

**TOWN OF NEW DURHAM
BOARD OF SELECTMEN
April 12, 2021, 6:00PM
Virtual Meeting, New Durham, NH 03855**

DRAFT: These minutes are strictly a draft copy and are awaiting amendment or approval at a subsequent, duly noticed public meeting. Amendments to these minutes will be noted in the minutes of said meeting. The draft will be posted on the website as a draft copy for public informational use only.

In accordance with Governor's Executive Order #12, pursuant to RSA 91-A: 2 Attendees log into:

<https://us02web.zoom.us/j/84100472190?pwd=K2V5ZHVhSG9EQzJZUXJnYVhPL0I2UT09>

Meeting ID: 841 0047 2190 Passcode: 660767 Or via telephone number: 1-646-558-8656

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Technical difficulties contact Town Administrator at ndadmin@newdurhamnh.us.

Note: Town of New Durham offers no security assurances to those connecting via PC to a third party software and hardware not configured or controlled by our IT Service provider.

PRESENT

David Swenson, Chairman, Board of Selectman –via Zoom
Cecile Chase – Board of Selectman – excused absence
Dorothy Veisel – Board of Selectman via Zoom

ALSO PRESENT

John Scruton, Interim Town Administrator – via Zoom
Peter Varney, Fire Chief – via Zoom
Melanie Maguire, resident – via Zoom
John Chase, resident – via Zoom
Rudy Rosiello, resident – via Zoom
Josh Linzetta, Esq., representative for the applicant – via Zoom
Christopher Berry, Berry Engineering and Surveying – via Zoom
Steven Whitley, Esq., Town Counsel – via Zoom
Peter Rhoades, applicant – via ZOom

CALL TO ORDER

Chair Swenson called the meeting to order at 6:00PM.

Chair Swenson stated that due to the State of Emergency declared by Governor Sununu and pursuant to Executive Order #12, 2020-04, the Town is authorized to meet electronically. He stated there is no physical location to observe this meeting. However, in accordance with the Order, it was confirmed that they are providing public access to the meeting by telephone, with additional access possibilities by video (Zoom); all members of the Board of Selectmen and Town Administrator have the ability to communicate contemporaneously during this meeting;

the public has access to contemporaneously listen and participate via links posted on the agenda. Chair Swenson confirmed the meeting was posted appropriately with access numbers. He stated in the event the public is unable to access the meeting, it would be adjourned and rescheduled. Chair Swenson stated in the event they need to go into non-public session, a separate phone number will be used for the Board of Selectmen members to use and they will then reenter nonpublic session. Chair Swenson stated all motions would be taken by roll call vote; roll call attendance was taken for those participating in the Zoom meeting.

Appointments/Announcements

Facility Study Update

Peter Varney, Fire Chief, stated he attended most of the meetings for the space needs study project and in Mr. Kinmond's absence, he would be willing to continue. It was noted the final draft of the report has been submitted in the last few weeks; a group of residents and others, including Town employees, will be reviewing for comment. Chair Swenson stated once the input is received, they will have decisions to make for the next steps.

Chair Swenson stated the Board has selected an individual to fill the position of Town Administrator and a public press release will be going out soon.

Rudy Rosiello, resident, stated he is unable to find the public posting of this meeting's agenda and it cannot go forward. After review of the website and input from Interim Town Administrator Scruton, Chair Swenson confirmed the agenda was in fact posted on the Town's website on the Friday prior to the meeting, fulfilling the posting requirements.

Nicole Zoltko, soon to be hired Town Administrator, introduced herself. Chair Swenson stated Ms. Zoltko has extensive experience working with various town departments and looks forward to working with her.

Mike Gelinas: Permission to cross Class VI Marsh Hill Road: Discussion of plans to clean up and add picnic tables in area of Downing Launch Boat Access area

Mr. Gelinas stated at the last meeting, approval was granted by the Board for crossing Merrymeeting Road and now he is requesting permission to cross Marsh Hill Road. He stated he forgot the trail would also need to cross the Class VI road with the snowmobile trail. It will allow the trail to avoid more of Merrymeeting Lake. Mr. Gelinas presented maps for review by the Board. Mr. Gelinas confirmed proper signage would be put in place and permission was obtained from landowners and abutters.

