

Special Selectmen's Meeting Minutes
May 2, 2018, 4pm
Harpswell Town Office, 263 Mountain Road
Approved May 9, 2018

Selectmen Present: Richard A. Daniel, Chair; Kevin E. Johnson, and David I. Chipman

Staff Present: Kristi Eiane, Town Administrator; Rosalind Knight, Town Clerk; and Marguerite Kelly, Town Treasurer

Town Legal Counsel Present: Amy Tchao of Drummond Woodsum

Chairman Daniel called the meeting to order at 4pm. [The meeting was broadcast live on Harpswell Community television and streamed live over the internet].

Chairman Daniel noted that the meeting is to inform the Inhabitants of the Town of Harpswell that the Board is in receivership of a petition.

Town Clerk Rosalind Knight read the following memo to the Board: “On April 20 and 26 petitions were submitted to the Town Clerk’s office to Petition the Board of Selectmen to place on Secret Ballot: *To see if the Town will repeal the decision of the Harpswell Town Meeting on March 10, 2018 on Warrant Item #30, and authorize the Select Board to enter into an agreement with the non-profit corporation Friends of Mitchell Field to undertake initial repairs of the Mitchell Field Water Tower and fully explore cell-phone transmission from the tower, costs of repairs to be funded by said non-profit group from contributions and grants, with no effect on the Town Budget and with any net operating revenues from cell phone service payable directly to the Town, said agreement to be for 5 years with extension subject to Select Board approval.* Of the 435 signatures submitted, 351 were found to be valid fulfilling the 307 signature requirement.”

Conflict of Interest Matter

Before getting into the issue of the petition itself, the Board decided to take up the matter of a possible conflict of interest involving Selectman Chipman. Chairman Daniel noted that before the Town Meeting, it was Selectman Chipman who brought before the Board his potential conflict of interest regarding his involvement with the Friends of Mitchell Field, citing that no money was involved. He left it up to the other two Selectmen to take the issue up. At that time, both Chairman Daniel and Selectman Johnson were okay. However, since becoming aware of Selectman Chipman’s possible involvement in a petition effort that concerned the water tower, Chairman Daniel raised questions at the last Selectmen’s Meeting trying to discern if there was now a conflict of interest.

Selectman Chipman noted that since the last meeting, it has come to light that he signed the petition and witnessed 94 signatures. He noted that when he became Selectman he took an oath to uphold the Constitution which allows people to petition their government. He stated that when he became a Selectman he did not give up being a citizen, and he supports the people of

Harpwell. Selectman Johnson asked Selectman Chipman if he let people know when he was circulating the petition that this was not something the other Selectmen supported. Selectman Johnson was aware of some people perceiving that because one Selectman was involved in circulating the petition that the other two were also supportive; however, Selectman Chipman stated he assumed most people knew that was not the case. He had a lot of discussion with people about the petition and if asked, he would indicate he wasn't representing the other Selectmen.

Attorney Tchao recommended creating a record of full disclosure. She heard that Selectman Chipman was a petitioner and witness, asking if he also was a circulator, to which he responded he was. She asked Selectman Chipman to describe his role with the Friends of Mitchell Field. Selectman Chipman stated that he is and was an advisor, not actually a member. He stated that he helped pay the legal fees to get the group established, and that when the Water Tower Task Force recommended that the water tower be turned over to a nonprofit, there was some investment to hire an engineer. He noted that he recently participated with the Board of Selectmen and agreed to send out the Town's request for proposals for demolition of the water tower.

Asked by Attorney Tchao if he assisted in preparing the Friends' response to the Town's RFP that went out prior to the Town Meeting, Selectman Chipman responded that he did not participate to any great extent. Selectman Johnson responded that he was cynical of that response and thought Selectman Chipman was quite involved.

Robert McIntyre asked to make a point of order that since the other Selectmen had not seen the petition, Selectman Chipman could not possibly have known or communicated what the other Selectmen's opinions might be.

