The Board of Selectmen met in Executive Session on Tuesday, November 5, 2013 in the Tisbury Senior Center.

Present: Jeffrey C. Kristal, Chairman; Jonathan V. Snyder; and Tristan R. Israel, Clerk; John W. Grande, Town Administrator and Aase M. Jones, Assistant to the Town Administrator.

Also Present: William Straw, Renewable Energy Committee.

Motion: To go into Executive Session to discuss strategy with respect to collective bargaining, pending and current litigation and contract negotiations, and real estate acquisition, to reconvene in Open Session. Seconded.

Voting on the Motion: Mr. Israel: Yes; Mr. Kristal: Yes; Mr. Snyder: Yes.

Convened in Executive Session: 6:55 p.m. M/s/c.

Cape & Vineyard Electric Cooperative (CVEC) and American Capital Energy (ACE) Phase I Solar Array Project at the Landfill: was discussed first.

Town Administrator Jay Grande pointed out that there are many reasons why the Phase I solar array project has been delayed several times already, the initial approved contract amended once and is now being presented with two additional amendments for the Board’s consideration prior to moving forward with the project.

He noted that one of the reasons is that the financial backers for the project will have no recourse if the project does not succeed.

At this point Selectman Israel asked Mr. Grande to summarize the proposed change(s) to the contract, which he suggested may present a larger degree of liability for the Town, if approved.

Mr. Grande referred to the memo from Town Counsel David Doneski dated October 30, 2013 in which Mr. Doneski expressed his concerns about the changes to the original agreement with Cape & Vineyard Electric Cooperative (CVEC) and American Capital Energy (ACE) and the increased liability for the Town by accepting these amendments. David Doneski’s memo is hereby incorporated by reference.

The amendments were deemed necessary in order to secure final financing commitment from ACE’s financing partners for ACE to proceed and obtain construction funds to move forward with the project.

According to Mr. Doneski several of the concerns were related to maintenance of security at the site and assurances that the site is physically adequate to handle the installation of the solar panels, and the Town is being asked to make certain statements about the suitability of the site and the surrounding area, which Mr. Doneski does not deem to represent a significant risk to the Town.

Mr. Doneski states in his opinion that it would not be unreasonable for the Town to enter into the agreement including the proposed amendments, noting that if the Phase I solar array project does not go forward there is some risk in not finding another developer to finance such a project and adding that it is a business decision for the Board to weigh the economic benefits to the Town vs. the possible risks with the added amendments.
The amendments are discussed in Mr. Doneski’s memo including area of responsibility for the Town to CVEC regarding activities on adjacent property, which Mr. Doneski wants removed. Mr. Doneski feels that the Town should not be required to keep a watch of activities on land that it does not own.

Other provisions are concerned with security issues and access to the property putting the responsibility on the Town to assure that access to the premises is prevented.

Another provision raises questions about the “as is” condition of the premises without representation or warranties from the Town, and whether the Town is able to make such a guarantee to the developer about the site and accept the risk in doing so.

The revised document would also involve Town liability if the Town should do something that might adversely affect the PV system, and that would involve a breach of contract and the Town would be found responsible.

The summary provided by David Doneski involves amendments to both the PDA and the Power Sales Agreement (PSA). An amendment to the PDA is also revised from 20 to 25 years from the effective date of the Agreement. These amendments have raised the concerns of the Selectmen as to the viability of the project and whether or not to approve the proposed amendments which seem to include payments that may be made under a so-called PILOT program and adds language for collection of damages payable to the Town under the new “event of default” provision in the PDA.

A lengthy discussion followed about the financial advantages that could result if the Phase I project is successfully implemented, the fact that after 7 years the Town would have the ability to get out of the agreement and take over the ownership of the solar array system, and the appearance of increased liability for the Town as a result of the proposed amendments.

Mr. Straw inquired if other Towns with solar array projects are represented by Kopelman & Paige and was informed that K&P is handling similar agreements for several other Towns that the firm represents. Mr. Straw added that West Tisbury is not involved in Phase I of the solar array projects with CVEC and ACE.

Mr. Grande noted that David Doneski is concerned about adverse impact on the Town as a result of the Power Sales Agreement amendment and has suggested several changes to the amendment language.

Mr. Israel expressed reservations about the changes in the contract language, suggested that perhaps a dialogue between David Doneski and attorneys for ACE/CVEC could resolve some of these issues, added that he really does not want to go forward with this project, but concluded by stating that in any case he wants the outstanding issues resolved before agreeing to sign the amendments to the contract.

