



Fairhaven Board of Selectmen
Meeting Minutes
July 12, 2021

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2021 JUL 29 P 3:45

FAIRHAVEN,
MASS.

Present: Chairman Daniel Freitas Selectman Keith Silvia, Interim Town Administrator Wendy Graves and Administrative Assistant Vicki Oliveira

Present via Zoom: Vice-Chairman Robert Espindola

The meeting was videotaped on Cable Access and Zoom meeting application.

Chairman Freitas opened the meeting at 6:30 pm in the Town Hall Banquet Room

Minutes

Mr. Espindola made a motion to approve the Open Session minutes of June 21, 2021. Mr. Silvia seconded. Vote was unanimous. (3-0)

Roll Call vote: Mr. Espindola in favor, Mr. Silvia in favor, Mr. Freitas in favor

Town Administrator's Report

Ms. Graves reported:

The Town received \$841,000 from ARPA the week of June 25th, and will receive the other half 12 months from receiving the first half.

The ARPA committee met last week again and continued work on securing grant money.

The Bristol County Commissioner's Meeting will be held at Bristol Agricultural High School on July 15, 2021 to talk about the \$3.1 million of ARPA money that was sent to the County for the municipal allocation.

The Department of Transportation has sent notification that Fairhaven has been awarded \$332,000 for the complete streets project that was submitted in May.

The Clerk's Office will be welcoming a new Assistant Town Clerk, Elizabeth Horan, who will be starting work on July 26, 2021.

Benefits Coordinator Susan Roderiques has been taking classes and training sessions in Human Resources, and she will be starting the Society for Human Resource Management (SHRM) certification in August.

The Town's stake in the opioid litigation is small and the Board took the position that it would go along with the advice of the consortium attorneys while trying to minimize the Town's cost of participation. One of the main defendants, Purdue Pharmaceuticals, has declared bankruptcy and

submitted a plan to the bankruptcy court. The consortium attorneys have recommended that the Town agree to the proposed plan. Based on that advice Attorney Crotty has given the town's approval of the plan.

Committee Liaison Reports

Mr. Silvia said he did not have any meetings since the last Board meeting.

Mr. Silvia thanked the Information Technology Department for their helping the seniors during town meeting with computer help.

Mr. Espindola said the Broadband Study Committee will discuss the route for fiber optics and will get an estimate to inter connect other streets and look for potential funds to make the project more affordable and accessible to other communities. (Attachment A.) The Committee will be setting up a meeting with Ms. Graves and Town Counsel.

Mr. Espindola said the Marine Resources Committee met last week to discuss the aquaculture license transfer for Taylor Seafood.

Mr. Espindola said the South Coast Bikeway Alliance will be planning a ride in September that will pass through Fairhaven.

Mr. Espindola said Southeastern Regional Planning & Economic Development District (SRPEDD) met last week where he was elected to represent Fairhaven on the Southeastern Massachusetts Metropolitan Planning Organization (SMMPO).

Mr. Espindola welcomed new business American Freight where he attended the Grand Opening last week.

Our Lady of Angels Feast

Mr. Freitas said it was nice to see the Our Lady of Angels Feast back this year.

Mr. Espindola made a motion to approve the Our Lady of Angels, Once Day All Alcoholic Beverages License for the Annual Three-Day Feast to be held on September 4, 2021, September 5, 2021 and September 6, 2021. Mr. Silvia seconded. Vote was unanimous (3-0)

Roll Call vote: Mr. Espindola in favor, Mr. Silvia in favor, Mr. Freitas in favor

Year-End Transfers

Mr. Espindola made a motion to approve the year end transfer of \$200 for the Conservation Department. Mr. Silvia seconded. Vote was unanimous. (3-0)

Roll Call vote: Mr. Espindola in favor, Mr. Silvia in favor, Mr. Freitas in favor

Mr. Espindola made a motion to approve the year end transfer of \$60 for the Zoning Board of Appeals. Mr. Silvia seconded. Vote was unanimous. (3-0)

Roll Call vote: Mr. Espindola in favor, Mr. Silvia in favor, Mr. Freitas in favor

Mr. Espindola made a motion to approve the year end transfer of \$4175 for the Town Clerk Department. Mr. Silvia seconded. Vote was unanimous. (3-0)

Roll Call vote: Mr. Espindola in favor, Mr. Silvia in favor, Mr. Freitas in favor

Altered Premise - JEJM, Corp d/b/a Traveler's Ale House, 111 Huttleston Ave

Mr. Freitas read the public hearing notice for the alteration of premise for Traveler's Ale House. The Board discussed the issues that may arise and the other Department's concerns. (Attachment B)

Mr. Espindola made a motion to approve the plan contingent on the Building Commissioner signing off on the permit. Mr. Silvia seconded. Vote was unanimous. (3-0)

Roll Call vote: Mr. Espindola in favor, Mr. Silvia in favor, Mr. Freitas in favor

At 7:01 pm the Board took a four-minute recess

Transfer of Aquaculture lease from Taylor Cultured Seafood to Blue Stream Shellfish

Harbormaster Tim Cox met with the Board regarding the transfer of the aquaculture lease from Taylor Seafood to Blue Stream Shellfish. Mr. Cox said Taylor Seafood was one of the first aquaculture licenses in Fairhaven dating back to the 1970's. Mr. Cox has already contacted the State regarding the transfer and the Marine Resources Committee has approved the transfer of the license at their most recent meeting. Current owner Zack Zhang told the Board he is looking to transfer his aquaculture license to Blue Stream Shellfishing. The proposed owner, Dale Leavitt, a retired Professor of Marine Biology at Roger Williams, gave the Board a brief history of himself and his company, Blue Stream Shellfishing, LLC.

Mr. Espindola made a motion to approve the aquaculture lease from Taylor Seafood to Blue Stream Shellfishing LLC. Mr. Silvia seconded. Vote was unanimous. (3-0)

Roll Call vote: Mr. Espindola in favor, Mr. Silvia in favor, Mr. Freitas in favor

Meet and Greet: Precinct 3

There were no representatives from Precinct 3 present at the meeting.

Rogers Reuse Committee

Ms. Graves told the Board Cathy Melanson would like to join the Rogers Reuse Committee (RRC) as a representative of the Economic Development Committee (EDC). Mr. Espindola expressed that he would like to see a representative from the Planning Board and the Finance Committee in addition to a representative from the EDC and would like to look at the structure of the RRC. Mr. Espindola told the Board the EDC has not voted to appoint a member at this time. The Board agreed to table the discussion for a future meeting.

New England Preservation Lawsuit

Mr. Freitas read a letter from Town Counsel regarding the status of the lawsuit between New England Preservation and Development and the Town of Fairhaven. (Attachment C). The court has ordered that the plaintiffs pay the town's attorney's fees, and require the town to submit affidavits of those fees within thirty days.

Town Meeting Article 56: Amendment to Town By-law Chapter 50-13, part 2

Mr. Freitas read a memo from Cable Access Director Derek Frates (Attachment D). Mr. Frates reminded the Board the Annual Town Meeting voted to continue the Zoom portion of the meetings. The Zoom participation will be for residents and not Board members. Currently, the State has extended the emergency remote access for Board members until April 2022.

Mr. Frates explained there are a few options for equipment and he will know more once all the current equipment is tested. Mr. Frates also explained this new bylaw will require more staffing, as each meeting will need a camera operator and an operator to run the Zoom, therefore there will have to be an increase in the Cable Access budget. The Board discussed ideas to make the Zoom bylaw addition more efficient and cost effective.

Update of Opioid Litigation

As explained in the Town Administrator's report:

The Town's stake in the opioid litigation is small and the Board took the position that it would go along with the advice of the consortium attorneys while trying to minimize the Town's cost of participation. One of the main defendants is Purdue Pharmaceuticals has declared bankruptcy and submitted a plan to the bankruptcy court. The consortium attorneys have recommended that the Town agree to the proposed plan. Based on that advice Attorney Crotty has given the town's approval of the plan.

Mr. Espindola made the motion to approve the opioid litigation plan that was sent to the Town. Mr. Silvia seconded. Vote was unanimous. (3-0)

Roll Call vote: Mr. Espindola in favor, Mr. Silvia in favor, Mr. Freitas in favor

Notes and Announcements

Mr. Espindola asked a few questions relating to the Town Administrator report.

Mr. Espindola asked Ms. Graves if the ARPA committee has any minutes from the meetings based on a question in the chat (Attachment E). Ms. Graves told Mr. Espindola there are no formal minutes as this is a working group, but the group is in the process of trying to look for grants that the town may qualify for. Mr. Espindola said he would like to see the ARPA meetings televised.

