



BOXBOROUGH AFFORDABLE HOUSING TRUST

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Meeting Minutes

January 11, 2019

9:00 AM

Morse-Hilberg Room

Boxborough Town Hall, 29 Middle Road

Members Present: Les Fox, Chair, Al Murphy, Ron Vogel, Becky Neville, and Channing Wagg

Also Present: Adam Duchesneau, Town Planner
Jennifer Barrett, Town Accountant
Paul Redmond, Town Treasurer

Mr. Fox called the meeting to order at 9:04 AM.

Meeting Minutes of April 18, 2018

Mr. Murphy MADE a MOTION to approve the minutes of June 27, 2017. Mr. Vogel SECONDED the MOTION. All members voted in favor 5-0.

Summary Status of BAHT Funds, Allocations, and Expenses

Ms. Barrett went over the standard town revenue and expense report for the Housing Trust. Mr. Murphy had a question regarding the balance in Stow Road appropriations. Ms. Barrett provided additional clarification.

Mr. Murphy provided an update on the Stow Road property maintenance and affordable housing project. Per the direction provided and funds allocated previously, the two houses and garage have been boarded up to prevent vandalism or entry by animals. The total cost was \$4,465. He also reported that contact had been made with Elizabeth DeMille Barrett regarding development of plans for an affordable housing project on the site. Ms. DeMille Barrett was very interested in the opportunity and had provided an outline for scope of services to develop an overlay district approach that has worked well in other towns. Unfortunately, since then, due to pressing family matters she has been unable to devote any time to Stow Road. The Town Administrator has sufficient information to develop a contract for services with Ms. Barrett when she is again available for engagement, perhaps in April or May. Meanwhile the project is on hold.

Housing Board Update

Mr. Murphy provided a brief update on Housing Board activities and items from the Housing Board meeting of January 10. The resale of 118 Summer Road appears to be going well and on track. There were five applicants for the housing lottery which was held on January 10. Winners have been selected. Joan Meyer has volunteered to assist working the process with MetroWest. Based on this positive development for resale, there does not appear to be a need for contingency

funds from the trust. There was no request for additional allocations for the Housing Board at this time.

There was a brief discussion on a strategy for low income housing for households well below 80% AMI. What is the best way for the Housing Board and Housing Trust to address this segment? The success of the Boxborough Rental Assistance Program was noted as indicating one possible direction. No actions were taken other than to note this topic merits further discussion.

Mr. Murphy then briefly discussed a matter that he had introduced in his mail of Oct 8, 2018, that arose from his attendance at a housing trust conference and roundtable. In 2016, the passage of H.4565 modified sections of MGL Ch 44 pertaining to Municipal Housing Trusts. The changes pertain to some definitions of affordability, the segregation of trust funds by source for proper tracking, and reporting requirements for use of Community Preservation Act funds. The trustees should seek advice of Town Counsel on what changes to Boxborough's trust documents are required or may be desirable. The matter will be taken up at a future trust meeting.

This led to a brief discussion on possible topics for a future BAHT agenda:

- Modification of local BAHT bylaw relative to H.4565
- Low income housing strategy
- BAHT funding of Stow Road property zoning overlay
- Ongoing Stow Road property maintenance
- Contingency funding for future sale/resale cycles

Review of BAHT Portfolio (Bartholomew Reports)

Mr. Wagg introduced the topic of the Trust portfolio performance, continuing along the lines that had been explored previously. He provided a number of charts summarizing his analysis of the portfolio performance over time.

Mr. Redmond briefly reviewed the town's investment policy and the treasurer's responsibility in working with Bartholomew. He noted that by law, Bartholomew may only choose from instruments on the so-called Legal List, which tends to result in modest investment returns with relative safety compared to the general equities market.

Mr. Wagg would like to see the BAHT portfolio performance compared to relevant financial benchmarks. Mr. Murphy would also like to see this, and to understand what metric should be used to assess the BAHT portfolio performance.

Mr. Duchesneau posed the question why the trustees are concerned with financial performance, in light of other responsibilities, such as ensuring expenditures are appropriate.

Mr. Wagg stated that he felt that the trust could be getting a better return on its investments. He gave an example of investing only in Treasuries.

Mr. Vogel stated that he did not want to delve into the financial side of things. That was the responsibility of the Treasurer, who is better prepared to do this and advise the trustees.

Mr. Wagg stated that he was not comfortable with the arrangement between Bartholomew and Commonwealth Financial Networks for providing brokerage and financial services. Are we paying too much? Mr. Wagg moved to ask the Treasurer to have Powers and Sullivan, the town auditor, audit the arrangement between Bartholomew and Commonwealth Financial Networks with the purpose of determining the fees that the Town pays to Commonwealth Financial Networks. Ms. Neville pointed out that the contract and budget for the town auditor does not provide for additional audits – additional funding would have to be provided. There was no second to Mr. Wagg’s motion. Mr. Redmond said he would inquire about the cost of doing such an audit for the trustees to consider at a future meeting.

