

SIMSBURY BOARD OF SELECTMEN
ENO FARMS SUB-COMMITTEE

Minutes of Special Meeting – Monday, July 2, 2012

Call to Order

A special meeting of the Board of Selectmen's Eno Farms Sub-Committee was called to order on Monday, July 2, 2012 at 4:30 p.m. in the Main Conference Room, Simsbury Town Hall, 933 Hopmeadow Street, Simsbury, Connecticut. Sub-Committee members Sean Askham and Lisa Heavner were present. Town Counsel Robert DeCrescenzo and Director of Administrative Services Tom Cooke were also present.

Ms. Heavner summarized the prior proceedings of the Sub-Committee, describing the two prior meetings which provided an unprecedented opportunity for public comment and gave the public the opportunity to ask questions directly of the Sub-Committee, Town Counsel and Town staff. Ms. Heavner noted that it was clear from these prior meetings and Counsel's responses to questions that the Town is bound by the legal obligations of the Eno Farms 1991 Ground Lease and the 1991 amendment to the Ground Lease (the "Ground Lease"); that under the terms of the Ground Lease, which cannot be changed, the current Lessee, Connecticut Housing Finance Authority ("CHFA"), has the right to assign its interest under the Ground Lease; and that the Town of Simsbury cannot unreasonably refuse the assignment. The Town of Simsbury cannot insist upon purchasing the property itself – its rights and obligations are spelled out in the Ground Lease which was drafted many years ago.

With this background, the Town's responsibility is to do its best to negotiate the terms of the assignment with John Rutenberg, the purchaser of CHFA's interest in the lease, in a way that protects both the interest of the Town and of the residents of Eno Farms.

Ms. Heavner asked Mr. DeCrescenzo to summarize a letter recently received from the Attorney General's Office. Mr. DeCrescenzo stated that he had received a letter from Assistant Attorney General Gary Hawes which provides the Town with guidance on how to comply with the charitable restrictions in the Amos Eno deed of the property to the Town. The letter notes that rent at Eno Farms had recently been restricted to 40% of the units at 60% of AMI with the remaining units restricted to 80% of AMI. Recognizing that continuation of these limits might be insufficient for debt service or capital improvements, the Attorney General found that allowing all the rental of all of the Eno Farms units at 80% of AMI or lower would be appropriate, and that this could be revisited if the limitation proved to be problematic in the future. Mr. DeCrescenzo also pointed out that the letter's reference to the Town's commitment to certify the income eligibility of each tenant "if CHFA is no longer in a position to do so." Mr. DeCrescenzo concluded by pointing out that the letter did not require a certain number or percentage of the Eno Farms units to be rented at "very low income" levels.

Mr. DeCrescenzo also reviewed the due diligence letter prepared by him and submitted to CHFA on behalf of the Town and noted that he had received a partial response from CHFA.

Finally, Mr. DeCrescenzo reviewed a letter received from Peter Alter, Esq., attorney for Mr. Rutenberg, which addresses some of the outstanding issues requiring agreement and clarification. The four points of the letter include: (1) a definition of Low (80% or less of Median Income for Hartford County which is \$87,700) and Very Low (50% of median income) income Tenants using a standard HUD form; (2) a proposed mix of 10% of units for Very Low and 90% of units for Low income tenants; (3) a three-year average income rule for tenant continued eligibility; and (4) that ground rent should be considered part of the tax bill and this should be clearly stated to remove ambiguity.

Mr. DeCrescenzo noted that the Sub-Committee needed to direct him in his response to Mr. Alter's letter. He added that the CHFA's response included a budget for October, 2011 and that this could be useful in determining a "return on investment" approach to help the Town and Mr. Rutenberg find a balance between return on investment and the number and cost of Very Low and Low income units.

Public Audience

The Sub-Committee offered the opportunity for public audience.

Robert Kalechman stated that it was not too late for the Town to purchase the property. He foresaw continued legal disputes if the Town continued on the path of leasing the units to a private company and recommended that, in order to avoid problems in the future, the Town should buy the property.