Mr. Espindola told the Board he was contacted by the Tree Warden who had questions regarding clarity from Town Counsel on the role of the Tree Warden and emergency services. Ms. Graves will reach out to Town Counsel to seek answers.

Mr. Espindola expressed concerns over the procurement for the high school turf and the additional costs of this project. Mr. Espindola would like to see more communication between the Board and the Town Administrator when large scale procurements are brought to the Town Administrator for approval.

Mr. Silvia asked Mr. Espindola to save his comments for a future meeting as these subjects were not on the agenda to be discussed.

At 7:21 pm Mr. Espindola made a motion to adjourn. Mr. Silvia seconded. Vote was unanimous. (3-0)

Roll Call vote: Mr. Espindola in favor, Mr. Silvia in favor, Mr. Freitas in favor

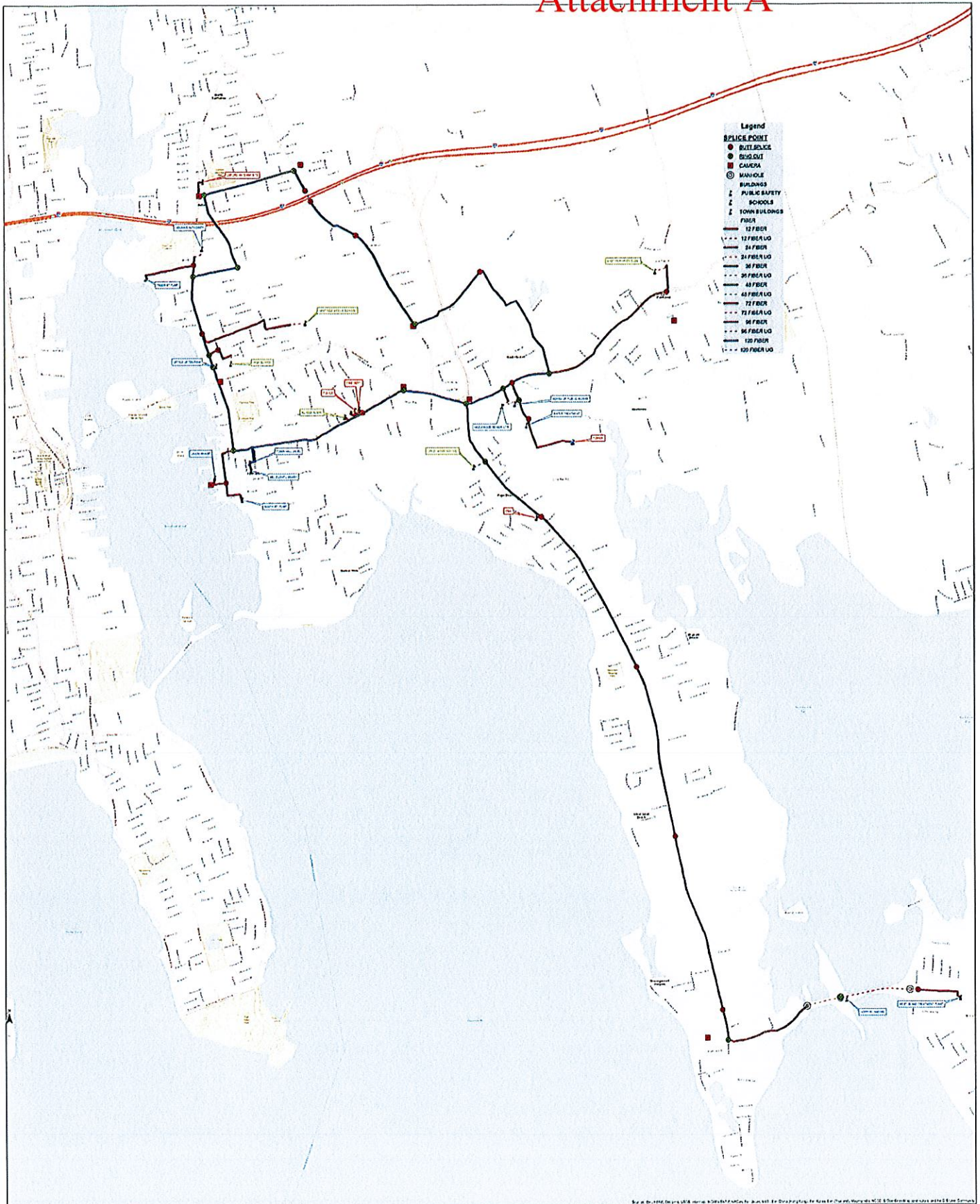
Respectfully submitted,



Vicki L. Oliveira
Administrative Assistant
(Approved 07/28/2021)

- A. Fiber Optics Route
- B. Traveler's Ale House- public hearing notice, application, email concerns
- C. New England Preservation and Development lawsuit decision/email
- D. Memo from Cable Access Director regarding Zoom
- E. Transcript of Zoom chat

Attachment A



TOWN OF FAIRHAVEN MA.
MUNICIPAL FIBER OPTIC NETWORK

PREPARED BY: CORY AUCOIN
DATE: JUNE 3, 2019
PROPRIETARY AND CONFIDENTIAL

Attachment B

SELECTMEN'S MEETING

Liquor License Hearing

Monday, July 12, 2021

@7:00 PM

Application submitted for:

**AN ALTERED PREMISE
(Year Round Outdoor Area)**

From:

**JEJM, Corp.
Travelers Ale House
111 Huttleston Avenue
Fairhaven, MA 02719
Minh Tieu, Manager**

Bldg. Comm.-See Attached email
Planning Dept.-See Attached email
Fire Dept.-See Attached email
Abutters-Applcant to submit Certified mailing receipts
Taxes-OK
WC-OK

TOWN OF FAIRHAVEN

Notice is hereby given under Chapter 138 of the Massachusetts General Laws that JEJM, Corp, d/b/a Travelers Ale House, 111 Huttleston Avenue, Fairhaven, MA, Minh Tieu, Manager, has applied for an Altered Premise transaction, by adding an outdoor dining/patio & bar area.

The proposed altered description of premise would include a fenced in area to be used; a trex deck for the raised floor, with 1 step up stair; a small outside bar area, with twelve (12) seats, six (6) tables, emergency exit door, string lights for outside area. A seven foot (7ft.) high wall in the back with an emergency/exit only door on the side, umbrella for every table or sun shades to cover the area, tall bushes would surround the perimeter of the outside dining area on the outside of the fencing; fenced in area would only be accessible through the restaurant. Exiting can go through the exit only or back through the restaurant and to the front door. Total Sq. Footage; 900 sq. ft.; number of entrances (1); number of exits (2); seating capacity (42); occupancy number (36); number of floors (1).

A hearing will be held at a Selectmen's Meeting, Fairhaven Town Hall, Banquet Room, 40 Center Street, Fairhaven, MA on Monday, July 12, 2021 at 7:00 PM.

BOARD OF SELECTMEN

Daniel Freitas, Chairman
Robert Espindola
Keith Silvia



The Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
95 Fourth Street, Suite 3, Chelsea, MA 02150-2358
www.mass.gov/abcc

AMENDMENT-Change or Alteration of Premises Information

☐ **Change of Location**

- Chg of Location/Alteration of Premises Application
- Financial Statement
- Vote of the Entity
- Supporting financial records
- Legal Right to Occupy
- Floor Plan
- Abutter's Notification
- Advertisement

☒ **Alteration of Premises**

- Chg of Location/Alteration of Premises Application
- Financial Statement
- Vote of the Entity
- Supporting financial records
- Legal Right to Occupy
- Floor Plan
- Abutter's Notification
- Advertisement

1. BUSINESS ENTITY INFORMATION

Entity Name

JEJM Corp

Municipality

Fairhaven

ABCC License Number

05823-rs-0384

Please provide a narrative overview of the transaction(s) being applied for. Attach additional pages, if necessary.

Adding out side dining on the side of the building

APPLICATION CONTACT

The application contact is the person who should be contacted with any questions regarding this application.

Name

Title

Email

Phone

Minh Tieu

President

minh@travelersalehouse.com

2. ALTERATION OF PREMISES

2A. DESCRIPTION OF ALTERATIONS

Please summarize the details of the alterations and highlight any specific changes from the last-approved premises.

outside dining, small bar, 6 tables, raised deck

2B. PROPOSED DESCRIPTION OF PREMISES

Please provide a complete description of the proposed premises, including the number of floors, number of rooms on each floor, any outdoor areas to be included in the licensed area, and total square footage. You must also submit a floor plan.

fence in area to be used, trex deck for the raised floor floor, 1 step up stair, small outside bar with 12 seats, 6 tables, emergency exit door, string lights for outside

Total Sq. Footage

900 sq ft

Seating Capacity

42

Occupancy Number

36

Number of Entrances

1

Number of Exits

2

Number of Floors

1

AMENDMENT-Change or Alteration of Premises Information

3. CHANGE OF LOCATION

3A. PREMISES LOCATION

Last-Approved Street Address

Proposed Street Address

3B. DESCRIPTION OF PREMISES

Please provide a complete description of the premises to be licensed, including the number of floors, number of rooms on each floor, any outdoor areas to be included in the licensed area, and total square footage. You must also submit a floor plan.