Adjournment

At 10:45 AM Ms. Neville MADE a MOTION to adjourn the meeting. Mr. Vogel SECONDED the MOTION. All members voted in favor.

Ed: As noted in the minutes of the Feb 20, 2019 BAHT meeting, the advice of town counsel on fiduciary duties of the BAHT trustees is appended to these minutes, as requested by Trustee Wagg.

INTEROFFICE MEMORANDUM

TO: BOXBOROUGH AFFORDABLE HOUSING TRUST

FROM: RYAN FERRARA

SUBJECT: RESPONSE TO AFFORDABLE HOUSING TRUST QUESTIONS

DATE: DECEMBER 28, 2019 / 2018 *ff*. 12/12/19

CC: PAUL REDMOND AND JENNIFER BARRETT

The following is a response by Attorney Shirin Everett from KP Law regarding questions posed by Affordable Housing Trust member Les Fox. The italicized sections below are Les's questions and the bolded areas are Attorney Everett's responses:

Ryan,

This is to follow-up on our earlier conversation regarding the fiduciary duties of the Affordable Housing Trustees, who are appointed by the Selectboard according to Boxborough's Affordable Housing Trust bylaw. The trustees are evidently also subject to a Declaration of Trust. Both documents, copies of which I have attached, were prepared by Town Counsel, who should be able to help with my questions, which follow. My questions arise in the context of the appointment of new (successor) trustees and ongoing discussions regarding trustees role in management of the trust financial corpus. Please ask KP Law to advise on the topics below. John Giorgio was involved in setting up the Affordable Housing Trust and matters related to G.L. c. 44, sec. 55C. Declaration of Trust

1. The language of the Declaration closely follows the language of the Bylaw. Why do we have the Declaration? At this juncture, I cannot recall the reason(s) for creating the Declarations in the first place, when the trust was first established in 2007. Since then, we have had very little turn-over in trustees, and I simply cannot now recall some of the early history. I would like to be able to provide a simple rationale for the Declaration for new trustee appointments. It appears that Article Sixth - Acts of Trustees - spells out some beneficial trustee protections that are not stated in the Bylaw. For example, according to the Declaration, it seems the trustees are not personally liable for certain acts, faults or omissions when acting in good faith. Is this accurate? I'd like a simple summary of this and similar benefits that arise from the Declaration.

Response: A trust is governed by a document called a Declaration of Trust, which sets forth the powers of the trustees, rules about appointment and removal of trustees, meetings of the trustees, the beneficiaries of a trust, and other matters related to the administration of a trust. While a Declaration of Trust is not necessary to create a municipal affordable housing trust fund (a "AHT") under GL c. 44, §55C ("Section 55C"), as it takes a vote of Town Meeting and the adoption of a bylaw to create this statutory trust, a Declaration of Trust is adopted by almost all AHTs, as a bylaw often does not set forth all the particular

provisions relating to an AHT. Here, the Declaration of Trust for the Boxborough AHT (the “BAHT”) contains provisions (see Articles Sixth through Eleventh, for example) relating to how the BAHT functions that are not set forth in the bylaw. It is often impractical to set forth such provisions in the bylaw, as a vote of Town Meeting would be required to amend these provisions.

A Declaration of Trust is particularly important if the BAHT intends to engage in real estate transactions where documents are recorded with the Registry of Deeds. In real estate transactions, almost all documents pertaining to title to property, with exceptions that are not relevant here, need to be on record at the Registry of Deeds, so that persons reviewing the title to property do not have to locate off-record documents that are pertinent to the property. For example, a buyer purchasing property from the BAHT will want a document on record stating whether the Trustees have the authority to sell the property and whether the persons signing the deed are in fact Trustees of the BAHT. Without a document on record, the buyer will have to rely on the bylaw, which lists the powers of the Trustees but does not identify who the Trustees are from time to time.

Both the Massachusetts Housing Partnership (“MHP”) and the Department of Revenue (“DOR”), which provide guidance to AHTs, urge every AHT to prepare and record a Declaration of Trust. MHP states, in its 2013 Guidance, that: “The first order of business for the new board of trustees is to execute a Declaration of Trust, which sets forth the trust’s authority, rules and regulations. It should be recorded at the Registry of Deeds/Land Court District. While a Declaration of Trust is not legally required under the statute, it is strongly recommended because the Declaration, once recorded, will provide record notice of the establishment of the Trust and its powers and authority to hold and convey title to real estate. In any event, it would have to be recorded when a trust acquired any interest in real property” (emphasis added).

