

CITY OF NEWTON

IN BOARD OF ALDERMEN

PROGRAMS AND SERVICES COMMITTEE REPORT

SPECIAL MEETING

APRIL 5, 2007

Present: Ald. Johnson (Chairman), Ald. Hess-Mahan (Vice Chairman), President Baker, Ald. Sangiolo, Parker

Absent: Ald. Merrill, Coletti, Lipof

Also Present: Mayor David B. Cohen, Dan Funk (City Solicitor), Fran Towle (Parks & Recreation Commissioner), Carol Stapleton (Parks & Recreation Department), Ald. Lennon

**REFERRED TO PROGRAMS & SERVICES, COMMITTEE ON COMMUNITY PRESERVATION & FINANCE COMMITTEES**

#88-07(2) COMMITTEE ON COMMUNITY PRESERVATION recommending that 20 Rogers Street, including trees and structures on the property, be taken by eminent domain in accordance with the March 13, 2007 recommendation of the Community Preservation Committee.

**COMMITTEE ON COMMUNITY PRES APPROVED 6-0 on 3/27/07**

**ACTION:** **APPROVED 5-0**

**NOTE:** Ald. Johnson asked Mayor Cohen to address the Committee on the programmatic aspects of the future use of the property.

Short-Term Goals

The Mayor started by giving an overview of this item. He said it was heard and approved by the Community Preservation Committee last month and was also approved by the Board's Committee on Community Preservation.

He stated that once the Board of Aldermen vote on this, the 20-day period elapses, and we record the taking action in the Registry of Deeds, we own the property. We can then start the very important work of repairing the wall and making the entire Crystal Lake Newton facility accessible to swimming. If the Board votes on this in its April 17, 2007 meeting, we will be able to begin the repair work on May 8<sup>th</sup>. 2007. We believe that will enable us to open the beach as scheduled on June 11<sup>th</sup>. 2007. Shortly thereafter, we will complete the finishing touches on the wall area and be able to open that area to the public as well. This would bring about a real renaissance of that facility.

### Long-Term Goals

The Mayor went on to describe the long-term plan. He said that a decision needed to be made as to the best use of the property. An Advisory Committee will be set up. There will be 9 citizen participants. Three of them will be nominated by the Ward 6 Aldermen and the Mayor will appoint 6 of them plus a Chairman. There will also be Aldermanic representation. The Mayor will be asking President Baker to appoint 2 Aldermen. He thought one should be from Ward 6 and one from some other part of the City. There will also be representatives from a number of bodies: the Recreation Commission; the Community Preservation Committee; a representative of the Commissioner of Parks & Recreation; and various staff to act as backup for the Committee as well. They will all need to decide the best way to utilize that property and reinvigorate the entire site. The restoration of the aging bath house and figuring out how to best utilize the 20 Rogers Street property are the key issues. He said he will ask the Advisory Committee to report back by January 15, 2008.

The other thing the Mayor said we need to determine is whether or not the house itself is still safe enough to stay up. The first thing we ought to do is make that determination and if it is unsafe and needs to come down then the Board will be asked for funds to demolish it. If it is found safe, and this is something I'm not convinced of 100% either way, the best thing would be to keep it up pending what we decide to do with the entire property. Maybe someone would find an appropriate use that meets the needs of the facility, the neighborhood, etc.

### Logistics and Reasons for Acquisition by Eminent Domain

The Mayor explained that acquiring this property by eminent domain is both the best way to go and important to do. It is the most certain way of obtaining clear title to this property as soon as possible. It also affords the best way of moving forward on the programmatic aspects of this as quickly as possible. The Mayor explained that acquiring land by eminent domain is never something to be taken lightly and requires the most careful consideration. We do not use eminent domain to deprive people of their homes and to force people to sell land that they don't want to sell. In this case, the landowner has put the land on the market and the house is uninhabited and has been that way for some time.

We can get title through eminent domain in a way we can't get it through any of type of voluntary purchase and sale. This is a unique opportunity for us. We have a piece of property that the owner wants to sell, we will not be dispossessing any person living there, and we can have a fair market value determination. It will enable us to acquire a piece of property that will enhance the quality of that facility and as a result really be a lasting contribution of the Board to the betterment of Newton for generations. It is really an opportunity and I hope you will act on this and will be able to acquire the land and fix the wall and have the entire facility available to swimmers and bathers for this season.

