

GUNSTOCK AREA COMMISSION MEETING
August 25, 2021
Stockade Lodge, Gunstock Mountain Resort
DRAFT MINUTES

GAC: Russell Dumais, Brian Gallagher, Gary Kiedaisch, Rusty McLear

Gunstock Personnel: Tom Day, Cathy White, Kristen Lodge, Robin McGonagle, Patrick McGonagle, Peter Weber, Tami Dubois

BDC: Rep. Sylvia, Rep. Howard

Public: Alex Deluca, Jade Wood

Chairman Kiedaisch called the meeting to order at 6:01PM with the Pledge of Allegiance. Chair Kiedaisch made note for the minutes that Commissioner Ness was not in attendance.

Minutes

The minutes of the July 29, 2021 Gunstock Area Commission public meeting were reviewed. CFO, Cathy White, thanked HR Director, Becky LaPense for an accurate recording of the July minutes. There was a lot of information and numbers and all was captured with precision. Chairman Kiedaisch made a correction to the action vote on page 2 and removed the line that recorded him as voting as proxy for Commissioner McLear.

ACTION

Motion: Commissioner Dumais made a motion to approve the minutes as amended.
Second: Commissioner Gallagher.
Vote: 4 yes. Commissioner Ness absent.

The minutes of the July 12, 2021 non-public meeting were reviewed.

ACTION

Motion: Commissioner Gallagher made a motion to approve the minutes as presented.
Second: Commissioner Dumais.
Vote: 4 yes. Commissioner Ness absent.

Financial MD&A & Executive Summary- July

Cathy White reviewed the month end results for July. Total revenue was \$576K, \$61K favorable to budget and \$424K favorable to LY. YTD revenue was \$1.07mm, \$266K favorable to budget and \$813K favorable to LY. Operational EBITDA was \$26K, \$36K unfavorable to budget and \$87K favorable to LY. YTD Operational EBITDA was (\$237K), \$380K favorable to budget and \$18K favorable to LY. Total Company EBITDA was (\$177K), \$19K unfavorable to budget and flat to LY. YTD Total Company EBITDA was (\$900K), \$363K favorable to budget and \$232K unfavorable to LY. Net Income favorable to budget by about \$3K. YTD Net loss was (\$1.37mm), \$407K favorable to budget and \$245K unfavorable to LY. The balance sheet has cash at \$4.5mm, \$2.5mm favorable to budget and \$4.1mm favorable to LY. Cash reserves and short term investments remain the same. Long term debt had a net decrease of \$29K. Chairman Kiedaisch asked about capex projects not done yet and about the \$2mm difference from budget to actual. Cathy responded that it is due to deferred revenue and a great quarter 1. Cathy reviewed the

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recapture plan and due to timing there is still \$135K additional spending for R&M and WC increase over budget of \$65K. YTD favorable \$163K to budget. Commissioner Gallagher asked what materials will be presented for the Revenue Anticipation Note (“RAN”). Cathy responded that a packet was mailed to the delegation today that included the public notice, budget, audit report and other RAN background information. Chairman Kiedaisch asked for a copy to be sent to the commissioners as well.

Cathy reviewed capex spending and reallocation of funds. \$2.4mm was approved with the budget but revisions have happened as projects begin. Chairman Kiedaisch noted that the Breezy Knoll project seems to have the larger revision. Facilities Director, Patrick McGonagle, responded that it is due to the cost of materials, availability of contractors, and additional drainage for stormwater management. President and GM, Tom Day, added that with the completion of the project the lot should be able to hold an additional 200 guest cars. Chairman Kiedaisch asked if there was any growth giving concern for revenue for this winter.

Tom replied that the Well Top project will happen later in spring due to the top usage for Ford Bronco events. Commissioner Gallagher asked Tom to give an overview of the Ford Bronco event. Tom reported that there are only 4 locations in the United States; Arizona, Utah, Texas, and Gunstock, NH. New Ford Bronco owners can attend the events that include training courses around the mountain, lunch at the Panorama Pub at the summit, and dinner at their Basecamp, located at the Gunstock Ski Club. All meals are provided by Gunstock, paid for by Ford Bronco. At maximum capacity they would be able to have 32 guests per day and a potential of 270 lunches and dinners per week, which is something they are anticipating for next summer.

