

**SPECIAL MEETING OF THE TOWN BOARD
OF THE TOWN OF NEW HARTFORD, NEW YORK
HELD AT BUTLER MEMORIAL HALL IN SAID TOWN
ON TUESDAY, MAY 30, 2017, AT 5:00 P.M.**

Town Supervisor Patrick Tyksinski called the meeting to order at 5:00 P.M. and led those in attendance in the Pledge of Allegiance to the American Flag. The roll was then taken with the following Town Officials and Department Heads being present during the progress of the meeting.

TOWN BOARD MEMBERS PRESENT:

Councilman James J. Messa (Arrived 5:05 P.M.)
Councilman Paul Miscione
Councilman David M. Reynolds
Councilman Richard B. Woodland, Jr.
Supervisor Patrick M. Tyksinski

OTHER TOWN OFFICIALS/EMPLOYEES PRESENT:

Town Attorney Herbert J. Cully
Town Clerk Gail Wolanin Young

Thereafter, a quorum was declared present for the transaction of business.

Unsafe Building Matters:

Councilman Woodland offered the following Resolution for adoption; seconded by Councilman Miscione:

(RESOLUTION NO. 100 OF 2017)

WHEREAS, on May 10, 2017, the New Hartford Town Board adopted Resolutions to establish Hearings on June 14, 2017, to consider Code Enforcement Officer Reports of unsafe buildings on Rosedale Court and Glendale Avenue in the Town of New Hartford;

NOW, THEREFORE, BE IT RESOLVED that, in accordance with Chapter 52 (Unsafe Buildings) of the Code of the said Town, the Town Board does hereby authorize and direct Code Enforcement Officer Joseph Booth to provide written notice to the owners of property at 11 Rosedale Court (Tax Map No. 328.019-2-90) and 19 Glendale Avenue (Tax Map No. 316.015-3-5), of the date, time, place, and purpose of said unsafe building Hearings.

Town Clerk Gail Wolanin Young confirmed that a legal notice of said Hearings would be published in The Observer Dispatch on either June 1, 2017, or June 2, 2017. Upon roll call, the Town Board voted as follows:

Councilman Miscione	-	Aye
Councilman Messa	-	ABSENT
Councilman Reynolds	-	Aye

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Councilman Woodland	-	Aye
Supervisor Tyksinski	-	Aye.

Thereafter, the Resolution was declared unanimously carried and duly ***ADOPTED***.

Transfer/Appointment – Full-time Patrolman

Upon recommendation of Police Chief Inserra, the following Resolution was introduced for adoption by Councilman Miscione and duly seconded by Councilman Reynolds:

(RESOLUTION NO. 101 OF 2017)

RESOLVED, that the Town Board does hereby approve the transfer of Mark Moskal from the Oneida County Sheriff's Department, effective June 19, 2017, contingent upon the approval of the Oneida County Civil Service Commissioner. Said transfer will fill the vacancy created by Brad Pietryka's retirement. His annual salary shall be \$53,448.39, payable bi-weekly, in accordance with the Police Benevolent Association union contract.

The Supervisor polled the Board who voted as follows:

Councilman Miscione	-	Aye
Councilman Messa	-	ABSENT
Councilman Reynolds	-	Aye
Councilman Woodland	-	Aye
Supervisor Tyksinski	-	Aye.

Thereafter, the Resolution was declared unanimously carried and duly ***ADOPTED***.

FOIL Appeal – Catherine Lawrence

The Town Supervisor acknowledged that the Town had received an Appeal from Catherine Lawrence with regard to release of the Town's draft financial statements.

[NOTE: Councilman Messa arrived at 5:05 P.M.] Supervisor Tyksinski explained the FOIL Appeal filed by Mrs. Lawrence that deals with the draft financial statements. Mrs. Lawrence, who was present, asked if she could speak during the public comment period; the Supervisor stated this was a special meeting and there was no comment period. He explained that the Town has received the draft documents from D'Arcangelo who is auditing the Town, and that Mrs. Lawrence has made a request to receive a copy of the draft documents. Supervisor Tyksinski explained to the Board that, in his opinion, the documents requested by Mrs. Lawrence were considered the auditors' work papers, and therefore are the property of the auditor. Without the consent of the auditor, in his opinion, these draft documents are not subject to FOIL, and any formal request should be denied. Supervisor Tyksinski explained that if you were to go through the Government Accounting Auditing Standard and the Statement on Auditing Standard issued by the

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AACPA, it talks about draft documents and draft financial statements that are basically the auditors' work papers and therefore are the property of the auditor. Without the consent of the auditor, the Town is left with no recourse except to deny any form of formal request, in Supervisor Tyksinski's opinion. Supervisor Tyksinski then turned the meeting over to Town Attorney Cully who had reviewed the information.