Further discussion followed on the perceived increase in liability for the Town, a decrease in return on investment from $60-70,000 to the present projection of $45,000 annually.
Mr. Straw commented that the decrease in return on investment cannot be justified, noting that it should be going up and added that the Town has no documentation what ACE will do for the Town.

Mr. Israel stated that he wants to minimize the risk for the Town but is willing to “hang in there”, and then made the following,

Motion: That the Town ask David Doneski to work with ACE/CVEC to modify the contract for the Phase I Solar Array Project to make sure that the liability for the Town is not increased due to proposed amendments and that if an agreement is reached within one month or by the end of the year the Town will go forward with the project. Seconded for discussion.

Mr. Straw inquired if other Towns doing similar projects approved such amendments to the contract.

Mr. Israel commented that the proposed amendment would increase liability of the Town, but added that if CVEC and ACE agree to the additional conditions proposed by Town Counsel, the Town can move forward with the project.

Mr. Grande noted that he was unable to speak with Building and Zoning Inspector Ken Barwick about the suitability of the site as Mr. Barwick is on vacation this week. Some discussion followed on the condition that the membrane covering the capped landfill cannot be penetrated by the construction of the solar arrays.

Mr. Kristal commented that the contractor, ACE must provide insurance for its construction at the site.

Mr. Grande pointed out that he does not have the contract amendments for signing at this time. Mr. Kristal stated that the Board is not planning on signing these documents tonight.

Voting on the Motion: M/s/c.

7:25 p.m.: Liz Argo, CVEC representative and Eric McLean, ACE representative, joined the Selectmen at this time.

Mr. Israel stated that the Selectmen do not want to sign the proposed amendment to the contract with CVEC at this time in order to assure that the Town’s liability level is not increased due to the proposed language and then asked that CVEC’s attorney work with our counsel David Doneski to put together a document that will assure the Board that the Town’s liability will not be increased due to adoption and approval of these proposed contract amendments as discussed and as presented.

Mr. Israel continued by stating that this would be one way of dealing with these issues and added that another would be to decide not to go forward with the project which includes the proposed amendments. Mr. Israel stated further that the Board wants to extend this discussion beyond tonight and requested that the agencies work with our Town Counsel to give the Town additional time to consider an agreement between the parties so the project can go forward.

Ms. Argo noted that the CVEC Board will meet on Thursday, and then predicted that the Board will probably say no, as other Town having similar projects and agreements have signed off on amended contract agreements. Ms. Argo concluded by stating that CVEC is seeking to
move liability issues and added that this is a no cost project for the Town.

Mr. Kristal commented that Ms. Argo does not realize what the Town has sent on legal fees to get to this point with the project.

Mr. Israel commented that the estimated gains for the Town have gone from $60,000 to $45,000/year.

At this point American Capital Energy (ACE) representative Eric McLean addressed the Board noting that ACE must have the project in the ground by December 31st or there will not be a project. He continued by stating that he cannot speak for CVEC, adding that “his” lenders are looking for a partner and that liability is one issue noting that to date ACE has spent about $145,000 working with NSTAR to get the work started on the project. He acknowledged that the amendment to the contract contains one paragraph with language regarding increased liability, but added that the reality of liability is not as serious as it is perceived to be.

Mr. McLean stated further that the additional language that the lenders want included is determining the future of this project, and then reiterated that we only have until December 31st to get the project started or the project does not exist.

Mr. Israel then stated that the Board of Selectmen has had to deal with what he described as one smoking mirror after another with regard to this project - delays after delays in ground-breaking and start of the project, but added that the Town wants to move ahead with this project and that the Town is not “the bad guy here”. Mr. Israel stated further that the Board is willing to and could schedule an emergency meeting within 48 hours to approve a compromise amendment worked out between attorneys for both parties if necessary.

Ms. Argo stated that CVEC has only changed the liability language regarding “small issues”.

Mr. Kristal pointed out that from the initial expectation of a $60-70,000 gain for the Town from this project the projection has gone to about $45,000 annually, and now with additional liability for the Town, suggesting that the Town wants to see some “give-back” for that.

Mr. McLean stated that he fully understands the Board’s frustration.

Mr. Israel stated that he does not want to sign the amendments to the contract at this time, adding that to this point all projected deadlines have been broken and now the proponent(s) want the Selectmen to sign and approve these documents today because all the other Towns have agreed to the changed contract terms.

Mr. Kristal pointed out that Town Counsel David Doneski has questions about the contract amendments and does not want the Selectmen to sign the amendments as presented.

Mr. Kristal stated that what he wants to hear is that the projected gain is not $45,000 annually and that 50% of the project is underway.

Mr. McLean reiterated that the financial backers want assurances.

