

The Planning Board for the Town of Derry held a public meeting on Wednesday, February 3, 2010, at 7:00 p.m. at the Derry Municipal Center (3rd Floor) located at 14 Manning Street in Derry, New Hampshire.

Members present: David Granese, Chair; Virginia Roach, Vice Chair; Jan Choiniere, Secretary; Brian Chirichiello, Town Council Representative; Gary Stenhouse, Town Administrator; John O'Connor, Maureen Heard, Members; Darrell Park and Frank Bartkiewicz, Alternate

Absent: Paul Hopfgarten, and Randy Chase

Also present: George Sioras, Director of Community Development; Elizabeth Robidoux, Planning Clerk; Michael Fowler, Director of Public Works

Mr. Granese called the meeting to order at 7:00 p.m. The meeting began with a salute to the flag. He introduced the staff and Board members present, and noted the location of emergency exits and agendas and other materials.

Mr. Park was seated for Mr. Hopfgarten for the evening.

Escrow

#10-02

Floyd Road

Paul George

Cash escrow

PID 06065, 65 Floyd Road

The request is to establish cash escrow in the amount of \$12,861.50 for the above noted project.

Motion by Roach, seconded by Choiniere to approve as presented. All voted in favor and the motion passed.

#10-05**Harvest Estates****Ronald Mead****Town of Derry, Cash escrow****PID 10015, 10024, 10025, Hampstead Road**

The request is to release cash escrow held by the Town of Derry for the above noted project. The Town of Derry called this escrow on September 16, 2009, on a Letter of Credit furnished by Butler Bank. The property has been sold at auction and a duplicate Letter of Credit has been furnished by the new owner's bank, Enterprise Bank. The Town's legal counsel is attempting to recover unpaid property taxes and timber yield taxes in the amount of \$17,115.45 plus interest. The amount to retain is \$20,000.91 while the two banks settle property tax and yield tax obligations. The amount to release to Butler Bank is \$1,403,971.96, which represents the remaining escrow proceeds.

Motion by Roach to approve as requested, seconded by O'Connor. Discussion on the motion ensued.

Mrs. Choiniere inquired how the amount to be retained was calculated. Mr. Fowler advised that legal counsel had advised the town should retain in excess of the amount owed for timber and property tax plus accumulated interest. When they added in the escalation factor, it created the ninety one cents.

All voted in favor and the motion passed.

Minutes

The Board reviewed the minutes of January 20, 2010 meeting.

Motion by Choiniere seconded by Roach to accept the minutes as written. The motion passed in the affirmative with Roach, Park and Stenhouse abstained.

Correspondence

The Board has received a new issue of *The Source*.

Other Business

Mr. Sioras advised the Board will place the workshop to discuss rezoning the area around the Robert Frost Farm on the March 17, 2010 agenda. A notice will be placed in the paper and on the town website.

Rezoning Request

In addition, a request for rezoning on the Caras property has been received by the Board. At its last meeting, the Board suggested Mr. Caras come before the Board to discuss his request.

Arthur Caras advised South Range Realty Trust owns 3 parcels in the Frost Road, Berry and Windham Road area. The lots are surrounded by homes. He provided maps to the Board members which depict the parcels under discussion. [PID 02082, 20.5 Berry Road; PID 02070, 7.5 Willow Street; PID 02082-001, 25 South Range Road] He also provided an outline of the history of the lots. The Planning Board rezoned the lots from Rural/Residential/Agricultural to the current use. At that time, in that part of Derry, the Sybiak property [PID 02067] was zoned Industrial. At that time, the expectation was that sewer would run from Shute's Corner and possibly extend to these lots and make a well rounded Industrial zone. However, a developer went to Court and he was able to construct a residential development between the three parcels and the Sybiak parcel. There is no longer good access to Windham Road for Industrial purposes. The Planning Board convinced him to leave the parcels as is in the current zone. The Chair at that time had stated that if Town Council did not support by extending water and sewer, the three parcels could be zoned back to residential. That has not happened. He does not feel this is fair. The Board is now working on the Master Plan and he asks that they please consider rezoning back to residential use.

The development around the Robert Frost Farm on Route 28 has been on the Planning Board's agenda. Industrial access to Berry Road would dump the traffic onto Route 28 adjacent to this property. The DEDC hired Holden Engineering to create a mock up to see what the parcels might look like. They were able to place five, 100,000 square foot buildings on the parcels that had a lot of ledge cuts. Even with sewer, that level of commercial development would not support the infrastructure. There would be a lot of people and a lot of trucking. If he thought he could do Industrial, he would wait, but he does not feel that would be a good match for the area. There is the potential for the lot near Frost Road to support some type of use if there is future expansion of the hospital, such as an assisted living facility.

