

**MINUTES OF SELECT BOARD MEETING**

**Hope Select Board**

**Tuesday, February 23, 2021**

**6:30 PM**

**Via Zoom**

*View the meeting in its entirety at*

[https://townhallstreams.com/towns/hope\\_me](https://townhallstreams.com/towns/hope_me)

**Board Members Present:**

- Sarah Ann Smith, Brian Powers Jr., Thom Ingraham, and Amy Gertner

**Others Present:**

- Samantha Mank

**Call to Order:**

- The meeting was called to order at 5:32 PM by Sarah.

**Executive Session:**

- Thom made a motion to enter executive session pursuant to 1MRS §405(6)(A)(1). It was seconded by Amy.

**Motion passed 4-0**

- Exited executive session by consent at 6:24 PM

**Board Members Present:**

- Sarah Ann Smith, Brian Powers Jr., Thom Ingraham, Bruce Haffner, and Amy Gertner

**Others Present:**

- Samantha Mank, Amy Powers, Paul Smith, Margaret Morse, Juanita Hunt, Dan Dunkle, Dick Crabtree, Ellie Goldberg, Caleb Lincoln, Ari Meil, Molly Luce, and John Monroe

**Regular Meeting Call to Order:**

- The regular meeting was called to order at 6:31 PM by Sarah.

**Agenda Adjustments/Approval:**

- Thom made a motion to accept the agenda as written. It was seconded by Brian.

**Motion passed 5-0**

**Public Comment:**

- None

**Minutes:**

- February 9, 2021: Brian made a motion to approve the February 9, 2021 minutes as edited. It was seconded by Thom. Thom wanted the email that was sent to the Select Board by Harold Mosher regarding Langley Willauer as the chair of the planning board to be included in the minutes. Comments made by Juanita Hunt and Sarah were added to the minutes.

**Motion passed 5-0**

**Town Administrator Report:**

- Hope School Committee member, Sarah Gilbert, was appointed to be a judge. She tendered her resignation from the School Committee. Per Maine law, the School Committee had 30 days to appoint another person to fill the vacancy. During an emergency meeting on Thursday, Feb. 11th, the School Committee appointed Lori Perez for the remainder of this year until June 30<sup>th</sup>. The vacant seat will be voted on to be filled by secret ballot during the June 8<sup>th</sup> election.
- Bill Pearse has confirmed that the “proposed” budget schedule will work as none of the budget committee members have indicated it would not work. Bill would really like to be able to meet in person for the budget presentations. I contacted Danielle Fagonde who has said that we may use the school gym for the Select Board and the Budget Committee joint budget presentation meetings. The public will be invited to watch/participate remotely.
- The first budget presentation is March 11<sup>th</sup>. I plan on working with Tina beginning on Wednesday and making the budget books available to you and the Budget Committee by Friday, March 5<sup>th</sup>.
- Both of the new employees have started their jobs. David and I have been spending a lot of time training them. There some online trainings that will be available in the near future and hopefully there will be room to get them a seat.
- Received a call from Rick Bresnahan asking to have Michelle Fong replace Ellie Goldberg on the Roads Advisory Committee. The RAC is an agenda item under old business.
- All of the 2019 real estate taxes have been paid and there were no automatic foreclosures for that year.
- There are 18 real estate 2020 accounts totaling \$33,413.45. This is the same number accounts, but the dollar amount is reduced by \$81.40 from two weeks ago. Unpaid 2020 real estate taxes will automatically foreclose on February 10, 2022 if the accounts are not paid in full.
- There are 991 RE accounts for 2021, totaling \$1,504,158.02. The number of accounts has decreased by 10 and the amount owed is \$10,998.67 less than the last report. The second half of taxes are due on April 30, 2021.

### **New Business:**

- Appointments to Board of Appeals: Thom made a motion to appoint John Jensen and Brad Boyd to the Appeals Board. It was seconded by Brian.

**Motion passed 5-0**

- NEMHS January Activity Report: Sarah gave an update on what is happening with the ambulance steering committee. She said that this was originally an initiative started by Camden and Rockport and they have allowed Hope and Lincolnville to begin taking part in this committee. She said that she thinks they are very close to having recommendations for the new contract.

For the budget planning part of this, the fire department can have their firefighters become EMTs and they can function as first responders. She hopes to have additional guidance prior to the actual budget time. The NEMHS appears to be in compliance according to the January report.

- Town Policies: Wage, Hour, and Accurate Reporting Policy: Thom offered some minor comments regarding the first reading of this policy. He suggested using more generic terms for the town office hours and the employees work hours. This would eliminate the need to have a policy change if those items were to change from time to time. The Select Board decided to wait for the edits on a second reading until the next meeting before taking action.

### **Old Business:**

- Update Amending the “Retail Marijuana Establishments and Retail Marijuana Social Clubs Prohibition Ordinance” – Seth Haskins/Botany: Amy has been in touch with Ari and Samantha’s been very helpful in explaining how the process works.

