

**MOUNT AIRY, NORTH CAROLINA**  
**CLOSED SESSION**  
**November 15, 2018**

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

**CLOSED SESSION:**

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

*(Spencer's Economic Development Project-Apartment Complex)*

Hugh Campbell: I apologize for the impromptu nature of this. It seems to me that where we are is at an important crossroads of either being able to make a decision or not being able to make a decision and it seems to me there needs to be a decision one way or the other. The hurdle that's preventing this board from getting to a decision is the local ruling on the four to one. I didn't want to say this out there because I didn't want to put anybody on the spot, but the fact of the matter is, that local rule can be rescinded by this board at any time. On a three to two vote, this board can rescind any rule that you put in place and take that away. If you want to go there, you can take that away and do a new vote.

Commissioner Armbrister: Where is Ken?

Hugh Campbell: I have talked to him.

Commissioner Armbrister: I guess I figured he might be available.

Hugh Campbell: He will be available by phone I think. I think he would have attended if he thought it was important.

Commissioner Brinkley: We have backed ourselves into a wall because of that 4-1 vote we did for the benefit of Dana making sure everything we had almost a full board agreement. Now, by being able to back out of that, then we can put ourselves back on a playing field that we are familiar with.

Hugh Campbell: I think that was an important vote to make it 4-1. I think that would be a hard thing to back out of at this point, but my concern is what Commissioner Cawley said, which is if there's not a decision, then we do not know where we are. You are giving the power to his bank to decide and interpret what the board is doing. On paper, Ken is in default because he arguably hasn't met the deadlines. It depends what obtained means. He has gotten term sheets, he's gotten commitments from the banks to make loans, but he doesn't have the money in the bank.

Commissioner Brinkley: Didn't we have a full...Jon, how did you vote? Did you say a consensus when we did the consensus? Did you agree with that?

Commissioner Armbrister: I did.

Mayor Rowe: Jim did, Jon didn't.

Commissioner Brinkley: Jon did not. That was pretty much saying that there are at least four of us that would agree with that so why would that consensus not go out here and the four people that said amen to it in there not be the same people that said amen to it out there with a vote.

Commissioner Armbrister: Because it's just like you mentioned to Jon a while ago, now that you've said that, I've got this information and it's made me think this way and you know, that can happen to us at any time with a gathering of more information and all the analyzing and all that, you come to the decision.

Commissioner Brinkley: I just feel like we have to look at the ethical thing here. Ethically, for this business man there was a consensus that we were going to give him that unwind agreement until December 31st. Now we are backing up our honor here by changing our mind with a vote of 3-2, whether it is 3-2 one way or 3-2 the other. The fact is, ethically, this man thought we were going to allow this and probably continued doing his business trying to get ready for us.

Hugh Campbell: Commissioner, with all due respect, I asked to come into the closed session. One thing about parliamentary procedure and I know this is an opportunity to talk about things, but this board wanted to have this conversation in open session. The matter of privilege that I wanted to discuss with you is there is a legal opinion that the board could get out of the 4-1 vote tonight. That is a hard decision and I'm not suggesting that should happen, but I wanted to let you all know that is an option because everyone was saying what do we do.

Commissioner Brinkley: Ok I won't say anything else and you all decide what you want to do.

Commissioner Cawley: We will go back out there if there is a motion to do that and we will take a vote on it.

Commissioner Armbrister: I know I'm not going to vote to change that.

Commissioner Cawley: When we voted on that, it was unanimous-a 5-0 vote.

Commissioner Armbrister: Yes and I'll stay with that.

Commissioner Cawley: I could understand how people can change their mind. I have no problem with that because otherwise, we are at an impasse.

Commissioner Brinkley: So what Hugh is saying is the only way we are going to get out of this impasse is to do away with the single majority.

Hugh Campbell: You can stay at an impasse.

Commissioner Armbrister: Leave the one effect and the process takes itself

Hugh Campbell: Yes, but I think it just creates uncertainty. I don't know what to tell the developers or tell their lenders when they call and ask about the status of the agreements. What do you say to Jerry Coram when he bids...

Commissioner Cawley: Steve, I think I interrupted you a while ago...what were you going to say?

Commissioner Yokeley: We are never going to get anything done if we don't change it. I'm never going to agree with you and you're never going to agree with me. Commissioner Armbrister is never going to agree with me and I'm never going to agree with him...that's the way it is.

Commissioner Brinkley: It is time we come together for the benefit of this one situation and if Ken doesn't have it ready by December 31st, then we can say we did the best we could. It's over.

Commissioner Yokeley: We are not talking about months and months, we are talking about six weeks.

Commissioner Brown: We started the process-we don't stop in the middle of it and turn around. That's what I was trying to say out there.

