

**MOUNT AIRY, NORTH CAROLINA
CLOSED SESSION MINUTES
November 26, 2018**

MEMBERS PRESENT: Mayor David L. Rowe, Commissioners Shirley Brinkley, Dean Brown, Jon Cawley, and Steve Yokeley

MEMBER ABSENT: Commissioner Jim Armbrister

Mayor Rowe welcomed everyone and called the meeting to order.

Barry Schneider talked about the issue with the apartments at the Spencer's Redevelopment Project and stated he feels the board needs to make a decision because being in limbo is a bad place to be. He recommends the board amend the agreement with the developer to Dec. 31st. He also distributed a proposed resolution to the board regarding the super majority (2/3rd) vote regarding everything relating to the Spencer's Redevelopment Project.

CLOSED SESSION:

On motion by Commissioner Brinkley, seconded by Commissioner Yokeley and passed unanimously, the board entered into closed session pursuant to NCGS 143-318.11(a)(3) Attorney-Client Privilege.

Spencer's Redevelopment-Apartments:

Mayor Rowe: The purpose of this closed session is to solve the issue of the unwind agreement and what was on the Nov. 11th agenda was a motion to allow the developers of the apartments until after Dec. 31st, which failed on a three to two vote. The next step that should have been taken would have been a motion to invoke the unwind agreement, which would have failed by a three to two vote. That motion wasn't made so we are in limbo at the moment. I guess being in limbo gives the developers the opportunity to do whatever they want to do.

Hugh Campbell: The developers are continuing to work with their lender toward a closing at some point. Originally, the closing was scheduled for November 15th, but the lender required additional information. It concerns me that at the same time, they are pushing ahead and Barbara correctly told city staff to stand down and not approve anything because she isn't clear where the board is in terms of this decision making process. Things were getting a little out of sequence between the developers and the city and my concern for the board had been that as long as the developers are pushing forward and any time they could close on their construction financing, which at that point the unwind agreement becomes null and void by its terms because you can't have an unwind agreement following a closing. The board would therefore be dragged involuntarily without a vote to the point where the unwind agreement is null and void and we have no consensus and no unanimity about how to move forward. At that point, the board's obligation contractually would be to go ahead and award the bid and move forward with the construction of the infrastructure. To go into that involuntarily and without a vote and a united front would be the worst outcome for the city because that would put things in disarray and the LGC is going to be puzzled about what that means and

in the interim, the developers and the lender may be wondering what it means. So, after talking to the Mayor and City Manager, we felt it was important to try to get some decision as to how to move forward rather than the alternative of them closing and saying they are ready...what is the city going to do.

Commissioner Brinkley: The email that Nicki sent to us-the excerpt from the August 2, 2018 Regular Meeting minutes, it says Commissioner Armbrister made a motion that a 2/3rd's vote be required on any decision regarding the Spencer's Redevelopment Project from this point forward and it was seconded by Commissioner Cawley and approved unanimously. How does that come in with the four to one vote? Did we take the four to one vote out?

Hugh Campbell: The 2/3rd vote is the same as four to one....a super majority.

Commissioner Cawley: I want some clarification on the contract. This is the contract between us and the apartment developer since Dec. 2017. Hugh sent an email to us....Hugh, did you write the contract?

Hugh Campbell: Mac and Matt Springer wrote the unwind agreement together. I wrote the 1st amendment.

Commissioner Cawley: Under this #1, it says the original unwind agreement set out the timeline for development of the apartments and includes the following language "buyer and seller agree that notwithstanding anything to a contrary contained in the purchase agreement that the transactions undertaken in consummation of the purchase agreement will be unwound and reversed at seller's sole discretion in the event of any of the following: 1-buyer fails to obtain construction financing; 2-buyer fails to commence development". When I read that, I read that if the buyer doesn't do either 1 or 2, that the unwind agreement kicks in because of the word "will". It says this purchase agreement will be unwound and reversed at the seller's sole discretion. If the unwind isn't reversed, then what would be in the seller's sole discretion to reverse?

Hugh Campbell: To me, unwound and reversed are basically synonyms. The transaction will be unwound meaning it will be dissolved and reversed to put the parties back in the same position they were in where the city owns the property and the developers get their purchase price back.