Regarding the recommendation of the Water Tower Task Force (WTTF), Gary Vincent addressed the Board to state that he read the WTTF minutes and that the Task Force unanimously proposed to the Board that there be two articles at Town Meeting: one to keep the tower and one to fund tear down, as well as a recommendation to solicit proposals.

Attorney Tchao suggested she provide the Board with the framework of the standards regarding conflict of interest. Prior to doing so, Dorothy Rosenberg, a member of the WTTF, stated she had a correction of fact about the WTTF recommendation as reflected in the minutes. She wanted to make clear that the recommendation was read aloud in draft form to the members and that the final formulation was not voted on or approved by the Task Force.

Attorney Tchao reviewed the provisions of the conflict of interest statute (30-A MRS § 2605):

- 1) **Business Interest.** Official has a business interest—is an officer, director, etc. and has 10% interest in the entity.
- 2) **Personal Financial Interest.** Official has a personal financial interest and is placed in a position to serve his own personal pecuniary interest to the prejudice of the interests of those for whom the law authorized and required him to act.
- 3) **Appearance.** Official acts in a manner that creates the appearance of a conflict of interest—not strictly financial—for which there is case law.

Selectman Chipman indicated that having a difference of opinion is not a conflict of interest.

Selectman Johnson stated he thought Selectman Chipman should stay put. Chairman Daniel stated he was good to move on, but if this takes on a new turn or new facts arise, then the Board could revisit the issue at a later time.

The Petition

Mr. McIntyre, the President of the Friends of Mitchell Field, explained that the group was set up to respond to the Town's RFP. The group did so with legal and technical advice. He noted that because David Chipman is an expert on the condition of the Tower, he was the first person talked with. Mr. McIntyre noted that the goals of the group are broad and that the water tower is a functional component of achieving those goals. He indicated that the group held a clarifying meeting before the Town Meeting with the Select Board about the group's response to the Town's RFP and changed "not a problem" language in their proposal to "we agree." Mr. McIntyre indicated that the group was operating on the assumption that the Select Board would present the content of their proposal at Town Meeting. Mr. McIntyre indicated that he was informed on Friday afternoon before the Town Meeting that the group would be allowed to put out information on a shared table. He said he was forbidden to distribute the group's full proposal at the Town Meeting so the Town Meeting voters did not vote on their proposal but rather on rumor and innuendo without access to the facts. He stated that it would be reasonable to request that there be a revote. He went on to note what was missing at the Town Meeting—no mention of the proposal's content; no mention of who the group was or what they represented; no mention of the unanimous recommendation of the Water Tower Task Force to hand over the water tower to a non-profit; no comprehensive market survey of cell phone providers; no mention of the U.S. Cellular request to put a transponder on when Mark Wallace was a Selectman; no reconciliation of the lead measurements; no mention of the FAA registered airfield; belief that another facility can be built at Mitchell Field; no mention of the uniform engineering findings that the tower is structurally strong and of the group's independent study confirming same. Mr. McIntyre stated that there was unknown or misrepresented information at the Town Meeting and that we are looking for reconsideration. He noted that the timeframe from when the warrant articles were known to the time of the Town Meeting was a condensed period and did not allow much time in which his group could engage in public outreach. He also noted that the issue of whether there are DEP funds has not been fully explored by the Town.

Town Clerk Roz Knight addressed the handout. She said there was one handout and Mr. McIntyre put it out on a table like everybody else. She questioned what did it matter what table it was put on, noting that the document he asked to display was put out.

Mr. McIntyre indicated that the document that was put out had broad goals on it, and that the Town did not have the Friends' full proposal at the Town Meeting. He indicated that he was shocked that the Select Board did not present his group's proposal, noting they tried to make the document self-explanatory, comprehensive and responsive to the Town's expectations.

Gary Vincent asked if this was the time for evidence gathering. Mr. Vincent noted that the Task Force was chartered and had been dedicated to exploring the issue of the cell capability for over

a year. He referenced a warrant article for \$10,000 from the Mitchell Field reserve that could be used for cell related matters. He noted that the facts are continually being juggled. The tower has been voted on twice, there was a study and two articles at the past Town Meeting, and the Town Meeting has voted to take it down.