Chair Swenson made a motion to allow the Powder Mill Snowmobile Club to cross Class VI Marsh Hill Road at the locations of Map 118, Lot 007 and Map 110 Lot 001, with respective property owner approvals and proper signage, with the understanding that any work for the crossing will satisfy the New Durham Road Agent to ensure there is no further deterioration of the road. Selectman Veisel seconded the motion. Roll Call Vote: Selectman Veisel – aye; Chair Swenson – aye. Motion passed, 2-0-0.

Mr. Gelinas stated he received confirmation all the necessary information was received by the State of NH DES for the shoreline permit approval for the Downings Pond boat access; the only remaining piece is signatures and approval from the Board of Selectmen. Mr. Gelinas outlined the plans for removing some old planters, old shed and possibly install a fence so people can't drive on the grass. There will also be some minor regrading and a 6' path down to the water. Crushed gravel would be put down in the parking area. Chair Swenson noted this property was at one time a gas station and asked if anything special needs to be done as a result. Mr. Gelinas stated he confirm with the State of NH that the tank was pumped dry and filled with sand, per the State mandate at the time but their work will not be doing any digging more than 6" or so, nor near where the tanks are located.

Chair Swenson made a motion to approve the NH DES Shoreline Permit request as presented to the Board by Mike Gelinas for the work involving the Downing Pond Dam areas, with the understanding there will be no negative environmental impact and that proper signage will be placed in the dry hydrant area, with full consideration made for appropriate access for emergency vehicles and to appoint Mike Gelinas to act as the agent for the NH DES permit. Selectman Veisel seconded the motion. Roll Call Vote: Selectman Veisel – aye; Chair Swenson – aye. Motion passed, 2-0-0.

Town Administrator Scruton stated he was able to obtain supporting documentation regarding confirmation from the webmaster on the date and time the agenda was posted for this meeting, and offered to email the information to Mr. Rosiello. Mr. Rosiello stated he wants to see the servers and the logs.

AGENDA REVIEW

No changes were made to the Agenda.

Public Input

None.

Town Administrators Report

The Board reviewed the Consent Signature Manifest and Interim Town Administrator Scruton outlined the following items which were included:

1. Accounts Payable 3/31/21 for \$6,147.12
2. Accounts Payable 3/31/21 for \$815.65
3. Accounts Payable 3/24/21 for \$3,434.63
4. Accounts Payable 3/24/21 for \$37,625.99
5. Accounts Payable 3/24/21 for \$12,218.94
6. Payroll Biweekly for 3/22/21 for \$37,930.04
7. MS 232 (Report to DRA of Town Meeting approved expenditures
8. Deed to return tax deeded lot 245-025
9. Certification of Yield taxes (Timber) Map 267 lot 1
10. Intent to Cut Map 270 Lot 17

Accept Land and Community Heritage (LCHIP) Grant Funds

Chair Swenson made a motion to accept the Land and Community Heritage (LCHIP) Grant Funds in the amount of \$200, RSA 31:95-a to the Town of New Durham and to deposit to the Meeting House Restoration CRF account. Selectman Veisel seconded the motion. Roll Call Vote: Selectman Veisel – aye; Chair Swenson – aye. Motion passed, 2-0-0.

Purchase Order – Department of Public Works Grader Repair

Chair Swenson made a motion to approve the grader repair of up to \$6,000 for the repairs as outlined and this cost to come from the Vehicle Equipment Maintenance CRF, account 01-4915-10-070. Selectman Veisel seconded the motion. Roll Call Vote: Selectman Veisel – aye; Chair Swenson – aye. Motion passed, 2-0-0.

NEW BUSINESS

Town Administrator Scruton stated he received a request to change the Board of Selectmen meeting of April 26 to April 28, at the request of a Board member.