Total Sq. Footage

Seating Capacity

Occupancy Number

Number of Entrances

Number of Exits

Number of Floors

3C. OCCUPANCY OF PREMISES

Please complete all fields in this section. Please provide proof of legal occupancy of the premises. (E.g. Deed, lease, letter of intent)

Please indicate by what means the applicant has to occupy the premises

Lease

Landlord Name

Cathy Melanson

Landlord Phone

Landlord Email

totalconfections@gmail.com

Landlord Address

110 Adams Street Fairhaven, MA 02719

Lease Beginning Date

12-1-2020

Rent per Month

9,000

Lease Ending Date

12/1/2025

Rent per Year

108,000

Will the Landlord receive revenue based on percentage of alcohol sales?

☐ Yes ☒ No

4. FINANCIAL DISCLOSURE

Associated Cost(s): (i.e. Costs associated with License Transaction including but not limited to: Property price, Business Assets, Renovations costs, Construction costs, Initial Start-up costs, Inventory costs, or specify other costs):

Associated Cost(s):

20000

SOURCE OF CASH CONTRIBUTION

Please provide documentation of available funds. (E.g. Bank or other Financial institution Statements, Bank Letter, etc.)

Name of Contributor	Amount of Contribution
JEJM Corp	20000
Total	20000

SOURCE OF FINANCING

Please provide signed financing documentation.

Name of Lender	Amount	Type of Financing	Is the lender a licensee pursuant to M.G.L. Ch. 138.
			<input type="radio"/> Yes <input type="radio"/> No
			<input type="radio"/> Yes <input type="radio"/> No
			<input type="radio"/> Yes <input type="radio"/> No
			<input type="radio"/> Yes <input type="radio"/> No

APPLICANT'S STATEMENT

I, Minh Tieu the: ☐ sole proprietor; ☐ partner; ☒ corporate principal; ☐ LLC/LLP manager
Authorized Signatory

of JEJM Corp
Name of the Entity/Corporation

hereby submit this application (hereinafter the "Application"), to the local licensing authority (the "LLA") and the Alcoholic Beverages Control Commission (the "ABCC" and together with the LLA collectively the "Licensing Authorities") for approval.

I do hereby declare under the pains and penalties of perjury that I have personal knowledge of the information submitted in the Application, and as such affirm that all statements and representations therein are true to the best of my knowledge and belief. I further submit the following to be true and accurate:

- (1) I understand that each representation in this Application is material to the Licensing Authorities' decision on the Application and that the Licensing Authorities will rely on each and every answer in the Application and accompanying documents in reaching its decision;
- (2) I state that the location and description of the proposed licensed premises are in compliance with state and local laws and regulations;
- (3) I understand that while the Application is pending, I must notify the Licensing Authorities of any change in the information submitted therein. I understand that failure to give such notice to the Licensing Authorities may result in disapproval of the Application;
- (4) I understand that upon approval of the Application, I must notify the Licensing Authorities of any change in the ownership as approved by the Licensing Authorities. I understand that failure to give such notice to the Licensing Authorities may result in sanctions including revocation of any license for which this Application is submitted;
- (5) I understand that the licensee will be bound by the statements and representations made in the Application, including, but not limited to the identity of persons with an ownership or financial interest in the license;
- (6) I understand that all statements and representations made become conditions of the license;
- (7) I understand that any physical alterations to or changes to the size of the area used for the sale, delivery, storage, or consumption of alcoholic beverages, must be reported to the Licensing Authorities and may require the prior approval of the Licensing Authorities;
- (8) I understand that the licensee's failure to operate the licensed premises in accordance with the statements and representations made in the Application may result in sanctions, including the revocation of any license for which the Application was submitted; and
- (9) I understand that any false statement or misrepresentation will constitute cause for disapproval of the Application or sanctions including revocation of any license for which this Application is submitted.
- (10) I confirm that the applicant corporation and each individual listed in the ownership section of the application is in good standing with the Massachusetts Department of Revenue and has complied with all laws of the Commonwealth relating to taxes, reporting of employees and contractors, and withholding and remitting of child support.

Signature:

Minh Tieu

Date: 5/19/2021

Title:

President

ADDITIONAL INFORMATION

Please utilize this space to provide any additional information that will support your application or to clarify any answers provided above.

Trex decking would be the floor, with a step up
7ft high wall in the back with an emergency/exit only door on the side
bar with chairs
6 tables with chairs
string lights outside
umbrella for every table or sun shades to cover the area.
tall bushes would surround the perimeter of the outside dining area on the outside of the fencing,
fenced in area would only accessible through the restaurant. exiting can go through the exit only or back through the rest and to the front door

CORPORATE VOTE

The Board of Directors or LLC Managers of JEJM Corp
Entity Name
duly voted to apply to the Licensing Authority of Fairhaven and the
City/Town
Commonwealth of Massachusetts Alcoholic Beverages Control Commission on 5/1/2021
Date of Meeting

For the following transactions (Check all that apply):

☒ Alteration of Licensed Premises

☐ Change of Location

☐ Other

"VOTED: To authorize

Minh Tieu

Name of Person

to sign the application submitted and to execute on the Entity's behalf, any necessary papers and do all things required to have the application granted."

A true copy attest,

For Corporations ONLY

A true copy attest,

Minh Tieu

Corporate Officer /LLC Manager Signature

Corporation Clerk's Signature

(Print Name)

(Print Name)



The Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
95 Fourth Street, Suite 3, Chelsea, MA 02150-2358
www.mass.gov/abcc

RETAIL ALCOHOLIC BEVERAGES LICENSE APPLICATION
MONETARY TRANSMITTAL FORM

AMENDMENT-Change or Alteration of Premises Information

APPLICATION SHOULD BE COMPLETED ON-LINE, PRINTED, SIGNED, AND SUBMITTED TO THE LOCAL
LICENSING AUTHORITY.

ECRT CODE: RETA

Please make \$200.00 payment here: **ABCC PAYMENT WEBSITE**

PAYMENT MUST DENOTE THE NAME OF THE LICENSEE CORPORATION, LLC, PARTNERSHIP, OR INDIVIDUAL AND INCLUDE THE
PAYMENT RECEIPT

ABCC LICENSE NUMBER (IF AN EXISTING LICENSEE, CAN BE OBTAINED FROM THE CITY)