Commissioner Cawley: Tell me how you would say it if you were going to say it will be unwound and reversed unless the seller decides they don't want to.

Hugh Campbell: I would say it will be unwound and reversed at seller's sole discretion. That is what it says...that was the intent because the parties understood that these dates were put there as placeholders but the dates really don't matter in the way that dates matter in some contracts. These dates are not material terms to the city so long as the developers are continuing to work. The city entered into the contract to protect itself against the developer stopping and abandoning the project. So as long as the developer is continuing the project, the fact that they missed deadlines didn't prejudice the city. If it had come to prejudice the city, the city would have the discretion to unwind the agreements. Do you know where the June date and the October 31st date came from?

Commissioner Cawley: Mac said the first one was the drop dead date for them to start construction.

Hugh Campbell: They will contend they did start construction-they got their development permit and started something. They didn't have their financing and that is why the Oct. 31st date came to be because we called the developers and asked what date they think they would have their financing. That is how the Oct. 31st came about. It isn't that it was a material date to the city-as long as they were continuing to work and continuing to submit their paper work and get the tax credits, the material for the city was performance. For that reason, it says "will be unwound and reversed in the seller's sole discretion". If the city felt like they had breached the contract or not doing what they should have, this board has the discretion to unwind the agreement.

Commissioner Cawley: Why not use "may" instead of "will"?

Hugh Campbell: I think "will" is different than "shall". The words "may" and "will" are synonymous. "Shall" is no discretion... "it shall be unraveled".

Commissioner Cawley: But if you say you will do something, that don't leave them any discretion. I know in legalese, it is different but when I say I will take out the trash, I am not saying I may...I am saying I will.

Commissioner Brinkley: We are having a play on words here. When we gave consent four to one, which said to me we will allow this to continue to Dec. 31st. What is the difference in those words when we did a consensus four to one that we will extend to Dec. 31st?

Hugh Campbell: Consensus isn't formal action.

Commissioner Brinkley: It was our agreement four to one in this room that we would allow them to go to Dec. 31st and then it is automatically unwound. We are at the point to make a decision and move forward. I respect how you feel Jon, but in order to be able to make something happen, someone has to make a decision. The confusing thing for me is when we went into closed session and Jim said he had new information that made him change his mind, we should have all been given that same information if it were legitimate stuff. Changing the whole concept of what we had said in one meeting with consensus and then changing when we were supposed to vote on it...it doesn't look like we know what we are doing and it looks like we are wishy-washy. I wonder what this will look like in the future with future developers. We need to move forward and extend to Dec. 31st and if the developer doesn't deliver, we unwind. What is the point of consensus if you aren't going to stick with it?

Commissioner Brown: We are talking about 35 days and I can't see spending all night talking about it. Thirty-five days is nothing. I agree to extend to Dec. 31st.

Mayor Rowe: I can see Commissioner Cawley's point.

Commissioner Brinkley: What will the developer do if we don't make a decision either way?

Hugh Campbell: I don't know what he will/will not do. A problem is that they own the property so as it stands now, they have somewhat more leverage and in order for the city to

reverse and unwind the transaction, if they don't do it voluntarily, would be necessary for the city to sue and that is a significant danger. I think it is an equal concern to say that it is out of the city's control-if they were to close on it tomorrow and the city gets caught in a place of limbo, where does that leave the city in front of the LGC and community. Legally, it leaves us in a place of we start the infrastructure by Jan. 31st because that is what the agreements say and those were all approved by the super majority. That isn't a good place for the city to get dragged to. If we say we are going to extend to Dec. 31st and give the developers every opportunity to build the apartments, they know and we know that Dec. 31st is the date that they have to start. If they don't close by then they know they can't do it. The second amendment to the unwind says if it doesn't close by Dec. 31st, it is an automatic unwind and there is no further discussion and within five days, we are going to write a check to the developers and they will convey the property back to the city...period. They agreed to those terms and said they would sign that second amendment prior to the Nov. 15th meeting.

Hugh Campbell: In October, if you remember, Matt said as long as we start by Dec. 31st, we will be ok. We have everyone engaged and there are people working on it. We know as long as we start by Dec. 31st we will be ok. They did present term sheets from First Carolina Bank, which is a good indication that they are committed. Based on what they presented, the consensus to extend to Dec. 31st is because they were continuing to spend money and moving ahead. If the city wants the apartments, extend to Dec. 31st...if not, begin the unwind.