Joan Coe stated that she was not provided enough time to review the Town's files on Eno Farms because Tom Cooke was on vacation on Friday and the file was locked in his office. She stated that the Amos Eno "trust" did not provide for a private company operating at a profit and that the Town should buy the property and have the Housing Authority run it. She stated her belief that a \$70,000 income limit was too high. She opposes using the three year averaging income certification approach. She stated her concern about CHFA's agreements with Mr. Rutenberg, in particular §§ 11 and 18 of the "Stewart" agreement and a provision that one of the agreements not be recorded.

Rogene Bogoslofski stated that in her opinion lots of people were not there because they did not receive personal notice. She also noted that the door to Town Hall was locked at 4:30. She stated that people were "categorizing" Eno Farms and that it was getting too expensive for low income residents. She concluded that the Town would have to decide where to put a homeless shelter.

Gary Lapins asked whether or not the 80% income limit included utilities, and more generally, what was covered by the 80%.

Rafi Khan stated that the "Whereas" clauses in the Ground Lease talked about the conveyance of house ownership to residents, that this was the intent of the Ground Lease and that this did not occur.

Gary Lapins asked whether, if the Town wanted to buy the property, it would the Town have to deny the assignment first.

There being no further members of the public desiring to speak, public audience was closed.

Discussion and possible recommendation with respect to negotiation of terms of assignment of Eno Farms Lease

Ms. Heavner asked Mr. DeCrescenzo to address the issue of a Town purchase of the Eno Farms lease interest. Mr. DeCrescenzo noted the absence of any proposal from the Board of Selectmen to do so and pointed out that the Board of Selectmen, the Planning Commission and the Board of Finance would have to approve such a proposal; that it would have to go to referendum; and that the Town would have to raise money from bonding or from the reserves to purchase the property, noting that the purchase price proposed by Mr. Rutenberg was approximately \$3 million. He noted that there was no appropriate for this in the Town's current budget. He also pointed out that the Town was not a party to the purchase agreement between CHFA and Mr. Rutenberg; that the lease gives CHFA the right to assign its interests under the lease; and that the Town cannot compel the lessee to sell its interests. Should the Town refuse consent to the assignment on this basis, a court would likely find the refusal to be unreasonable and such an approach might open the Town to claims of tortious interference with contract. Ms. Heavner noted that the Town was not in a position to start from scratch and that the Ground Lease controls the issues before the Sub-Committee, and Mr. Askham pointed out that the issue was not a purchase of land but the lessee's right under the Ground Lease to transfer the improvements on the land.

Upon questioning by Ms. Heavner, Mr. DeCrescenzo agreed that the controlling document is the Ground Lease, pointed out that the Attorney General was aware of the document and, and stated that compliance with the Ground Lease was would, in the Attorney General's opinion, constitute compliance with the Eno deed restrictions. He stated that the Town would continue to work with the Attorney General's office as it moved forward with the assignment process.

Mr. Askham stated that the Town's due diligence was in part to ensure future compliance with the Ground Lease. Upon questioning by Ms. Heavner, Mr. DeCrescenzo expressed the opinion that the best approach for the Town was to negotiate an assignment contract with Mr. Rutenberg. Mr. Askham asked if the purchaser was required to negotiate, and Mr. DeCrescenzo responded that while negotiation was not required, it was in the best interests of the purchaser. He pointed out that the purchaser's June 20, 2012 letter indicated an interest in reaching an agreement; and that Mr. Alter wanted to know if the points in the letter were on the right

track. If so, the purchaser would provide a more formal letter. In Mr. DeCrescenzo's opinion, the purchaser is trying to reach out proactively to establish a good working relationship.

Ms. Heavner stated that any agreement would have to provide the purchaser with sufficient funds to cover costs and that one issue was to determine how many "Very Low" income units could be sustained. She stated that it was also important to understand how existing tenants would be affected by the sale; to put an income certification process in place; and to require a sufficient maintenance reserve. She also said that there needed to be a process for the treatment of over-income residents and for determining rents. Finally, she said that any agreement would need to provide for regular reporting. Mr. DeCrescenzo and Ms. Heavner agreed that this summarized the Town's primary goals for an assignment agreement.