Attorney Cully asked the Board members if they had a chance to read the appeal and the attached decision from the Committee of Open Government issued by Mr. Bob Freeman. Attorney Cully pointed out that this was initially done as an advisory and later as the FOIL process, and that it related to documents that were prepared in connection with a GIS that was being done. Attorney Cully differed slightly from Supervisor Tyksinski but reviewed the statute that relates to the public officers' law, both Section 87 or 89 would apply. He remarked that this is probably one of worst worded section Attorney Cully has seen because it contains double negatives. Attorney Cully read the section which says that each agency shall, in accordance with its published rules, make available for public inspection copies of all records except that such agency may deny access to any records that in an inter-agency which are not statistical or factual or final agenda policy or determination. Attorney Cully states a draft report is not a final report it is simply a draft. Attorney Cully hadn't read the draft yet himself but he knows that each page is stamped in bold letters with the word "draft." Attorney Cully understands that a draft is given to you and it welcomes your comments and/or input as it may have blanks that need to be addressed by the Town in order to assist in the preparation of final report. Attorney Cully stated that there is no question that the final report is open to the public and anyone can have it but not the draft. A draft is just that, a draft. A draft may be incomplete and may contain information that is not fully accurate. Attorney Cully explained that once the draft is given to the Town, the Town has the right to respond; and from the response submitted a final report is then issued. Attorney Cully thinks that there is no drawing a parallel from the statute where it refers to reports or determination that are not final are exempted out; he explained that the final reports are clearly documents anyone can receive.

Supervisor Tyksinski gave Attorney Cully information from the Government Auditing Standards Handbook which is called the "Yellow Book." The information was helpful but in order to be comprehensive he read about 50 pages of the documents which took a lot of time but explained that the standard for performance Governmental of audits or the "Yellow Book" explains...Attorney Cully read aloud what he felt was relevant from Chapter 7...especially Section 7.32 which says auditors should obtain and report the views of responsible officials of the audited entity concerning findings, conclusions, and recommendations including in the audit report. Section 7.33 provides a draft report with findings for review and comment by responsible officials of the audited entity, and others helps the auditor develop a report which is fair, complete, and objective. The clear reference is that the draft is submitted before the final and complete report and the responses are used by the auditor to complete and finalize the report including the

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reviews of responsible officials results that not only the auditors findings, conclusions, and recommendations but also the perspective of the responsible officials of the audited entity and corrective actions they plan to take. Obtaining the comments in writing is preferred but oral comments are also acceptable. Section 7.43 says when the audited organizations are subject to public record laws, as ours, auditors should determine whether public record laws could impact the availability of classified or limited use reports and determine whether other means of communicating with management and those in charge of governance should be more appropriate. For example, auditors may communicate general information in a written report and communicate the detailed information orally. The auditor may consult with legal counsel regarding the applicable public records. Attorney Cully continued to Section 7.44, reading how the distribution of reports completed in accordance with GAGAS depends upon the relationship between the auditor to the audited organization and the nature of the information contained in the report. Auditors should document any limitations on report distribution. The outlines discuss the distribution for a report in accordance with GAGAS. Audit organizations in government entities should distribute audit reports to those charged with governance to the appropriate audited entity officials and to appropriate oversight bodies in organizations requiring the range of the audit. As appropriate, auditors should also distribute copies of the reports to other officials who have legal oversight and authority and who may be responsible on acting on the audit findings, recommendations and others authorized to receive such reports. Furthermore, Section C states (in Attorney Cully's opinion more importantly) public accounting firms contracted to perform an audit in accordance with GAGAS should clarify the report distribution responsibilities with the engaging organization if the contracting firm is responsible for the distribution; it should also reach an agreement with the party contracting for the audit. Regarding which officials or organizations are to receive the report and what steps are taken to make the report available to the public. It would seem to the Town Attorney Cully that the report as it stands now, the "Draft Report" is the product of the auditor and if it is going to be released, an agreement would have to be reached or they would have to have input with regard to it at least up to this point. Once the report is finalized and the Town has signed off on the report and has received it, it the belief of Town Attorney Cully that it then becomes a public document subject to FOIL.

