

SPECIAL MEETING OF MARCH 30, 2012

Mayor Baratta called the meeting to order at 9:01 a.m.

In accordance with the Open Public Meetings Act, notice of this special meeting, was sent to The Record on March 27, 2012 and was published in The Record issue of March 30, 2012. Notice was also posted on the bulletin board located on the first floor of the Municipal Building. Copies were mailed to The Community News and posted on the Borough of Fair Lawn Website. The notice identified the time and location of this special meeting.

PRESENT: Mayor Baratta, Deputy Mayors Cosgrove and Trawinski, Councilmembers Peluso (by telephone) and Swain.

ALSO PRESENT: Acting Manager Metzler, Assistant Municipal Clerk Bojanowski and Attorney Mondello.

Closed Session:

Upon motion by Deputy Mayor Trawinski and a second by Deputy Mayor Cosgrove, the following Closed Session resolution was approved at 9:01 a.m.

WHEREAS, the Open Public Meetings act of the State of New Jersey permits the public to be excluded from certain matters to be discussed by the Governing Body; and

WHEREAS, the Mayor and Council of the Borough of Fair Lawn desire to discuss litigation - Messina; and

WHEREAS, these matters are ones which permit the exclusion of the public from such discussions; and

WHEREAS, minutes will be taken during this closed session and once the need for confidentiality no longer exists the minutes will be available to the public.

NOW, THEREFORE, BE IT RESOLVED, by the Mayor and Council of the Borough of Fair Lawn that the public be excluded since these matters as set forth above are ones which permit the exclusion of the public from such discussions.

Mayor Baratta reconvened the meeting at 9:16 a.m.

Attorney Mondello explained that the previous motion to lay on the table has now fallen off the table. At this point and time, someone needs to make a motion to memorialize resolution number four.

Upon motion by Mayor Baratta and a second by Deputy Mayor Trawinski,

Deputy Mayor Trawinski asked Attorney Mondello to modify the resolution with the following additions:

On the next to last recital, before the now, therefore, be it resolved, he would like it to reflect the following:

Whereas, in a prior Closed Session on March 6, 2012 the Mayor and Council unanimously, tentatively agreed to settle this matter subject to a written resolution being adopted; and

Whereas, since that time the Mayor and Council have reconsidered concerns raised with the language of the resolution and concerns with the law and they received the same advice supplemented by both the attorney for the MEL and the Borough Attorney that if they did not adopt this resolution that the taxpayers of the Borough of Fair Lawn could be at risk for beyond \$261,000 since the MEL would no longer cover the Borough for anything above \$261,000 and the taxpayers of Fair Lawn would be at risk for the legal fees that would be sought by the plaintiff's attorney and any motion to enforce the settlement previously tentatively agreed upon.

Deputy Mayor Trawinski explained that he wanted this added so that the taxpayers know why the Council is settling it because they have the advice of both of the attorneys and that the MEL has told the Council that any award beyond \$261,000 the Borough would be responsible for. The taxpayers would face a risk beyond the \$261,000 and would have to absorb it out of general revenue. He did not want the resident to think they were settling because they were caving. They were settling because he believes there are sound economic reasons and sound legal reasons for settling.

Mayor Baratta made a motion to amend the motion with a seconded by Deputy Mayor Trawinski with Councilmember Peluso and Councilmember Swain dissenting. Attorney Mondello said the motion carried.

Mayor Baratta asked the Assistant Municipal Clerk Bojanowski to read the resolutions as amended. Attorney Mondello will supplement it with the two revisions that were just added.

Upon motion by Deputy Mayor Trawinski and a second by Deputy Mayor Cosgrove, Resolution No. 134-2012 was discussed.

Deputy Mayor Trawinski stated it was distasteful to him that they are in the position of having to settle this matter for two reasons but he believed despite the money involved, this is in the best interest of the taxpayers of Fair Lawn. He will comment further on this at another meeting. For now, he does not do this

with any joy or pleasure, he is doing this with a degree of sadness where the law and the oath that he took as a Councilman, that they all took, obligated them to faithfully, justly and impartially enforce the laws of the State of New Jersey, the Constitution of the State of New Jersey, the laws and the Constitution of the United States that leads him to no other conclusion than to support this resolution.