Town Administrator Jay Grande inquired about insurance coverage and whether ACE will provide “umbrella insurance” for the project.
Mr. McLean stated that the equipment will be insured by ACE and then pointed out that there are three things that ACE and CVEC is asking the Town to do:

1. Inform ACE if there are any issues regarding the site (which he stated that the Town did when informing the company that the site is a capped landfill, approved by Department of Environmental Protection (DEP) and that the cap cannot be permeated by the construction of the solar arrays;

2. Inform ACE if we are building anything in the area; and

3. Take reasonable safety measures to safeguard the property once the solar arrays are in place.

Discussion followed on the extent of these requests and the potential liability for the Town if these provisions are approved.

Mr. Israel questioned why the proponents will not give the Town one additional week to discuss these amendments, adding that he thought that ACE and CVEC are not interested in accommodating the Town.

Ms. Argo disagreed stating that CVEC does want to accommodate the Town.

Mr. McLean agreed, adding that it is the lenders who have concerns about the contract language.

Mr. Kristal questioned why this is happening now in the 11th hour, adding that he has never wanted to take a vote on something if being told that if this vote does not happen today, there will not be an opportunity to do so tomorrow.

Mr. Israel commented that Ms. Argo and Mr. McLean said these were only minor changes, and then pointed out that it took over a week for the Selectmen to get to see what these changes actually were, which is when they were sent to Town Counsel for review and input.

Ms. Argo then stated that she would try to get a hold of the CVEC Board President to see if they will agree.

Mr. McLean stated that he as a representative of the contractor cannot negotiate with the Town.

Mr. Grande asked if Mr. McLean could find out about insurance coverage for the contractor, citing the Delayed Risk Prevention issues. He commented further that the actual changes in the contract must be clearly defined.

Mr. Kristal noted that the Board heard Mr. McLean’s summary of the three liability issues that are involved in the changes in the contract language, expressing hope that some of these can be resolved and a consensus reached if the attorneys for the parties have an opportunity to speak to each other.

A brief discussion followed on the amendments approved for the agreement for a similar solar array project in the Town of Dennis, where a Post Closure Agreement for the landfill exists outlining the terms established by DEP for what can be built on the site.

Mr. Israel reiterated his concerns about increased liability for the Town if amendments as proposed are approved.
7:55 p.m.: Ms. Argo and Mr. McLean left the meeting so that the Board could continue their discussion about the implications of approving the proposed amendments.

The Selectmen discussed what might occur if something went wrong with the solar array installation and who would be responsible.

The Selectmen also discussed whether a Post Closure DEP approved Agreement exists. It was noted that such an agreement exists and that the Board of Health would have this document.

At this point Selectman Snyder commented that he feels that the little extra liability that the Town may pick up as a result of the amendments to the contract for the solar array project will probably be made up by the financial gains in income attributable to the project itself. He stated further that the question to be raised is whether, with the amended language, this is a good deal. Is this project as it stands now a good deal for the Town? Also, is the present projected guaranteed annual return of $45,000 adequate for the risk in proceeding with this project? He further stated that he thinks that it is.

Mr. Straw commented that possession is half the battle, adding that he would want the Town to own this project which in the long run will earn the Town an annual income.

The question was raised whether the Town will get cash or credit on the NSTAR electric bill, and it was noted that the Town will get credits - not cash.

Mr. Snyder then stated that he feels that the Board should go ahead with the deal and sign the agreements as presented at this time.

Mr. Israel objected stating “that is not democracy.”

Mr. Kristal suggested that David Doneski work with the ACE/CVEC attorneys and then let the Board see what can be resolved in view of what the Selectmen have learned this evening about the project. Some discussion followed on what the next step would be.

Mr. Snyder urged the Board to weigh the benefits vs. the risks of the project.

Mr. Grande stated that the Town needs letters from the respective attorneys for all parties clarifying the language regarding potential increased liability for the Town with caveats that the Board is signing the documents based on a certain premise of understanding terms as outlined in the contract regarding responsibilities and liability of parties.

After a brief discussion it was suggested that the Board be posted for an emergency meeting on Friday, November 8th, but Mr. Kristal announced that he would not be available on that day.

8:05 p.m.: Ms. Argo and Mr. McLean rejoined the Board of Selectmen for further discussion.

Mr. Kristal announced that the Selectmen will speak with Town Counsel about clarification of the changes in the contract (the proposed amendments) and we will also ask that the attorneys speak to each other about the issues that have been discussed here.

Ms. Argo reported that she already has spoken to her Board which wants agreement to the proposed amendments.
Town Administrator Jay Grande stated that the Selectmen need clarification of the terms via discussions between the attorneys. At this point Eric McLean stated that he can help with this and expedite the process, but added that he cannot negotiate with the Town. He stated further that his due diligence on behalf of ACE is to make sure that the site is OK and that it has a Post Closure Permit.