Mr. DeCrescenzo proceeded to review the four points in Mr. Alter's letter.

With respect to the first point, Mr. DeCrescenzo stated that there was already agreement on the income limitation suggested.

With respect to the second point, Mr. DeCrescenzo, Mr. Askham and Ms. Heavner discussed whether the proposed 10% set-aside for very low income units could be determined as reasonable without information about the current mix of low and very low income tenants. Mr. DeCrescenzo stated that the current mix, which would include some very low income tenants still covered by Section 8 vouchers, would be a critical factor in determining a "reasonable" number of units for very low income tenants. He pointed out that the Ground Lease provides no guidance on the issue of the number of units for very low and low income tenants. The Sub-Committee concluded that it did not have enough information to determine the reasonableness of the proposal in the June 20, 2012 letter.

Mr. Askham expressed concern for finding the right cost balance. Mr. DeCrescenzo pointed out that CHFA had estimated approximately \$380,000 in operating expenses and that the Town should be concerned if the owner cannot raise substantially in excess of this number to fund costs and reserves. Ms. Heavner added that residents also had an interest in the assurance of sufficient funds to maintain the property.

With respect to the fourth point, Mr. DeCrescenzo addressed the letter's assertion that the tax bill is equivalent to the ground rent and stated that he was not sure this was an accurate reading of the lease. Mr. Askham pointed out that Article IV of the Ground Lease which defines the lease amount should be read in context with Article V which places responsibility for taxes and assessments on the lessee. Mr. DeCrescenzo noted that there were other ambiguities in the Ground Lease that were addressed in the proposed amendments to the Ground Lease – with the defeat of the proposed amendments, the ambiguous terms remain in the document. Ms. Heavner and Mr. Askham asked Mr. DeCrescenzo for a legal opinion on how the lease fee and tax provisions in the Ground Lease should be interpreted.

The Sub-Committee identified the next steps as (1) gathering more information on the current status of income levels at Eno Farms and (2) obtaining a recommendation from Town Counsel on how to proceed with the negotiation of an assignment contract.

Ms. Heavner returned to point three in the June 20 letter, pointing out that the Ground Lease does not provide any guidance on how income certification would work. She noted residents' concerns that providing only thirty days notice to tenants above the income limits would be impossible. Ms. Heavner asked Mr. DeCrescenzo to check with the Attorney General's office on the proposed three-year review for certification and Mr. DeCrescenzo agreed to do so.

Mr. DeCrescenzo also recommended that the Town ask Mr. Rutenberg to provide a projected budget. He noted that the budget provided by CHFA appeared to provide, roughly, a 5% return on investment. Ms. Heavner asked Mr. DeCrescenzo to determine what industry practice would recommend as an appropriate return on investment, and Mr. DeCrescenzo stated that he could obtain that information from CHFA. This would provide a solid basis for negotiating the points in question. Ms. Heavner also asked for a methodology with respect to the determination of rents. The Sub-Committee discussed the standard of 30% of income as an upper limit for rent. Mr. DeCrescenzo noted that while this was not in the Ground Lease, it was a good measuring stick for reasonableness – it is used by HUD and is a nationally recognized standard.

Approval of minutes of meetings on June 5, 2012 and June 11, 2012

Ms. Heavner and Mr. Askham reviewed the minutes from June 5, 2012 and made changes as necessary. Ms. Heavner moved their approval, Mr. Askham seconded her motion and the Sub-Committee voted to approve the minutes as revised.

The Sub-Committee also reviewed the June 11, 2012 minutes and made changes as necessary. Mr. Askham moved their approval as amended, Ms. Heavner seconded the motion and the motion passed.

Adjournment

Mr. Askham moved to adjourn the meeting; Ms. Heavner seconded the motion and the motion passed. The meeting adjourned at 6:00 p.m.