Councilman Reynolds asked when the Town Board should anticipate the report being in its final form. Supervisor Tyksinski said the auditors have all the information they need so it should be final within a week or two.

Councilman Woodland asked if the Draft ever becomes the Final Report. Supervisor Tyksinski responded: no.

Town Attorney Cully asked if the draft is signed. Town Supervisor Tyksinski responded, no, and that's why it never becomes the final. He then explained that there are two

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opinions that the auditors have to sign off on and they will never sign off on a Draft copy; in addition, a draft copy is incomplete; Supervisor Tyksinski explained that the auditors need additional information from the Town in order to complete the audit. Once the Town accepts it as final, the auditors will sign off, and that report is subject to FOIL.

Councilman Miscione asked for clarification on Town Attorneys' thoughts and what he's saying: Town Attorney Cully said first it's an interim draft report not a final report so it comes under that exception and secondly, Attorney Cully believes that the report is an unsigned draft document which the auditor gives to the Town expecting input and responses from the Town which Supervisor Tyksinski indicated was done. Town Attorney Cully also thinks that to give out a drafted, unsigned document which requires additional information and input, and which may contain unknown errors, is a dangerous precedent to set especially when a final document will be available within a week or two.

Councilman Miscione asked if the Board even wanted to give the draft out, could the Board do so without the authorization of the auditor. Attorney Cully replied he did not think they could and he checked with another accountant who also told Attorney Cully a draft is a draft; it's not a final document.

Councilman Miscione asked Attorney Cully about an article printed in the Observer - Dispatch where they printed "they have no problem providing this document." Attorney Cully apologized but he did not see the article and does not read the Observer-Dispatch so he could not give a response. Councilman Miscione explained that the Observer-Dispatch called the Association of Towns for a response on a related article and the Association of Towns told the Observer-Dispatch these draft documents were Foilable. Attorney Cully responded again by saying he did not see the article but he relied on the opinions that Mrs. Lawrence provided which dealt with the GIS and he explained that GIS has a comment period and all the comments get typed up and added to the report, he also explained that it's a different type of situation. Attorney Cully said that although he did not read what was in the newspaper, he did talk with the Association of Towns and they relayed to Attorney Cully that statistical information can be released and this is similar to what Mrs. Lawrence said and that information is in the exception portion of the double and triple negatives. He also said in talking with the Association of Towns regarding statistical data in a draft then the statistical data is subject to being released. The Association of Towns was going to provide Attorney Cully with some additional information which he did not receive as of 4:30 P.M. today when he left office to attend the Special Board Meeting.

Councilman Woodland commented that when speaking with the Association of Towns, they said they have to give the information requested and Attorney Cully replied no, all he asked them is about a draft report and Association of Towns said if it's a draft report that contains statistical data then it is subject to FOIL.

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Councilman Reynolds confirmed the final report will be released and the time frame is two weeks at the latest which was confirmed by Supervisor Tyksinski.

Supervisor Tyksinski stated that anytime the Town releases a document with incomplete information or the possibility of wrong information, the Town could be looking at potential legal liability and he knows the auditors would not want it released because it's not a completed document and changes will have to be made.

Councilman Reynolds asked if a draft document has ever been released in the past. Supervisor Tyksinski replied not that he knows of. Councilman Reynolds asked if the Town has ever not released an audit and Supervisor Tyksinski replied that, as a matter of fact, Mrs. Lawrence Foiled the annual report that we send into the State and it was given to her.

Attorney Cully read from the Standards of Field Work, received by Supervisor Tyksinski, which states the auditors' reports should not be dated earlier than the date on which the auditor has received sufficient appropriate audit evidence to support the opinion, among other things, sufficient appropriate audit evidence includes evidence that the audit documentation has been reviewed and that the entities' financial statements including disclosures have been prepared and that management has asserted it and has taken responsibility for them. Supervisor Tyksinski replied that the Town has not done that, the Town has not signed off or provided management letters to the auditor. Supervisor Tyksinski explained that management signs off in a letter saying management has reviewed the report and acknowledges things in the report and to date the Supervisor, Dan Dreimiller or the library has not signed off on it. He also explained that the library audit is part of the Town's audit which is another concern; the library numbers are made part of the Town's audit because the library is considered a component of the Town and the Town would have to take responsibility for the library.