Commissioner Yokeley: Hugh, what is the chance of litigation from the developer if we don't approve this?

Hugh Campbell: I don't know, that just calls for too much speculation. He may just go away, but like I said, they have committed to architectural and engineering and legal fees.

Commissioner Brown: He's already spent a lot of money.

Hugh Campbell: I don't know how much.

Commissioner Brinkley: According to our last meeting in closed session, he moved forward expecting to go to December 31st because of the consensus we had in that closed session. Not getting a 4-1 vote out there now is going to do nothing but stagnate everything. We may not look great to the citizens at this point if you do a 4-1 vote, but I just want to see us do something that is right and ethical.

Mayor Rowe: We are exactly where we were when we walked in the door. You have explained it, we've either got to go to a 4-1 vote-change someone's mind, or we've got to do away with that super-majority vote.

Commissioner Armbrister: We do have to leave it as is. Like I said before, follow what's on the agreement that's active.

Mayor Rowe: Hugh said in order to do that, we would have to have some kind of a vote.

Hugh Campbell: I think we would have to have...

Commissioner Armbrister: We don't have to do anything. Leave the other one active and whatever it proclaims, dictates, and conforms with, that is what it will be.

Commissioner Cawley: I don't know about the 31st, but the June agreement says it will unwind except at the seller's discretion.

Hugh Campbell: Right.

Commissioner Cawley: It doesn't say the seller may choose to unwind this agreement, it says it will unwind.

Hugh Campbell: At the seller's discretion-that means the seller has to do something because otherwise, we would be going along with it by not acting. How do we get past June 30th if your interpretation is correct because the seller didn't unwind it. We have just been in a constant state of waiting.

Commissioner Cawley: I thought we agreed to extend it.

Hugh Campbell: We agreed to extend it in October but it was after June 30th when we adopted that first amendment. By the same reading, they have been in a state of default since October 31st and today is November 15th. The closed session minutes will reflect that there was a consensus to allow them keep going so there was some discretion exercised.

Commissioner Brinkley: My concern here again is litigation. Could we get sued? Is there anything in there that makes it look like we've done something wrong?

Hugh Campbell: The problem is they own the building so I'm just trying to think how it would play out. We call them and say we are unwinding it, here is a check for \$35,000, we want the property back and they say wait a minute that doesn't make us whole. We were going to make \$2 million on this thing before the end of the year and we stood to make a big pot of money when this thing was all built out, so no, we are not going to convey it back to you. What are you going to do about it City? That's how I think it would go. They hold the title to the property. They may or may not be able to develop it depending on what act this

board takes, because the lender says it can't make a loan with the possibility of an unwind or litigation. I don't know how it goes from there.

Commissioner Cawley: But if we operate the unwind agreement right now, where is their legal case? That they spent money? Everybody spends money getting ready to do something.

Commissioner Brinkley: But Hugh was saying \$2 million that they could have gotten.

Commissioner Cawley: I'm saying if we enact the unwind agreement, which by the contract, we have the right to do, they are the ones in default-not us. If we say you defaulted, sorry but this deal is done, they don't have a legal case against us.

Commissioner Brinkley: But he is the lawyer that says it could happen.

Hugh Campbell: I think they would say that by our acts and by our comments, they have spent money and done things in reliance on it being extended.

Commissioner Cawley: And we say there were three parts to this deal when it was going on and everything changed. That is all I'm trying to get everybody to think about. This is our one chance to operate an unwind agreement so that we go back to ground zero and I know you all don't want to go back to ground zero.

Commissioner Armbrister: I am not afraid of ground zero brother.

Commissioner Cawley: I am thinking this is the only opportunity we've got, if it doesn't go right down the line, not to get sued.

Commissioner Brinkley: The only way we will be able to move forward at this point is the resend the motion of a 4-1. Is that right?

Hugh Campbell: That is a board decision.

Commissioner Brinkley: That is the only way we can move forward.

Commissioner Brown: We've got to get back out there. Hugh told us 15 minutes.

Hugh Campbell: I would say it is more likely than not that the City would end up in litigation or pay more than \$35,000 to unwind because they are willing to take the position that they own the property, that they presented term sheets, and they had started construction, which were the two criteria from the previous unwind agreement.

Commissioner Brinkley: If they were that sure of themselves and they thought we would go with this unwind agreement to the end of the year.

Hugh Campbell: We can sit on it until December 31<sup>st</sup> but that is why we have changed the definitions in this second amendment to say they have to have closed on their finances so we know they have a project and it is an automatic unwind, there is no discretion, and no notice. It is just an automatic and within five days, there will be a closing. Those are the two significant changes from the first amendment to the second amendment.