Chairman Kiedaisch asked about the E-Bikes and Rental Shop as listed on the capital improvements list. Cathy responded that the revision for the E-Bikes was for replacement and increase of fleet but were not able to get any new bikes due to COVID. Commissioner Dumais asked about the demand. Resort Service Director, Robin Rowe, responded that they have sold out on occasion but there is need for various sized bikes. In response to the question about the rental shop Tom replied that a new building will be built and according to the master plan it will eventually be a building that could be used as recreation center in the campground for summer. Cathy also added that money was allocated for rental equipment replacement and adding sizes to the rental fleet. Cathy also added that the capital improvement information page can be included each month with the meeting materials and if something changes then a discussion can be had.

ACTION

- Motion:** Commissioner Dumais made a motion to accept the changes to the capital improvements plan.
Second: Commissioner McLear.
Vote: 4 yes. Commissioner Ness absent.

New Business - none

Old Business

- a. *Ethics Policy : Review of Commissioner Ness Conduct, Proposed Vote of No Confidence and Referral to County Delegation*

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Chairman Kiedaisch reminded the commission that at the last GAC meeting there was a lengthy discussion, as memorialized in the minutes, and legal issues brought forward. A vote was taken to authorize funds to pay for legal counsel to review the legal issues brought forward. The commission hired Attorney Tom Quarles from Devine Millimet Law Firm who has reviewed the claims brought forward by Commissioner Ness and his conduct. Mr. Quarles is in attendance at tonight's meeting to present his findings to the commission and the public. Attorney Tom Quarles has provided a report of his review to all five commissioners.

He started his presentation stating that he was asked by Chairman Kiedaisch and Vice Chairman Gallagher to research and provide an opinion on the legality and propriety of the conduct of Commissioner Ness. His report has two parts, first the conflict of interest by Commissioner Ness repeatedly trying to get Gunstock to purchase his OTTO program and secondly the insulting and demeaning behavior from Commissioner Ness towards Gunstock employees, members of management and other commissioners. In regards to conflict of interest, Commissioner Ness has repeatedly tried to get Gunstock to buy a snowsports instruction software program, OTTO, that he helped design and has ownership interest in. This is in direct violation of general NH statutes prohibiting conflicts of interest as well as the 1959 special statute creating the GAC. According to NH RSA 95:1 "No person holding a public office...in...any political subdivision governmental service shall, by contract or otherwise, except by open competitive bidding...sell....goods, commodities or other personal property of a value in excess of \$200 at any one sale to...the political subdivision under which he holds his public office." The 1959 statute also prohibits a commissioner from any self-dealing with the GAC or the ski area. Section 399:9 states that "no member of said commission shall receive any compensation for services other than compensation herein provided....or have any financial interest in the area, or in its operation, either directly or indirectly."

By attempting to sell his OTTO product to Gunstock, Commissioner Ness is in violation of these statutory prohibitions. Attorney Quarles continued to summarize his findings in regards to Commissioner Ness's refusal to sign the GAC Ethics Policy. In his professional opinion, Attorney Quarles said that the GAC has the authority to enact a Code of Ethics Policy as long as that policy is not contrary to any applicable statutory provisions. The policy that was adopted on February 27, 2019 is consistent with the general statute prohibiting conflicts of interest by government officials and the specific prohibitions on conflicts of interest in the 1959 Gunstock Enabling Statute. In regards to Commissioner Ness' disruptive, intimidating, and demeaning behavior Attorney Quarles reviewed emails and spoke with Chairman Kiedaisch and Vice Chair Gallagher and based on that input he said there is sufficient evidence of general misconduct to be grounds for removal from the commission. The GAC's role, in comparison to a board of directors for a private company, is to oversee and evaluate current operations and offer expertise on future resort planning. It is not to micromanage any department, specifically instances of interference with the running of the ski school, ski patrol, and management, as Commissioner Ness has done. In conclusion, Attorney Quarles added that if the other commissioners are in agreement the conduct of Commissioner Ness can be grounds for a vote of No Confidence and then would go to the BCD for further proceedings for removal from the commission.