Councilman Miscione asked what information could change from the draft audit to the final audit? Supervisor Tyksinski replied the numbers (if the auditors entered wrong numbers), responses to any findings, and why things are classified in certain categories, typos. These things happen. Supervisor Tyksinski said he never leaves a draft with a client; after they review the report, his firm takes the report back. Supervisor Tyksinski is also concerned with the legal standpoint that if the Town releases the draft document without the consent of D'Arcangelo, he's not sure of what legal standpoint the Town may have with D'Arcangelo should something transpire afterwards. The Board was given copies for their review only so, they have input on whether they would accept the report but that the report should only be given on a limited basis. Attorney Cully said the reason he does not read the Observer-Dispatch is because he's had situations where items were misreported on misinformation and any responses would be how the question is asked which he is unaware of that information.

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The library president Kelly Moore gets the library's portion of the audit to review the numbers and accuracy. At this point the library has not signed the engagement letter.

Councilman Miscione asked to hear Mrs. Lawrence's version as a resident and taxpayer, he would like to give her the opportunity to speak on this matter.

Mrs. Lawrence reads from her prepared statement:

"Gentlemen,

As you are aware, you are here tonight to vote on my FOIL appeal because my FOIL request for a copy of the Draft Audit prepared by D'Arcangelo & Co. that was discussed at the May 10, 2017 Town Board meeting was denied by Supervisor Tyksinski.

According to town law, the Town Board is required to annually audit, or cause to be audited, the books, records, and documents of certain municipal officers and employees responsible for receiving and disbursing money.

Town Law 123 specifically lists three (3) options a municipality can utilize to be considered in compliance. Writings of the Association of Towns and the NYS Comptroller's office further underscores the necessity of complying with the legal requirements of Town Law 123.

Our Town Board has opted to follow the third option found in Town Law 123 which is to hire a CPA by January 20th each year. D'Arcangelo was hired on September 14, 2016, with the belief that work on the audit would begin in November or December 2016.

However, this option in the town law also requires that the Audit be completed within sixty (60) days of the close of the fiscal year. Town Fiscal years are January 1 to December 31.

It was reported at the March 8, 2017 town board meeting that D'Arcangelo's field work was completed sometime toward the end of February which would imply that D'Arcangelo was performing their work in accordance with Town Law 123. The Supervisor also stated at that meeting that D'Arcangelo only found two items that needed to be changed.

In response to my FOIL request of May 11, 2017, Supervisor Tyksinski stated he believes that the draft financial statements are considered D'Arcangelo's property the same as their work papers.

An article in yesterday's Observer Dispatch quoted Supervisor Tyksinski as saying, the document in question 'is not even a complete draft.'

If that's the case, the Town Board is in direct violation of Town Law 123 since it is now almost June...or, roughly 151 days from the close of the 2016 fiscal year; not the sixty (60) days required by law.

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If the problem in releasing the financial statements is that D'Arcangelo is unable to produce a final and complete audit in accordance with Town Law 123, then the time is now to go out to bid for the 2017 audit and find another auditing firm that has the capability of complying with Town Law.

If the problem with making the 2016 financials public is due to Supervisors Tyksinski's unwillingness to accept the results of D'Arcangelo's financial audit, then it is the duty of this town board to publicly demand an explanation by Supervisor Tyksinski regarding D'Arcangelo's findings along with a discussion of the Supervisor's objections to the findings.

At the last town board meeting on May 10, 2017, this board approved a \$1.25 million bonding resolution and did so without any review of a draft or a completed 2016 audit. For that matter, I would doubt that any board member has a true understanding of where the Town finances really stand. Shame on this town board!

Getting back to my FOIL appeal, the NYS Freedom of Information Law is a state law that was enacted for a very specific reason. Part of the Law states:

'The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. The legislator therefore declares the government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of the government in accordance with the provisions of this article.'

Section 87(2)(g) of the FOI Law specifically states that an external audit containing factual and statistical information cannot be withheld. The FOI Law further makes it clear that a document held by the town, particularly with factual and/or statistical information, is a record of the town and cannot be withheld under the guise of being called a draft or work papers.

As tax payers of the Town of New Hartford, we are deeply concerned that the 2016 Financial Statements are being withheld for reasons that make absolutely no sense and are contrary to state and town law.

This town board should be just as concerned since town law makes it your duty to oversee the financial health of our town by calling for an audit of the town's records to be completed within sixty (60) days of the end of the fiscal year.