Deputy Mayor Cosgrove stated that in these tough budgetary times he felt terrible that while they sit here on Tuesday nights trying to figure out how to maintain vital services for the residents that they have to spend this money. He felt like the guy in the circus, the guy with the shovel that is following behind to clean up the mess. He promised the people of Fair Lawn that he would provide the leadership that is necessary to put these matters behind them. As far as he is concerned, this is not a vote that they would like to take to spend the taxpayer's money because they didn't get one service or anything out of this. They will provide the leadership and do what is right for the people of Fair Lawn.

Councilmember Swain reiterated that actually for the reasons they both stated she will not vote for this because she does not feel it is in the best interest for Fair Lawn.

Mayor Baratta asked Councilmember Peluso if he wanted to comment. She was not sure if he heard them when he voted in favor of this in Closed Session.

Councilmember Peluso stated during the Closed Session he did not hear very well what was going on. He was not going to be voting for this resolution. There are a couple of points in the article that he thought they would have a case on. He thought this was a tough call both ways. It was a tough decision either way.

Deputy Mayor Trawinski questioned Councilmember Swain and Councilmember Peluso, if they don't vote for this, what did they want to do. Councilmember Peluso thought they should go back to Court. He thought about the cases that were in the article that Councilmember Swain found that could be argued against. As he said before, this may not be tethered to the whistleblower context. It shows if it is not a whistleblower, then it is not covered under CEPA.

Deputy Mayor Trawinski said that the Borough's Attorney in the underlying litigation stipulated that Messina was a whistleblower even though the Council was not advised of that. That issue that is discussed in the article is an issue that they are precluded from rising at a trial on the topic of damages as they have been advised by both Mr. Mondello and Mr. Hanrahan and as the Appellate Division instructed. Councilmember Peluso asked what attorneys advised the Council. Deputy Mayor Trawinski said Mr. Hanrahan, Mr. Mondello and the Appellate Division said the only issue on a new trial is the amount of damages. They cannot litigate the other three items that their attorney underlying case stipulated to. Councilmember Peluso repeated that they cannot bring up this

whistleblower if they appeal it. Deputy Mayor Trawinski said they did appeal it, they tried to overturn it and the Appellate Division did not grant that relief. The Appellate Division said the only issue was the amount of damages and that the trial court was wrong on certain instructions on the amount of damages. The fact that Messina was deemed a whistleblower for purposes of this case was a fact that was stipulated into evidence by the Borough's then Attorney, again without any of the Councilmembers being aware of it. Nevertheless, the Council is struck with what Mr. Botta did at the time.

Councilmember Peluso wondered if they do approve this resolution could they go after the Attorney for malpractice. Deputy Mayor Trawinski said they had explored that idea and was advised by previous Borough Attorney Rosenberg that there was not case. But they did, however, ask Mr. Mondello to find another expert. They decided at the time that Attorney Mondello presented that to the Council that they would not spend the money to go after it. He wants to put back on a Work Session, that they reconsider spending those dollars to have another attorney explore whether or not they have a viable claim against Mr. Botta for stipulating something they as a Council were never advised about. His only fear in there is whether or not Mr. Stafford was advised and he never told them, but that is a different issue. He would welcome Councilmember Peluso in supporting him in revisiting that topic. Councilmember Peluso stated he would be in favor of that. Deputy Mayor Trawinski stated that is why they all unanimously agreed to pursue Messina's second case because no such stipulations have been agreed upon.

Councilmember Peluso thanked him for that explanation.

There being no further discussion, Resolution No. 124-2012 was approved with Councilmember Swain and Councilmember Peluso dissenting.

Deputy Mayor Trawinski stated that he would like to place on a Work Session to get, together with Councilmember Peluso, reconsideration of a possible malpractice claim against Mr. Botta. Councilmember Peluso seconded it. Deputy Mayor Trawinski said if the expert would come in. Attorney Mondello advised he would come in to speak to the Council to give them an overview. Councilmember Swain wondered if he was an expert in legal malpractice. Deputy Mayor Trawinski said it should be someone experienced in legal malpractice.

Public Comments

There were no comments from the public.

Adjournment

Upon motion by Deputy Mayor Trawinski, seconded by Deputy Mayor Cosgrove, the meeting was adjourned at 9:30 a.m.

Respectfully submitted,

Marilyn B. Bojanowski, RMC
Assistant Municipal Clerk

The undersigned have read and approve the foregoing minutes.

Mayor Jeanne Baratta

Deputy Mayor John Cosgrove

Councilman Kurt Peluso

Councilwoman Lisa Swain

Deputy Mayor Ed Trawinski