

GUNSTOCK AREA COMMISSION MEETING
July 29, 2021
Stockade Lodge, Gunstock Mountain Resort
APPROVED MINUTES

GAC: Russell Dumais, Brian Gallagher, Gary Kiedaisch, Peter Ness in attendance. Chair Kiedaisch reported that Rusty McLear is unable to attend the meeting.

Gunstock Personnel: Tom Day, Cathy White, Becky LaPense, Kristen Lodge, Robin McGonagle, Patrick McGonagle, Peter Weber

BDC: Rep. Sylvia, Rep. Howard

Chair Kiedaisch called the meeting to order at 6:01PM with the pledge of allegiance. He opened the meeting with the review of the draft financial audit. Jennifer Door from Vachon Clukay & Company PC, joined by phone to review the findings of independent auditor's report for FY20 and FY21.

New Business

- a. *20/21 Draft Financial Audit Review* - CFO, Cathy White, presented the independent auditor's report for fiscal years ending April 2020 and April 2021. She reported that there were no adjusting entries made to the financial statements as a result of the audit and no changes to the numbers presented for year-end results. She reviewed the draft audit package and read from the opinion statement which found that "the financial statements referred to in the audit present fairly, in all material respects, the respective financial position of the business-type activities of the Gunstock Area Commission and the respective changes in financial position and cash flows for the years ending April 29, 2021 and April 30, 2020 in accordance with accounting principles generally accepted in the US". She summarized each section of the auditor's report, noting there were no discrepancies or changes. She asked if there were any questions or comments from the GAC and there were none. Chair Kiedaisch said it is the commission's fiduciary responsibility to make sure the finances of the resort are accurate, and the financial audit is done every year to ensure those numbers are legitimate. He added that this year's fiscal budget allowed for performance bonuses, contingent upon the results of the financial audit and he would be asking for a vote to release those funds. Commissioner Gallagher asked Jennifer if, during her time spent doing the audit for Gunstock, she and her team agreed that all of the information requested was provided and if the time spent by their firm was sufficient to complete the audit. Jennifer said it was a challenge doing the audit remotely but that is more demanding on the Gunstock staff than it is for the auditors. She said the audit went smoothly and there were no issues with any information requested. She said they had all the support and time they needed to complete the audit. Chair Kiedaisch noted that the audit report states management was cooperative. Cathy asked for any questions about the notes. Commissioner Ness asked when the Profit Sharing Plan would be terminated and consolidated into the 457(b) retirement plan. Cathy reported that the plan termination date is 4/29/21 and they are still working with BPAS on the consolidation. She said it will be stated on the FY22 audit that the plan was terminated. Commissioner Ness said that as the ski season started last fall, the commission was told that revenue recognition policies were changed, but the auditor's letter says no new policies were changed. Cathy said there were changes to the way the accounting system calculated revenue deferrals but the process or policy itself has not changed. Jennifer said the changes they make

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note of are those that speak to new standards or new internal guidelines. Chair Kiedaisch thanked Jennifer for joining the meeting and asked for a motion to accept the findings of the auditor's report and release the allocated bonus funds.

ACTION

Motion: Commissioner Gallagher made a motion to accept the findings of the auditor's report as presented and approve the release of allocated funds for recommended bonuses based on the completion of the independent financial audit.

Second: Commissioner Dumais.

Discussion: Commissioner Gallagher commented that the audit now validates that Gunstock will be returning close to \$250,000 to Belknap Country because of the good work that was done this year. He said this is a significant increase to the \$175,000 that Gunstock would normally send to the county and should be recognized.

Vote: All in favor.

Minutes

The minutes of the June 23, 2021 Gunstock Area Commission public meeting were reviewed. Chair Kiedaisch and Commissioner Ness requested edits via email, which were documented in the hard copy of the draft minutes presented at the meeting.

ACTION

Motion: Commissioner Gallagher made a motion to approve the minutes as amended.

Second: Commissioner Dumais.

Vote: All in favor.

The minutes of the June 23, 2021 Gunstock Area Commission non-public meeting were reviewed.

