

SPECIAL BOARD MEETING of September 8, 2004, with Mayor Buck Trott and Commissioners Amy Patterson, Hank Ross, H. N. James, Alan Marsh, and Dennis DeWolf present.

Also present were Richard Betz, Lamar Nix, Bill Coward, Amelia Pavlik, Kim and Jim Lewicki, Richard Melvin, Charlie McDowell, Rosemary Fleming, Jack Bournemann, Dennis Wilson, Ran Shaffner, Alan and Jane Lewis, Bill Emerson, Elizabeth Bryant, and others.

I. Call to Order.

The Mayor called the Special Board meeting to order at 7:00 p.m. He stated that he had called the meeting in order to discuss pending litigation in the Town v. Edwards et. al. case, which the Board had discussed in closed session with the Town Attorney at the September 1 meeting, and specifically a Motion for Relief of Judgement filed on August 19 by Richard Melvin, attorney for the defendants.

II. Business.

The Mayor read the following statement into the record:

"The Highlands Town Board was advised on September 1, 2004, that a Motion for Relief from Judgment had been filed in the General Court of Justice, Superior Court Division, regarding the Town of Highlands, et. al. plaintiff v Grover William Edwards, et. al.

This action was a total surprise to the Town Commissioners. The Board thought the case closed as of last September when a Consent Judgment was entered on September 15, 2003.

As I understand, the Motion for Relief from Judgment can lead to expenditure of additional public tax monies by the Town in further litigation. The Town has spent approximately \$178,000 in court and associated legal costs in this case.

On September 2, 2004, I, the Mayor, started contacting defendants in the case. I was surprised that nine of the defendants had not been contacted by their counsel on this matter. This is just the opposite of the initial paragraph of the motion, which states, "defendants in the abovementioned action by and through their undersigned counsel, respectively move the Court for relief from the judgment persistent to Rule 60 of the North Carolina rules of Civil Procedure due to mistake."

The Town entered into a Consent Agreement that if the defendants would not file a second appeal the Town would waive some \$80,000 in survey fees as well as various other legal costs. This agreement was consummated on September 15, 2003.

The question I have is: what has caused this action? I feel the Town has the right to take steps to use Poplar and 4½ Streets as they see fit. Did the budgeting of a much needed sewer line down the street create this action? Why were the defendants not consulted? In my opinion it is a disgrace to bring these people back into a court case without them being consulted. I think the Board would like to hear how they feel on the matter."

The Mayor asked if there were any comments from any of the defendants in the case, many of whom were present; there were none. He then asked Richard Melvin if he had any comments.

Mr. Melvin said that he had filed the motion not to have the consent agreement set aside but to have the Court enter a judgement that it should have entered at the time: Do the defendants have better

title to the streets in question than the Kelsey heirs? He understood that the Town had budgeted to put a sewer line in Poplar Street and that some Board members were contemplating doing so; such an action might be considered "overburdening the easement," the theory being that Kelsey had said nothing about sewer or water easements. The Mayor asked if the Town could not place infrastructure within the street. Mr. Melvin replied that there were many cases that said it could not, and he felt it was his duty to protect the defendants.

The Mayor asked if he had not consulted his clients, and Mr. Melvin said that he had consulted those who were primarily concerned. The Mayor said that he thought this case was closed. Mr. Melvin said he had consulted with Town Attorney Bill Coward some time ago and had not received a response.

Comm. Marsh asked if the defendants in the case wanted to go ahead, and if so how many. Mr. Melvin replied that he had not talked to all of them; the motion had been filed so that the Judge would decide all of the issues in the case.

Comm. Patterson asked him why he and his clients had signed a consent agreement if it did not think it covered everything; Mr. Melvin said there might be other issues. She asked if he did not think it was reasonable for the Town to try to consolidate its infrastructure in the right-of-way.

The Mayor asked if the judge could reconsider the consent agreement; Mr. Melvin said it was possible. He asked if the Judge might require the defendants to pay attorney fees; Mr. Melvin said there was not a chance.

Comm. DeWolf asked again why all of the clients had not been consulted; Mr. Melvin said that he had considered it part of the original case.

Comm. Ross said that he did not think the merits of putting in a sewer line should be part of the discussion today; he felt it was a legal issue that needed to be resolved. He also thought it was interesting that all of the clients had not been contacted since it put the consent agreement in jeopardy, including \$80,000 in costs that they might have to pay. The Mayor reiterated that he had personally telephoned nine of the defendants the previous week and not any of them knew about the motion; this was amazing to him.

Comm. James said that he had not heard any special conditions on the streets when they had been in Court. He thought they were just like any other streets, and felt that the Jury had understood that the Town could put sewer, water, and power lines in the streets; this motion was nothing short of harassment. The Mayor pointed out that there had not been any sewer lines in Kelsey's day. Mr. Melvin said that he felt the job of the Board was to defend the rights of private citizens like his clients; he had always felt that he was protecting the public in this lawsuit as much as the Town was. Comm. James said that was not what a lot of other people thought.

Comm. DeWolf asked if the Town would not have to conduct a survey in order to determine the feasibility of a sewer line. Mr. Melvin said he would not advise his clients to object to surveying.

