

REPORT OF THE PENNICHUCK WATER SPECIAL COMMITTEE

May 25, 2004

A meeting of the Pennichuck Water Special Committee was held on Tuesday, May 25, 2004 at 6:40 p.m. in the Aldermanic Chamber.

Alderman Brian S. McCarthy presided

Members of the Committee present: Alderman-at-Large Steven A. Bolton
Alderman-at-Large David W. Deane
Alderman David D. Lozeau

Members not in Attendance: Alderman Robert G. Shaw, Jr.

Also in Attendance: Alderman Robert A. Dion (@ 6:47 p.m.)
Alderman Marc W. Plamondon (@ 6:51 p.m.)
David Connell, Corporation Counsel

DISCUSSION

Chairman McCarthy

First I would bring the committee up to speed on what has happened with the district. Londonderry and Litchfield both voted to join last night so assuming a successful passage of the Charter review by the Attorney General's Office there are now 6 towns that will be members of the district when that review expires.

Also as you are probably aware I have put legislation in this evening to establish who our directors are since I anticipate that there will be a meeting of the Board of Directors at some point in the not too distant future.

Is there anything that we want to talk about in public session about the lawsuits or would it be appropriate to do that in non-public session?

David Connell

We can go in greater depth in non-public. We can give a couple of facts openly. It was 10 days ago – almost 2 weeks ago, we had a hearing on the request of Pennichuck for a Preliminary Injunction, which was specifically aimed at stopping the PUC proceedings from going forward claiming that they were going to be irrefutably harmed somehow by that. That was taken under advisement by Judge Groff and there hasn't been a decision yet. Our response to that was that there was no irrefutable harm – in fact they had raised the exact same defense at the PUC and that the PUC was the forum designed by statute to decide how much of the property outside the city the city either would be allowed to or required by the PUC to acquire. That was the issue that was posed to Judge Groff and we are still awaiting the decision.

The civil action in which they were seeking \$5 million for supposed inverse condemnation and deprivation of due process that was removed to the Federal Court by us. When there are federal civil rights claims brought in the state court the defendant has the option of taking them to the federal court to be dealt with there, and that is commonly done. It is hoped that the federal court will take a look at those civil rights claims, which it sees a lot of and will dismiss them and then send the case back to the state court with the state claims to be dealt with and then we can address those in the state court.

In the meantime the PUC has indicated that it will stand by and wait for the decision of the Superior Court on that Preliminary Injunction at any rate.

Alderman Bolton

I was present for that Preliminary Injunction hearing from my admittedly biased perspective I would say that our counsel had the better of the argument that afternoon.

PERIOD FOR PUBLIC COMMENT

Chairman McCarthy

Marilyn did you have anything you wanted to discuss with the committee?

Marilyn Peterman

... speaker inaudible .. away from microphone.

NON-PUBLIC SESSION

**MOTION BY ALDERMAN BOLTON THAT THE COMMITTEE GO INTO NON-PUBLIC SESSION BY ROLL CALL PURSUANT TO RSA-A:3,II(E) TO CONSIDER A PENDING CLAIM OR LITIGATION WHICH HAS BEEN THREATENED IN WRITING OR FILED AGAINST THE CITY OF ANY SUBDIVISION THEREOF OR AGAINST ANY MEMBER THEREOF BECAUSE OF HIS MEMBERSHIP IN SUCH BODY
MOTION SECONDED BY ALDERMAN DEANE**

Yea: Alderman McCarthy, Alderman Bolton, Alderman Deane, Alderman Lozeau

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Nay:

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MOTION CARRIED

NON-PUBLIC SESSION

David Connell, Esq.

Some of the tactics involved in this federal court are interesting. There is a doctrine called the Williamson County Doctrine which was actually a zoning case, but back in the '80s the U.S. Supreme Court and the Federal Courts in general were seeing this trend of every local case being transformed into a civil rights case and they were not happy with that so in an effort to try to minimize what was going on in the federal courts they said well the Fifth Amendment says you can take property as long as you pay just compensation so we are going to wait and see on each case whether there is an adequate state remedy whereby you can get just compensation. If there is then we will dismiss the federal case and they can exhaust that state remedy. That is why it is a good idea to remove this case at the federal court because the federal court is anxious to dismiss the federal claims and send you back for your state remedy.

The funny part is often when they get back into the State Court they will find that the remedy isn't that adequate after all and they will try to return to the Federal Court and the Federal Court will say oh you had your shot at litigation that is collateral estoppel you can't re-litigate the same thing. So it can work as a catch 22 for the municipalities. In this case we are hoping that is exactly what will happen. There are cases that claim there is such a thing as inverse condemnation in New Hampshire where you can get damages, but it is very rare and we don't think it should happen here. There are some cases from other states in federal courts that say mere delay or even failure to go forward with eminent domain even if it reduces values does not amount to unconstitutional behavior so we are hoping that within a couple of months that maybe those damages claims will be gone.