Commissioner Cawley: So the extension to Dec. 31st is meaningless since we didn't pass by a super majority vote to extend...nothing changed.

Hugh Campbell: Except that city staff is no longer working on it and we don't have an automatic unwind so our position is diminished. If you compare the language in the second amendment to the first amendment, the second amendment says the transaction will automatically be unwound and reversed without further notice as of midnight of Dec. 31st in the event of any of the following: The developer fails to close on the property or financing. If an unwind event occurs, the unwind event should occur within five days and the city shall return the sum of \$35,000 and developer shall turn over their predevelopment planning documents to the city and surrender and relinquish any claim to the property such that each of the agreements as signed is null and void.

Commissioner Cawley: So we added the word automatically. What happens if on December 31st we didn't want to unwind...we have no way out of it?

Hugh Campbell: Correct. We talked about having a discretionary unwind and consensus of the folks that are working on it was it needed to be an automatic unwind.

Commissioner Cawley: I notice the word "will" was used again..."will automatically unwind".

Hugh Campbell: I will change that to "shall". You are welcomed to disagree with me.

Commissioner Cawley: I do.

Hugh Campbell: Anyone who disagrees...if you or any citizen feels that this is an illegal contract...the intent was that it was in the discretion of the city because the deadlines weren't material terms of the contract. Think about your mortgage, your payment is due on the 1st...it is late on the 15th and you got a penalty...30 days late and it affects your

credit...six months late and they start a foreclosure because all the bank wants is their money. There are penalties built in but through the process, what the bank wants is the outcome intended in the beginning which is they want the house, they want the mortgage, they want their money. It is the same thing here...the deadlines were important from the standpoint of making sure the developers were spending money, staying engaged, because it makes it less likely they would walk away and at the end of 2018, they would have shovels in the ground and be committed to construction. If the city doesn't want the apartments for other reasons, that is entirely different but if the goal is to have the apartments on this campus, then the deadlines aren't material-they were there to keep them moving forward to a closing.

Commissioner Cawley: I guess I was the only one that didn't understand that correctly. I thought deadlines were deadlines. I was surprised when I sat in here in October and I heard you say that all of a sudden you thought this thing was going to get done. Up until just that time, you thought maybe it wasn't going to happen. If that happens in the future, I would like to know about it because I didn't know that the two people who knew it the best didn't think it was going to happen.

Hugh Campbell: I thought it was going to get done. I was worried about the financing piece of it but in terms of their commitment...

Commissioner Cawley: Let's vote.

Hugh Campbell: We would have to go into open session to vote and it would have to be a unanimous vote since Commissioner Armbrister is absent. I think getting the second amendment signed by the developers and bring it back and vote on it at the next meeting would be as good...at least we would know they were committed.

Commissioner Brinkley: I will not be at the next meeting. Hopefully Commissioner Armbrister will be back.

Hugh Campbell: It is up to the Board.

Mayor Rowe: It is my preference that we vote today.

Commissioner Brinkley: Commissioner Cawley, are you on board with approving the second amendment?

Commissioner Cawley: Yes.

Commissioner Brinkley: Thank you. I do see all of your points I will say.

Mayor Rowe: So we are preparing to vote on the second amendment to the unwind.

Hugh Campbell: I will change that word to "shall" to make it clear that it is an automatic unwind.

OPEN SESSION:

On motion by Commissioner Brinkley, seconded by Commissioner Brown and passed unanimously, the board entered back into open session with the following:

Commissioner Cawley made a motion to approve the second amendment to the unwind agreement with the Mayor's signature being contingent upon the developer's signature. If the

developer refuses to sign by December 3, 2018 5:00 pm, the board will begin the process to unwind. Commissioner Brinkley seconded it and it was approved unanimously.

Barbara Jones stated that once the second amendment is fully executed, she will inform staff to move forward with the permitting process.

ADJOURNMENT:

On motion by Commissioner Brinkley, seconded by Commissioner Brown and passed unanimously, the meeting was adjourned.

These minutes are sealed until the transaction consummates or terminates.

Approved this the 20th day of December, 2018.

CLOSED SESSION