Chair Swenson made a motion to move the regularly scheduled Board of Selectmen meeting of April 26, 2021 to April 28, 2021, at 6:00PM. Selectman Veisel seconded the motion. Roll Call Vote: Selectman Veisel – aye; Chair Swenson – aye. Motion passed, 2-0-0.

Initiate Comment period Ascertainment Cable Franchise

Town Administrator Scruton stated he expects to have a Memorandum of Understanding for the consortium the Town partnered with as was done last time, for the next meeting. He stated the legal costs will be shared over eight communities if they decide to go that direction again. Public input is welcomed from residents.

Chair Swenson made a motion to initiate the comment period for the Ascertainment Cable Franchise from a period starting April 13, 2021 and ending September 15, 2021, with a possible extension based on need at that time. Selectman Veisel seconded the motion. Roll Call Vote: Selectman Veisel – aye; Chair Swenson – aye. Motion passed, 2-0-0.

CONTINUED PUBLIC HEARING – *Petition For A Portion Of Bennett Rd. From Class VI to Class V, In accordance with RSA 231:8 Applicant Seeking To Convert Portion Of Bennett Rd From Class VI To Class V.*

Chair Swenson reopened the public hearing at 7:00PM for the original public hearing opened March 22, 2021.

Chair Swenson stated the purpose of the continuation of the public hearing is to consider the layout petition submitted by Mr. Rhoades to convert portions of Bennett and Libby Road from Class VI to Class V.

The Board's review of the layout petition is limited to what is presently existing and the Board cannot consider the impact of future developments that may occur if this layout is granted. Because of that narrow scope, any comments from the public should be limited to what is before this particular Board and avoid any potential impacts from possible future development.

If this layout is granted (and that has yet to be determined), and a future development is proposed, there will be opportunity to provide input directly related to that development; but that is not tonight.

If comments stray into this area that the Board cannot consider, Chair Swenson stated he will remind the speaker to focus their comments; if the comments continue to stray, he reserves the right to mute the speaker.

For the Board and public's convenience, we will be using this document to guide our review and decision making process. (See Layout Test-FOR PUBLIC RELEASE document). Presentations to the Board should be consistent with the test outlined in that document.

DETERMINATION OF "OCCASION" WHEN CONSIDERING LAYOUT PETITION

RSA 231:8 authorizes the BOS to layout any public highway "for which there shall be occasion."

Occasion is not defined in the state statutes but has been interpreted in several NH Supreme Court cases.

Reviewing for "Occasion" breaks down into three factors that must be balanced against each other:

1. The public convenience and the public necessity for the proposed highway;
2. The financial burden to be imposed upon the town's taxpayers for construction and maintenance; and
3. The rights of owners, if any, whose land would have to be taken to locate the public ROW for the road.

The balancing works as follows:

- Step 1: balance the public interest in the layout vs. rights of the affected land owners if land must be taken or obtained for the public ROW
 - If the rights of the affected land owners exceed the public interest, then the layout is NOT justified and there is no "occasion"
 - If the public interest exceeds the rights of land owners, then go to Step 2.
- Step 2: balance the public interest in the layout vs. the burden imposed on the town
 - If the public interest exceeds the burden, then there is "occasion" and the BOS must vote to layout the road
 - If the burden exceeds the public interest, then there is no "occasion" and the BOS must deny the layout

Public Interest vs. Town Burden

Step 2 requires weighing the *public interest vs. town burden*. Each of those is described in further detail below.

The Board of Selectmen should evaluate public interest vs. town burden based on *what is already presenting existing*. In other words, the BOS cannot consider the impact from any potential future development that may occur on Bennett Rd if this layout is approved.

The Board of Selectmen cannot use the layout process as a kind of planning/zoning tool; that is not what was intended by the layout process. The Town has zoning and planning boards that have jurisdiction over those issues.