He would ask that parcels one and two be changed back to residential zoning, with the possibility of parcel three which is about 60 acres, being retained for some type of medical use. Lastly, the Sybiak property has been placed in conservation and there are no other parcels in the area that would utilize sewer. He does not anticipate the Board making a conclusion now, but would like the Board to reconsider rezoning the lots residential.

Mr. O'Connor asked if there are wetlands on parcel two? Mr. Caras said that between Willow and his parcel there is a forested wetland. There is a stream that runs between Berry Road and Windham Road, towards Windham. It is a seasonal stream. This

property has been surveyed and would have supported 100+ homes with a state approved wetland crossing.

Mr. Chirichiello asked what was the zone before the change? Mr. Sioras advised the current zoning is Office Research Development. It used to be one acre, Medium Density Residential. The potential change would be to Low Medium which would be two acre zoning. Mr. Caras stated he anticipates a two acre zone on these lots. Mr. Sioras felt this matter should be taken up fairly soon by the Board so that the Land Use Chapter of the Master Plan could be updated if necessary. The lots don't need water or sewer.

The Board elected to hold a workshop on Wednesday, February 24, 2010 beginning at 7:00 p.m.

Master Plan

Mr. Granese advised the Master Plan is coming along very well. At the last meeting, the Board was asked to complete ranking sheets. A few responses are missing, and he asked that they be sent to Mrs. Robidoux tomorrow if possible. Mr. Sioras advised the Plan is 90% complete. The implementation strategies are needed because it tells how the town carries out the goals. The other chapters are 90% complete.

Private Roads

Mr. Granese announced that the Tobacco Road public hearing will need to be continued to either April 7 or April 21, as the fees have not been paid. This was a petition submitted under RSA 674:40, III. There are several other petitions that cannot be heard because the Planning Board has no jurisdiction over them pursuant to RSA 231:8. They include the petitions for Saunders (Rocky Road); Manseau (Lake Ave); Cockcroft (Pebble); Labo (Ezekiel/Clyde), and Shillingburg (Sarah). Per the RSA, none of these are in the Planning Board's jurisdiction.

Motion by Roach to forward the matters listed by Mr. Granese back to Town Council as Town Council has to make the determination pursuant to RSA 231:8. O'Connor seconded the motion. Discussion followed.

Mr. Stenhouse felt that this needed to be discussed because people came out to be heard. Town Council referred all the road petitions to the Planning Board whose jurisdiction is limited to RSA 674:40. The number of roads petitioned under RSA 231:8 are for Town Council to determine if a layout for a road should take place in a certain area or not. The Planning Board does not come into play. He apologized to the residents. But this was beyond the control of this Board. The RSA says this Board has no jurisdiction at all. He did not want people to think they were being misled.

Sue Shillingburg, 1 Sarah Lane, asked if this is the case then why weren't they instructed of this when they were told how to fill out the petition, or at the last meeting? They followed procedure. Why were they not told? They pay in their small area of homes \$40,000.00 in taxes each year and this shows a lack of communication.

Mr. Granese apologized but felt this was the Town Council's issue and he would defer to Mr. Chirichiello or Mr. Stenhouse. The Board can't vote on these petitions.

Mr. Chirichiello noted this is new ground and he feels this was an oversight and not done on purpose.

Mr. Stenhouse said as a procedural matter, the Road Ordinance was passed last year and provided residents with two means of petitioning. He was instructed to have DPW take the applications and Mr. Fowler and his staff did what he told them to do. The application has two provisions, one under RSA 231:8 and one under RSA 674:40, so DPW took applications for both. The petitions went to Council and this is new ground. The departments did what they were told.

Mrs. Heard asked if when the petitions are sent back to Town Council, can the Board ask that Council vote on this with haste? She feels enough of the residents' time has been wasted. Mr. Stenhouse advised a Council has two choices. It can layout a road, as was done with McKinley and Mundy, so that the Council can decide to layout a road or not, based on the presented evidence. He thinks Council will act on these, but can't speak for the outcome. Mr. Chirichiello agreed there are no guarantees. Chairman Metts should be contacted as the upcoming agendas will be busy. Elections are soon and the Council will be dealing with the budget as well.