05823-rs-0384

ENTITY/ LICENSEE NAME JEJM Corp

ADDRESS 111 Huttleston Ave

CITY/TOWN Fairhaven

STATE MA

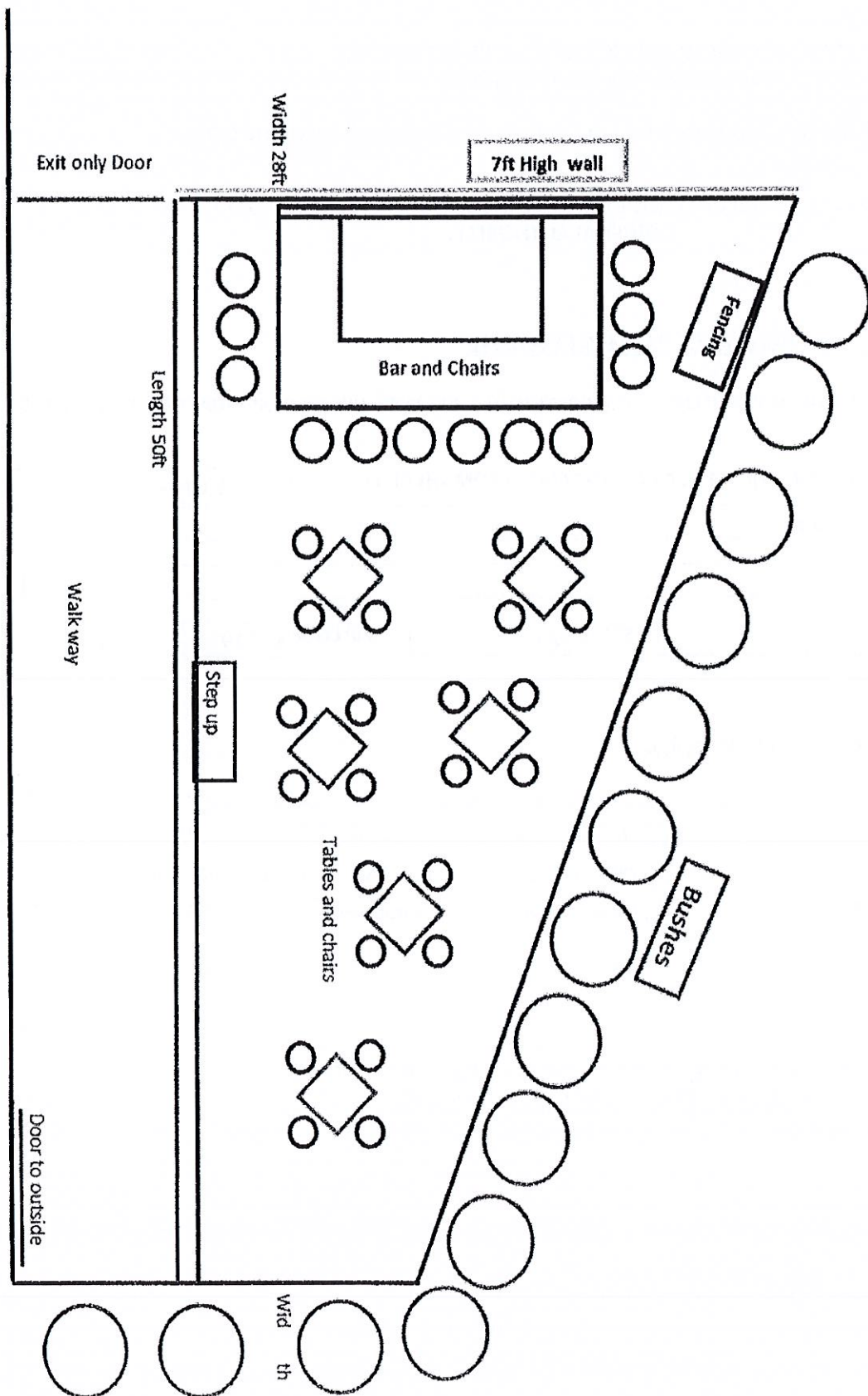
ZIP CODE 02719

For the following transactions (Check all that apply):

- | | | | |
|---|---|---|---|
| <input type="checkbox"/> New License | <input type="checkbox"/> Change Corporate Name | <input type="checkbox"/> Change of Class (i.e. Annual / Seasonal) | <input type="checkbox"/> Change Corporate Structure (i.e. Corp / LLC) |
| <input type="checkbox"/> Transfer of License | <input type="checkbox"/> Change of DBA | <input type="checkbox"/> Change of License Type (i.e. club / restaurant) | <input type="checkbox"/> Change of Hours |
| <input type="checkbox"/> Change of Manager | <input checked="" type="checkbox"/> Alteration of Licensed Premises | <input type="checkbox"/> Change of Category (i.e. All Alcohol/Wine, Malt) | <input type="checkbox"/> Pledge of Collateral (i.e. License/Stock) |
| <input type="checkbox"/> Change of Officers/Directors | <input type="checkbox"/> Change of Location | <input type="checkbox"/> Issuance/Transfer of Stock/New Stockholder | <input type="checkbox"/> Management/Operating Agreement |
| <input type="checkbox"/> Change of Ownership Interest | <input type="checkbox"/> Other | | |

THE LOCAL LICENSING AUTHORITY MUST MAIL THIS
TRANSMITTAL FORM ALONG WITH
COMPLETED APPLICATION, AND SUPPORTING DOCUMENTS TO:

Alcoholic Beverages Control Commission
95 Fourth Street, Suite 3
Chelsea, MA 02150-2358





Deborah B. Goldberg
Treasurer and Receiver General

**Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
239 Causeway Street
Boston, MA 02114**

Kim S. Gainsboro, Esq.
Chairman

**GUIDELINES FOR EXTENSION OF PREMISES TO
PATIO AND OUTDOOR AREAS**

1. Alcoholic beverages cannot be served outside of a licensed establishment unless and until an application to extend the licensed premises has been approved.
2. An application to extend the premises must describe the area in detail, including dimensions, seating capacity, and maximum occupancy.
3. The premises must be enclosed by a fence, rope, or other means to prevent access from a public walkway.
4. The outdoor area must be contiguous to the licensed premises with either (a) a clear view of the area from inside the premises, or, alternatively (b) the licensee may commit to providing management personnel dedicated to the area.
5. The applicant must have a lease or documents for the right to occupy the proposed area.
6. The licensing authorities should consider the type of neighborhood and the potential for noise in the environs.
7. Preferred are outdoor areas where alcohol is served to patrons who are seated at the tables and where food is also available.

Approved July 28, 2015 (superseding August 22, 1989, Guidelines)



Loreen Pina <lpina@fairhaven-ma.gov>

Send data from MFP12198749 06/01/2021 10:49

8 messages

Selectmen's Copier <copier@fairhaven-ma.gov>
To: Loreen Pina <lpina@fairhaven-ma.gov>

Tue, Jun 1, 2021 at 1:49 PM

Scanned from MFP12198749
Date: 06/01/2021 10:49
Pages: 8
Resolution: 200x200 DPI

DOC060121-06012021104907.pdf
2229K

Loreen Pina <lpina@fairhaven-ma.gov>

Wed, Jun 2, 2021 at 8:49 AM

To: Chris Carmichael <ccarmichael@fairhaven-ma.gov>, Patricia Pacella <ppacella@fairhaven-ma.gov>, Jocelyn Bowers <jbowers@fairhaven-ma.gov>, David Flaherty <dflaherty@fairhaven-ma.gov>

Good Morning All,

Attached please find an application from The Traveler's Ale House Rest. A hearing is scheduled for July 12, 2021 @ 7:00 PM for an altered premise transaction by adding a YEAR ROUND outdoor serving area & bar (the description will be placed on the liquor license). Please advise if you have any questions or concerns. Thank you very much.

Sincerely,
Lori Pina,
Selectmen's Office
[Quoted text hidden]

DOC060121-06012021104907.pdf
2229K

X **Chris Carmichael** <ccarmichael@fairhaven-ma.gov>
To: Loreen Pina <lpina@fairhaven-ma.gov>

Wed, Jun 2, 2021 at 9:42 AM

Cc: Patricia Pacella <ppacella@fairhaven-ma.gov>, Jocelyn Bowers <jbowers@fairhaven-ma.gov>, David Flaherty <dflaherty@fairhaven-ma.gov>, Paul Foley <pfoley@fairhaven-ma.gov>, Todd Correia <tcorreia@fairhaven-ma.gov>, Joy Nichols <jnichols@fairhaven-ma.gov>, Mike Myers <chief@fairhavenpolice.org>, Wendy Graves <wgraves@fairhaven-ma.gov>

Loreen,

My concerns are as follows:

1. An increase in floor area will increase the occupant load
2. The increase in occupant load will trigger the need for additional parking
3. The addition of 5 or more spaces will require a Special Permit from Planning
4. The increased occupant load also requires additional plumbing fixtures
5. The exterior deck will need to be handicap accessible, and cannot affect the existing accessible path into the restaurant

This is the same scenario that Ice House is attempting, an added deck with no increase in occupant load, plumbing fixtures and or parking.

The added pavilion at Off the Hook is creating a parking problem there already.

Chris Carmichael
Building Commissioner/Zoning Enforcement Officer
Town of Fairhaven

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[Quoted text hidden]

--

Chris Carmichael
Building Commissioner/Zoning Enforcement Officer
Town of Fairhaven

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Loreen Pina <lpina@fairhaven-ma.gov>
To: Minh Tieu <minh@travelersalehouse.com>

Wed, Jun 2, 2021 at 9:50 AM

Good Morning Minh,

Attached please find the Building Commissioner's comments regarding your application for the Year Round Outdoor Area. If you have any questions, you may call the building department (508) 979-4023, Ext. 117. This may be an issue at the Hearing set for July 12, 2021.

Thank you.

Lori

[Quoted text hidden]

Todd Correia <tcorreia@fairhaven-ma.gov>

Wed, Jun 2, 2021 at 9:57 AM

To: Chris Carmichael <ccarmichael@fairhaven-ma.gov>

Cc: Loreen Pina <lpina@fairhaven-ma.gov>, Patricia Pacella <ppacella@fairhaven-ma.gov>, Jocelyn Bowers <jbowers@fairhaven-ma.gov>, David Flaherty <dflaherty@fairhaven-ma.gov>, Paul Foley <pfoley@fairhaven-ma.gov>, Joy Nichols <jnichols@fairhaven-ma.gov>, Mike Myers <chief@fairhavenpolice.org>, Wendy Graves <wgraves@fairhaven-ma.gov>

Good Morning,

We see no issue with the outdoor seating.