The Declaration of Trust for the BAHT is very similar to Declaration of Trusts for other AHTs.

2. *I’ve spoken to Town Clerk Liz Markiewicz whose records confirm the initial declaration of trust was signed by the first-appointed trustees and recorded at the Middlesex Registry. The original declaration has not been amended with signatures of successor trustees when they were appointed. As the Clerk pointed out, this appears to be not necessary according to the language in the Declaration which says in Article Third:*

“Upon the appointment of any succeeding Trustee and the filing of such appointment, the title to the Trust estate shall thereupon and without the necessity of any conveyance be vested in such succeeding Trustee jointly with the remaining Trustees.”

We have presumed that the terms of the Declaration apply to the successor trustees upon their (signed) acceptance of appointments, and there is no need to revise or re-execute the Declaration. We simply follow our normal appointment process and swearing-in. Are we OK continuing this practice? Regardless, in future, I would us to be able to state accurately to successor trustees what benefits or protections inure to the position by virtue of the Declaration. It seems positive for the individual(s) and we should be able to articulate them.

Response: Yes, the Declaration of Trust applies to successor Trustees upon their appointment and acceptance; there is no need to revise or re-execute the Declaration. If the

BAHT holds title to real property, title to such property automatically vests in the new Trustees without the necessity of amending the Declaration or recording other documents. However, whenever the BAHT engages in real estate transactions, it needs to record a Certificate of Trust at the same time as deeds or other real estate documents are recorded, which Certificate identifies the persons who are the then-current trustees of the BAHT. Until the BAHT engages in such transactions, however, there is no need to record certificates of appointments, acceptances, or resignations, updating the names of the Trustees.

Note that a Declaration of Trust typically does provide for the benefits and protections available to the Trustees of the BAHT. Such benefits and/or protections are set forth in Section 55C and in the common law principles governing trusts in general; there are treatises on the common law on trusts (such as Nichols, on Trusts), which I do not discuss in detail, except to note that such treatises generally provide, for example, that trustees of a trust are typically not liable for errors of judgment in acquiring or holding property or conducting the business of the trust in good faith, for loss arising out of any investment made in good faith, for actions or omission performed or omitted by them in the execution of their office in good faith, or for the actions or omissions of each other or of any officer, agent, attorney or servant appointed by or acting for them, but shall be liable only for their own individual breach of trust.

Fiduciary responsibilities of trustees

What are the fiduciary responsibilities of the trustees? Currently, all trust funds except the OPEB trust fund are managed collectively as one pool of funds. The OPEB trust fund is managed separately under so-called “prudent person” guidelines that can result in more aggressive investment strategies. In previous meetings of the trustees, two views on funds management have emerged:

1. Passive funds management: The trustees fiduciary responsibilities for management of the trust fund corpus are adequately discharged by assigning funds management to the town treasurer who then follows the town’s policy on management of town general and trust funds, and contracts with a professional fund manager for execution. (Currently Bartholomew and Company). In this case, the trustees from time to time might ask for general portfolio reviews.

2. Active funds management: The trustees could take a more active hands-on role in managing the portfolio to optimize risk/return.

In both cases the trustees have a fiduciary responsibility to ensure that requests for expenditures from the trust fund are in accordance with the terms of the Bylaw and Declaration. No-one is questioning this. But there has been considerable discussion about the role of the trustees in funds management.

I can see no clear statement or definition of trustee fiduciary responsibility in the language of either the Bylaw or Declaration. Is there any guidance on this question from General or common law, or other quarter (eg., DOR, etc)?

Response: The bylaws contain some provisions related to the powers of the Trustees with respect to Trust funds. For example, Section 3 provides that the Trustees may: make “investments that yield a high rate of income or no income” (subsection 2), and “hold all or

a part of the trust property uninvested for such purposes and for such time as the Trustees may deem appropriate” (subsection 15).

As you know, the Town Treasurer maintains custody of all Town funds, including funds of the BAHT, and expenditures of such funds must comply with the warrant process. However, the Treasurer must invest the BAHT funds as directed by the Trustees (or the Trustees may rely on the Treasurer to invest the same), provided that all investments comply with applicable statutory provisions, such as GL c. 44, §54 (which lists the entities with which funds may be deposited, including investing in the legal investment of funds by savings banks in Massachusetts, subject to the limitations set forth therein). The investments must fall within the so-called Legal List of Investments, as stated in the Treasurer/Collector’s Memorandum dated December 4, 2018. According to DOR counsel (to whom I spoke without identifying the Town), Trust funds may not be invested in accordance with the prudent investor rule, as there is no statutory authority for such investments, but, rather, must comply with the Legal List.