

TOWN OF DERRY

Town Council
Derry Municipal Center

August 5, 2014
Tuesday - 7:30 PM

7:30 PM Call to order

Pledge of Allegiance, warning of fire exits, handicap access & turn off all cell phones

Roll Call: Councilors Cardon, Fischer, Fairbanks, Bourdon, Dimmock, Katsakiores and Chairman Osborne.

Consent Agenda

14-100 Approve Workshop Minutes – July 1, 2014

14-101 Approve Minutes – July 15, 2014

Approved

14-102 Amend June 3, 2014 Minutes
(Roberta Robie has asked to have her statement corrected as follows: amend 2% & 4% to 2 cents & 4 cents.) **Approved**

14-103 Schedule Public Hearing August 19, 2014 –
Enforcement of Underage Drinking Laws (EUDL)
Grant

14-104 Schedule Public Hearing August 19, 2014 –
Road Acceptance – Cella Drive

Consent Agenda: Approved with amendment to #14-102

Chairman's Report

***** Citizens' Fireworks Concerns

The Chairman spoke in regards to the amount of fireworks being set-off and complaints from citizens. The question: is there anything that can be done regarding the concerns of citizens. He has reached out to other prosecutors and their opinion is that noise ordinances are unenforceable. Mr. Osborne suggests the use of the State RSA 644:2 Disorderly Conduct. The Chairman read the RSA for the public.

***** Exit 4A Update

Chairman Osborne stated there is no evidence that files, documents, or papers were either lost, stolen or destroyed. The question remains; "Is Derry legally bound to contribute the \$5M?" This Town Council is committed to dealing with this issue, by consulting with legal counsel, be diligent and to make a decision to provide some certainty for the residents. So far \$1,749,221 has been spent; the remainder would be \$3,250,779.

Mr. Osborne has researched the history of Exit 4A and an outline of his research is included in these minutes.

Town Administrator's Report –

- Dog Park reopened today
- Rockingham Road construction is on schedule
- Adams Memorial reconstruction of the roof and support began yesterday
- Verizon is gifting a generator to the fire department. This will be on the next consent agenda for a public hearing to be held on 9/16/14.

- AED – EMS Director, Chuck Hemeon and Fire Chief, George Klauber are asking the Town Council to participate in CPR & AED training. It will be held at the Hampstead Fire Station on Wednesday evenings. They are also willing to set up a special time for training.
- Frank Childs will be retiring at the end of September and Bob Gorham will be stepping down as Treasurer. The Town will be recruiting a Treasurer part-time for 5 hours/week for the Treasurer position. We are looking for someone with an accounting and finance background.

***** Update on Sale of Tax Deeded Properties

Seven tax deeded properties remain. Mr. Budreau reported that the owner of one of the properties, 10 Jewel Lane, was able to repurchase his home. There are two houses and five small unbuildable pieces of land. They will go up for auction and sealed bid. Mr. Budreau anticipates using the auction company for the two houses and will initiate bids for the land giving abutters a chance to purchase and consolidate with their existing properties.

Public Forum

Open Public Forum 7-0-0

Tony Bruno, Oak St - Wall St parking lot needs mowing, town administrator position replacement should be a Derry resident, commented on the downtown and 4A.

Steve Trefethen, North Shore Rd – commented on downtown issues, a tax saving by consolidating open positions and 4A changes.

Doug Newell, English Range Rd – Questioned obligation for Exit 4A and suggested a non-binding referendum regarding 4A.

Kevin Coyle, Folsom Rd - stated referendum in past failed, explained letter from Hyrax, and stated the majority of money spent went to CLD.

Roberta Robie, Chester Rd – should fund EIS even if Exit 4A doesn't get done. Exit 4A is a detriment to her but 4A will help the downtown. She was pleased with Chairman Osborne's presentation.

Close Public Forum 7-0-0

New Business

14-105 Appointment to Energy/Environmental Advisory Committee

Chairman Osborne moved to appoint Diane Daigle as a member of the EEAC term to expire on March 2015, seconded by Councilor Katsakiores.

Vote: 7-0-0

14-106 Appointment to Conservation Commission

Chairman Osborne moved to appoint James Degnan as a member of the Conservation Commission term to expire on March 2016, seconded by Councilor Katsakiores.

Vote: 7-0-0

14-107 Acceptance of equipment from the State of NH Liquor Commission, Division of Enforcement and Licensing

Chief Garone explained that the grant worth \$3,200 for equipment from the State Liquor Commission. These portable breath analyzing equipment are for sobriety testing. There will be 10 devices.

**Move to grant authority to the acting Town Administrator Larry Budreau to apply for portable breath testing equipment from the NH Liquor Commission and accept any equipment that may be approved without further action of the Town Council. Motion by Councilor Katsakiores, seconded by Councilor Dimmock
Vote: 7-0-0**

Council Requests / Open Discussion

Ms. Katsakiores appreciated the chairman's work on Exit 4A. There has been legislation that has been put in place by the Senators regarding funding for this project.