1. Concur with the building commissioner.
2. Occupant load must be fixed annually for all rooms and outdoor seating for crowd enforcement.
3. All tents need to be NFPA approved.

Regards,

Todd Correia
Chief of Department
Fairhaven Fire Department / Emergency Medical Services
Fairhaven Emergency Management
www.fairhavenfire.org

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Fairhaven Fire Department
146 Washington St. Fairhaven, MA 02719
Phone: 508-994-1428 Fax: 508-994-1515 Cell: 508-989-4717

[Quoted text hidden]

Minh Tieu <minh@travelersalehouse.com>
To: Loreen Pina <lpina@fairhaven-ma.gov>

Wed, Jun 2, 2021 at 10:03 AM

Understand.
Will work on this today.

Thank You

Minh Tieu
www.travelersalehouse.com

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On Jun 2, 2021, at 9:50 AM, Loreen Pina <lpina@fairhaven-ma.gov> wrote:

[Quoted text hidden]

Loreen Pina <lpina@fairhaven-ma.gov>
To: Minh Tieu <minh@travelersalehouse.com>

Wed, Jun 2, 2021 at 10:42 AM

Good Morning Minh,
Not to worry, we'll get it done!
Thank you!!!
Lori

[Quoted text hidden]

* Paul Foley <pfoley@fairhaven-ma.gov>

Wed, Jun 2, 2021 at 5:59 PM

To: Chris Carmichael <ccarmichael@fairhaven-ma.gov>
Cc: Loreen Pina <lpina@fairhaven-ma.gov>, Patricia Pacella <ppacella@fairhaven-ma.gov>, Jocelyn Bowers <jbowers@fairhaven-ma.gov>, David Flaherty <dflaherty@fairhaven-ma.gov>, Todd Correia <tcorreia@fairhaven-ma.gov>, Joy Nichols <jnichols@fairhaven-ma.gov>, Mike Myers <chief@fairhavenpolice.org>, Wendy Graves <wgraves@fairhaven-ma.gov>

If they are increasing the occupancy by 12 and a half people or more they will need to file for a Special Permit. Both Travelers (under old name) and Ice House have been reviewed as Special Permits in the past.

Special Permit - §198-29.A(1) New construction that would require a total of five or more parking spaces counting existing and new demand;

Parking Schedule - §198-27.B(2) (f) Restaurant, theater, assembly hall: one space per 2.5 fixed seats; if seats are not fixed, one space per 2.5 occupants as calculated under the Building Code for maximum occupancy.

Thanks,
Paul

Paul H. Foley, AICP
Director of Planning & Economic Development
Fairhaven, Massachusetts

Town Hall, 40 Center Street
(508) 979-4082 EXT. 122

On Wed, Jun 2, 2021 at 9:42 AM Chris Carmichael <ccarmichael@fairhaven-ma.gov> wrote:
[Quoted text hidden]



Wendy Graves <wgraves@fairhaven-ma.gov>

Rogers School

1 message

Thomas P. Crotty <tomcrotty@tcrottylaw.com>
Reply-To: tomcrotty@tcrottylaw.com
To: Wendy Graves <wgraves@fairhaven-ma.gov>
Cc: "William T. Harrington" <wharringtonlaw@gmail.com>

Thu, Jul 8, 2021 at 10:12 AM

Wendy

The court has entered the attached decision and order dismissing the case brought by Zachary Mayo and his company, New England Preservation and Development, against the town for the termination of the purchase and sale agreement for the Rogers School. The order also dissolves the lis pendens on the property. That order will become final in thirty days.

If the plaintiffs file an appeal within that thirty day period, the lis pendens would continue until a judge of the appeals court acts on that appeal. Appeals to the single justice are usually acted on quickly.

The court also ordered that the plaintiffs pay the town's attorneys' fees, and requires the town to submit affidavits of those fees within thirty days. Attorney Harrington and I will file those affidavits.

We will keep you advised of developments. Please let me know if you have any questions in the meantime.

Tom

Thomas P. Crotty

Thomas P. Crotty & Associates, PLLC

5 Dover Street, Suite 102

New Bedford, MA 02740-4992

TomCrotty@tcrottylaw.com

Tel: 508-990-9101 Fax: 508-990-9108

Cell/SMS: 508-916-7862

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Rogers School Decision on Motion to Dismiss.pdf
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7/8/21

#17

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
SUPERIOR COURT DEPARTMENT

BRISTOL, ss.

Civil Action No. 2073CV00650.

BRISTOL, SS SUPERIOR COURT
FILED

NEW ENGLAND PRESERVATION AND
DEVELOPMENT, LLC and
ZACHARY MAYO,
Plaintiffs

JUL - 6 2021

v.

MARC J SANTOS, ESQ.
CLERK/MAGISTRATE

TOWN OF FAIRHAVEN,
Defendant

MEMORANDUM OF DECISION AND ORDER ON
DEFENDANT'S SPECIAL MOTION TO DISMISS AND
DISSOLVE MEMORANDUM OF LIS PENDENS
PURSUANT TO G.L. c. 184, § 15 (c)

The plaintiffs, New England Preservation and Development, LLC and its manager, Zachary Mayo, bring this action against the defendant, the town of Fairhaven, for breach of an agreement to sell premises that previously served as the Rogers School. The plaintiffs seek specific performance of the agreement or, in the alternative, compensatory damages.

The defendant town has filed a special motion to dismiss the amended verified complaint and to dissolve a memorandum of lis pendens, issued by the court on September 20, 2020, pursuant to G.L. c. 184, § 15 (c). The town also seeks an award of attorney's fees. The plaintiffs have filed a written opposition to the motion.

FACTS

"In ruling on the special motion to dismiss the court shall consider verified pleadings and affidavits, if any, meeting the requirements of the Massachusetts rules of civil procedure." G.L. c. 184, § 15 (c).

In May of 2018, the town issued a request for proposals for the renovation of the Rogers School property. Mayo submitted a proposal on behalf of New England Preservation and Development, LLC ("NEPD.") During the town's review of the proposal, Mayo submitted a letter dated July 24, 2018 from The Raymond C. Green Companies. The letter provided:

This letter shall confirm our interest in providing funds towards the remediation of the Rogers School Building and for the construction of four single family homes at the Property. Said financing will be subject to the terms and conditions of a loan commitment letter to be issued by Lender upon its review and approval of the approved development plans. This letter shall not be deemed a formal loan commitment.

Rees Affidavit, Exhibit A.

On July 23, 2019, the town entered into a written agreement to sell the former Rogers School premises to NEPD. Rees Affidavit, Exhibit C. The agreement was signed by Zachary Mayo, purportedly on behalf of NEPD. The agreement provided that the purchase price of \$ 35,000 would be paid at a closing to be held thirty days after either party provided notice to the other "of satisfaction of the last of all the conditions" set out in paragraph two of Rider A:

2. Conditions: The performance of the Purchase and Sale Agreement shall be conditioned on the satisfactory completion of the following conditions.

A. The Buyer shall prepare complete plans for development of the premises, including but not limited to, complete construction plans showing details of the components of the Rogers School building that are to be preserved, and new components to be added to the Rogers School building and to the premises, and the time line for project completion. Such plans shall be submitted by the Buyer to the Seller within one hundred twenty (120) days from the date of the full execution of this Agreement. Upon satisfactory completion of its review of those plans the seller will notify the Buyer, within thirty (30) days of receipt of the plans from the Buyer that the plans have been approved. In [the] event the Buyer is required to amend the plans prior to approval by the Seller, the Buyer shall be allowed an additional thirty (30) days to submit such amended plans. The plans as approved may not be further amended prior of the Seller [*sic*].

- B. The Buyer shall notify the Seller when it has obtained financing commitments sufficient to fund the development of the project, within one hundred eighty (180) days from the date of the full execution of this Agreement.
- C. The Buyer shall provide the Seller notice when it has obtained the necessary permits, including zoning permits and planning board approvals or endorsements necessary to proceed with the project. The Seller agrees that to the extent the Buyer is required to pay permit application fees, water and sewer tie in fees and BPW filing fees, the purchase price set forth in Paragraph 7 of the Purchase and Sale Agreement shall be reduced by the aggregate amount of all such payments, provided that the purchase price shall not be reduced by this, or any other reduction, or combination of reductions, below a price of \$ 17,500.00. The Seller also agrees to provide assistance to the Buyer in obtaining all necessary Town of Fairhaven municipal permits.
- D. The Buyer agrees to commence the application process to have the Rogers School building placed on the National Register of Historic Buildings and shall provide the Seller notice of such application. In the event such application is not approved within one hundred twenty (120) days of the full execution of this Agreement the Buyer will provide the Seller with a covenant or other legally enforceable mechanism, which shall be entered into a[t] time of conveyance of the deed, to guarantee the preservation of the historical component of the Rogers School building. In such event the Seller shall notify the Buyer when it is satisfied with the form of covenants or other documents, within thirty (30) days of the date of receipt by the Seller of such documents.
- E. The Buyer shall provide the Seller with a Letter of Credit sufficient to guarantee the completion of the work as shown on the approved plans. The Seller shall notify the Buyer when it is satisfied with such Letter of Credit within thirty (30) days of the date of receipt by the Seller of such documentation.