Jim Henderson asked if revisiting the battle was relevant given that the petitioners have followed state law. He noted that the statute allows for petitions and if people didn't agree with what a Town Meeting did, it could be changed. He noted that the Selectmen have to consider what to do with the petition now.

Mr. Vincent stated that he hoped the Board would vote to dismiss the petition.

Attorney Tchao stated that analyzing the law with regard to petitions is relevant, and she noted that there are exceptions to requiring that petitions be voted based on a body of case law. Her view is that the Board has discretion in this situation not to put the petition before the voters. If the Selectmen unreasonably refuse to call a town meeting, the group may decide to have a notary call a meeting. She noted that the Selectmen have discretion to reasonably refuse when a vote has already been taken. In cases of new petitions, statute is followed. In cases of reconsideration, where the minority seeks a re-vote, a petition can be rejected. She noted that the court has ruled that you can never have finality if all you can do is keep re-voting, which is why the Board is allowed to exercise its discretion. If the group decides to go the notary route, then the Selectmen could go to court, and ultimately a court would decide if the Selectmen's decision was reasonable or unreasonable.

Selectman Chipman stated that he knows three attorneys waiting to take this to court. He talked about an example of a Bowdoinham Town Manager starting a petition when he used to serve on the SAD # 75 School Board. He cited another court case from 1978, the Heal case.

Attorney Tchao informed the Board that this decision is soundly within the Select Board's discretion.

On the issue of a minority seeking a re-vote, Selectman Chipman noted that the number of petitioners exceeds the number of people who attended the Town Meeting.

Jane Covey, member of the Mitchell Field Committee (MFC), acknowledged that there is legal precedent and options. She has been involved with the MFC since about 2012-2013 where there has been a history of discussing the water tower, and the committee recommending to take it down. She noted that there have been many articles in the Anchor. She believes people were informed, and that the Town Meeting was asked not to approve a specific proposal but to authorize the Selectmen to enter into an agreement if the Board saw fit. In her view, the work of the task force was to further study and deliberate. The task force was unable to agree and there were two articles. She stated that it has been a long deliberative process, and the judgment of the Town Meeting, based on the best information known at the Town Meeting, was to take the tower down. Personally, she suggested that the Board decline to take this further.

Scott Sheffer indicated that 30-A MRS, § 2522 regarding how a petition is handled, states that municipal officers “shall” put this in front of voters, so why not just let people vote on it again. He noted that the group didn’t do a good job at Town Meeting and doesn’t have a good public relations program. He asked if the vote could occur in June, but was informed that the deadline had passed. He suggested holding another meeting.

Selectman Chipman indicated that the next scheduled vote would be in November.

Ann Standridge stated that the Town needs better cell phone coverage and that is why she circulated the petition. She believes that the water tower represents an asset that could be used to generate better cell phone coverage as well as revenue to the Town. She questioned if the tower were taken down, what would be put in its place.

Selectman Chipman noted that a guy from Orr’s Island said he would chain himself to the tower, an example of how much emotion is tied up in this issue.

Gary Vincent stated that cell phone coverage is a legitimate issue, however, in 2017, the Town Meeting voted to look at the issue of the water tower as a cell phone carrier. The task force looked into the cell carrier issue and in its minutes has a written unanimous decision of recommending two articles to the Board. The minutes also make note of the possibility of a petition. Mr. Vincent is concerned that if the Board is considering another vote it should be done at a Town Meeting where it could be discussed on the floor.

Selectman Chipman noted that if there is to be a secret ballot vote, there would have to be a public hearing.

Terri Flanagan stated that the advantage for the Selectmen in deciding to accept the petition would be that it would go to a Town Meeting for a vote. He stated that if Selectmen decide not to accept this petition, it will lead to more dissension within the Town and the Town could end up with sizable legal costs.