### Liens

The Mayor said that there are a couple of reasons why eminent domain is appropriate and important in this case and why a negotiated purchase and sale just would not work. The main reason is that there are approximately \$12 million worth of liens on this property. That doesn't mean the property is worth \$12 million and it doesn't mean that everybody who has one of those liens is going to get paid from that property. If he were to try to sell that property, before anyone put down a dime, they would have to buy off all of the lien holders in order to get them to release their liens. It doesn't mean giving them all the money that they were owed, but it would mean a tremendous amount of negotiations to get them to voluntarily discharge their liens in order to allow the sale.

He went on to say that if you take the land by eminent domain and you pay the amount in your appraisal which is based on fair market value, it automatically cuts off all of the private liens. They no longer have any legal interest in the land.

In terms of those creditors of the owner who will not get paid through the value of this land, that does not mean that the owner has escaped those debts. Those debts still exist they just can't get satisfaction from that piece of property. It does mean that they can go after whatever other assets that person may have, or failing that, can try to throw him into bankruptcy in order to get as much on their claim as they possibly can.

The Mayor explained that there are also two public lien holders: the IRS; and the Massachusetts Department of Revenue. The good news is that they are used to dealing with situations like this. We are quite confident we can work out an arrangement with them to pay whatever the proceeds are. We also believe they have a policy of allowing any purchase money mortgage holder, the first mortgage holder, to get paid off first. We are quite confident that we can arrange all of that by the time it comes to take title to the land.

President Baker said that he'd like to be clear about the question of the lien holders. He said he understands the privately held lien holders take the risk as the City acquires the value, and they're remitted to whatever other opportunities they have. Where do the Feds and the State stand on this? We don't want to acquire this and have the Feds think they have a deep pocket in the City of Newton.

Dan Funk said that they've been talking with the IRS and it is accustomed to this sort of situation, maybe not with the taking, but with private foreclosures and bank foreclosures and the like. The position that they seem to be taking at this point is that more than likely the first mortgagee will get the lion share of the \$2.3 million, and assuming the Feds come next, they either work something out with the State or maybe they get the whole thing. We don't have final answers on that yet. We're waiting for a commitment letter from both the State and the Feds indicating what their practice will be here, which will be that they will grant us a waiver. If they're comfortable with the appraisal and the order of who is supposed to get what, then they'll sign off on that and eventually we'll get the waiver releasing their liens.

President Baker stated that the timing of this could be tricky. As he understands it, once the City makes the taking, the City owns the land and will we have the commitment letter before the actual vote. Mr. Funk responded that we're not inclined to record the Board Order unless we have that commitment letter in hand. And if we don't record it in 30 days, we need another vote from the Board. President Baker asked if the recordation date is the date of acquisition, not the date of the vote. Mr. Funk answered that the recording date is the date you record and you have to do it within 30 days of the vote. President Baker asked what the effective date of the taking is if you record within 30 days. Mr. Funk said the City takes ownership upon recordation. President Baker wanted to have clarity about what that means exactly. Mr. Funk said if they vote on April 17<sup>th</sup>, then there's a 20-day waiting period, and by then we fully expect we will have in our hands those commitment letters and an understanding of what to expect.

The Mayor said that he did not want to be in a position where if we make the taking vote, and somehow this all blows up and the IRS says that somehow we would be liable for certain expenses and will have lost the \$2.3 million, and still be liable for liens on the property.

President Baker said his concern is that if they make a vote, the vote is the taking. Mr. Funk said that the vote is the taking. By law, until it's recorded, and if it's not recorded within 30 days of that vote, it lapses and expires. It's as if you never took it. President Baker said we're making a vote subject to a condition subsequent that you're going to make sure you've got a waiver before you record. Mr. Funk said yes, but we're not going to put the City at risk in this way.

Ald. Johnson asked if there was some sort of timeline that could be put in writing in a confidential memo to the Board? Mr. Funk said that if they're going to give us commitment letters that they're going to give us waivers upon happening of certain events that will be agreed upon, then they are bound by that. He also stated that he would put together such a memo for the Committee.