David Cockroft, 2 Pebble Lane, advised his understanding of the statute is that these petitions require a vote of the legislative body. If that is the Town Council, why was this not voted on prior to this meeting, knowing the residents would be here?

Mr. Stenhouse explained petitions filed under RSA 674:40 come to the Planning Board, but petitions under RSA 231:8 do not. Mr. Cockroft wanted to know why a vote was not taken prior to this meeting so it could be discussed. Mr. Stenhouse said he could not answer that question, but the Planning Board has no jurisdiction over RSA 231:8 petitions. A question was asked, when did Town Council vote to send this to the Planning Board? Town Council voted at its November 3, 2009 meeting. Mr. Cockroft stated they all received notices, many of them duplicates, at the taxpayer's expense. He is at this meeting and is being told that nothing has been done. Mr. Granese said it was unfortunate, but those five petitions cannot be voted upon by the Planning Board. Mr. Sioras agreed, without jurisdiction the Planning Board can't take action. Mr. Stenhouse felt the residents should have been informed of that. Mr. Cockroft said they were told if they did not pay fees by a certain date in December, they would not be heard. He had to take time out of his governmental job, at his expense, for this meeting and he wants the names of the people responsible. Mr. Granese commented the Board

concurring. Mrs. Roach suggested Mr. Cockcroft contact the Town Council. She did not know until she read the material that this Board did not have jurisdiction. Mr. Cockcroft asked if this Board has ever been asked to reclassify a road? Mrs. Roach said not during her tenure on the Board. Mr. Sioras did not recall a similar situation in the years he has worked for the town. The petitions went to Town Council to layout the roads. The Planning Board does not have the authority to layout the roads and this is the first time he has seen a petition under RSA 231:8 come before this Board. Mr. Cockcroft stated this came from the Town Council and it has taken 3 months to act upon it. Mr. Sioras explained the hearings were placed on the first available date on the Planning Board's agenda which was in January. That hearing had to be postponed because the legal notice requirement had not been met. Mr. Cockcroft asked when the Board thought Town Council might vote on this?

Stenhouse made a motion to enter non-public session to review an Attorney/Client privilege communication and to invite Mr. Sioras, Mr. Fowler and Mrs. Robidoux to attend. Roach seconded the motion. Stenhouse, Chirichiello, Heard, Roach, Park, O'Connor, Choiniere and Granese voted in favor and the Board recessed to non-public session.

Motion by Roach to exit non-public session and to seal the minutes of the meeting, seconded by Choiniere. Stenhouse, Chirichiello, Heard, Roach, Park, O'Connor, Choiniere and Granese voted in favor.

Public session resumed at 7:50 p.m.

Motion by Roach to withdraw her previous motion to refer the RSA 231:8 petitions to Town Council, so that the Board can listen to the residents thoughts and make advisory comments to the Town Council. The motion was seconded by O'Connor. All members voted in favor to withdraw the motion.

Mr. Granese advised for the petitions filed under RSA 231:8, the Board would hear the residents' testimony. He cautioned that the Planning Board would be acting in an advisory capacity only on those applications so that Town Council can have access to the minutes.

Motion by Roach to open the public hearing, seconded by Choiniere. The motion passed.

Field Road – RSA 674:40, III

Barry Cohoon, 11 Field Road advised he filed a petition under RSA 674:40. He asked if the Board would vote on the petition this evening? Mr. Granese said that was the intent. Mr. Cohoon advised there were some issues discussed today with regard to

parts of the statute and how it proceeds. He may ask the Board to wait to vote on this matter at its next meeting. The petition was submitted under RSA 674:40. He understands the Town Council put the Ordinance into place a year ago. One criterion is that the Planning Board votes and then the Town Council takes it up. The Town Council can vote by simple majority if the Planning Board recommends acceptance as a public road. If the Planning Board does not recommend acceptance, the Town Council can override that recommendation by a 2/3 vote in the affirmative. So in some ways, the Planning Board's vote is advisory.