The 2016 Financial Statement prepared by D'Arcangelo in any form is clearly a record of the Town of New Hartford that should be released no matter what Supervisor Tyksinski 'believes' or what words he chooses to describe them.

You now have the facts, gentlemen. The town currently is in non-compliance with state and town law. Will you choose to remain ambivalent to release of the town audit, be it called a draft or otherwise, or

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will you stand up for the taxpayers you represent; the same people whose doors some of you may be knocking on next month as you seek their support for re-election for another term to sit 'at the table' come November?

Thank you, Gentlemen."

Supervisor Tyskinski asked the Board if any of them have any questions. Councilman Messa asked Town Attorney Cully if he had any comments in regards to Mrs. Lawrence's statement read aloud. Attorney Cully replied, "No, Attorney Cully thinks the Law is clear and the Town Board has referenced what the Law is." Attorney Cully also said there may some statistics, but not much and as he understands it but has not seen it, the report has the word "Draft" in bold letters stamped on every page and is unsigned. Within two weeks there is going to be a final report available to the public.

Councilman Reynolds agreed with Attorney Cully and said the final report will be done completely and signed.

Mrs. Lawrence alleged that the Town is in violation of Town Law Section 123 at this point.

Councilman Miscione questioned how the draft audit could not be the Towns' property when the Town is paying for it. Attorney Cully responded by saying it's not a final document, that it is unsigned, and the Town still needs to respond to the draft. Supervisor Tyksinski replied to Councilman Miscione stating the draft is the just the auditors' work papers and the Town should not have them; what the Town pays for is the final report with the auditors' signature after the Town has reviewed it and signed off on it.

Councilman Miscione asked Supervisor Tyksinski if he was familiar with Town Law 123 and Supervisor Tyksinski replied yes, and that Mrs. Lawrence had copies of Town Law 123.

Councilman Messa asked Mrs. Lawrence if she was stating the draft is the property of the taxpayers accordingly to the Law 123. Supervisor Tyksinski said it does not say that in Law 123. Mrs. Lawrence clarified that according to Law 123 the audit should be completed within sixty days of the end of a fiscal year. Supervisor Tyksinski clarified that Councilman Messa was talking about two different things regarding Law 123. (Mrs. Lawrence discussed the time it took to complete an audit and the question for review is regarding a draft document).

Councilman Reynolds said the important document is the final report and he feels what leads up to that document is "in house." Supervisor Tyksinski said that Councilman Reynolds was correct and how the auditors came up with the final document is up to the auditor and the Town does not have any right to any of their documents by State Law.

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Councilman Woodland asked if it was considered a record of the Town and Supervisor Tyksinski replied no, it is not a record of the Town but the final report is a Town record and Foil-able.

Supervisor Tyksinski told the Board he agrees that this is an incomplete document that the Town does not own, and asked if the Board has any other questions and/or comments.

Councilman Messa asked again for clarification: if the Board wants to give the current draft copy tonight, or in the near future, would the Board need consent from D'Arcangelo? Attorney Cully replied that it was his belief from everything he's read, and he felt it was pretty clear, that the Town would need to make an arrangement with D'Arcangelo about releasing it to the public and D'Arcangelo would have to give consent. Attorney Cully added that as of today, the Town has no agreement in this regards with D'Arcangelo.

Councilman Messa asked if the Board could vote contingent upon an agreement with D'Arcangelo. Councilman Reynolds replied he sees no advantage or disadvantage to releasing a report or document that is not complete.

Councilman Miscione offered the following Resolution for adoption; seconded by Councilman Woodland:

(RESOLUTION NO. 102 OF 2017)

RESOLVED that, after deliberation, the New Hartford Town Board does hereby grant the FOIL Appeal submitted by Catherine Lawrence regarding her request for a copy of the draft 2016 financial statements, and that said draft document be made available to the public and Mrs. Lawrence.

The Resolution was subject to a vote upon roll call, resulting as follows:

Councilman Miscione	-	Aye
Councilman Messa	-	Aye
Councilman Reynolds	-	Nay
Councilman Woodland	-	Aye
Supervisor Tyksinski	-	Nay.

The Resolution was carried and duly **ADOPTED** by a vote of 3 to 2.

ADJOURNMENT

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There being no further business to come before the Town Board, Councilman Reynolds made a motion for adjournment at 5:45 P.M. and it was seconded by Councilman Miscione.

Respectfully submitted,

Gail Wolanin Young, Town Clerk

Melody K. Fancett, Deputy