#### Challenges of Eminent Domain: Price and Validity

Mayor Cohen explained that when you challenge a taking in court, there are basically two types of challenge: challenges to the validity; and challenges to price. The only real dispute or disagreement we would have here is on the price. We are completely willing to pay fair market value for this piece of property and we will. To that end, we have already had an appraisal which appraised the property at \$2.3 million. If the Board goes along with this, we will tender that payment, not to the landowner, but to his creditors. If the landowner thinks that the property is worth more, he has a perfect right to go into court and have a jury decide what the value of the property is. A jury might come up with a different number, either higher or lower. They can come up with any number they want within certain broad limits at the discretion of the judge.

We are quite confident with our price for a couple of reasons. First of all, the firm that did the appraisal is quite reputable. The other significant thing is that earlier this year, the

owner went in to the City for an abatement and was granted one. The property is now valued by the City, at the landowner's request, at \$2,319,800. We are really in the same ballpark and although there are no guarantees, we are on very solid ground as far as price.

The landowner can not tie us up in court for any long period of time because of this. The price challenge proceedings can take a very long time but that doesn't matter. Title to the property passes the instant that we file in the Registry of Deeds. If he challenges the price, the court may decide ten years later what the price really is, but it will not affect the fact that we own the property and we will be able to do with it as any other property owner would be able to do from the moment that we take title to the property.

The second type of challenge is on validity. In terms of validity, if the taking is for a public purpose, then it is pretty much bulletproof. This is a classic public purpose. This recreation area that we are expanding has been in place for 80+ years, and we are not taking someone's home that they are inhabiting. We're taking the property for passive and active recreation purposes. We are going to retain the use of the land by the City and it is going to be an adjunct to a public facility that we have run for decades.

#### Funding

President Baker said that he thought the other piece of this that was important was that the commitment from the CPC is \$2.3 million and that's what we're voting. If there are supplemental funds, because of its public purposes, he felt this project could clearly be funded by other sources. The City could seek a capital bond issue if we wanted to. The community has not participated in the funding at all yet and he has seen that happen in other CPC projects. He said there has been representation at the CCP meeting that the neighbors are interested in participating and being helpful in the second round of things that might go on. We are voting CPC funds for this taking and not making a commitment beyond that for any difference that may be involved, from CPC funds. If the value is adjudicated at a different number, that's a difference question of financing than what's before us in the taking order.

Ald. Parker said there were three pieces of money.

1. The initial \$2.3 million.
2. The "x" factor. If Mr. Hannon appeals and a jury says more money is needed – that is money that could be appropriated out of Community Preservation Funds, from free cash, bonding, etc.
3. Money to fix up the site. Since we're talking about land not acquired by Community Preservation Funds, at least in part because we're talking about fixing the bathhouse as part of this process and the parking lot, my guess is we'll be talking about some bonding or capital stabilization funds.

He stated that what needs to happen is we have to do it right and treat the site holistically. We have to think about the run-off from the parking lot and maybe we need to re-orient the land and swap some things out to make it work best. It may or may not make sense to

keep the building for use of the site. We just shouldn't pre-judge what should happen with it even if it is "preferably preserved". It's important to keep a holistic view of the site.

President Baker said that he respectfully wanted to dissent from Ald. Parker's categorical statement about that. He went on to say that he is prejudging but he's also concerned what the price tag beyond the CPC Funds are and where the money's coming from and I'm also concerned about the building independently. He said he understood Ald. Parker's point of view and it's legitimate but also wanted to state my own. Chairman Johnson agreed with President Baker.

#### Money for Legal Fees

Ald. Hess-Mahan asked Mr. Funk about the money for the legal fees. Mr. Funk said he brought that to the CPC last Wednesday and they approved it. They need to get it now to the Board and they also included in that some bond fees as well, all as one package. Technically it's not in front of the Board now. Mr. Funk also said he has to talk to Mike Kruse to figure out how it works its way out to the Board to get voted on. The estimate is \$30,000 for legal fees. He thought it could go to \$100,000 if it goes into litigation for a long time. He said he gauged it on the likelihood, short of litigation, of all the work we have to do to make sure this thing goes smoothly after the Board votes it. Then there's the possibility of an interpleader action to figure out who is supposed to get what money. Maybe there would have to be a court order on that to make it nice and clean and make sure everybody who should be wiped out, is wiped out. Then there's the appeal on the value which could have a life of it's own for some time. It could be more than \$30,000 but he's gauged it with some optimism. We'll try to work through it expeditiously, but often much of it is beyond your control.