ACTION

Motion: Commissioner Gallagher made a motion to approve the minutes as presented.

Second: Commissioner Dumais.

Vote: All in favor.

Commissioner Ness asked when the non-public minutes from July 12th would be voted on. Commissioner Gallagher explained that Commissioner McLear is responsible for drafting them but has not presented the draft minutes for review. He said they are sealed but will be reviewed and approved in a public meeting at a later date. Commissioner Ness said he has questioned the GAC's legal ground for sealing the non-public minutes, noting there were only 3 circumstances and wanted to know the reason they are sealed. Commissioner Gallagher said it would be more appropriate to discuss that question when the draft minutes are available for review. Chair Kiedaisch referenced NH RSA 91-A:3 III noting that matters discussed in public that would affect the reputation of any person, other than a member of this board itself was one circumstance allowing for the minutes to be sealed. He does not think there will be any issue with sealing the minutes of the July 12th non-public meeting. Commissioner Ness asked

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who the person being discussed was and who requested that the minutes be sealed. Commissioner Gallagher said he did not think this was the proper time to have that discussion and asked that Commissioner Ness be patient until the draft minutes are available from the GAC Secretary. Commissioner Ness asked to have this meeting's minutes show that he objects to the characterization of those minutes being sealed and that no one from the commission has provided articulation on the legal reasoning for sealing them. Commissioner Gallagher said his comments are noted.

Financial MD&A & Executive Summary

Cathy White reviewed the month end results for June. Revenue was \$490K, \$261K favorable to budget and \$411K favorable to LY. YTD Revenue was \$498K, \$205K favorable to budget and \$389K favorable to LY. Operational EBITDA was \$8K, \$349K favorable to budget and \$102K favorable to LY. YTD Operational EBITDA was (\$263K), \$417K favorable to budget and \$70K unfavorable to LY. She reviewed the recapture plan which accounts for the timing of expenses and shows the revised YTD EBITDA is about \$40K better than budget. Debt is down \$700k compared with last year. She plans to continue filing for the RAN to give them a safety net. Commissioner Gallagher asked why the revenue for Hillclimb and Trailfest was unbudgeted. Cathy explained that when the budget was built in March, she and Tom were hesitant to budget anything for events because they were not confident about the COVID impact on large events. Chair Kiedaisch said that the balance sheet represents a great first quarter and asked if it was it too soon to start building up a reserve for master planning. Cathy said it was too soon because by November the balance sheet will get lean after spending the planned \$2.4M in capex. She said by December they may need to activate the RAN to keep cash flow strong. So, if they moved the money to reserves now, she would likely have to move it back to operations before the new year. Chair Kiedaisch asked if they were preparing an ROI schedule for the capex projects. Cathy said the most revenue-driving project will be the Stockade Lodge renovation and they don't have final bids yet. Most of the other capex projects are R&M and they do not plan for an ROI schedule. Chair Kiedaisch said it was important that management show they can develop projects for growth for future investors. Cathy agreed and said she plans to have the Stockade Lodge ROI schedule done in about 6 weeks and they expect a healthy return on the improvements.

New Business (cont'd)

- b. *Ethics Policy* - Chair Kiedaisch reported that Commissioner Ness requested discussion about the GAC Ethics Policy, and so it was added to the agenda. Commissioner Ness said that he was concerned about the document distributed on June 23rd. He reported on his research of the subject, including a 65-page presentation from the NH Department of Justice regarding the limits of ethics policies in NH state government. He said the basis for his concern is Dillon's Rule, which holds that no governing body below the state legislature can undertake any action if they do not have express statutory authority to do so by the state legislature. Commissioner Ness said it has been recognized by SCOTUS and a prominent case in NH, *Girard v. Allenstown*, deemed it is not permissible to assume or imply that authority is granted by a statute, that you have to have express authorization under the state legislature. Commissioner Ness said when you look at 399:10 of the Gunstock Area Enabling Statute, there are no powers that speak to an ethics policy. And if there are no powers granted to the commission to adopt or

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implement an ethics policy then that action become *ultra vires*, which he explained as action of the municipality beyond the powers conferred by law. He added that, in NH, if a body does this, then that act is wholly void *ab initio*, that it was never valid and any act based on the action is invalid. Commissioner Ness explained that was why he believed the Gunstock Area Commission ethics policy was completely invalid from its inception.