Selectman Chipman stated there were 231 who voted at the floor of Town Meeting, and there were 351 valid petitioners’ signatures, so it was not the minority running roughshod over the majority.

Selectman Johnson indicated that Selectman Chipman is not going to take no for an answer.

Selectman Chipman indicated that he would if the issue could be fairly discussed.

Chairman Daniel stated that the issue has been fairly discussed. While, the Water Tower Task Force did not have a clear recommendation, it suggested that a nonprofit or for-profit entity be considered. Chairman Daniel indicated that the process worked right up until the result of the Town Meeting.

C. Matthew Rich, a Harpswell resident and attorney, stated that he attended Town Meeting. He read the warrant and minutes, and was fully informed. He commented that people who had a

concern about this issue could have been at Town Meeting, noting the Town Meeting has spoken about this issue that has hung on for 6 years. He indicated that the issue is now in the hands of the Selectmen, and you don't willy-nilly overturn the vote of the Town Meeting. As pointed out by the Attorney, he noted there is case law on the matter of reconsideration.

Jeff Stann seconded Mr. Rich's remarks stating that he has been kept informed, and it's time to accept the vote of Town Meeting and move on. He hopes the Board will choose to end the matter.

Town Clerk Roz Knight spoke about Article 38 at the 2013 Annual Town Meeting. At that meeting, there had been 232 voting cards handed out and a vote to take down the water tower was defeated at that time. She noted that nobody challenged that vote and the numbers were similar to the 2018 Annual Town Meeting when 219 cards were handed out.

Attorney Tcho reviewed the Vassalboro decision, a Superior Court decision. She noted that the court's commentary included mention that while voter turnout was low and the margin of victory small, there were no allegations that voters were unable to cast ballots because of natural disaster or other adverse circumstances. In addition, a ballot inspection revealed no evidence of fraud or impropriety. The court noted that the Board could have reasonably concluded that allegations that misinformation was circulated before the vote were insufficient to cause the Board to call a second vote.

Garrett Knight read his comments, noting that the issue has been debated for years, and there is no new information. He called this a special interest petition from disgruntled voters. He referenced Selectman Chipman's involvement in a previous petition effort. He also noted that the Town had previously appropriated \$22,000 for the water tower. He also stated that he believed that Selectman Chipman did have a conflict of interest in this matter. He urged the Selectmen to carry out the will of the voters.

Mr. McIntyre made two points: the \$22,000, previously referenced, was to be used for small-scale repairs at the petitioners' request, but it was Selectmen who re-wrote the article allowing for funds to be used for studies. Mr. McIntyre also asked the Town Attorney if she was familiar with the statute regarding destruction of Town property.

Chairman Daniel asked Attorney Tcho about the form that the Selectmen will need to consider for its decision to hold weight. The Attorney explained that she was taking notes and that the Board could have a free-range discussion. The Board did not need to be overly formal, but will need to reference facts.

She asked Selectman Chipman if he intended to vote. He said he did plan to vote after the discussion.

Selectman Chipman felt that the discussion at Town Meeting was based on opinion, not a lot of facts about the use of the tower for water and cell phone. He said every engineer he has talked to asks why the Town wants to take it down. Selectman Chipman believes the water tower is a valuable piece of infrastructure that could be helpful for fire suppression purposes.

Chairman Daniel asked why then isn't the Fire Department expressing an interest. Selectman Chipman indicated that one person on the Harpswell Neck Board of Directors is influencing the entire Board.

Chairman Daniel stated this issue of use for fire suppression has been debated and has been put to the Board of the Fire Department.

Selectman Johnson stated that we have a letter from the Harpswell Neck Fire Department indicating they don't need the tower.

Selectman Chipman stated that he has spoken to members of the Orr's Island Department that would like it.

Mr. Sheffer reiterated that the statute regarding petitions states that the Selectmen "shall" put petitioned articles to a vote. Since there was a petition with enough signatures in front of the Board, he questioned if there was something that warranted the Board to say no.