Regarding Field Road, Field and Kenro Way were created in a 1966 subdivision. This is an existing, unobstructed right-of-way that allows the passage of safety vehicles. All deeds say it is a gravel road. The neighbors agree it is sufficient and feel it should be public because of the presence of town sewer. It is not just the existence of the sewer, but how the town went about it. The town acted as if it was a public road. Rockingham County Registry of Deeds (RCRD) shows betterment assessments. If the home was more than 100 feet from the road, it did not need to hook up to the sewer. He is not sure if there are easements of record; he can't find any. There has been minimum prior maintenance of the road. The town replaced the street sign. This road does not cross wetlands. Field Road is paved for its entire length. He spoke with his neighbor, Margie Ives who had advised she spoke with Mr. Sioras and perhaps Alan Côté. Her concern is that if they proceed on this basis and because it is a town road, the town could widen it to such a width as they determine. All the petitioners thought Town Council would accept it as existing (1960 road standards). That is a concern for Ms. Ives. Once the road becomes public, the town can do anything. There is confusion as to the initial layout of the road. The subdivision plat shows the road as 42 feet wide, but the deeds all say it is 20 feet wide. Ms. Ives is concerned that if the road is widened, it will destroy the rural character. One other matter is that there may be time for her to withdraw her signature before this goes to Town Council.

RSA 231:27 allows Town Council to re-establish the boundaries of Class IV, V or VI roads that are uncertain. He feels this need to go forward to Town Council and be accepted as a road before they can do that. He knows these applications are breaking new ground, but he would appreciate clarification if possible.

Margaret Ives, 4 Field Road, provided a map to the Planning Board Chair showing the layout of the road. What triggers the possible road widening? When she asked Mr. Côté he said there might be a reason in 15 years to consider it. She said Mr. Sioras agreed and thinks that as the Ordinance reads now, it leaves it open to the potential widening if DPW decided it was required for safety or if a new neighbor wanted a two lane road. Is there anything in the current language that protects the residents from a future widening of the road?

Mr. Sioras advised the regulations require a 50 foot wide road and today, the roads are built to those standards. In the 1960s there were 42 foot wide right-of-ways. In the

1970's the standards were changed to 50 feet. There is no provision in the regulations today that state existing roads are protected.

Mr. Fowler advised his department stance is that based on budget constraints he would be hard pressed to widen this road. In the Rainbow Lake matter, the Court ordered the taking. He only has funds to perform basic maintenance. Regarding Field Road, there are 12 homes on it, and he has not received any resident complaints. People can plow the road. He sees no reason in the short or long term to widen it. Theoretically they could widen it, but he feels it would be imprudent to do so. His recommendation would be to accept the road as is. There are no funds to do major improvements on either Field or Kenro.

Ms. Ives stated Mr. Fowler's opinion is valued, but she would like assurance that the road will remain as is. Things change. She is asking if under this Ordinance is there some way the residents can protect themselves such that the road will remain as is going forward, past Mr. Fowler's tenure. Mr. Fowler said the Town Council wanted to accept the roads as is, but there is nothing in the Ordinance that protects from improving the road. Ms. Ives is correct in that a future Town Council can vote to improve it, but the residents would have a right to be heard on that. Ms. Ives felt future money might not be there to make improvements, but it is possible it could happen. They entered into this thinking the road would be protected. She feels a compunction to raise this as an issue. She also does not feel confident that all the residents are aware of this risk.

Neil Wetherbee stated the Council has accepted some roads as is. If Town Council adds that provision in, that is the way it is. Mr. Stenhouse agreed, but it is not within this Board's jurisdiction. Mr. Wetherbee felt the Board could recommend the Council accept the road as is, and the Council can vote to accept the road as is and it would apply to future Councils. Mr. Chirichiello did not see where a present Council can tie the hands of a future one. Mr. Wetherbee noted that McKinley, Sanborn and Collette's Grove can't be improved. Mr. Stenhouse felt Field Road could be improved because the plat shows it as a 42 foot wide road, and that may govern for the future. Mr. Chirichiello did not think it likely that this road would be widened at any time in the future, but a Council ten years from now may decide to widen it.

Mr. Cohoon advised his preference would be for the Board to vote tonight and he would plan to get the road classified as a public road. He would then ask the Council under RSA 231:27 to rebound the road at 20 feet to match the residents' deeds. Under that statute, Town Council could change the road to 20 feet wide and that would allay the concerns that have been brought up.

Michael Duval, 5 Field Road, concurred with Mr. Cohoon. He would prefer this move forward. This is all about plowing. They pay a lot of taxes and their road should be plowed.