Commissioner Gallagher asked Commissioner Ness if he objected to some of the suggestions or behaviors in the enabling statute or ethics policy as to how commissioners should conduct themselves. Commissioner Ness said he was not talking about that. He noted that public meeting minutes indicate that the GAC themselves seemed to question if the ethics policy was even necessary. He added that whether or not the commission believes there should be an ethics policy, he believes the GAC does not have the legal authority to adopt an ethics policy or any other feel-good policy simply because it thinks it's a good idea.

Commissioner Gallagher read the following from the GAC oath of office, "I do solemnly and sincerely swear and affirm that I will faithfully and impartially perform the entire duties incumbent on me as a Gunstock Area Commissioner, to the best of my abilities, agreeable to the rules and regulations, the Constitution, and laws of the State of New Hampshire." He asked Commissioner Ness if a commission comes together and agrees to put together a policy that they all agree to, and then a subsequent commission comes forward and says it doesn't count, does that affect the commissioner's oath of office? Commissioner Ness said that was a completely different matter. He said the concept of an ethics policy is simply not permissible and the bigger question is what is the purpose of the ethics policy? If it's to bind the members to the policy and then they breach the policy, what is the effect? Commissioner Gallagher asked if they should understand that he is refusing to sign the ethics policy. Commissioner Ness responded that he doesn't have to refuse it if it is invalid. Commissioner Gallagher said he will take that as a "no" and Commissioner Ness said, "Right". Chair Kiedaisch said this debate was not productive to the work that the commission is supposed to be doing. He said it was his understanding that the ethics policy was drafted using a culmination of items from various statutes addressing the code of conduct expected of a commissioner. The document was written in "plain English" with the general public in mind. The commission believed it was a positive thing for members of the public to see what the GAC stood for, and the ethics policy was born from the statutes which came from the state legislature. Chair Kiedaisch said he questions the position that the policy cannot be adopted and believes it is a legal issue that requires a legal opinion. He said he would entertain a motion to authorize funds to pay for legal counsel to review this matter. Rep. Howard suggested that the commission ask the Attorney General of their opinion to see if the policy is allowed. Chair Kiedaisch said that could be a reasonable approach and offered to withdraw the motion. Commissioner Gallagher asked to him to keep the motion on the floor and said he can clarify the reason the commission was considering reaching out to the Attorney General in the meeting that Commissioner Ness referenced. He said the commission had a question about the by-laws, not the ethics policy, and the GAC ultimately decided not to go forward with that inquiry. He said he would like to go back to Chair Kiedaisch's motion because he believes it would be worthwhile to seek legal counsel on this debate.

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ACTION

Motion: Commissioner Kiedaisch made a motion to authorize funds to pay for legal counsel to review this matter.

Second: Commissioner Gallagher.

Vote: 3 Yes

Commissioner Ness did not respond during the voice vote. Commissioner Gallagher asked him if was going to vote on the motion on the floor. Commissioner Ness responded, "Well, do we have a budget on it?" Chair Kiedaisch said he was sure that management will find the funds for it. Cathy White confirmed they do have a budget for legal services.

Old Business

- a. *Parking Lot* - Patrick McGonagle, Facility Ops Director, reported that notifications of the grant awards will be sent on August 15th. He had no other updates. Chair Kiedaisch added that on August 5th at 5:15 the BCD will be taking public input on American Rescue Plan funds. The GAC will be advocating for this parking lot project and there are other worthwhile projects that should be presented during the public hearing. Commissioner Gallagher and Tom Day will attend on behalf of Gunstock.
- b. *Master Planning Committee* - Chair Kiedaisch said they are not ready to present any plans publicly but did provide an update. He reported that the Gilford Conservation Commission will give the GAC an audience to discuss the plans and they can do it in private since it is not a formalized plan. When he returns from vacation he will resume that planning and set a date with them to meet. He suggested contacting Steve Weeks about some of his materials to help with the presentation. Tom Day reported on his site visit three weeks ago with the planners from SE Group. They hiked the whole mountain and base area to talk through the potential development opportunities under consideration. Chair Kiedaisch asked Rep. Sylvia if the Belknap County Delegation would like to present the master plan drafts to a subcommittee of the BCD. Rep. Sylvia said it should be presented publicly when ready.