Sarah asked all of the Select board if they were OK with her sending the stop-gap language to the town attorney. All of the Select board agreed.

They Select Board also considered moving the Town Meeting to a later date in order to make sure that school was out for the summer break so that the makeshift classrooms could remain in place until the end of the school year.

- Roads Advisory Committee Clarity on Charge: Sarah said that she thought it was clear that it was the Select Board’s intention that the snowplowing would be included in the work that the Roads Advisory Committee was doing.

Thom agreed, and said that he thought the original charge included everything dealing with roads. The Select Board unanimously agreed that anything dealing with roads including snowplowing was open for the RAC to look at.

Rick Bresnahan asked if Elli Goldberg could be removed from the Roads Advisory Committee and have Michelle Fong appointed in her place. Thom made a motion to appoint Michelle Fong to the Roads Advisory Committee replacing Elli Goldberg. It was seconded by Amy.

**Motion passed 5-0**

- July 14, 2020 Election: Bruce submitted an FOAA request and shared letter from an attorney Joseph Baldacci. Sarah forwarded the letter from Mr. Baldacci to Kristin Collins who addressed the matter. Sarah read the letter from Ms. Collins who works for Preti Flaherty Law Firm which specializes in municipal law. Sarah the following letter:

**RE: Access to Ballots / Tally Sheets After Election**

Dear Select Board members:

The Board has engaged me to review legal issues related to whether Town officials may access and view the contents of sealed ballot boxes more than 30 days after an election. I understand that there were several discrepancies noted in the tallies submitted by ballot counters following the July 14, 2020 municipal referendum election. There were 25 ballot questions on the referendum ballot. Although the majority of the questions showed tally counts totaling around 500 votes, tallies for certain individual questions ranged from 463 total votes to 548 total votes.

This has led the Select Board and some members of the public to question whether there were irregularities in the counting process that led to these discrepancies in the tally. The question has been raised as to whether the Board or other Town officials might be able to access the ballot boxes (in which tally sheets were sealed) to review whether mistakes were made in the counting process. I understand that the goal is not to alter the results of the election but more to understand what happened so that procedures might be improved in the future.

**Access to Sealed Ballots**

Ballots are not public records. Title 21-A M.R.S. § 22(2) provides that, “[o]fficial ballots, whether in paper form or in an electronic or image format, are not public records and may be inspected only in accordance with this Title.” This and other Title 21-A provisions pertain to municipal ballots as well as state ballots. 30-A M.R.S. § 2501. At the close of the polls, ballots are to be placed in a sealed container, and that container must remain secured. 21-A M.R.S. § 698(2-A), (6). The containers must remain sealed for at least two months after the election. After two months, they may be transferred from the official security containers to other containers by the clerk (with supervising witnesses) or destroyed. 21-A §§ 698(2-A); 23.

The only statutory processes by which ballots may be viewed are inspection and recount, each of which must be requested within five business days after the election. 30-A M.R.S. §§2532; 2531-B. These statutes interact in a way that, in my opinion, makes it clear that ballots are to remain sealed and confidential, accessible only to the clerk for the purposes of transferring to a different storage container or for destruction, and not for any examination. Interestingly, even where photocopying is allowed during an official recount, the photocopy is not a public record. 21-A M.R.S. § 737-A(7).

I have reviewed the letter by Atty. Joseph Baldacci dated February 9 on this subject. He cites *Opinion of Justices*, 130 A.2d 526, 532 (Me. 1956) as support for a conclusion that ballots are public records subject to public inspection under the Freedom of Access Act (FOAA). Atty. Baldacci's excerpt from the *Opinion* is a quotation of a then-valid statute, "Section 39, Chapter 5." Title 21-A now contains all pertinent statutes regarding election procedures and contains no similar language. Two other caveats are worth noting regarding this *Opinion*. First, the cited language indicates that ballots are to be stored as "public records," but this does not necessarily indicate that the public is intended to have access to them. Second, Maine's FOAA was not enacted until well after this 1956 *Opinion*. So, the term "public records" did not have the same connotations in 1956 as it does today. I do not find the *Opinion* persuasive on this point. Notably, we were unable to find any more recent case holding that ballots were subject to inspection or copying except under the statutory processes, even in cases of suspected error or malfeasance.

There is no blanket allowance under Maine law that confidential records may be obtained by court order. The FOAA provides at 1 M.R.S. § 409 that a person aggrieved by a refusal or denial of a request to copy a record may appeal to the Superior Court. However, the appeal would need to be based on a violation of the FOAA, e.g., it would have to assert that a public record was not provided. Since ballots are not public records, a court would almost certainly uphold any denial of a request to inspect them.