Ms. Ives commented she needed to understand more, what Mr. Cohoon had suggested. If Town Council votes to accept the road, another Town Council could change its mind. A new neighbor could trigger something. She feels uncomfortable because the neighbors signed the petition believing the road would be accepted and maintained as is. She is hearing that a new Town Council could override that. Mrs. Roach explained Mr. Cohoon is suggesting that once the road is accepted as public, under RSA 231:27, the bounds can be redone at 20 feet wide. Mr. Stenhouse felt uncomfortable rendering legal opinions because the Board is here to determine if Field could be accepted as a public road under RSA 674:40 or not. He would like to ask some questions of Mr. Sioras, Mr. Fowler and the petitioner. Ms. Ives accepted that, but she needs to feel comfortable with her rights and to decide if she needs to withdraw her signature.

Mr. Stenhouse asked if there is an existing layout? Mr. Sioras explained the road was laid out and recorded in the 1960's as a 42' wide right-of-way. The plan is on record at RCRD. Mr. Stenhouse asked if the same held true for Kenro Way? Mr. Fowler indicated it did. Both have sewer lines and the town has provided winter maintenance since 2001. The plans show a right of way at 42 feet wide with metes and bounds. The paved portion is approximately 16 feet wide.

Mr. O'Connor asked if the petitioners were still considering going forward? They are.

Stenhouse moved based upon facts presented this evening and answers provided by the Public Works Director and the Planning Director, and an existence of a plat on record at RCRD, the Planning Board recommend that Kenro Way and Field Road should be accepted as town roads under RSA 674:40, and that this petition is accepted. O'Connor seconded the motion.

Mr. Granese inquired if any abutters or petitioners for Kenro Way would like an opportunity to speak? Joseph McCarran, advised he was all set.

Friendly amendment by O'Connor to add the wording "accept as is". Mr. Stenhouse did not feel that was within the jurisdiction of this Board and O'Connor rescinded the amendment.

Stenhouse, Heard, Roach, O'Connor, Choiniere, Park and Granese voted in favor. Chirichiello voted no, citing he does not see a benefit to the public as a whole. The motion passed.

Rocky Road – RSA 231:8

Anne and Edwin Saunders, 4 Rocky Road, advised they have lived at this address since 1989. The house was listed as private road. When sewer went in, Alan Swan told them it was now a public road and it has been maintained. The street sign was replaced, and the residents now have mail delivery. The road has been plowed since

1989 or prior, perhaps even before the road was paved. She sees an estimated cost to layout the road. When the sewer went in, was the land not surveyed? Mr. Fowler advised that the estimated cost is for the layout by a land surveyor. The surveyor will use the historic data available and research deeds. Typically, this takes between 70 and 100 hours. He provided estimates based on 100 hours. That number includes all three roads: Pebble, Lake and Rocky. The past record is not sufficient because it locates the road as it sits. Bounds would need to be set to include additional feet on each side. There is a lot of work that goes into creating the layout. There is additional work to be done. Mrs. Saunders noted this was a cottage area. There is no access to EMS (Emergency Medical Services) if their road is not plowed. If the road is not accepted as public, it would deny the residents access to service that they deserve as residents of the town.

Mr. Stenhouse asked if the road is paved? It has been since the sewer went in and the town paved the road. There are no sewer easements and the residents are afforded on road mail delivery. Mr. Stenhouse asked if to the best of knowledge, is there a layout for this road on record at RCRD? Mr. Sioras said there is not. Mr. Stenhouse explained he is trying to set the record for Town Council.

Mr. O'Connor asked if there is sewer under the road? Mr. Stenhouse noted there is and added he has been told the town did it. Mr. Saunders advised he is the only resident on Rocky Road.

Lake Avenue – RSA 231:8

Jessica Manseau, 5 Lake Avenue advised she moved in two years ago. They have always had mail delivery and town plowing. Without the plowing there is no way for an ambulance or fire truck to get into the road. If the road is blocked, many people could not access North Shore Road. They do have public sewer and the Town of Derry plows the road, has filled potholes and sanded the road. There is no reason this road should not be made public. There are street signs. Winter maintenance is a safety concern. For their home to be heated, the propane truck needs to be able to access their lot, and currently can access the property easily. Taxes in Derry are high. It makes no sense that the road not be public. She asks that the Planning Board recommend the road changes from private to public status. Regarding the layout of the road, Lake Ave, Pebble Lane and Rocky Road are in the shape of a pea. If the road is widened it will not be an issue for the residents.