Public Interest Factors:

1. Integration within existing road system
2. Ease of existing traffic flow
3. Improvement to convenience of travel
4. Facilitation of transportation of school children
5. Improved accessibility to business district and employment centers
6. Improved accessibility for fire, emergency, and police
7. Whether it would benefit a significant portion vs. small fraction of town's tax base or year round residents; and
8. Anticipated frequency of road use.

Town Burden Factors:

1. Anticipated construction costs to bring road up to town standards;
2. Ongoing maintenance costs for the road itself; and
3. Impact on town's infrastructure due to town growth, i.e. increased costs for school, fire, police, emergency.

The Hearing is for the applicant to make a presentation and to take public comment regarding whether the benefits and or burdens of the proposed road layout. A technical review was conducted by Town Staff and will provide written testimony regarding the proposal.

Chair Swenson opened the public hearing to input from the applicant or applicant's representative.

Josh Linzetta, Esq., representative for the applicant, stated he understands there is a quorum but because it is not the full Board and the public hearing is being held via Zoom, he requested a two-minute recess to consult with his client. The Board concurred and the public hearing was recessed for the time requested.

Mr. Linzetta stated they would like to move ahead with the public hearing.

Mr. Linzetta presented a PowerPoint presentation via Zoom, which outlined the proposed project as well as maps showing the area involved. Mr. Linzetta stated Mr. Rhoades is proposing the road layout and will pay for the entire cost of the project; they aren't asking for the road to be laid over private property. Both Libby and Bennett Roads are public roads, with four-foot right-of-ways. Mr. Linzetta stated the proposed road will have a 20' roadbed with 4' of shoulder. The stone walls will remain intact and in any area which needs to go further, within reason, for drainage or construction, would go towards Mr. Rhoades' properties. The road will not burden any landowner abutting these properties. Mr. Linzetta referenced case law related to roads in New Hampshire and stated the test as outlined by Chair Swenson is missing some information and added that the test deals with taking land and affecting landowners however that is not applicable in the proposed road upgrade project. Mr. Linzetta stated no other land owners are

being affected in the sense that their property is being “taken” or gone over by this proposal. He reiterated the proposal upgrades will not be going off the existing roadbed. Mr. Linzetta pointed out the factors previously outlined by Chair Swenson are not required to be considered by the Board to approve the layout; it is not a standard that needs to be met. The standard is the public interest weighed against the potential burden to the Town.

Mr. Linzetta reiterated the applicant is proposal to pay for the full costs of the road upgrade and suggested the Board consider the public safety, where the upgrades will improve the overall road conditions for the benefits of the public. He stated it is not a benefit to one household but the entire Town. He stated during the Site Walk, he was told that currently the fire department cannot get down the road most of the year and there is no place to turn around except on private property. The proposed plans will include a turn-around area and soil testing pits have been done. The land for the turnaround will be deeded to the Town for use by the Town departments as well as residents.

Mr. Linzetta stated that in regards to the input from abutters that Libby Road is discontinued, there has been no documentation produced that indicates Libby Road is in fact discontinued. He stated it's not often that a resident offers to do a project like this, of putting in a road as well as providing land for a turnaround for safety vehicles. The safety benefit to the Town, with a town-maintained road, will create a safe roadway for now and the future.

Peter Rhoades, applicant, stated he would like the Board members to remember they were looking at building on a Class VI road in 2018 and at that time the requirements were to have an agreement for maintaining the road. He stated that was not possible with some property owners; he has now gone this route and the goal is to follow through with the addressing the safety concerns raised by the Board at that time.

Chair Swenson opened the public hearing to input from the public.

Rudy Rosiello, resident, asked how long this proposed road will be and how many property owners have property on this road. Mr. Linzetta stated the proposed layout involves about 1500' but amount of lots on the road isn't relevant. Chair Swenson noted this public hearing is not addressing future development. Mr. Linzetta stated the maps indicate there are ten lots on this road but he can't comment as to what may happen in the future with regards to development. He stated this road is being used now and has used over the years by many people; he stated its been well maintained over the years by a private resident and he didn't know this was not a Town maintained road. Mr. Rosiello stated he is concerned about the costs for one or two individuals and asked if future development will take place. Chair Swenson reiterated they are not considering future possibilities.