Mr. Dimmock, questioned the vote of council. Mr. Osborne clarified it was the Executive Council. Mr. Dimmock also was pleased with the presentation

Mr. Bourdon stated there are three college students riding bicycles back to Derry from Seattle, Washington as a fundraiser for the Derry Rail Trail. They will arrive this Sunday, August 10th between 2-3pm. Their journey can be followed at Derryrailtrail.org.

Mr. Fairbanks questioned the Police Chief regarding the fireworks and asked what citizens should do and what is legal in town.
Chief Garone encourages citizens to continue to call the police. If the police are able to determine or witness, they can take action. RSA 160B or C can disallow permissible fireworks.
Mr. Dimmock would like an ordinance so that Derry receives fines for these instead of state.


Mr. Fairbanks reported on the Planning Board meeting regarding the Central Business District zoning and the board has taken a step back. There are other elements involved here so it is back to the drawing board. He also questioned as to where the State is at with the E911 report.

Mr. Fischer – commended Chairman Osborne. He wanted to give recognition to the Recreation Dept. and commend John Stewart and Devin Lahey as he watched them work at the Don Ball Park. Councilor Fischer also stated that in the July 7th timeline for the Town Administrator search process, some Councilors would not be available for the 8/30 or 9/6 meetings. Since they are interviewing on 8/26 & 8/28, these meetings are to be determined.

Mr. Cardon – attended the Derry Downtown Committee meeting and passed on recommendations to improve the downtown such as: a Property Maintenance Ordinance, a parking lot next to Veterans Hall, new business the Cask n' Vine, Opera House Improvements, beautification of Downtown, Robert Frost Scenic Byway designation.

Chairman Osborne moved to enter into non-public at 9:09p.m. Under RSA 91A:3, II, seconded by Councilor Katsakiores. Vote: 7-0-0

Adjourned 10:14 p.m.


Denise E Neale Town Clerk


Date

Transcription Denise E Neale, Town Clerk
Reviewed by Larry Budreau, Acting Town Administrator

Exit 4A BREAKDOWN

Questions:

- 1) Is Derry legally bound?

(Derry never signed a contract- Derry never signed a settlement agreement- No evidence of files or papers were lost, stolen, burned, or other nefarious misfortunes.)

(Derry has consistently acted as a party/partner/and participant to the 4A project for over thirty years.)

- Under contract law – other parties rely on a promise.
- The existence of a promise can be established by way of writing, or behavior.
- Course of conduct.

History:

- 1985
- Exit 4A dates back to at least 1985 – First year of Reagan's 2nd term.
 - Earliest days – envisioned as a project – among Londonderry, Derry, & Boston North, LLC.
 - Boston North was/is a private developer who owned some or all of the land the 4A exit would be located.

- 1987
- In order to get technical support from the State of NH, parties requested and received special Legislative authorization for 4A by General Court:

- DOT ordered to cooperate with Derry and Londonderry in designing 4A.
- The interchange will be funded and work will be performed by the towns of Derry and Londonderry.
- 4A Interchange will require no state funding. Design to be completed by 12/1/88.

- 03/90 Londonderry and Boston North entered into a written agreement
(Memorialization of Prior Agreement)

- "Whereas the Town of Derry wished to have a new exit off I-93 to help divert traffic from the overcrowded and failed downtown road system and to foster growth and development within Town of Derry"

** (Derry did not sign). But – Derry never disavowed.

03/15/91 - Londonderry selectmen drafted a referendum asking voters to decide whether to cancel the previously authorized \$5M bond

Same year - Boston North sued Londonderry for breach of contract
 - Boston North argued it had spent millions in reliance on Londonderry's commitment to the 4A project
 - During this time -Derry did not take any measures to disavow its real or perceived commitment for 4 A

Lawsuit the writ:

"Londonderry joined with Derry in the new interchange concept...."

3/1987 Derry and Londonderry engaged CLD for the project."

"CLD reminded Boston North it worked for Derry and Londonderry – for the development of the 4a project."

- Referred to a letter of "9/21/88 from the Town of Londonderry to the NH DOT describing 4A as an "unprecedented cooperative effort" by "the Towns of Derry and Londonderry."

7/1988 Londonderry, Derry, and Boston North agreed in principle on the manner in which the interchange costs would be funded."

"Derry was to post \$1.1 million bond for the connector road bypass"

- Provide its own funding of \$5million for construction costs;
- Allow use of its wastewater treatment plant
- Prepare a capital improvement plan for existing road network

"Voluminous studies, plans, profiles, surveys, charts, analyses and explanations (for 4A) submitted to DOT on behalf of Londonderry and Derry."

5/8/91 NH Dept. of Transportation – letter to Federal Highway Administration advocating for federal funds to complete project.