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Chairman Kiedaisch thanked Attorney Quarles and asked the commission if there were any additional comments. Commissioner McLear agrees with all that was stated and summarized. Commissioner Dumais added that Commissioner Ness has repeatedly made meetings uncomfortable with his demeaning behavior and it is not worth it. Commissioner Gallagher asked if Commissioner Ness had been given all the information prior to tonight's presentation and if there was opportunity for him to discuss the report. Chairman Kiedaisch responded that yes he was given the report on Sunday, and Chair Kiedaisch placed three calls to Commissioner Ness to offer discussion with him or with Commissioner Gallagher. He placed a call as late as this afternoon prior to tonight's meeting and has not had a response from Commissioner Ness. Commissioner Gallagher added he is disappointed that this situation has happened and that Commissioner Ness is not in attendance at tonight's meeting where he could have had the opportunity to have a discussion, but he feels comfortable that Commissioner Ness is not out of the loop and has received all the same information and that the Report from Attorney Quarles is a public document and should be included with the meeting materials. Chairman Kiedaisch added that he is also disappointed, as he has sat on a lot of private and public boards and has never been witness to such behavior from a board member.

ACTION

Motion: Commissioner McLear made a motion that the Gunstock Area Commission take a vote of No Confidence in the ability of Commissioner Peter Ness to continue to serve as a Commissioner and that the Commission ask for his resignation.

Second: Commissioner Dumais.

Roll Call Vote: Chairman Gary Kiedaisch - Yes
Vice Chairman Brian Gallagher - Yes
Commissioner Russ Dumais - Yes
Commissioner Rusty McLear - Yes
Commissioner Peter Ness - Absent

Comments: Commissioner Gallagher added that is difficult for the commission and we enjoy our relationship with the BCD and if we pass the next motion that it is not that we wanted to cause unwarranted difficulties but the statue moves us in that direction. Chair Kiedaisch added that if Commissioner Ness was in attendance at tonight's meeting they could have asked for his resignation and he hopes that Commissioner Ness will resign before putting the burden on the BCD.

ACTION

Motion: Commissioner Gallagher - Since the Commission has No Confidence in Commissioner Peter Ness, I move that the Commission vote to ask the Belknap County Legislative Delegation to hold a public hearing to remove Commissioner Peter Ness for cause as provided for in Section 399:4 of the 1959 special enabling legislation for the Belknap County Recreation Area, now known as the Gunstock Area Commission.

Second: Commissioner Kiedaisch.

Roll Call Vote: Chairman Gary Kiedaisch - Yes

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Vice Chairman Brian Gallagher - Yes
Commissioner Russ Dumais - Yes
Commissioner Rusty McLear - Yes
Commissioner Peter Ness - Absent

- b. *Parking Lot* - Patrick McGonagle and Tom Day announced that the application to the Northern Border Regional Commission had been turned down, funds were allocated to other projects as it was a very competitive year. Commissioner Gallagher added that he and Tom made a presentation to the BCD asking for funds from the American Rescue Plan. There is another BCD meeting on September 9th where discussion will ensue about allocation of funds. Commissioner Dumais added that he hopes that Gunstock will reapply next year and keep pushing for the project to go forward as it is important for winter planning. Chairman Kiedaisch added that paving the parking lot will not be a redundant investment in master planning.
- c. *Master Planning Committee* - Chairman Kiedaisch met with Tom Day and SE Group this week and there has been great progress in the master plan and he is personally excited about what is happening with the master plan, though information is not ready for the public yet. Some of the next steps will be cost analysis, phasing and then taking it to the public. Chairman Kiedaisch added that he believes that when the plan is at least $\frac{3}{4}$ complete Gunstock will be a premier resort. Chairman Kiedaisch has a meeting with the Gilford Conservation Committee to present information and then a public announcement can be finalized with a presentation that includes both positive and adverse impacts.

Miscellaneous - None

Public Comment - Chairman Kiedaisch thanked Alex Deluca for his constant attendance and interest in the resort. Rep. Howard made a 91A request for the contract for Attorney Tom Quarles noting that in the July meeting there was a motion on the floor to hire an attorney but no further discussion. Resident Jade Wood said she couldn't hear the names of commissioners during roll call. The commissioners apologized and all introduced themselves.

Adjourn

ACTION

Motion: Commissioner McLear made a motion to adjourn the GAC meeting at 7:02pm.
Second: Commissioner Dumais.
Vote: 4 Yes - Commissioner Ness Absent.

Respectfully Submitted,
Rusty McLear, Secretary
Gunstock Area Commission

Report on Gunstock Area Commissioner Peter Ness

I have been asked by Gunstock Area Commission (“GAC”) Chair Gary Kiedaisch and Vice-Chair Brian Gallagher to research and give an opinion on the legality and propriety of the conduct of Commission member Peter Ness.

Mr. Ness became a Gunstock Commissioner on November 6, 2019. Commissioners have five year terms. He signed the required Oath of Office at that time which included a provision that he swore and affirmed that he:

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. So help me God.