Selectman Daniel stated that the Town has done its due diligence seeking input from the fire department and the Mitchell Field Committee, and they say no and Town Meeting says no.

Selectman Chipman stated that is because none of them want the financial responsibilities.

Mr. Sheffer stated that this is becoming like LNG and it should not be a personal argument. He did not agree on the point of needing the tower for fire suppression purposes, but that there may be use for a cell tower.

Chairman Daniel stated the petition delegitimizes a Town vote; there was a Town vote and an answer.

Mr. Sheffer stated that this is a legitimate appeal with enough signatures.

Mr. Rich told the Board not to be afraid of an appeal.

Attorney Tchao indicated it was not necessary for the Board to re-hash the pros and cons. She had laid out a framework for the Board's discretionary determination about whether it could reasonably refuse this petition for a re-vote, based on matters such as: how much or little it was vetted; was there impropriety, misinformation, or a natural disaster.

Mr. Vincent asked the Board if it wanted to uphold the integrity of the Town Meeting vote.

Selectman Johnson stated that for him it was about the integrity of the Town Meeting. The issue was voted on at Town Meeting and he wants to uphold the Town Meeting vote. He claims that the group wants to keep doing it until it gets the vote it wants.

Mr. McIntyre stated that we made a very clear case today that it was not an informed vote. So you are protecting a vote based on misinformation and missing information and why the Town's integrity should be tied to that he didn't know. He noted that the Town did not do a market search for cell phone providers, the Town did not explore U.S. Cellular interest years ago, and there is a whole list of things that it didn't do. He stated that there has been a failure of the Town's administration to carry out adequate and thorough analysis of the alternatives, there was covering up for poor performance, and let's have another vote with time to go to the Department of Defense, the State Environmental Protection to find out what funds are available and for what purpose. He reiterated that the Town did not conduct a market search of cell phone providers, did not follow-up on U.S. Cellular interest, did not get a lead test done, and that there was a whole universe of missing information needed to make a rational decision.

Jim Knight asked if this discussion was going to stay at the Board level.

Chairman Daniel indicated it would stay at the Board level for now.

Attorney Tchao asked about the point involving incomplete or missing information, on the alleged failure of the Town to carry out studies and the group's inability to hand out information at the Town Meeting.

Chairman Daniel indicated that there was one response to the Town's RFP for the water tower and it was from the Friends of Mitchell Field. The Board did not take a position on it prior to the Town Meeting. A Selectmen's workshop was held prior to the Town Meeting to get clarification on some aspects of the Friend's response. They made corrections and were given permission to put their proposal on the Town's website prior to the Town Meeting. Chairman Daniel noted that prior to the RFP being initially approved by the Selectmen, the Friends group was given the opportunity to comment on the draft RFP. Some of their suggestions were taken into consideration and the RFP was amended.

Town Administrator Kristi Eiane noted that Mr. Ott; Mr. Henderson and Mr. McIntyre attended the Selectmen's workshop as representatives of the Friends of Mitchell Field. Hope Hilton, who is not a member of the Friends, responded to questions that the Town raised about insurance coverage in the Friends' proposal. After the workshop and prior to the Town Meeting, Mr. McIntyre brought a thumb drive to the Town Administrator with the Friends' proposal on it for posting on the Town of Harpswell's website. Corrections made had to do with changing language in the proposal from "not a problem" to "we agree."

With regard to dissemination of information at the Town Meeting, the information that the Friends' group requested be disseminated was provided to the Town Attorney for review. On Friday afternoon prior to the Town Meeting, the Town Administrator informed a Friends' representative that the information it had asked to put out at the Town Meeting could be made available. This information did not include the full proposal, because the Town was not asked about dissemination of the full proposal. Mr. McIntyre indicated he had asked to disseminate the Friends' full proposal and was denied. The Town Administrator and Town Clerk stated that they did not deny any request by the Friends to disseminate information. The information that the Town checked with the Town Attorney about was a summary. Mr. McIntyre explained that it

was a summary of the Friends' goals put together by Jim Henderson and not a summary of their proposal to the Town.

