Board of Selectmen Meeting Minutes **draft**
Monday, May 14, 2007
Town Hall 6:30pm

Meeting with PDA Representatives

Chairman Jan Stuart opened the meeting at 6:30pm.

Present: Chairman Stuart, Selectmen Cosmas Iocovozzi & Jack O'Reilly, Justin Richardson of the Conservation Commission, Administrative Assistant Beatrice Marconi,
Planner Tom Morgan, Representing the PDA were Art Nickless, Lynn Hinchee and Executive Director Dick Green.

Art Nickless spoke of hopes of opening up communications between the PDA and the Town of Newington and referred to a letter written by the Selectmen dated February 22, 2007. He did recognize the fact that communication was intentionally halted to a certain degree between the Town's attorney and the PDA but noted that it was their intention to not only establish an open line but to be a good neighbor from this point forward.

Selectman O'Reilly spoke of a few items written into the Town Forest deed that the Board felt were not necessary nor related to the transfer. For example, reference to mineral rights. Attorney Hinchee stated that because of FAA requirements, this verbiage had to be written in due to Federal involvement. The PDA had and will have no intentions of mining or excavating the town forest. Thus, this issue is ***resolved*** with both parties acknowledging the reasons the deed refers to the minerals.

Selectman O'Reilly spoke of the portion of the deed which refers to land use regulations and controls of Newington Pease land managed by the PDA. Mr. Nickless stated that he agreed with it having little to do with the town forest however did state that there was an issue of a 15 year old on going land use law suit that he would like to see resolved whereas apparently RSA 12G gives Pease the right to have Newington's Planning Board enforcing the PDA's rules on land regulations. It has not been brought to court and gets postponed every 2 years. Newington's plea is that if the PDA had control of the land use regulations, it would be outside the law with how the rest of Newington is treated and proves inconsistent with our Master Plan. Mr. Nickless asked the Selectmen what their intensions were. Lynn Hinchee says the suit challenges the PDA's ability to establish land use controls for land that is located at Pease yet falls in Newington, so here, where the PDA is giving up a state asset, even though it is not a developable asset the issue was - is it appropriate to do that without getting the acknowledgment that the PDA's land use controls prevail so that the PDA will not end up with additional litigation in the future. Art goes on to say that the PDA instituted the voluntary noise requirements which Newington agreed would be a reasonable thing to do and the issue was dropped, however, the suit was never dropped.

Selectman O'Reilly stated that the Town was not arguing the PDA control of airport land but why was it in the deed?

Justin Richardson mentioned an issue that generated confusion on his part, for example was this provision in the deed intended to say that Newington's land use controls wouldn't apply to any property that the PDA acquired subsequently because as he (Justin) read RSA 12G, 12 G was intended to apply to the property that was deeded by the Air Force or what ever agency it was.

Lynn answered by saying that 12 G applied to any property acquired by public benefit conveyance for airport purposes regardless of the time it was acquired, and we (the PDA) can continue to acquire property….Justin then refers to the Khalsa property and Lynn states that this property is not being acquired by means of public benefit, therefore does not fall under the PDA wishes for land use controls. Lynn also adds that the Federal controls preempt all regulations and the PDA are subject to them. Justin clarifies by stating that he fears the Town has no control of what provisions you (the PDA) might use to acquire land in the future so we (the Town) are a little concerned that maybe by degree the PDA could expand and we start to lose control over parts of the town that are pretty close to residential areas. Lynn says, though, if you read the language, page 3 paragraph C it was intended, and does in fact state that the Newington Town Forest constitutes airport property under RSA Chapter 12-G and accordingly, remains subject to all land use controls of the grantor, now existing or hereafter. She said if the town transfers this property to others, they too will be subject to the town's land use regulations and you are letting them know. Both Justin and Jack went on to comment asking about the words stating that the grantee acknowledges that grantee's land use controls do not apply to any other airport property of grantor located at the trade port as defined in RSA 12 G whether such airport property is owned by Grantor or others. Lynn responded by saying that airport property is land acquired by public benefit conveyance and the PDA cannot increase by statute or change property without the consent of the community. Art then states that this statute would protect the town as the PDA wouldn't be allowed to put this property under the airport falling under the rules of acquisition via public benefit unless it first came to the town. Justin said he accepted that explanation (with more thought needed) but still took issue as to the fact that he felt the town is being asked to evaluate if we wanted the town forest or the prime wet lands. Jack concurred and added he couldn't quite fathom why the whole rest of Pease was incorporated in the deed. Art agreed with Jack and stated he would rather the PDA and Selectmen talk about this as a separate item. Lynn said that after multiple conversations about this issue she has yet to hear why by leaving that statement there, it hurts the town. Jack said still he didn't feel it right in the deed as the PDA was trying to use the land use/wetland control suit against the forest deed to get to the town to solve an unrelated battle.