Mr. Ness signed that document on November 20, 2019 and it was notarized by Notary Public Greg Goddard.

Conflict of Interest

Since becoming a Gunstock Area Commissioner, Mr. Ness has repeatedly tried to get Gunstock to buy a snowsports instruction software program that he helped design and has an ownership interest in called OTTO. According to Mr. Ness’ Linked In page he is the “Founder of Arlberg Technology Partners, LLC – Creator of Otto – Full-time from October 2014 to the present.” He describes that business as follows:

I founded Arlberg Technology Partners to create a platform technology for the snowsports industry. We at Arlberg Technology believe modern technology can assist the industry in confirming the value proposition of skilled snowsports instruction to consumers. Our Otto platform is a customer centric cloud based enterprise application that enables mobile commerce and enhances guest relations and snowsports school operations for the ski industry.

Since becoming a GAC Commissioner, Mr. Ness has repeatedly pressured Gunstock Snowsports personnel, Gunstock management, his fellow GAC Commissioners and members of the Belknap County Legislative Delegation to force Gunstock to buy his OTTO product. This is in direct violation of general New Hampshire statutes prohibiting conflicts of interest by public officials as well as the 1959 special statute creating the GAC.

NH RSA 95:1 states in relevant part:

“No person holding a public office ...in... any political subdivision governmental service shall, by contract or otherwise, except by open competitive bidding... sell...goods, commodities or other personal property of a value in excess of \$200 at any one sale to... the political subdivision under which he holds his public office.”

RSA 95:2 makes a violation of this statute a criminal misdemeanor.

The original 1959 statute creating the GAC is also explicit that a Commissioner is prohibited from any self-dealing with the GAC or the ski area. At Sec. 399:9 that statute states:

Dealing with Area Prohibited

No member of said commission shall receive any compensation for services other than compensation herein provided,or have any financial interest in the area, or in its operation, either directly or indirectly.

This language is clear and comprehensive. It prohibits Mr. Ness from obtaining any compensation from Gunstock or having a financial interest in its operation, “either directly or indirectly” beyond his stipend for service as a Commissioner.

Attempting to sell his OTTO product to Gunstock either directly or through his company Arlberg Technology or any of its personnel is a clear violation of this statutory prohibition on GAC Commissioners.

The GAC adopted a Code of Ethics Policy unanimously on February 27, 2019, before Mr. Ness became a Commissioner. The document has only one substantive page and is a general restatement of the existing laws and GAC by-laws on expected GAC Commissioner's conduct. It requires that "Commissioners be independent, impartial and fair in their judgments and actions" and that "the Commissioner's Office be used for the public good, not for personal gain."

The GAC Code of Ethics Policy requires that Commissioners "Act in the Public Interest;" that they "work for the common good of the public and not for any private or personal interest" and that they "Comply with the Law." It provides that Commissioners, in their conduct "shall be above reproach and avoid even the appearance of impropriety."

As a GAC policy that was adopted and in effect before he became a Commissioner, Mr. Ness was bound by this Code of Ethics Policy as soon as he became a Commissioner. His refusal to sign it does not mean he was not bound by it. Mr. Ness was first asked to sign this Code of Ethics Policy at the June 23, 2021 GAC meeting. He refused to do so. He was asked repeatedly thereafter to sign the Code of Ethics Policy and repeatedly refused, claiming that the policy was illegal, but refusing to explain why.

Shortly before the July 29, 2021 GAC meeting, Mr. Ness asked that the Code of Ethics policy be placed on the Agenda. Mr. Ness is a member of the N.H. Bar. At that meeting, he explained that in his opinion that policy was illegal because his legal research showed that a public body cannot take any action unless they have been given express statutory authority by the state legislature to do so. Because the special GAC enabling statute does not expressly authorize the GAC to formulate an ethics policy, Mr. Ness claims that the policy is illegal.

It is important to note that in this legal argument Mr. Ness has completely ignored Sec. 399:9 of the GAC enabling act quoted above at page 2, which prohibits him from attempting to

sell OTTO to the GAC or the ski area. Chair Kiedaisch and Vice-Chair Gallagher countered Mr. Ness' analysis at this meeting that they viewed the Code of Ethics Policy as a combination and summary of the various statutes addressing the conduct expected of a Commissioner. They pointed out it was written in plain English with the general public in mind. The GAC voted to authorize funds to pay legal counsel to review this issue. Mr. Ness did not vote on that motion.

