. **Mr. Payson** said that just so everyone knows that they will make sure that the council is informed prior to letting everyone else know so that the council is not caught off guard.

Councilor Nolan put forward that this was a tough night, and they did learn from example some things. Just so everybody knows that regardless of how people do this or how the court came back, there's still a 40 B option. Until they reach that 10 percent, it's something that can always be held over their head. He never wants to use this as an example or something to change their votes to better the neighborhood or to vote to oppose something. It is a reality and is always there until they figure it out.

Council LeBlanc thanked General Counsel Payson, Asst. General Counsel Kasu and Attorney Mullin and appreciated what they did for the Council during this process. As they all stated, this is a lesson learned, and they are moving forward. They are going to build on that to make sure this doesn't happen again. **Council LeBlanc** thank Councilor Gilman again for stepping up and making sure that this doesn't happen again.

MOTION: On a motion by Councilor Cox, seconded by Councilor Memhard, the City Council voted by ROLL CALL 9 in favor, 0 opposed to adjourn the Executive Session and close the Special City Council Meeting @ 7:19 p.m. on November 17, 2020.

Respectfully submitted,

Joanne M. Senos
City Clerk

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November 16, 2020

TO: Chip Payson

FR: Mark Bobrowski

RE: Appellate Issues
Bevilacqua v. City Council, 19 MISC 000516 (HPS)

You have asked me to review the file documents from the above-referenced case, and to determine issues to be addressed (with an estimate of success) in a possible appeal.

For the purposes of this memorandum, I will assume that my reader(s) have an understanding of the proposed townhouse project, the applicable zoning ordinances, and the Land Court's Decision.

1. **Did the City Council's failure to make adequate findings for each and every factor pertinent to the four (4) special permits requested by the Plaintiff require a remand?**

As a general rule, "refusal to grant a special permit does not require detailed findings." *MacGibbon v. Bd. of Appeals of Duxbury,* 369 Mass. 512, 515 (1976). If the board finds any permissible reason to deny the application, its decision will be sustained. *Sedell v. Zoning Bd. of Appeals of Carver*, 74 Mass. App. Ct. 450 (2009).

In the instant matter, Judge Speicher ruled that the City Council ("SPGA") made only one finding required by the Ordinance: that the project was "in harmony with the intent and purpose of the zoning Ordinance." Decision, at p. 8. Although Sections 1.8.3 and 3.2.2 called upon the SPGA to make at least another half dozen findings, the SPGA did not. With only this single positive finding in hand, the SPGA then voted 3-5 to deny the four (4) special permits.

The question is this: Should the Land Court have remanded the inadequate decision back to the SPGA for clarification, or was the Court right to avoid a remand, vacate the SPGA's decision, and order the issuance of the special permits?

A remand commonly results when a SPGA made deficient findings. See, e.g. *Gordon v. ZBA of Lee*, 22 Mass. App. Ct. 343 (1986). This result probably occurs more often when the original decision is an approval, not a denial (as we have in this case). However, when "it is clear from the record that exactly the same ultimate result would occur from a remand as that effected by the decree, no useful purpose would be served by a remand." *Chira v. Planning Bd. of Tisbury*, 3 Mass. App. Ct. 433, 440 (1975).

Thus, on appeal, the issue will be whether "the same ultimate result would occur" after remand. On the one hand, the SPGA may argue that once the 5 or 6 other factors set forth in Sections 1.8.3 and 3.2.2 are addressed, the reasons for the denial will be explained. On the other hand, the SPGA ***DID*** explore other reasons not mentioned in the denial at the trial – specifically, neighborhood character, excessive school costs, and loss of view – and the Land Court found the arguments wanting. It wasn't close. I think the chances of successfully appealing the avoidance of a remand order is at best 25%.

2. **Was the Land Court correct in ruling that a reviewing court "need not entertain a board's efforts to defend its denial of the special permits at trial based on grounds it never articulated before?"** Decision, at pp. 11 and 15.

This ruling strikes me as particularly harsh, especially because Judge Speicher cites only an unpublished decision for his proposition.

The more customary standard is in *S. Volpe & Co. v. Bd. of Appeals of Waltham*, 4 Mass. App. Ct. 357, 360 (1976): "[I]f any reason on which the board can fairly be said to have relied has a basis in the trial judge's findings and is within the standards of the zoning bylaw and the Zoning Enabling Act, the board's action must be sustained regardless of other reasons which the board may have advanced."

The problem for the SPGA is that while, in the Judge's view, the court "need not entertain" new arguments at trial, that's exactly what happened. Neighborhood character, excessive school costs, and loss of view were not mentioned in the SPGA's decision as grounds for denial, but they were litigated anyway.

I think the chances of successfully appealing the "need not entertain" pronouncement is at best 10%.

3. **Did the Land Court err in allowing the minutes of the SPGA's hearings to provide evidentiary support for the Decision?**

Normally, the minutes of a public hearing have no evidentiary value. In *Building Inspector of Chatham v. Kendrick,* 17 Mass. App. Ct. 928, 931 (1983), the Appeals Court ruled:

> We think that the statutes just cited make public records, such as those required to be kept by the board, admissible to prove the specific matters which the statutes require expressly to be recorded, e.g., the date of each meeting, the motions made, the vote upon each motion, the board members present and absent, and the reasons formally stated for each decision. Even findings by a zoning board, however, have no evidentiary weight. See Devine v. Zoning Bd. of Appeals of Lynn, 322 Mass. 319 , 321 (1955); Dion v. Board of Appeals of Waltham, 344 Mass. 547 , 555 (1962). See also Lawrence v. Board of Appeals of Lynn, 366 Mass. 87 , 89 (1957). We do not decide whether such minutes may be used for some other purposes when supplemented by the testimony of persons present at the meetings recorded, or of the person who prepared the minutes, particularly if the minutes are shown to have been complete and prepared on the basis of a verbatim transcript or tape recording.

Here, Judge Speicher used the minutes of the SPGA hearing to explain the votes of at least two councilors. Decision, at p. 13. Because he did not find the reasons offered by the councilors sufficient, he concluded that the real reason the SPGA voted against the project was the overwhelming opposition of the attendees that evening.

The SPGA's denial was not predicated on specific findings supported in the evidentiary record of the public hearing. Therefore, Judge Speicher took it upon himself to look far and wide for any valid reason to defend the denial. Although the minutes were probably not the best place to look, the chances of reversing the decision based on this reliance does not look promising. I put the chances at 20%.

4. **Any consideration of an appeal must account for the SPGA's failure to provide credible evidence as to the issues it did litigate.**

The Appeals Court is unlikely to reverse the Land Court's Decision and remand the matter to the SPGA. When the SPGA did get the opportunity to make its case regarding neighborhood character, excessive school costs, and loss of view, the evidence was less than compelling. In the eyes of the Judge, the SPGA did not properly define "the neighborhood." The witnesses offering testimony on view and school costs were not credited. Ultimately, in my opinion, this dooms any chance for success on appeal.

Please let me know if you have any questions.