Ald. Sangiolo asked if the \$30,000 in legal fees and the bond fees brought the total up to \$2,230,000? Mr. Funk said that the \$2.3 million is the money that is going to whoever is supposed to get it for the taking. It'll be a separate docket item as it has a different purpose. The main Board Order will have the \$2.3 million in it as you need it for the taking. The extraneous money will come in a separate Board Order. President Baker wanted to confirm that the Board Order that goes to Finance will have the correct wording.

#### Board Order Language

President Baker said that the draft they saw didn't explicitly say who took the property. It had City of Newton at the top and it said the property would be taken. Mr. Funk said that it says "In Board of Aldermen" and it's going to have all the names of the members who voted for this once the vote is taken. This is pursuant to a statute that authorizes the Board of Aldermen to make the taking. He said that they could add "taken by the Board of Aldermen of the City of Newton" if that would be more comfortable. It would be superfluous, but we could do that. President Baker said it would make him more comfortable to do that. He said the Webster Conservation area was originally going to be taken by the Mass. College of Art and it got taken by the City because the Mass. College of Art didn't frame the taking order right. Mr. Funk said that the court said that entity did

not have the authority to make the taking. It wasn't the wording, it was the authority, whereas, the Board of Aldermen has the statutory authority to make this taking.

#### Parks & Recreation Introduction

Chairman Johnson asked Fran Towle and Carol Stapleton from Parks and Recreations to speak on programmatic aspects.

Ms. Towle said that her Commission has voted unanimously for this property to be acquired. We see it as a unique opportunity for the City to purchase this and a unique opportunity for generations to come. The land itself offers quite an array of landscape and beauty and we foresee a very happy recreation and open space, in addition to the facility that we already have there. She said that she's heard from the community that they are very happy as well for this opportunity and for the generations to come to be able to enjoy the facility. Once the land is acquired, we will be working with the community to figure out what sort of enhancements they would like as well.

#### Wall and Structures

Ald. Hess-Mahan asked if the land or grade would be changed in a way that wouldn't require the wall. The Mayor responded that the plan that has been approved by the Conservation Commission would be to trim the wall down to about 3 feet, cap it, and then grade the rest of the property back. He said in a meeting this morning, the Commissioner of Public Works had a brainstorm and said it would be just as easy to get rid of the wall and do everything in one step. He is preparing plans and will be going back before the Conservation Commission. The caveat is if this thing gets tied up in Conservation Commission red tape, what we will do is fix the wall under the existing plan and defer the best solution when we have an entire plan. He explained that they are going to await the recommendations of the Advisory Committee and would be interested in any ideas from the Board.

Carol Stapleton showed the Committee a picture of the area from 1929.

#### Historic Commission

Ald. Sangiolo asked if it was still under historic jurisdiction. Mr. Funk said that the landowner has had the right to demolish it since February, so we would too. President Baker asked if it was clear whether the right runs with the land or whether the new owner has to start over. Ald. Sangiolo says that in practice it runs with the land.

Ald. Hess-Mahan said that he had a memory of anything acquired with CPA funds and what the historic commission could do with it. Mr. Funk said it will probably end up getting torn down for safety reasons but there's no definitive answer yet. Chairman Johnson said that if it is repairable and it has some historic value, she would be very disappointed to see it taken down.

Parks & Recreation Budget

Chairman Johnson asked Ms. Towle what she saw happening from a budgetary standpoint. Ms. Towle said that right now they are planning to run the facility as they have in the past with the lifeguards, the bath house and that the swim area that is out there and roped off is the same. She didn't see any major increase in that part of the operation. Chairman Johnson wondered if there are more people and a wider space, from a safety standpoint would we need more staff. Ms. Towle said that for the first year, she didn't anticipate any increase in staff. The same area would be used. In fact there is no "new" beach; it's just a recapturing of space that has been unused for the past 2 years. As the facility takes on a new life, she said she'd see what they need in the future. Nothing will change from a programmatic perspective for this fiscal year. Ms. Towle said the Board would hear from her if any changes were needed.

All other items held without discussion.

Motion to Adjourn

Respectfully submitted,

Marcia Johnson, Chair