Justin said on another issue, the PDA wetland's management plan has been held out as the land use control of the PDA inventory, but as he understood it, it was essentially a document the PDA or its consultants prepared but its never been through any type of a legal process. After reviewing all the regulations, Justin found the word wet land was only contained in the document twice, as he as seen some projects come through with the development coming right up to the borders of the wetlands at the same time, finding reports such as the Phase II Clean Water Act and Storm Water Management Issues saying 40% of our watershed are somewhat impervious and the legislation is studying why the siltation is increasing in the Piscataqua & Great Bay and looking at our entire town, we find the PDA is not playing by the same guidelines as everyone else is in the industrial/commercial areas. So there is a real nervousness on the Conservation Commission and possibly the Planning Board as well as the BOS. Lynn stated that this concern was not accurate. Only about ½ acre in all has been filled at Pease. Art went on to say that he personally felt Newington's wetland requirements are a model and that the PDA too hires consultants to make recommendations to protect the wetlands and their buffers.

Tom said he personally doubted that the PDA wetlands management plans are the proper way to regulate wetlands and said that that type of regulation belongs in the zoning ordinance. He said every community in the State has it as part of the zoning ordinance. Lynn said that no one is obligated to place it in the zoning ordinance, it was their choice. Tom felt that 12G set forth certain criteria which included an aggrieved process that specified they go to a zoning board. He said for sure some day a lawyer will test their process. Lynn disagreed and feels that with the set backs by

the PDA sitting at the land lords review of the concept plan, no one can challenge that and that the PDA can just simply say *we don't like your plan*. From a challenge stand point, she said the PDA had absolute discretion and governmental authority to make that decision and it doesn't come down to a land use, so the PDA has more power in the land lord capacity to get what they want (and they do in many instances); for example, open space has a much stricter standard as well as landscaping and parking lot requirements. It is a board policy decision which they are entitled to enforce.

Justin responds by asking Lynn if she now understood why that *absolute power* and use of the land lord role as a mechanism to control whether wetlands are protected or not terrifies the Conservation Commission and the Town of Newington as it now is pretty much in the absolute discretion of the PDA. Art then said if the Town would feel more comfortable with the PDA putting this in the zoning ordinance, he would be willing to talk about that. He suggested the parties make a list of things and get them resolved. Tom said then does this mean that if the law suit disappears, then our list of concerns may disappear? Art said we can come to an agreement of that….absolutely.

The Board will meet with their counsel, Malcolm McNeil, discuss this 15 year law suit then meet with the PDA.

Jack asked for clarity and stated 'the grantee acknowledges our land use controls do not apply to other airport property located as defined by RSA 12G. That in fact is true, right? Justin stated that that statement excludes prime wetlands.

Lynn said that our counsel suggested (Ransom for the Conservation Commission who reviewed the Town Forest deed), if PDA wants to get this resolved, the PDA can sue the town, however Lynn says the PDA does not want to take that route. So what they did was to follow their administrative process which was to get an opinion from the AG office on their statutes leaving it so that the PDA is now comfortable saying they were not following those rules and if Newington wishes to challenge, they (the Town) will have to be the ones to bring forth action. Lynn goes on by saying that in order to resolve it all, (and you've mentioned that you want the PDA to put its wetlands in zoning) but the fact is is that it's really not enough for you. You also want the jurisdiction. Tom said that whether PDA puts it in zoning or not is really PDA's affair and sooner or later someone is going to call you on it and Newington is not the ones who are going to be sued. Lynn then asked 'If the PDA does put the wetlands management plan under zoning, (which Lynn agrees is a more traditional location for handling it) does that then mean that Newington will then drop their claim that you have jurisdiction to send Pease property into prime wet lands status?' Justin asked 'are you saying that if the PDA wanted on its own accord to designate those wetlands as prime wet lands we withdraw our nomination of those wet lands?' Lynn said no, she didn't say that. Art said this wasn't the issue and felt we should stop arguing about who was going to establish land use controls at Pease.
Art said the Town should get rid of that 15 year old law suit, then the town and the PDA will come to some sort of agreement on this wet lands issue. The only difference on that project mentioned earlier (and 100' was the buffer) was a detention pond, which all parties agreed upon. Tom said that after talking to Dori Wiggin of the DES, she stated she had nothing to do with that project. And Art said Tom was correct. It was withdrawn. Town had no problem with it. He (the developer) left because the channeling was too costly and did not pursue it. (as designed).

Selectman O'Reilly said the Town would consult with Attorney McNeil on the suit.

Selectman Iocovozzi asked what the law suit had to do with the Town forest. He wanted a clean deed and wanted the bull stopped. The PDA got our attention by adding all that in the deed. The Selectmen will then meet with the PDA again after consulting with town counsel.

Selectmen Iocovozzi then went on to ask the PDA reps why they didn't take the time to show up at any of the many public meetings held on the prime wetlands? None is the answer. He said you knew it was going to effect you and you chose not to show up. Lynn said no, the PDA did not know but she did have a conversation with Tom Morgan and Peg Lamson. Cos said it was open to the public. You were informed. You didn't show. Lynn said "even today, she might handle it exactly the same way because if someone sent me a notice that said they were going to submit this property at Pease to this and I don't think you have a right" I don't need to show up in my opinion. Cos disagreed and said if you were a good attorney, you are obligated to show. Lynn said she did review the map and certain areas with Tom and made comments and if he didn't bring this information back to the Selectmen, she wasn't at fault.