3. **Right of Termination:** If each of the conditions set forth in paragraph 2 of this Rider A has not been satisfied, with notice thereof given as provided in each of the conditions, no later than one (1) year following the date of this Agreement, then either party may terminate this agreement by written notice [to] the other, and this agreement shall thereupon be void and without recourse.

Rider A was signed by the town administrator on behalf of the town, as "Seller," and by Zachary Mayo, as "Buyer."

Sometime thereafter, Mayo filed an application to register the building with the National Register of Historic Buildings. Mayo Affidavit, par. 8. Amended Verified Complaint, par. 21.

On December 28, 2019, NEPD was organized as a limited liability company with Zachary Mayo as its manager. Crotty Affidavit, Exhibit A.

On February 14, 2020, Mayo, on behalf of NEPD, submitted a letter to the town from Millers River Development, LLC. The letter provided in part:

This is a letter to confirm my interest and commitment to the project in Fairhaven, Ma. presented and being permitted by Zachary Mayo and **New England Preservation and Development, Inc.**

I have spoken to one of our long time bankers at Cambridge Trust Company about the Fairhaven project and they have indicated that financing it would not present any kind of problem for them. They would require 20% equity or about 500K in cash. This does not present a problem for myself and my partners.

Rees Affidavit, Exhibit D (emphasis in original).

On February 19, 2020, the town administrator, Mark Rees, advised Mayo that the letter from Millers River Development did not satisfy the purchase and sale agreement because it was not a binding agreement to provide financing. Rees Affidavit, Exhibit E.

On May 21, 2020, Mayo submitted a timeline for obtaining required permits for the project. On May 28, 2020, Rees advised Mayo that the timeline was inadequate due, in part, to the lack of a date on which Mayo would submit architectural plans to the town's planning board. Rees Affidavit, Exhibit F.

On June 15, 2020, the town notified Mayo that the board of selectmen would consider terminating the purchase and sale agreement at their meeting on June 29, 2020 unless Mayo provided an executed agreement with an architectural or engineering firm with a timeline prepared by an architect or engineer. Rees Affidavit, Exhibit G.

On June 26, 2020, Mayo submitted a timeline for the project and a contract between NEPD and Civil Environmental Consultants [*sic*], L.L.C. The contract provided for the design of the project for \$ 35,000. Rees Affidavit, Exhibit H.

On July 15, 2020, Rees sent a letter to Mayo informing him and NEPD that the board of selectmen had decided to terminate the purchase and sale agreement based on the buyer's failure to fulfill conditions B (financial commitment), C (necessary permits), D (National Register of Historic Buildings) and E (letter of credit) set out on Rider A to the agreement. Rees Affidavit, Exhibit J. The letter stated that, notwithstanding the termination, the board of selectmen proposed that Mayo, his attorney and financial backer meet with Rees no later than July 23, 2020. The letter stated that if Mayo provided "written proof of a legally binding financial commitment, satisfactory to the Board of Selectmen in its absolute and sole discretion, in both form and amount," the board would consider amending the purchase and sale agreement to extend the time for the buyer's performance. *Id.*

Although a video conference between Mayo and Rees was scheduled for July 20, 2020, the meeting was cancelled when an employee at town hall tested positive for COVID-19. Rees Affidavit, par. 14 & 15.

On July 24, 2020, at Mayo's suggestion, town counsel spoke to Bart Bussink, managing partner of Millers River Development, LLC. Bussink said that Millers River Development would not finance the project. Crotty Affidavit, par. 16 & 17.

That same day, the town administrator sent a notice of termination of the purchase and sale agreement to Mayo and NEPD. Rees stated that the town terminated the agreement due to the buyer's failure to fulfill conditions B (financial commitment), C (necessary permits), D (National Register of Historic Buildings) and E (letter of credit) set out on Rider A to the agreement. Rees Affidavit, Exhibit L.

In his affidavit, Mayo states that he "attempted to obtain the Town's assistance with permitting and preparing acceptable plans. However, the Town repeatedly rebuffed, and failed to respond to, my requests, despite its contractual obligations. The Town also repeatedly demanded additional documents and information not required by the Agreement. I complied with a number of these serial requests, although I was not contractually obligated to do so." Mayo Affidavit, par. 8-11. Mayo did not provide further details.

ANALYSIS

The plaintiffs have asserted two claims in their amended verified complaint: (1) breach of contract and (2) breach of the implied covenant of good faith and fair dealing. The town contends that the plaintiffs' claims are frivolous. The town seeks dissolution of the previously issued memorandum of lis pendens and dismissal of the amended verified complaint pursuant to G.L. c. 184, § 15 (c). The town also seeks an award of attorney's fees pursuant to that statute.

G.L. c. 184, § 15 provides a procedure by which a person asserting a claim to real property may obtain a memorandum of lis pendens, which the claimant may record in the appropriate registry of deeds or register in the appropriate division of the Land Court in order to provide notice of the litigation to third parties. G.L. c. 184, § 15 (b) provides that the court "shall" issue the memorandum "if the subject matter of the action constitutes a claim of a right to title to real property or the use and occupation thereof or the buildings thereon...."

The statute also provides a mechanism by which a defendant may seek dissolution of a memorandum of lis pendens and dismissal of such an action if the claim is frivolous:

A party may also file a special motion to dismiss the claimant's action if that party believes that the action or claim supporting the memorandum of lis pendens is frivolous. ... The special motion to dismiss shall be granted if the court finds that the action or claim is frivolous because (1) it is devoid of any reasonable factual support; or (2) it is devoid of any arguable basis in law; or (3) the action or claim is subject to dismissal based on a valid legal defense such as the statute of frauds. In ruling on the special motion to dismiss the court shall consider verified pleadings and affidavits, if any, meeting the requirements of the Massachusetts rules of civil procedure. If the court allows the special motion to dismiss, it shall award the moving party costs and reasonable attorneys fees, including those incurred for the special motion, any motion to dissolve the memorandum of lis pendens, and any related discovery.

G.L. c. 184, § 15 (c).

"[A] special motion to dismiss under § 15(c) requires the motion judge to consider alleged facts beyond the plaintiff's initial pleading and, based on those allegations, to determine whether the plaintiff's claims are devoid of a factual or legal basis.... [T]he burden is on the defendant to demonstrate, by a preponderance of the evidence, that the plaintiff's claim is completely lacking in 'reasonable factual support ... or ... any arguable basis in law.' ... '[T]he question to be determined by a judge in deciding a special motion to dismiss [under § 15(c)] is not which of the parties' pleadings and affidavits are entitled to be credited or accorded greater weight,' but whether the party with the burden of proof (here, the defendants) has shown that the claim made by the moving party was devoid of any reasonable factual support or arguable basis in law." *Ferguson v. Maxim*, 96 Mass. App. Ct. 385, 390 (2019).

NEPD's Claim. The town argues that NEPD's claims are frivolous because NEPD was not formed until December 28, 2019, which was five months after the contract was signed. The town argues that NEPD therefore has no right to enforce the contract.

Under an 1889 Supreme Judicial Court decision, a corporation that was not formed until after a contract was signed in its name is not a party to the contract. "If a contract is made in the name and for the benefit of a projected corporation, the corporation, after its organization, cannot become a party to the contract, even by adoption or ratification of it." *Abbott v. Hapgood*, 150 Mass. 248, 252 (1889). Whether the Court would adhere to this rule today is questionable. "While never renounced, the rule has been gradually eviscerated...." *Copp v. Hague*, 1994 Mass. App. Div. 11. "This rule is the extreme minority position. Most states hold that a corporation can be bound to a pre-incorporation agreement by some signal of knowing ratification or adoption of the contract." *Framingham Savings Bank v. Szabo*, 617 F.2d 897, 898 (1st Cir. 1980).

The *Abbott* rule "does not mean that after the organization of the corporation it cannot enter into a contract such as previously had been prepared." *Pennell v. Lothrop*, 191 Mass. 357, 360 (1906). "Massachusetts appears willing to bind a corporation to the terms of a preincorporation contract... by means of theories of continuing offer and implied contract." *Framingham Savings Bank, supra*, at 899 (footnote omitted), citing *Holyoke Envelope Co. v. United States Envelope Co.*, 182 Mass. 171 (1902).