While the contents of ballots might come into play in a challenge to the results of an election, and thus potentially subject them to inspection on court order, no challenge of the July election results has been filed. Such a challenge would not necessarily be untimely at this point; however, I would still find it unlikely that a court would allow inspection of ballots where the plaintiff did not avail itself of the formal inspection or recount procedures.

#### Access to Tally Sheets

Procedures related to tallying and tally sheets are contained within 21-A M.R.S. § 695. Each counting team is to produce two tally sheets for each lot of ballots that are in complete agreement as to the count for each question. One of the tally sheets is to be wrapped around the lot of ballots; the other is to be given to the moderator for use in completing the election return.

In this case, the Section 695 procedure was not followed in that both tally sheets were placed with the ballots after reporting the totals to the moderator, and were ultimately sealed in the ballot boxes.

We have not found any statutory provision suggesting that the tally sheets are confidential or otherwise exempt from the FOAA. As such, my conclusion is that the tally sheets are public records subject to inspection by Town officials as well as members of the public. I see nothing in the law that would prohibit the Clerk from removing the tally sheets when, following proper protocols as set forth in Sections 698(2-A) and 23, she prepares the ballots for transfer or destruction. Examination of the tally sheets may provide some indication of what may have gone wrong during the counting process, if anything.

#### Conclusion

While I would tend to agree that the election results indicate that errors may have been made in the counting process, I do not believe there is any legal ability to access the ballots to compare them to the posted results. I do believe there is legal authority to access the tally sheets to see if they demonstrate whether or how errors may have been made in the counting process.

At this point, six months past the election, my advice is to proceed with reliance on the election outcome. The information you may glean from tally sheets should be used as guidance to ensure against errors in the future, but probably could not be used to change the results of the election.

However, if you do find evidence of extreme errors on the tally sheets, those issues should be brought to legal counsel for a more specific evaluation.

I hope this is of help. Please contact me if you require any further clarification.

Sincerely

Kristin M. Collins

After reading the letter she stated, “We cannot look at the ballots.” Sarah then suggested that the Select Board authorize preparing and sending the ballots for destruction and to make copies of any tally sheets and place one copy with the ballots and one copy to be made available for public review as required by law.

Brian made a motion to accept the recommendation from Kristin Collins with the caveat that David Herrick is the Clerk in charge of the process for opening the ballots copying the tally sheets sealing them appropriately and preparing them for destruction.

Bruce made a comment that the last paragraph from the Collins letter clearly says that if there were severe discrepancies then the ballots could be looked at.

Thom said that in his mind he would like to have a number of people “witnesses” present. He said, we should be inviting Dan Dunkle and the other election clerks who signed off on the tally sheets should be present.

Thom then re-read the last sentences of the Collins letter. He reiterated that he thought the July election was not managed well so he wanted to know what was meant by “Extreme Errors”. He suggested contacting Ms. Collins and asking her to define what extreme errors means. He would like to have extreme errors defined before moving forward.

Bruce said he has fought a long and hard battle regarding the roads and snowplowing. He commented that the roads budget was one of the most important and interesting items on the ballot. He said, “We need to investigate the disappearance of 150 ballots. 150 missing ballots is a big stain on the Select Board.”

Brian reminded everyone that the Select Board had already taken a vote and approved to follow the advice of attorney Collins. He explained that his interpretation of the last sentences of the Collins letter is that if there is a problem with the tally sheets then those tally sheets should be investigated.

Thom asked if these questions could be sent back to Kristin Collins and to find out some guidance on what extreme errors really means.

Brian also reminded the Select Board that the person who would tell us whether or not there is an extreme problem or not would be David Herrick. He went on to say Town Clerks know about these kind of things, not Town Administrators, not Select Boards, but Town Clerks. Brian followed that comment up with saying he trusted David.

Thom agreed and seconded Brian’s motion.

Bruce said he wanted to make an amendment that the ballots are not destroyed until the tally sheets are inspected. Amy agreed.

After much discussion, the Select Board settled on destruction one week after the following meeting, which is March 16, 2021. The vote was called.

(The entire discussion can be viewed at [https://townhallstreams.com/towns/hope\\_me](https://townhallstreams.com/towns/hope_me))

**Motion passed 5-0**

**Other Business:**

- None

**Warrants #'s 64, 65, & 66:**

- The Select Board reviewed the warrants. Bruce made a motion to approve warrant #'s 64, 65, and 66. Thom said that he would have to abstain from voting on the warrants because he didn’t have time to review them. The motion did not receive a second. **Motion failed.** Dick said that Board members couldn’t just abstain from voting without acceptable reasons. He stated that abstentions can only be made for a conflict of interest.

Brian made a motion to approve warrants 64 & 65 but not 66 since no one from the School Committee had signed the warrants. It was seconded by Amy. There was no proviso made for warrant #66.

**Motion passed 4-0-1** (*Thom*)

**Adjournment:**

- Brian made a motion to adjourn at 8:09 PM. It was seconded by Bruce.

**Motion passed 5-0**

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