Mr. Stenhouse asked what is the main road that Lake comes off? It is North Shore Road. Mr. Stenhouse asked if there is a plan on record? There is not. Deeds reference the road as private. Mr. Fowler is not aware of any. Mr. Stenhouse noted the Board is just finding facts this evening and will not make a recommendation to the Council. The letter that stated this was going to be a public hearing is incorrect in that it says the Planning Board will make a recommendation to Town Council on this petition.

Mr. Stenhouse confirmed that there is mail delivery on the road, the potholes are filled, and there is sewer service. Ms. Manseau noted the residents fronted the funds to install the sewer.

Mrs. Roach asked if the road is not plowed, would there be no access to Pebble and Rocky? Ms. Manseau stated that was correct.

Heather Gendron, 2 Lake Avenue remarked they have been going through this since 2001, and it keeps getting discussed. Lake Ave was always maintained by the Town. They purchased the home with the knowledge that it was on a public road, with a private well. The information gathered on their property was given by the Town that this was a public road. The town maintains the stop signs, the 55 foot culvert, and the pavement around the sewer caps. In the spring, the Town sweeps the streets. The Town should continue winter maintenance due to the sewer system. If Lake is not plowed, the remainder of the residents can't get out of their homes and there is no EMS access. There are 11 households with 6 on Lake, 1 on Rocky, and 5 on Pebble. There are homes that have North Shore Road as an address, but they access the homes from Lake, so there are 13 homes in need of access. There are 26 adults and 15 children. They need EMS services year round. All of the homes have mailboxes in front of the homes, not at the end of the street which is normal on a private road. Public safety is an issue given the number of residents – these are factors in this road becoming public. They need mail delivery, which does not happen on a private road. On a yearly basis there has been some type of emergency provider on the street, without an issue of access. There are no issues with the large private companies who deliver services on this street, such as UPS, moving vans, FedEx, Pinard, etc. The households can't afford winter maintenance fees. The taxes on the properties are high and she does not have a water view or beach access. There are a large number of adults and a growing number of children and leaving this as a private road puts them in a dangerous position. They have sewer, mail, and culverts, but are denied road maintenance. If they want to sell their homes, they could sit on them for years because people know about the private roads in Derry. The current maintenance is not good. The road is plowed but not sanded. Snow will pile up to 12 feet at the corner of her lot and she is unable to see the stop sign. She described her issues with the plowing of the road. She summarized by stating that at one time their homes were valuable because of proximity to The Pavilion. Her home used to be a boarding house. She hopes that this Board will help them.

Bob Ormond, 3 Lake Avenue stated he was irritated. He has been running around with petitions and getting signatures. He stated he was not notified of this hearing and believes the town purposely was trying to miss a step so that this issue gets dropped. The Town of Derry has set precedent by paving and plowing. He is irritated at the loss of time because they have to sit here and there is no reason for it. He feels the town is wasting the residents' time. Mr. Ormond was advised that a notice was delivered to his home and the certified card was signed by Rebecca Ormond.

Mrs. Manseau felt that it was important to note that the original meeting was scheduled for January 5th. She received a phone call at 3:00 p.m. the day before advising that the hearing was cancelled. She had to leave work early and notify the abutters. A lot of work went into that and she feels nothing is happening.

Mr. Stenhouse felt the petitioners had answered many questions.

Pebble Lane – RSA 231:8

David Cockroft stated he echoed the same sentiments. The road has been maintained, there is public mail delivery, the pot holes have been fixed, and the road has been plowed every year of the five years he has lived there. The three roads combined take 3 minutes and 5 seconds to plow from North Shore, up Lake, to Rocky to Pebble and then back to North Shore Road. These are long roads.

Mrs. Roach asked for clarification, in order for EMS to access Mr. Cockroft's home, Lake has to be plowed? He agreed.

Mr. Stenhouse asked Mr. Sioras and/or Mr. Fowler to confirm that there is no subdivision on file at RCRD. He was informed that is correct. There is sewer service, but no easements attached. The deeds for the lots reference 3 private ways. Mr. Cockroft noted that at one time Rocky Road was called Bartholomew.

Ezekiel/Clyde – RSA 231:8

There were no residents present to represent this petition. Mr. Stenhouse asked if when the subdivision was approved by the Planning Board in 1987, did the plan note this was a private or public road? Mr. Fowler stated that he believes upon review of the plan that this is a private road, maintained by the homeowners. It has never been maintained by the town, and there are no public utilities under the road.