After reviewing the matter, in my professional opinion, the GAC does have the authority to enact a Code of Ethics Policy as long as that policy is not contrary to any applicable statutory provisions. As discussed above, the Policy is completely consistent with the general statute prohibiting conflicts of interests by government officials and the specified prohibitions on conflicts of interest in the Gunstock enabling statute.

The GAC's Code of Ethics Policy is not different than the many written policies that local Boards of Selectmen and land use boards have for their routine procedures. Few if any of these have any direct supporting statutory authority, yet it is a given that such policies and procedures are within the governing body's authority and that they need to be in writing so that the public can know what to expect and can rely on them.

Finally, to close this discussion of Mr. Ness' clear conflict of interest in trying to get Gunstock to buy his OTTO product, it is important to keep in mind that the validity of the GAC Code of Ethics that Mr. Ness refuses to sign, is immaterial to determining whether he is engaging in a conflict of interest in trying to get Gunstock to buy OTTO. His actions are in clear violation of the two New Hampshire statutes detailed above, prohibiting conflicts of interest by a public official generally and specifically by a GAC Commissioner.

Mr. Ness' Disruptive, Intimidating and Demeaning Behavior

Mr. Ness is a certified ski instructor who has taught skiing at Cannon Mountain and at Gunstock. Following his employment during the 2019 - 2020 ski season at Gunstock, he was told he would not be rehired for the next season because of his poor performance review and his abrasive and disruptive relationships with other snowsports instructors and the Snowsports Department's management.

As a Commissioner, Mr. Ness has repeatedly interfered with Gunstock ski instructors and their lessons. He has approached ski instructors during lessons, questioned their credentials and challenged their abilities. He has then often asked the instructor, "do you know who I am" and identified himself as a GAC Commissioner. This brought one instructor to tears because she thought she would lose her job. He also improperly told instructors about his OTTO product and how Gunstock needs to buy OTTO. He has repeatedly pressed Gunstock Snowsports Department management to buy his OTTO product.

He has interrupted ski instructor line ups on busy holiday weekends and vacation weeks, telling ski instructors how under-trained, under-paid and under-valued they are by Gunstock, to the degree that the Snowsports Manager asked him to leave. He refused saying he didn't need to listen to her. He would quiz instructors while they were teaching lessons, having at least the effect (if not also the intent) of embarrassing them in front of their students.

He has also confronted ski patrollers on the trails asking them about their credentials and why there were closing a trail. When one patroller would not engage with Mr. Ness, he insulted the patroller's skiing ability and ski equipment and told him he should take a ski lesson.

Mr. Ness has also openly and repeatedly disparaged Gunstock's Human Resources Director. He has repeatedly disparaged her for not being a good skier and ridiculed her appearance.

These confrontations with Gunstock personnel are obviously disruptive and inappropriate. They show that Mr. Ness lacks a sense of the boundaries his role as a GAC Commissioner should have and his disregard for Gunstock management and front line employees in interfering with their day to day operation of the ski area.

Mr. Ness has also acted inappropriately as to the GAC, beyond his repeated conflicts of interest in trying to sell OTTO to Gunstock. Contrary to RSA 95:1 and the special Gunstock statute's prohibitions on conflicts of interest, he was asked to review a draft employment agreement and then charged Gunstock to do so. Since the February 2021 GAC meeting, he has made last minute and oppressive demands for documents. He has repeatedly stated that he suspects there are financial improprieties in Gunstock's finances and refused to explain his no vote on paying management bonuses following Gunstock's record positive financial performance in the 2020-2021 ski season. Nevertheless, at the July 29, 2021 GAC meeting after a presentation by the GAC's auditors of their current audited financial statements that documented this record performance and found no financial irregularities, Mr. Ness voted with the rest of the Commission to accept the findings of the auditor's report and release the allocated bonus funds.

Mr. Ness has refused to explain his conduct in walking out of two GAC meetings and in refusing to attend some meetings at all. Under the GAC By-Laws the Chair has a duty to "protect the Commission from annoyance or interference" and prevent discussions "which are conducted in a disorderly or disrespectful manner." See By-Laws, p. 6 of 11. Mr. Ness' actions

in this regard can provide a basis, separate and apart from his conflict of interest activities, to ask for his resignation as a GAC Commissioner.

Respectfully Submitted,

Thomas Quarles, Jr.

Shareholder, Devine, Millimet & Branch, P.A.

Date

2/19/21

Thomas Quarles, Jr.