Ms. Argo stated that she is OK with that.

Mr. Grande noted that the Town needs to have a mutual understanding with the contractor and CVEC on what the amendment provisions mean and involve.

Mr. Kristal stated that David Doneski can talk with the attorney for CVEC.

8:15 p.m.: Ms. Argo and Mr. McLean left the meeting at this point.

Mr. Israel stated that the agreement needs clarification through an e-mail from David Doneski based on his conversations with CVEC’s attorney. The Board agreed.

8:20 p.m.: Ms. Argo and Mr. McLean rejoined the Selectmen.

At this point it was announced that the Board of Selectmen will post a meeting for Saturday, November 9, 2013 at 3:30 p.m. at the Vineyard Haven Public Library, which is a public building open to the public on a Saturday, and by that time the Board hopes that a consensus has been reached about the amendments to the contract so that it can be approved and signed.

Mr. Grande pointed out that it is critical to get the attorneys from both sides to talk to each other about the proposed amendments in order to clarify what they actually imply for all parties.

8:25 p.m.: Ms. Argo, Mr. McLean and Mr. Straw left the meeting.

14 Pine Street Property Acquisition: was addressed next.

Mr. Israel reported that he recently spoke with Payton Wallace, the agent for the sale of the property, and was informed that there may be a matching offer on the property. Mr. Israel then suggested that the wording of the Special Town Meeting Article could be changed to include taking by eminent domain. Discussion followed.

Mr. Kristal asked that a summary proposal for the property be prepared for Mr. Wallace and for the Special Town Meeting.

Mr. Snyder acknowledged that he is not “super enthusiastic” about taking the property by eminent domain.

Mr. Israel inquired if Mr. Snyder is opposed to proposing taking the property by eminent domain.

Mr. Snyder responded that he would not argue against it but would not support it.

A discussion followed on how to handle press inquiries about the Town’s interest in the Pine Street property and the possibility that there is another party also interested in the property.

Mr. Israel then stated that the Selectmen are leaving the Article on the Warrant. The Board agreed.
Kelly Kershaw Superior Court Case: will be heard on November 19th in Boston, with Gareth Notis of Morrison & Mahoney (attorney for the Town’s insurance company and Brian Maser of Kopelman & Paige representing the Town. It was noted that the BOS is not inclined to offer Ms. Kershaw a settlement. Mr. Grande will inform Mr. Notis about the Selectmen’s position. Also noted was the fact that the Selectmen want to know if Officer Stobie actually did or say something inappropriate to Ms. Kershaw.

Kelly Kershaw Separation Agreement: Mr. Grande announced that the MV Times has appealed to the Public Records Division the Town’s refusal to release the agreement reached with Kelly Kershaw following her termination in June. Mr. Grande explained that the Town has refused to release the agreement as agreed to with Ms. Kershaw as part of the agreement, but added that the Public Records Division is challenging that provision and added that there will be a discussion with Ms. Angela Puccini of the Public Records Division and Brian Maser about this issue some time later this week.

Clarence A. “Trip” Barnes’ Deposition: that was taken by Jeffrey Ugino of Kopelman & Paige at the Emergency Services Facility on Friday October 18th, was described and reported in a memo from Mr. Ugino dated October 22, 2013. Mr. Ugino reports that the deposition lasted about 2.5 hours and the report details some of the information obtained from Mr. Barnes through the deposition, which is hereby incorporated by reference.

It was noted that with regard to his residency. Mr. Barnes stated that his primary residence is at 300 State Road and that his West Tisbury property is his weekend home. Mr. Ugino points out that residency issues are difficult to challenge and win in court.

Mr. Grande noted that the Selectmen want to make the preliminary injunction against Mr. Barnes’ operations on High Point Lane permanent.

Emergency Services Facility Project Close-out: Mr. Grande stated that he wants to take the rest of the money and close out the project with no retainage, adding that there is a mediation process involved in this approach

Stop & Shop Project: was discussed briefly. Mr. Kristal that the project will be back on the Martha’s Vineyard Commission agenda on Thursday, commenting that there will be no land-swap and adding that he thinks that the revised plan is “very nice”. He stated further that the Town will request money for the Town’s Housing Trust Fund from the Stop & Shop.

There being no further business in Executive Session,

Motion to Reconvene in Open Session: 8:48 p.m. M/s/c.

Respectfully submitted,

Jeffrey C. Kristal, Chairman
Jonathan V. Snyder

Aase M. Jones, Asst. to Town Adm.
Tristan R. Israel, Clerk