Attorney Tchao asked questions about the process at the Town Meeting. Chairman Daniel noted that the Moderator, John Loyd, combined debate on Articles 29 and 30. He asked the Board for comment first. Chairman Daniel reviewed past history and mentioned that there was an entity at the Town Meeting that could explain its proposal to the Town. The Town Planner, Mark Eyerman, had been asked to give a synopsis of the Water Tower Task Force and what they did over time. Discussion was then opened up to voters at the Town Meeting. Attorney Tchao asked if members of the Friends were permitted to speak at the Town Meeting, and the response was yes. She asked how much time elapsed from the time of issuance of the RFP to its response. The answer was 30 days.

Selectman Chipman stated that he has worked on this project for 4 years, that there was not a factual discussion at Town Meeting and he has learned a lot since Town Meeting. He noted that while the statute regarding petitions is clouded by case law, there are far more instances of recall than rejections. Selectman Chipman moved that we accept the petition and put it up at the next established vote in November because he did not feel all information that would make a reasonable vote at the Town Meeting was brought out. It was seconded by Selectman Johnson for purposes of discussion.

Selectman Johnson noted that this issue was voted on at the Town Meeting.

Selectman Chipman noted that his great, great, great grandfather helped establish Town Meeting, and he understands the importance of it. He stated there was far more precedence to accept the petition. He would like to see this issue voted on by secret ballot with far more opportunity for voter participation and for discussion at a public hearing, like LNG.

Chairman Daniel indicated that there had been good give and take at the Water Tower Task Force and good give and take at the Town Meeting. He does not see this rising to the level that it keeps getting characterized as. He stated that he would vote against the motion.

Selectman Chipman stated that the Town Meeting was voting on opinion not facts, and he has learned a lot since.

Chairman Daniel noted that he has been listening to facts.

Attorney Tchao asked about the claim that there was misinformation or the allegation of it.

Chairman Daniel: They are unfounded.

Selectman Chipman: They are not unfounded.

Selectman Johnson: Water Tower commission had its findings. Friends of Mitchell Field presented its proposal.

Selectman Chipman: The cell phone companies' assumptions that they would be responsible for all of the costs were incorrect. The WTTF did not have solid facts, and he is trying to straighten out misinformation.

Chairman Daniel: There are some who think the tower is too expensive to fix and maintain over time. The WTTF was tasked to give direction to the Board and it did.

Dorothy Rosenberg, a member of the WTTF, stated that as a member of the task force she asked for lead testing and it was vetoed by the WTTF. She stated that she also asked for a market survey of cell phone providers and that was vetoed by the WTTF, and because of the task force's composition it was not effective as a fact-finding group.

Selectman Chipman stated we must honor the petition and it cannot be unreasonably denied. He stated this could wait until November to be voted on and there would be a public hearing before the vote and time to get the facts out, and if it is voted no, he will give up.

Chairman Daniel stated that there had been a lot of process and this issue is trying the patience of the Town. There is not a preponderance of evidence that information was so lacking it would change the vote. He noted that there has been years of debate.

Selectman Chipman indicated that the water tower could be used as the engine to get things going at Mitchell Field.

Don Miskill, a member of the Mitchell Field Committee and the Mitchell Field steward, stated that there were articles in the Anchor, and the warrant articles were in the Town Meeting warrant in the Town report, and that Town Meeting was the place to vote.

Chairman Daniel called for a vote on the motion to accept the petition and hold a vote in November. Selectman Chipman voted in favor of the motion with Chairman Daniel and Selectman Johnson voting in opposition. The motion failed.

Selectman Johnson then moved to reject the petition; it was seconded by Chairman Daniel and passed 2-1, with Selectman Chipman in opposition.

The meeting was adjourned by unanimous consent at 6:07pm.

Respectfully submitted,

Kristi K. Eiane, Town Administrator