Melanie Maguire, resident, stated they are the only home on the road in question. She stated Mr. Linzetta indicated they would not be affected but they will in their taxes; she stated there is no chain on the road as also indicated by Mr. Linzetta. Ms. Maguire stated the road has always been travelled except during fall and spring as its not plowed. She stated they have put a lot of time and money into maintaining the road and they haven't had any problem with police, fire or ambulance coming to their house. She stated it's also inaccurate to indicate the road is too soft

for travel as that is similar to all roads in Town during the spring season. Ms. Maguire stated a petition was submitted to the Board of Selectmen in which a vast majority of the property owners in this area do not support this proposed road upgrade and outlined the reasoning based on the criteria outlined previously.

Ron Gehl, resident, stated he is not a direct abutter but knows the neighborhood well; he stated he is concerned about road and land use issues which set precedents. Mr. Gehl stated the most recent plans for review indicate a 20' road bed with 4' of shoulders but there was some confusion during the Site Walk on this. He stated this does not come close to what is required in the regulations for roads in development; he asked the Board to only consider the cost benefit analysis for maintenance and liability under its current status. He stated he also disputes the applicant's counsel's statement that abutters are not affected. Mr. Gehl referenced RSA 231:28 which provides for layout petitions being stopped when a petition in opposition is received from residents. He stated he was on the Board of Selectmen at the time of the questioned discontinued roads; he stated there were portions discontinued at times subject to gates and bars but not completely. He stated a 1935 Town vote is unclear as to the intent of the voters regarding this road but it seems it was discontinued subject to gates and bars. Mr. Gehl stated this proposed plan doesn't make sense and it simply a 1600' road with a dead-end, cul-de-sac. He stated if this was reviewed by the Planning Board, it would not go forward. There would be significant costs to maintenance by the Town with gravel, ditching, culverts, etc. and the only possible financial benefit seems to be to the applicant.

Steven Whitley, Esq., Town Counsel, suggested allowing the applicant to rebut comments made by the public.

Selectman Veisel stated this is a complex issue but would like the applicant to address comments made by the public. She stated she needs time to speak with Town Counsel before she can come to a final decision.

Mr. Linzetta stated he disagrees with the mis-categorizations but doesn't think there is a clear understanding of the criteria. He referenced cases which have very different fact patterns but in this case there is an applicant proposing a road layout over an existing public way, which doesn't involve any taking of property of any land owner. There is not tax, levy or assessment being made with this proposal. He stated the benefit to the public with regards to safety is infinite; he stated if any of the landowners want to develop property they have to go before the Planning Board so there is no circumventing that process as suggested by Mr. Gehl. Mr. Linzetta acknowledged there is only one house on Bennett Road at this time, and their concerns are valid and he heard from all abutters strong anti-development sentiment. He stated he understands that but that is not what this proposal is about. Mr. Rhoades owns more property along this road than any other abutter and his property rights may well be considered by a court. In the end, it's an upgrade to the road for the Town and allows access for safety vehicles which is not there now.

Selectman Veisel asked for input from Fire Chief Varney.

Fire Chief Varney stated the proposed layout is one of the options he presented to them and confirmed he is satisfied with the turn-around area plans. He stated the road would be brought up

to the standard which will support their largest truck but the rest of the road, the upper part of Bennett Road, would not be able to support the big trucks at various times of the year. It doesn't matter if this portion is upgraded or not because it will still be limited unless the rest of the road is upgraded. Fire Chief Varney stated he is also concerned about how they did the test pits.

Mr. Linzetta stated they are happy to do core pits if need be.

Chair Swenson stated he agrees with Selectman Veisel in needing more time for fact-finding and he needs more time to think through the inputs presented from both sides. He suggested to close the public hearing and then the Board make a decision on terms of the process. Selectmen Veisel concurred.