NEPD's claim is not "devoid of any reasonable factual support [or] devoid of any arguable basis in law," G.L. c. 184, § 15 (c), merely because the company came into existence after the contract was signed. There is, at least, an arguable basis to conclude that the Supreme Judicial Court would overturn the *Abbott* rule and bring Massachusetts in line with the majority rule. There is little, if any, reason to prohibit a corporation or other legal entity from enforcing its rights under a contract, where the other party to the contract understood it was entering into a contract with the corporation.

Even if the *Abbott* rule remains good law, a reasonable jury could find that NEPD accepted the town's "continuing offer" to enter the contract on February 14, 2020 when NEPD submitted to the town a letter from Millers River Development, LLC as evidence that NEPD had financial backing for the project.

Breach of Contract. The town argues that the plaintiffs' claim for breach of contract is devoid of "any reasonable factual support" and "any arguable basis in law," G.L. c. 184, § 15 (c), because the undisputed facts demonstrate that the town properly terminated the contract.

The contract provided that the town could terminate the contract if the plaintiffs failed to fulfill certain conditions:

If each of the conditions set forth in paragraph 2 of this Rider A has not been satisfied, with notice thereof given as provided in each of the conditions, no later than one (1) year following the date of this Agreement, then either party may terminate this agreement by written notice [to] the other, and this agreement shall thereupon be void and without recourse.

Rees Affidavit, Exhibit C, Rider A, par. 3.

On July 24, 2020, the town sent written notice to the plaintiffs terminating the contract due to the buyer's failure to fulfill Conditions B (financial commitment), C (necessary permits), D (National Register of Historic Buildings) and E (letter of credit) set out on Rider A to the agreement. Rees Affidavit, Exhibit L.¹

The plaintiffs argue that the termination clause is "irrelevant" because the town breached the contract prior to the purported termination by its "refusal 'to accept Plaintiffs' submission of documents required by the Agreement, its imposition of requirements and standards not contained in the Agreement, its failure to assist Plaintiffs in obtaining necessary permits, and its improper purported termination of the Agreement.'" Plaintiffs' Opposition, p. 9.

¹ The town sent an earlier notice of termination for the same reasons on July 15, 2020. Rees Affidavit, Exhibit J. However, that notice was ineffective since it was sent less than one year after execution of the contract.

The termination clause is not "irrelevant." "A breach of contract is a failure to perform for which legal excuse is lacking." *Realty Developing Co., Inc. v. Wakefield Ready-Mixed Concrete Co., Inc.*, 327 Mass. 535, 537 (1951). The town's duty under the contract was to convey the land. However, that duty was subject to conditions precedent set out on Rider A. "A condition precedent is an act which must occur before performance by the other party is due." *Wood v. Roy Lapidus, Inc.*, 10 Mass. App. Ct. 761, 763 n. 5 (1980).

The issue before the court is whether the town was entitled to terminate due to the plaintiffs' failure to fulfill Conditions B, C, D and E on Rider A. If the town prevented the plaintiffs from fulfilling those conditions by, for example, refusing to accept required documents or by failing to assist the plaintiffs in obtaining permits as the town promised, that conduct would excuse the plaintiffs from their obligation to fulfill the conditions. A condition "may be excused by prevention or hindrance of its occurrence through a breach of the duty of good faith and fair dealing." *Restatement of Contracts (Second)* § 225 comment b. *See Lobosco v. Donovan*, 30 Mass. App. Ct. 53, 56 (1991).

Under G.L. c. 184, § 15 (c), therefore, the town has the burden of proving that its termination was proper, i.e. the plaintiffs failed to fulfill at least one of the four conditions precedent without legal excuse. If there is evidence in the record – even doubtful and disputed evidence, *Ferguson, supra*, – that the plaintiffs fulfilled all four conditions precedent or that fulfillment of the conditions was legally excused, the court must deny the town's motion.

Condition B on Rider A, which relates to financing, provides:

The Buyer shall notify the Seller when it has obtained financing commitments sufficient to fund the development of the project, within one hundred eighty (180) days from the date of the full execution of this Agreement.

Rees Affidavit, Exhibit C.

A “commitment” to provide financing is “[a] lender’s binding promise to a borrower to lend a specified amount of money at a certain interest rate, usu. within a specified period and for a specified purpose (such as buying real estate).” Black’s Law Dictionary, “Loan Commitment” (11th ed. 2019).

The plaintiffs did not notify the town of any “financing commitments sufficient to fund the development of the project” by January 19, 2020, which was one hundred eighty days after the parties executed the agreement.² On February 14, 2020, Mayo provided the town administrator with a letter from Millers River Development, LLC. Rees Affidavit, Exhibit D. The letter confirmed the company’s “interest and commitment to the project....” However, the letter was not a “commitment[] sufficient to fund the development of the project” as required by Condition B. The letter stated that Miller’s River would provide twenty percent of the financing. The other eighty percent would come from Cambridge Trust Company, which did not provide a “commitment” for the financing. The letter merely stated that Bart Bussink, managing partner of Miller’s River, spoke to an unidentified person at Cambridge Trust Company, who said that providing such financing “would not present any kind of problem for them.” The plaintiffs never provided the town with notice that any lender committed itself to provide financing “sufficient to fund the development of the project....”³ Therefore, the plaintiffs failed to fulfill Condition B. There is no evidence in the record that the plaintiffs were legally excused from fulfilling that Condition. The town therefore had the right to terminate the contract.

² A year prior to execution of the agreement, Mayo provided the town with a letter from the Raymond C. Green Companies confirming its interest in financing the project. However, that letter expressly stated: “This letter shall not be deemed a formal loan commitment.” Rees Affidavit, Exhibit A.

³ In addition, on July 24, 2020 – the day the town sent its termination letter to the plaintiffs – Mr. Bussink informed town counsel that Miller’s River would not finance the project. Crotty Affidavit, par. 16 & 17.

Condition C on Rider A, which relates to permits, provides:

The Buyer shall provide the Seller notice when it has obtained the necessary permits, including zoning permits and planning board approvals or endorsements necessary to proceed with the project. The Seller agrees that to the extent the Buyer is required to pay permit application fees, water and sewer tie in fees and BPW filing fees, the purchase price set forth in Paragraph 7 of the Purchase and Sale Agreement shall be reduced by the aggregate amount of all such payments, provided that the purchase price shall not be reduced by this, or any other reduction, or combination of reductions, below a price of \$ 17,500.00. The Seller also agrees to provide assistance to the Buyer in obtaining all necessary Town of Fairhaven municipal permits.

Rees Affidavit, Exhibit C.

The plaintiffs never obtained “necessary permits, including zoning permits and planning board approvals or endorsements necessary to proceed with the project.” However, the plaintiffs argue that the reason they did not obtain the permits is that the town failed to provide assistance, as the town promised. Mayo states in his affidavit that he “attempted to obtain the Town’s assistance with permitting and preparing acceptable plans. However, the Town repeatedly rebuffed, and failed to respond to, my requests, despite its contractual obligations.” Mayo Affidavit, par. 8 & 9. In addition, the amended verified complaint alleges that in May of 2020 the town selectmen “instructed Plaintiffs to reach out to the Town’s Planning Department to organize the necessary permit applications and plan requirements. Plaintiffs did so numerous times, but did not hear back for weeks.” Amended Verified Complaint, par. 22-24. This evidence provides at least an arguable basis in fact and law to conclude that the plaintiffs’ compliance with Condition C was legally excused.

Condition D on Rider A, which concerns registration of the school building with the National Register of Historic Buildings, provides:

The Buyer agrees to commence the application process to have the Rogers School building placed on the National Register of Historic Buildings and shall provide the Seller notice of such application. In the event such application is not approved within one hundred twenty (120) days of the full execution of this Agreement the Buyer will provide the Seller with a covenant or other legally enforceable mechanism, which shall be entered into a[t] time of conveyance of the deed, to guarantee the preservation of the historical component of the Rogers School building. In such event the Seller shall notify the Buyer when it is satisfied with the form of covenants or other documents, within thirty (30) days of the date of receipt by the Seller of such documents.

Rees Affidavit, Exhibit C.

In his affidavit, Mayo averred that after the contract was signed, he “filed an application to have the Property listed on the National Register of Historic Buildings....” Mayo Affidavit, par. 8. However, he does not claim – and there is no evidence to indicate – that he “provide[d] the Seller notice of such application,” as required by Condition D. Accordingly, the plaintiffs did not fulfill Condition D and the town was justified in terminating the contract.