"To pay for improvement – Derry has executed a \$1million bond."

P. 2 - "Derry is committed to relieving Downtown traffic."

"Derry is committed to other local road improvements to insure traffic using the proposed 4-A will be able to efficiently use the local road system..."

"Derry 4A will – present the total improvements necessary to address traffic capacity problems for the 20 year design period."

**Derry Town Council copied – never disavowed.

2/7/1992 Boston North and Londonderry entered into a settlement agreement

P.4 (funding section) – Derry shall raise \$5million for its (50%) share of exit 4-A costs as Derry has represented in the past.

P. 14 – In event costs exceed \$10 million (\$5/\$5) the parties agree subject to financing and or bonding approval, "That all project participants, including Derry, shall contribute equally to costs in excess of \$10 million –subject to bonding and financing. (More later) If any party is unable to obtain financing or bond approval – either or both of the other parties May, at their expense pay such additional costs to complete 4A."

4/24/92 Fresh off a settlement (\$1.5 million) where reliance was key theory

- Letter from Boston North's Attorney's ("reliance" mentioned no less than 8 times in a 5 page letter.

8/25/92 Derry's attorneys wrote to Boston North saying Derry was not bound to proceed with 4A unless the Mayor and Derry Town Council presented a bond resolution to the citizens of Derry and was subsequently adopted.

8/29/92 Supplemental Agreement

- Parties' obligation (Londonderry and Boston North) shall terminate on 1/1/98, unless and before Derry has raised and appropriated its share of the funding for the 4-A development.

** Derry not sign – not repudiate –nor interplead no challenge.

9/16/1997 Council passed the following resolution: (Council took care of that)
(Mayor said unwise and speculative).

- Meeting noticed

"Be it resolved that \$ 5 million is appropriated for the Town's share of the costs of construction of the proposed Interstate 93, Exit 4A Interchange project, including access and connector roads and related improvements; that to raise this appropriation the Treasurer is authorized to borrow said sum under the Municipal Finance Act to issue bonds and notes therefore; that any income derived from the temporary investment of bonds and notes therefore; that any income derived from the temporary investment of bond proceeds, shall be spent for the project in addition to the foregoing appropriations; and that the expected useful life of the project is determined to be at least 21 years.

Motion: Councilor Craig Bulkley; **Second:** Councilor Bruce Gurley

Council (according to minutes –Clerk -Linda Mahoney):

"It is the understanding of the Council that the Council that the town of Londonderry and a private Developer have entered into a Consent Decree on file at the Rock County Sup. Ct. in Case No – C-91-2637 and a Supplemental Agreement Dated 10/28/93."

"Derry is not a part of these agreements and will have to reach an understanding with the Developer and the Town of Londonderry as to the implementation of this project so that it can assure Derry's citizens of the proper expenditure of its funds."

Again 1997

- Discussion - \$ 5mil (yes –No) (unsure)
- Bonds – After environment impact study.

Motion Passed: Yes -Paul Doolittle, Gordan Graham, Craig Bulkley, James McEachern, and Mike Smith. No – Paul Hopfgarten.

Same meeting:

- 10/21/14 Schedule a supplemental appropriation for \$5 mil, for 4A.
Passed unanimously.
- 9/12/07 Report of the Towns

Submitted – Town Councilors and leading Derry business profession expressed overwhelming support for the 4 a project.
- 3/3/08 Exit 4A Special Committee

3 Executive Councilors, Gary Stenhouse, George Sioras, Sen Letourneau, Jack Dowd of DEDC
- CLD – Chris Bean said Derry committed
 - Derry and Londonderry have committed up to \$5 mil each;
 - No objection;
 - Reduce traffic 28 %
 - Passed unanimously – necessity to alleviate traffic patterns
 - Funding package for project to be estimated – 4-6 months
 - Funding would entail \$10 mil (Derry –Londonderry) (State and Fed officials as well as private abutters).
- 8/7/09 Legal counsel advised Town Council to get a written agreement describing and delineating once and for all – financial obligations or declaratory judgment.
- 9/11/09 CLD Consulting Engineers sent to Town Administrator Gary Stenhouse Proposal for Final Environmental Impact Statement Total: \$982,500 (\$491,250 – to be paid by each town – Derry and Londonderry)
- 1/8/10 Letter/ Boston North transferred interests to Hyrax Derry Partners, LLC
(10/27/09)
- Letter confirms Hyrax's understanding that Derry was limited to \$5 million minus monies already spent
 - If project no longer feasible - off the hook
- Up to now – the Town of Derry – has contributed \$1.7 million.

Questions remain:

- 1) Is Derry liable for only \$5 million towards 4 A.
(The Hyrax letter suggests yes)
(The agreement/sup agreement – leave two potential ambiguities:
 - A. Does the settlement create for Derry an affirmative duty to bond or finance beyond \$5million?
 - B. Does the language in the supplemental agreement wipe away all parties to do anything?