Lynn said one of the issues in a letter to the PDA from our counsel was dissatisfaction that this 80' ROW all of a sudden showed up in the deed and where did that come from as the Town had no knowledge. Lynn reminded the town of the 80' right of way issue – Arboretum Drive – shown in the 1988 map signed for the Municipal Services Agreement, and that it had to be so noted. It is a PDA ROW. Justin stated that the Celestica plans did not depict this 80' ROW. With the future development with the north ramp, the PDA is reserving this ROW for future plans. They are holding it in it's entirety as that is how it was established. Protecting it for the future, not that anything is planned right now, but in the future, at least it is protected. Lynn asked why no one called, rather than send a letter. Art interceded by saying that this is why we are here now. To get the issues before us all. Perhaps we can put some language in there that talks about the reduction in the future of this ROW. Lynn said to do this, we would have to include the City of Portsmouth as now they too have an interest. The FAA brought the 80' ROW issue to light and from there, it was so noted in the deed.

Chairman Stuart questioned the communication between the PDA and the Town with our reps. Peg Lamson was out of Town. Lynn mentioned that the fact she is on the Conservation Commission, she excuses herself really more than need be and it should just be in instances where a pecuniary interest might be perceived. But when she votes on issues involving prime wet lands at Pease, that is when she should step down from voting. Perhaps better guidance could be offered to our PDA reps so that they don't feel compelled to step down on many issues. Although stepping down on some issues, she does approach members individually but not at the in-session board level.

Art asked Selectmen Iocovozzi the following question. 'If someone came to you wanting to buy a piece of property and you said heck, you don't have to pay for it, we'll give it to you, yet that same guy had a law suit against you, wouldn't you want to get the law suit resolved prior to transferring the land?' Cos said we'll look into the suit and we'll meet again with you but is still troubled with not having a clean deed.

Justin said he heard, having to do with 12G two things he is confused with those being -the airport property is fixed and does not move forward without a municipal services agreement-the other thing he has heard was that if and when the Khalsa property gets acquired then that becomes PDA property that through which the prime wetlands doesn't apply. Art responded by stating that the Khalsa piece is coming to the PDA not through public benefit transfer - so we can agree on anything you want to agree upon. The Municipal Services Agreement applies to everything acquired through Public Benefit Transfer for Airport Property. This Khalsa piece is not subject to

our land use regulations. Lynn explained that where the town's zoning may permit development of that property, because the Federal regulations prohibit non compatible uses in the runway protection zone and within the 65 DBL we can't develop that property nor ever can-even if your zoning permits it.
Jack summarized the meeting by saying: the 80' ROW issue has now been resolved as you explained it was an FAA issue for you to list it in the deed. We are down to the wetlands regulation clause in the deed and the Town will be meeting with Malcolm and Simone on this issue. The mineral rights issue has been resolved.

Chairman Stuart added by stating that her observation was that many of these concerns stemmed around personalities rather than the issues themselves. Town trust vs. PDA trust and what are we going to do about it? Per Art. He adds by saying that the PDA is committed in transferring that forest to the town.

Justin asked if there was any opportunity for the Conservation Commission to step in and protect the wetlands on the other Khalsa property which houses turtles and other species and wondered if the PDA would consider either selling the mineral rights or them buying a conservation easement. Although not looking for the decision today, he hopes that this request will be kept in mind if and when it could be considered. Lynn said that they could not make that decision unilaterally and that the decision would have to go through the FAA. Justin recognized that to be true. Lynn went on to say that that particular sale was not looking real strong at the moment. The appraisal that the town got was having a hard time getting another confirming appraisal with those numbers. The P&S expired and their chance for a grant is now gone because of the federal standards. Lynn also says a difficulty that the PDA is having with the numbers is that Wil Corcoran is not a certified licensed appraiser and used general standards rather than yellow book federal law standards which are different.

Chairman Stuart concluded by agreeing we are all on the same page and that the Board is willing to work on getting all concerns settled. Dick Green brought up the Khalsa property current use penalty and spoke of the division of the land at the town's request to consider. The first piece penalty, according to Selectman O'Reilly was waived. If the PDA acquires the 7.11 acres, then the penalty on that site is in force and not waived. Dick Green then said that the PDA had hopes of buying the entire parcel of 16 acres but split it after the Town mentioned they may have an interest in a portion of it. He went on to say that if the PDA hadn't split it, no penalty at all would have been discussed as it was over 10 acres. Cos reminded the PDA of the $50,000 waived penalty on the first site. Paragraph C will be brought back to the PDA board for discussion on its deletion (with counsel).

The two groups hope to meet once again in the next month.

Selectman O'Reilly moved to adjourn at 7:40pm. Selectman Iocovozzi seconded. Motion passed 3-0.

Respectively Submitted

Beatrice Marconi
Administrative Assistant
Newington, NH