Mrs. Choiniere asked if there is a Condo Association? Mr. Fowler stated that when he spoke with Theresa Labo, she advised there is an active Condo Association that has and continues to maintain the road. The request is to recommend Town Council lay this out as a public road. Mr. Chirichiello asked if the Condo documents had been researched? They would specify that the town had no jurisdiction. If the residents pay dues, he does not feel the Board can touch this. Mr. Stenhouse felt this matter should be referred to Council. The plan was accepted by the Planning Board in 1987, and it specifically stated this is a private road and it has Condo documents. Mrs. Choiniere inquired how wide is this road? Mr. Fowler stated there is a 24 foot road width. Mrs. Heard read the following from the petition, "We are 20 homes that receive no tax break and no city services. The school buses and post office drive on our roads and the cost of keeping them plowed and salted have put us in hardship." Mrs. Roach confirmed the road is paved. Mr. Chirichiello reiterated that if there are Condo Association documents pertaining to the road, this Board has no jurisdiction. Mrs. Choiniere noted the Town

Council minutes of November 3, 2009 indicate the applicant stated she believes this to be a private road. Mrs. Roach commented the Town Council will have the minutes of this meeting to review.

Worthley Road, RSA 674:40

Susan Dionne advised the petition was signed by all 18 families, and they all will be impacted by the result of this meeting. She confirmed that each Planning Board member had a copy of the packet prepared by Chas Pearson. He is a Land Surveyor who has lived on this road for many years. His packet outlines in detail with documentation why this road should be considered a public road. Because of the delay in the hearing, he was unable to attend the hearing this evening, but he requests his information be presented as part of the record and gave her permission to use the contents of the packet.

In 1988-89 the sewer project required homeowners to connect to the system. If it involved land on a private property the town needed easements. No easements were obtained on Worthley indicating acknowledgement by the town that this is a public way. On page 4 of the packet, there is an excerpt from the 1911 deed sold by George Benson to Spurzhie Worthley. This was when it was created. The deed states it is a "private way, 25 feet wide kept open to the public". This was a public dedication in 1911 and the road has been town maintained since then, based on the record. There were 7 catch basins installed and maintained by the town on the road. At the bottom of the road, the basin has been redone 3 times. No easements were obtained when the town installed the drainage. She can recall crews cleaning the drains. The town has plowed the road the entire time she has lived there and it has been sanded as well. There is a section of the road that has been paved and repaved by the town with no charge to the residents. A street light was installed near #10 by the town and it is paid for by the town.

On page 10, there is an example of how the town consistently treated the road as a public highway. When parcel 56037 was divided into two parcels, # 8 and 10, no variance was required to waive the frontage requirement on a public road. On page 11, there is a notation regarding the Orchard Drive development. That subdivision includes a parcel that has frontage on Worthley and it clearly states on the plat, "notwithstanding the provisions of RSA 231:8, the right of way (Worthley) shall be dedicated to the town in perpetuity." That is a large portion of Worthley. Pages 16-17 of the packet contain copies of 2 deeds and 1 court decree that supports that Worthley is a public highway.

Brian Corliss, 35 Worthley Road, advised that he had a subdivision of his parcel without requiring a variance as well. Any one of the items illustrates this has been a public road

all along. He feels there is no question that Worthley is public. Evidence over the past 100 years essentially confirms the belief that it has been public.

Mr. Stenhouse stated he found it troubling that the application purports to be a petition under RSA 674:40, but at least one petitioner has attached conditions. If this is a public road, then there are no issues for conditions. There is no guarantee. If the conditions are to be met, then this is not a petition that contains all of the signatures. There is ample evidence that parts of the road have had public maintenance. Mrs. Dionne stated no one wants the road upgraded and they wish that they could attach the condition "as is". That is all the residents want. They don't want street lights. The town has done a good job plowing and sanding the roads. It would be a hardship for the elderly to pay for plowing and maintenance. The residents feel this has always been a public road.

Mr. Stenhouse stated he does not disagree, but this Board can't bind the Council to an as is condition.

Mr. Granese asked if the road is paved? Mrs. Dionne stated parts of it have been paved by the town. Mr. Stenhouse noted there is a report from the Assessor that for at least a portion of the road there is no record of the road. Mr. Fowler explained based on the evidence he has looked at and the prior Private Road Committee reviewed, it appears that up to #14, the town has the ability to consider its ability to reclassify the road to public. When you get beyond #14, it becomes more complicated. A portion goes over private land and may or may not have easements. There is a dedicated future right of way portion over the Gill land and at the top of the hill it becomes more nebulous. The town may be better suited to take it from that portion as a future layout. Mr. Stenhouse confirmed that up to #14, there is clear evidence of platting with metes and bounds and town maintenance, but after that it gets murkier. Mrs. Dionne stated two of the drains are beyond #14. Her deed says she lives on Worthley Road, not Upper Worthley or Worthley Extension.