Condition E on Rider A, which concerns a letter of credit, provides:

The Buyer shall provide the Seller with a Letter of Credit sufficient to guarantee the completion of the work as shown on the approved plans. The Seller shall notify the Buyer when it is satisfied with such Letter of Credit within thirty (30) days of the date of receipt by the Seller of such documentation.

Rees Affidavit, Exhibit C.

The plaintiffs do not dispute that they failed to provide the town with a letter of credit. Instead, they argue that the parties modified the condition. The amended verified complaint alleges that “[t]he Town and Plaintiffs also agreed that Plaintiffs could provide a performance bond at closing in lieu of the letter of credit.” Amended Verified Complaint, par. 15.

The written agreement provides that the document “sets forth the entire contract between the parties... and may be cancelled, modified or amended only by a written instrument executed

by both the SELLER and the BUYER.” Rees Affidavit, Exhibit C, par. 21. The plaintiffs do not contend that the parties modified the contract in writing.

“[A] provision that an agreement may not be amended orally but only by a written instrument does not necessarily bar oral modification of the contract.” *Cambridgeport Savings Bank v. Boersner*, 413 Mass. 432, 439 (1992). However, “[t]he evidence of a subsequent oral modification must be of sufficient force to overcome the presumption that the integrated and complete agreement, which requires written consent to modification, expresses the intent of the parties.” *Id.* at 439 n. 10. In the context of a summary judgment motion, the Appeals Court has held that a party’s claim that such a written contract was modified orally, without more, is insufficient to raise a genuine issue of fact for trial. “[I]n order to support the existence of an oral modification, the parol evidence must be sufficiently weighted and of competent probity to present a material issue for trial; that is, the parol evidence must be of sufficient strength to present an ambiguity between the actual conduct of the parties and the contract.... [A]mbiguity cannot be predicated solely on statements in affidavits.” *Wells Fargo Business Credit v. Environamics Corp.*, 77 Mass. App. Ct. 812, 817 (2010). (citation omitted.)

The same rule should apply to a special motion to dismiss under G.L. c. 184, § 15 (c) since such motions are also decided on verified pleadings and affidavits. The only evidence in the record of an oral modification of Condition E, agreed to by the parties after execution of the written contract, is Mayo’s conclusory claim of an oral modification in the verified amended complaint. That claim does not indicate who agreed to modify the written contract on behalf of the town or when or how the town agreed to the modification. There is no way to know from the conclusory assertion whether the town official (whoever it was) had authority to bind the town. The conclusory assertion is insufficient to overcome the written contract language.

Breach of Covenant of Good Faith and Fair Dealing. The plaintiffs also allege that the town breached the implied covenant of good faith and fair dealing in the purchase and sale agreement.

“Every contract implies good faith and fair dealing between the parties to it. ...The implied covenant of good faith and fair dealing provides that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract....” *Anthony’s Pier Four, Inc. v. HBC Associates*, 411 Mass. 451, 471 (1991) (internal quotations and citations omitted). The implied covenant “exists so that the objectives of the contract may be realized.” *Ayash v. Dana-Farber Cancer Institute*, 443 Mass. 367, 385 (2005).

The town’s good faith in dealing with the plaintiffs is amply demonstrated by the attempts it made to salvage the project when the plaintiffs failed to fulfill the conditions of the agreement. In the premature termination letter sent to the plaintiffs on July 15, 2020, the town offered to consider amending the agreement to give the plaintiffs more time to fulfill the conditions if they could show that they had the financial ability to complete the project. Rees Affidavit, Exhibit J. The town administrator later scheduled a meeting with Mayo to find out if the plaintiffs had the financial ability to complete the project. *Id.* at par. 13-15. Crotty Affidavit, par. 14 & 15. Even after the town sent its proper termination letter on July 24, 2020, town counsel spoke with Bart Bussink of Millers River Development and the plaintiffs’ attorney to explore the possibility of continuing with the project. Crotty Affidavit, par. 14-27.

It is clear from these facts that the town repeatedly attempted to work things out with the plaintiff so that the project could proceed. The failure of the project was not due to a lack of good faith by the town but due to the plaintiffs’ inability to secure financing.

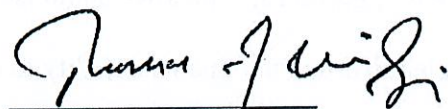
Conclusion. The plaintiffs failed to fulfill three conditions precedent – Condition B (financial commitment), Condition D (National Register of Historic Buildings) and Condition E (letter of credit) – to the town’s performance under the contract. The town had the right to terminate the contract, as provided in paragraph 3 of Rider A. The town exercised that right by giving written notice as the contract required. The town has therefore carried its burden of proving by a preponderance of the evidence that the plaintiff’s claim is completely lacking in “reasonable factual support ... or ... any arguable basis in law.” *Ferguson, supra*, quoting G.L. c. 184, § 15 (c).

ORDER

The defendant’s special motion to dismiss (Paper # 16) is **ALLOWED**. The memorandum of lis pendens is **DISSOLVED**. The amended verified complaint is **DISMISSED**. The court **AWARDS** the defendant its attorney’s fees incurred in this action to be paid by the plaintiffs.

The defendant shall file and serve an affidavit of attorney’s fees within thirty days. The plaintiffs may file an opposition to the amount of attorney’s fees sought by the defendant within thirty days after service of the defendant’s affidavit.

July 3, 2021



Thomas F. McGuire, Jr.
Justice of the Superior Court



June 17, 2021

Select Board,

Upon request, here is the info pertaining to additional hybrid/ remote meeting room(s) equipment needed based on Yes vote on Article 56 at the June 14, 2021 Annual Town Meeting.

ARTICLE 56: CITIZENS PETITION-AMENDMENT TO TOWN BY-LAW CHAPTER 50-13 PART 2 To see if the Town will vote to amend Town By-law c50-13 Part 2 (Televised Meetings take another action relative thereto. Amend the following title and section: Part 2 Televising Board Meetings and Allowing Remote Public Participation 50-10 Broadcast/recording/remote public participation required. All meetings of Town boards, commissions and committees shall be broadcast live and/or recorded for future broadcast over the local cable television network and online viewing as well as allow virtual remote participation via a live online platform such as Zoom or similar service unless emergency, operational or technical conditions suspend the requirements hereof, as determined by the Town Administrator, for broadcasts over the public access and government channels or the School Superintendent for broadcasts over the education channel. Members of the public may participate with comments if allowed by the Chair of the committee. C50-13 Compliance with Open Meeting Law Nothing contained in this bylaw shall be so construed as to conflict with the requirements of the Open Meeting Law, MGL 30A.

Petitioned by: Anne Morton Smith

Option 1: Large Scale meetings (Location Auditorium)

A/V Equipment (10-12 Wireless Mics, Mixer, Speaker PA, Zoom A/V Adapters) -

\$10,546.20

86" ViewSonic Smartboard - **\$6505.00**

Total: \$17,051.20

Option 2: Small Scale Meetings (Possible locations – Banquet Room, East Room, BPW)

4K Conference Camera System with Dual-Speakers and Mic Pods Set
(Possible locations – East Room, BPW) - **\$2386.79**

Accessories: 65" ViewSonic Smartboards (Possible locations – East Room, BPW) -
\$4505 each

Total per location: **\$6891.79**

ZOOM Platform Costs:

\$140/month for webinar for up to 500 participants (**\$1680/yr**)

\$199.90/month for 10 standard business licenses (**\$2388/yr**)

Currently paid for by Covid-19 Cares Reimbursement, set to expire at some point.

**Fairhaven Town Cable Access Enterprise
Retained Earnings Available as of 6-17-21**

Beginning Balance 7/1/20	\$693,838
Amount used for FY 22 Budget	<u>(\$ 49,587)</u>
Retained Earnings as of 6/17/21	\$644,251

Currently the Comcast Cable Budget is split between Town and School:
Town Cable = 56% (2 Channels: Government Access Channel 18 & Public Access Channel 95)
School Cable = 44% (1 Channel: Educational Access Channel 9)

An increase to the Town Cable percentage would allow us to hire a Part-Time Production Assistant (19 hrs per week) in addition to Full time positions of Cable Access Director and Production Coordinator to guarantee coverage of all meetings. We currently rely on Videographers, paid an hourly rate with no set schedule and availability.

Thank You,
Derek T. Frates
Government /Public Access Director
Town of Fairhaven

Attachment E

18:46:54 From Town Hall to DB (Direct Message) : Can you identify
yourself ?
18:47:11 From Cathy Melanson : At the last EDC meeting no one else said
they were interested
19:05:58 From Ann Richard - she/her/hers : just wondering if there are
minutes to the ARPA meetings discussing use of this money?
19:19:00 From Cathy Melanson : Is this on the agenda ?