Commissioner Brinkley: So we are still at an impasse.

Hugh Campbell: It is not like it's going to be smooth sailing once they start. There are going to be cost over runs, there are going to be problems, there's going to be traffic, there's going to be noise, and different things. This is not the end of our conversations about them by any means.

Commissioner Brinkley: What is going to happen if we go out there with a 3-2 vote? Do we go back to the last unwind and they don't get to go to the 31<sup>st</sup>?

Hugh Campbell: I think it can go one of two ways: 1-Their lender can say the City didn't do anything so we will just continue right along and hope for the best; 2-The lender says we don't know what this means-the project could be pulled at any time, we can't close the loan, and these guys can't sign personal guarantees because the City hasn't committed.

Commissioner Cawley: But we don't when the infrastructure is going to get done.

Commissioner Brinkley: But we were committed with the previous unwind.

Commissioner Armbrister: Yes.

Commissioner Brinkley: We have given them a commitment. Now if they want to hurry up and get things done, then this 3-2 vote is a 3-2 vote.

Commissioner Cawley: Will we have to go before the LGC for the infrastructure?

Barbara Jones: Probably, yes.

Commissioner Cawley: That is another thing to factor in.

Barbara Jones: That is another thing to think about as far as what the consensus was at the last meeting, which was to move forward to December 31<sup>st</sup> with an automatic unwind if it didn't happen and the amount specified in there. Also, on what you extended until October 31<sup>st</sup>, it also says the City will have infrastructure done a month later. We haven't started infrastructure either. I agree with Hugh, at some point there has got to be a decision either to extend or a decision to unwind. The longer we let them keep working and allow that, and communications have been to keep working, the more they could (and they may not) tie that up in the courtroom. Then you have a potential litigation issue that may or may not go anywhere. That is strictly up to you as a Board. Those are the things that you decided at the

last meeting and in good faith, has been communicated to the developers. It is up to you at this point what to do, but please be mindful in what we extended to October 31<sup>st</sup>, you said that we, as a City, will have the infrastructure under way in 30 days after that and we have not awarded that either.

Commissioner Yokeley: What were the developers told after consensus at the closed session?

Hugh Campbell: I don't think I've talked to them since then other than to send them the second amendment. They are also aware the construction bid has been extended until January 31<sup>st</sup>.

Barbara Jones: Yes, so we did have a conversation afterwards.

Commissioner Yokeley: So they were expecting this agreement to be approved?

Mayor Rowe: Yes. I think, based on what the consensus was (4-1) to proceed to allow them to go to December 31<sup>st</sup>. That was what was transmitted to them. That is why they have continued to try to get this done. I think they're working as hard as they can to get it done.

Barbara Jones: They understood that the Board had to formalize it by a public vote. They did understand that, because we made that clear to them.

Mayor Rowe: That is what this is tonight, to formalize that.

Barbara Jones: Those are some things that you need to think about it as you move forward.

Commissioner Brinkley: Jim, is there a possibility that you would change your vote and us get a 4-1 vote on this?

Commissioner Armbrister: Not right now. I hate it. With the consensus, I knew what I knew then and I know what I know now.

Commissioner Yokeley: What do you know differently tonight?

Hugh Campbell: Mayor I think we need to back into open session. I don't think that is privileged.

**OPEN SESSION:**

**On motion by Commissioner Brinkley, seconded by Commissioner Brown and passed unanimously, the board entered back into open session.**

Commissioner Brinkley: I think we need to make this happen since we have come this far.

Commissioner Armbrister: The four to one vote reflects the quality in our decisions. In exhibiting four to one, I think that strengthens what we say as a unit together. I am fine

with going back to ground zero and if we go to ground zero, that gives us the opportunity to come back unified in our thoughts and decisions.

Commissioner Yokeley: We will never come to a decision if we keep the four to one vote.

**Commissioner Yokeley made a motion to revoke the super majority (four to one) vote for any decisions regarding the Spencer's Development Project. Commissioner Brown seconded it and it was NOT approved by a three to two vote:**

**Vote Aye: Commissioners Yokeley and Brown**

**Vote Nay: Commissioners Cawley, Armbrister, and Brinkley**

Mayor Rowe: So we are back to an impasse.

Commissioner Cawley: I was wrong on the number I used about the parking lot. The parking lot was estimated to be about \$600,000 and the cost came in right at half of that.

Hugh Campbell: I will report to the developers tomorrow that the 2<sup>nd</sup> amendment wasn't approved and we are resting on the 1<sup>st</sup> amendment with no further action as of tonight.

**These minutes are sealed until the transaction consummates or terminates.**

Approved and adopted this the 15<sup>th</sup> day of August, 2019.