Mr. Rosiello stated Mr. Linzetta keeps referring to the future but they need to consider the ongoing costs to maintain the road and the liability to the Town. He stated there are still issues concerning services and costs that need to be discussed further.

Mr. Gehl stated if they close the public hearing, it starts the clock ticking on the ten day period on which abutters can submit a petition in opposition, to not conditionally lay out the road. He suggested the Board come to a decision well before the ten day period lapses and suggested a continuation of the public hearing may be more appropriate.

Mr. Whitley stated it is his opinion that the ten day period does not impact the Town in what they can do. He stated Mr. Gehl is correct in some of his understanding of the RSA but it doesn't explicitly say its only pertinent to betterment assessments. Mr. Linzetta if a betterment assessment is part of a road layout, there could be a levy or tax assessment applied to abutters.

Chair Swenson asked Mr. Whitley if there is a continuance, are there time constraints on when it is continued. Mr. Whitley replied no and suggested it be made clear that the same information does not need to be presented again; the purpose of a continuation will be for the Board to get new information. Selectman Veisel suggested requesting the Road Agent be present for the continuation of the public hearing.

The Board agreed to continue the public hearing. Chair Swenson suggested June 14, as that date is the best for his schedule.

Mr. Linzetta stated a continuation to June is a long time and requested the continuance be closer to 30 days.

Mr. Rhoades stated he understands the Board wanting to confer with Town Counsel; but he doesn't see a reason for continuing the public hearing as everyone in the public has had a chance to make comment as well as the legal counsel.

Mr. Whitley stated Selectman Veisel has requested the Road Agent offer input and provide new information, so the public hearing would need to be continued. Mr. Rhoades stated if it was important that the Road Agent offer input, he should have been requested to be present at this public hearing and wants to avoid repetitive continuances.

Chair Swenson made a motion to continue the public hearing to May 10, 2021 at 7:00PM. Selectman Veisel seconded the motion. Roll Call Vote: Selectman Veisel – aye; Chair Swenson – aye. Motion passed, 2-0-0.

The public hearing was recessed at 8:41PM.

APPROVAL OF MINUTES

Meeting of March 8, 2021 Edits were made. **Selectman Veisel made a motion to approve the minutes as amended. Chair Swenson seconded the motion. Roll Call Vote: Selectman Veisel – aye; Chair Swenson – aye. Motion passed, 2-0-0.**

Meeting of March 16, 2021 – Edits were made. **Selectman Veisel made a motion to approve the minutes as amended. Chair Swenson seconded the motion. Roll Call Vote: Selectman Veisel – aye; Chair Swenson – aye. Motion passed, 2-0-0.**

Meeting of April 1, 2021 Edits were made. **Selectman Veisel made a motion to approve the minutes as amended. Chair Swenson seconded the motion. Roll Call Vote: Selectman Veisel – aye; Chair Swenson – aye. Motion passed, 2-0-0.**

Meeting of April 7, 2021 Edits were made. **Selectman Veisel made a motion to approve the minutes as amended. Chair Swenson seconded the motion. Roll Call Vote: Selectman Veisel – aye; Chair Swenson – aye. Motion passed, 2-0-0.**

Site Walk Meeting of March 22, 2021 – Postponed.

Meeting of March 22, 2021 – Postponed.

OTHER

Town Administrator Scruton stated the Planning Board had some questions regarding the boundary line adjustment, noting the plot plan needs to be adjusted per the memorandum of understanding. Chair Swenson stated there was a vote by the legislative body and sees that as superseding any actions by the Board. Town Administrator Scruton will check with the Land Use assistant for clarification.

NEXT MEETING

April 28, 2021, 6:00PM

ADJOURN

Chair Swenson made a motion to adjourn. Selectman Veisel seconded the motion. Roll Call Vote: Selectman Veisel – aye; Chair Swenson – aye. Motion passed, 2-0-0.

The meeting was adjourned at 8:53PM.

Respectfully Submitted,
Jennifer L. Riel

Jennifer Riel, Recording Secretary