Miscellaneous - Commissioner Gallagher reported that he has been hosting a lot of family this summer and on July 12th, some of them wanted to come to Gunstock. The group arrived but they weren't sure what they wanted to do so they started at the Welcome Center. They told him that the service was "AAA" and they had a great experience. He said they went to The Patio to have lunch before their scheduled zip tour. But they were rushed and didn't think they had enough time to eat before their zip tour. They said someone from Food & Beverage rescheduled their zip tour so they had time to relax and finish their meal. He said it was a compliment to the entire staff, and Tom, Mary, and Robin and they are planning to come back.

Public Comment - Rep. Howard recommended that the GAC reach out to the Attorney General about the ethics policy because three different lawyers will give three different answers. Chair Kiedaisch said he believes it needs to be an independent 3rd party. They can then share that with the Attorney General. Rep. Howard said the GAC is still not compliant with 91-A regarding the non-public session of June 23rd. He said the motion made noted the reasons as (a) which is for the dismissal, promotion, or compensation of an employee, or the discipline of that employee. He asked which reason was it. Commissioner Gallagher said it was a personnel issue. Rep. Howard said if it was because of the investigation of an employee then the minutes can

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be sealed if it was to discuss a promotion or compensation they cannot be sealed. Commissioner Gallagher said the minutes of the June 23rd meeting are not sealed. The minutes from July 12th are sealed, they were discussing a different matter and those are not available yet. Rep. Howard said the commission needed to be more specific on the reason before going into non-public session. Rep. Howard said if they are not sealed, they should be part of the meeting materials. Chair Kiedaisch recommended that Commissioners Dumais and Gallagher review all GAC meeting protocol with Rep. Howard to make sure they are fully compliant.

Rep. Sylvia made a comment regarding the ethics policy. He said the document essentially restates what is already in the enabling statute and could be redundant with the oath of office. He said it has no teeth to it, the teeth are in the enabling statute. He said it is a feel-good letter with good intentions but doesn't think it does anything more than the enabling statute and oath of office. Chair Kiedaisch said he believes it does a good job of consolidating the code of conduct from several different statutes into one document. He said it was an effort to put forward what the GAC stands for and it was just one part of a larger effort to improve the overall transparency of the commission. Discussion ensued around conflicts of interest and inquiries that come directly to the commission, which must be handled carefully. Commissioner Dumais noted that Gunstock is unusual because decisions must be in both the best interest of the business and of the public and that it is difficult to remember that there is a line that should not be crossed. Commissioner Gallagher said he believes the ethics policy is a "cliff notes version" of the statute and they are attempting to do it better. Rep. Howard said he doesn't believe it is appropriate or authorized to have a new commissioner sign the document. Chair Kiedaisch said he believes these discussions are a waste of time when considering the amount of time being spent discussing business versus policy.

Chair Kiedaisch added that if someone wants to add an item to the agenda, it would be best to have it brought up in the current month's meeting. Before the agenda is published either, either he or Commissioner Gallagher will review and approve. He asked if anyone had any agenda topics for the August public meeting. There were no responses. Chair Kiedaisch said he will be adding the ethics policy and Commissioner Ness' position on it for the August agenda.

Adjourn

ACTION

- Motion:** Commissioner Dumais made a motion to adjourn the GAC meeting at 7:32 pm.
Second: Commissioner Gallagher.
Vote: All in favor.

Respectfully Submitted,
Rusty McLear, Secretary
Gunstock Area Commission