On the injunction, I agree with Alderman Bolton that we had the better of the argument. I thought Judge Graff might make short of it and issue a decision, but he hasn't. Our last argument was kind of interesting. When you get an infirmity junction you may be required to post a bond for the damages suffered by the defendant if it turns

out you shouldn't have granted the injunction. Arcel got together with Steve Adams and they said well you know if we have to wait a year or two the interest rates might go up a point or two and over the life of the bond they projected that would be another \$27 million so we asked for Pennichuck to post a \$27 million bond. Judge Graff didn't even want to hear the company argue against that. He just said no rebuttal and he stood up and left. We were hoping that would be no injunction, but we don't know yet.

Alderman Bolton

It is not uncommon for a Judge to write an order and then no one actually gets it in the mail for another 2 or 3 weeks. There is some administrative delay here so it could be that it has already been decided but is still winding its way through the administrative processes.

Alderman Deane

Is that where the typewriters come into play?

Alderman Bolton

No they actually have computers there they just don't have enough people to bang on the keyboards.

Chairman McCarthy

There are actually a couple of other developments that I think are appropriate for the non-public session and I will talk about the first one and get to...Pennichuck invited the legislative bodies of all of the surrounding towns to a set of meetings to describe the evils of Nashua taking the system over last week and this week. Attorney Connell and Director Hersh went to one of the meetings that was attended also by two former Selectmen from Hollis. I showed up for one of them where no one else was there. Mrs. Peterman showed up for one of them where no one else was there. I guess the day after you went to that one we received a communication from Attorney Camerino inviting us not to attend any more of them, which brings up an interest aspect of the Right-to-Know Law since Pennichuck isn't actually susceptible to it but any of the attendees who come in numbers exceeding a quorum even if it is at separate meetings according to precedent set against this city probably are.

Now we debated a little bit as to whether to tell the Telegraph that this was going on and I think the wisdom is to wait and tell them after the meetings have concluded since we think that no one will attend them anyway. We will still get the benefit of having called attention to the wrong but not given any credence to the meetings that would cause people from the other communities to go to them. To the best of our knowledge no sitting member of one of the boards has gone to any of these meetings yet.

David Connell, Esq.

For all we know they are very scrupulous about that and don't want to have an inadvertent quorum.

Chairman McCarthy

The second issue was that one of the PUC commissioners resigned last week and we are somewhat concerned as to who the replacement will be and whether that is sympathetic or not to our case.

David Connell, Esq.

That could be the single most important thing that has happened lately. This was an experienced commissioner who probably was relatively comfortable with the idea of municipalization. The Governor's most recent appointee is kind of are out front about being against the idea of government intervention in private affairs so we will see if there is somebody else of a like mind appointed and then we may have more of an uphill battle.

Alderman Deane

Has someone been appointed to replace him already?

David Connell, Esq.

Oh no. No this is just recently announced. They have two commissioners at the moment. I don't know if they have an alternate, I can't remember.

Chairman McCarthy

I don't know. Are there any questions about any of that stuff? Lastly, we did in fact receive an overture from the company to engage in mediation, which we have cautiously started to look at with the intent of finding out whether this is serious or an attempt at delaying the proceedings before the PUC. I think the consensus is that we absolutely will not agree to any stay of any of the current proceedings in order to accommodate it, but that is hopeful news that the company would like to sit down with us again. Any questions or comments?

**MOTION BY ALDERMAN BOLTON THAT THE COMMITTEE COME OUT OF NON-PUBLIC SESSION AND SEAL THE MINUTES OF THE NON-PUBLIC SESSION UNTIL SUCH TIME AS THE MAJORITY OF THE BOARD VOTES THAT THE PURPOSE OF THE CONFIDENTIALITY WOULD NO LONGER BE SERVED
MOTION CARRIED**

DISCUSSION

Chairman McCarthy

I also attended last evening a meeting of the Hollis Board of Selectmen where they held a public hearing on the water committee Charter. There was no action taken after that hearing.

Alderman Deane

Do you know when they will?

Chairman McCarthy

They looked like they were settling in for a fairly slow process. Is there any further business before the committee?

ADJOURNMENT

**MOTION BY ALDERMAN DEANE TO ADJOURN
MOTION CARRIED**

The Pennichuck Water Special Committee meeting was adjourned at 6:55 p.m.

Alderman-at-Large David W. Deane
Committee Clerk