Elizabeth Bryant, a resident of Pinebrook Apartments on Fifth Street, asked what the Town's interest was in opening Fifth Street to Poplar. The Mayor said that the Town was only considering a sewer line at this time. Rosemary Fleming said she did not understand why the Town would want to go that distance when a sewer could connect to a line in US-64. The Mayor explained that the Poplar Street sewer line would be a gravity line. Town Engineer Lamar Nix confirmed that he thought sewage would not have to be pumped in the proposed line, although it would take a survey to determine it for certain.

Charlie McDowell asked if this was a "quarterback sneak," because the Town would have to have a road in order to put in the sewer line. The Mayor pointed out that there were many sewer lines without

streets. Mr. McDowell asked if the Town would consider agreeing to placing the sewer underground, then deeding the other interests in the streets to the Land Trust.

Town Attorney Bill Coward explained that the Town does not have title to the streets; title was in Kelsey, remaining in the Kelsey heirs, subject to a right-of-way for the public, and the Town cannot sign a deed for the streets. The defendants in the case had claimed unsuccessfully that they had gotten title through adverse possession.

He said Mr. Melvin was trying to get the Judge to say that his clients, not the Kelsey heirs, have title. If the Town were to put in a sewer, he could then claim inverse condemnation; he could not do that without title. He had received a letter in August claiming that a sewer line would constitute overburdening the easement. He said it was the motion for relief of judgement, saying that his clients had title in the streets, that would be a "quarterback sneak." Kelsey had not limited use of the streets to horses and carts; it had been implied that it was for ingress and egress, tramways, and utilities. The verdict had declared that the Town could use the streets "to their full extent." A consent judgement, he said, is a meeting of minds; if there had been no meeting of minds, it is subject to being set aside in its entirety. The Judge could enter a judgement, and he might also deal with the issue of some \$80,000 in costs which the Town had agreed not to pursue; he pointed out that the statute said costs "shall be allowed."

Charlie McDowell said that if the Town opened the streets it would devalue his property by permitting traffic from an Industrial zoning district through a peaceful R-2 Residential neighborhood. The Town Administrator pointed out that there was no Industrial district; the area on Poplar Street was zoned B-3 and Governmental/Institutional. Mr. Coward said that the Town was not here to discuss widening Poplar Street, it was here to discuss whether it would have the right to do so 100 or 1000 years from now. Comm. DeWolf said that he had given this matter a lot of thought, and he felt the Town should stay focused on the legalities; he felt that the Town should have the right to put in utilities, but that now was not the time to open the street. He felt that the interests of the public should be protected for the future.

Dennis Wilson said that opening the street would appreciate the value of his property on Poplar Street because it needed access to sewer; he encouraged the Board to go ahead with its plans.

Ran Shaffner pointed out that only properties on upper Poplar Street needed the sewer; he felt the Town should consider that heavy equipment would affect property and appearance, and he was concerned about the homes in the area.

Comm. James said he thought the Board needed to discuss this further with the Town Attorney.

MOVED BY COMM. JAMES, SECONDED BY COMM. MARSH, AND UNANIMOUSLY CARRIED TO GO INTO CLOSED SESSION PURSUANT TO G. S. §143-318.11(A)(3) TO DISCUSS PENDING LITIGATION RE: THE TOWN V. EDWARDS ET. AL. WITH THE TOWN ATTORNEY. All present left the room except the Clerk, the Town Engineer, and the Town Attorney.

The Town Attorney discussed again with the Board the Motion for Relief of Judgement filed by Richard Melvin and how to respond to it.

MOVED BY COMM. JAMES, SECONDED BY COMM. MARSH, AND UNANIMOUSLY CARRIED TO GO BACK INTO OPEN SESSION. The Public was invited back into the meeting room; Amelia Pavlik and Jim Lewicki returned.

MOVED BY COMM. PATTERSON, SECONDED BY COMM. MARSH, AND UNANIMOUSLY CARRIED THAT (1) THE TOWN VIGOROUSLY DEFEND AGAINST THE PENDING MOTION FOR RELIEF OF JUDGEMENT; (2) THE TOWN PURSUE SANCTIONS AGAINST RICHARD MELVIN AND/OR ANY OF THE DEFENDANTS WHO KNEW ABOUT IT FOR FILING

A FRIVOLOUS MOTION; (3) THE MAYOR FILE A COMPLAINT WITH THE NORTH CAROLINA BAR AGAINST RICHARD MELVIN FOR FILING A MOTION WITHOUT DISCUSSING IT WITH HIS CLIENTS, AND SEEK TO BE JOINED IN THE COMPLAINT WITH ONE OR MORE OF THE DEFENDANTS; AND (4) IF THE CONSENT JUDGEMENT IS OVERTURNED, THE TOWN SEEK COSTS OF APPROXIMATELY \$80,000 TO BE ASSESSED AGAINST THE DEFENDANTS, JOINTLY AND SEVERALLY.

VII. MOVED BY COMM. PATTERSON, SECONDED BY COMM. DEWOLF, AND UNANIMOUSLY CARRIED TO ADJOURN.

There being no further business to come before the Board, the meeting was declared adjourned by the Mayor at 8:30 p.m.

Richard Betz, Town Clerk