Mr. Stenhouse said that for the record, the Board needs to apply RSA 231:8 or 674:40. Evidence supports a public road up to #14, based on the document prepared by Mr. Pearson. Mr. O'Connor inquired how far up the road is the sewer? Mr. Fowler said $\frac{3}{4}$ of the way beyond #14 through the boundary. There are easements, but not for the sewer. Mr. O'Connor thought that was done in conflict with RSA 674:40. Mr. Fowler noted there is a short section of the road that is not under pavement.

Paul Dionne, 22 Worthley, pointed to page 5 and 6 of Mr. Pearson's packet. There is a layout that is not recorded that goes from North Shore Road to his property. RCRD has plats for the entire road. #14 has a plat to #16, and #16 has a plan. The Gill land has a plat, and the Corliss subdivision is platted.

Mr. Corliss stated he owns property that exists from the top of the hill to Chester Road. He also has an address of 111 Chester Road. He supports all of Mr. Pearson's

information. He employed Mr. Pearson to survey his property and to prepare the subsequent subdivision, which was approved by this Board. The most significant item is that Parcel 12006, which he has owned since 1978, was subdivided around 1985. The questions raised at that hearing were similar to those this evening. He was asked if the road was paved. He was able to answer yes, because he and the owner of Parcel 12009 employed various contractors as recommended by the Department of Public Works. (Clarks Trucking and Mystic Bituminous) Based on this fact and the Board decision that Parcel 12006 fronted on a public way, there is support for what Mr. Pearson has outlined. He has always thought of this as a public way and has always considered the entire extent of Worthley to be public. This Board decided decades ago it was public. Regarding the First Responder issue, the road to his property was inspected by Chief Reynolds of the Derry Fire Department. He created a turnaround for larger vehicles to utilize and Chief Reynolds found it acceptable for the fire equipment to travel. He reiterated he feels this is a public way the entire length of the road.

Mrs. Roach asked for public safety reasons, is it true that if the road was not plowed beyond #14 that EMS equipment could not reach the upper lots? Mr. Corliss replied the road is adequate, absent snow. The Town needs to plow or we will need to do it.

Thomas Bear advised he concurs with all parties. When he purchased his property, he was of the understanding it was public the whole way up. He is disappointed that members of this Board have not been on the road where this is such a large issue. It is sad that the board needs to ask if the road is paved or not. The Board needs the big picture and needs to see what the residents are fighting for. Mr. Granese advised he went up Worthley. He explained that the Board is asking these types of questions to build a record so that Town Council will have all of the same information, so that they don't need to ask the same questions again.

Mr. Stenhouse asked Mr. Fowler if Mr. Pearson's report gave evidence of dedication for the whole length of the road? Mr. Fowler said he was looking at it again, but does not see where Mr. Pearson specifically states that there is a more modern plan that puts together all of the pieces. He feels the residents have a case, but he still has questions beyond #14. The town knows where the sewer lines are. Mr. Stenhouse noted the town should not have put sewer in without easements.

Diane Gill, 17 Worthley, reported they added a contingency letter regarding their concerns when they signed the petition. She agrees there should be plowing as it is a safety issue. The safety of the residents in the event of an emergency is important. Another component of safety is their home's location. If the road is made public, they will be closer to the road than they are now. There are existing safety issues with regard to traffic. They are part of the equation with regard to safety. It occurred to her that they are a special circumstance. Perhaps the road could be accepted because of the safety issues with special considerations that the road be made public in perpetuity, and a future Town Council could not change that for safety reasons. She is looking for a solution that will satisfy everyone. She confirmed that all the Board members had

seen the contingency letter. Mr. Stenhouse added that he did not give it a lot of weight because it was not germane to what the Board was discussing this evening.

Neil Wetherbee, 18 Worthley, noted the Board had been provided with a 2006 legal opinion from Attorney Boutin's office. He noted that opinion was rendered long before the Private Road Ordinance, and it was three years old. The opinion was rendered to the Private Road Committee and the attorney did not have all of the facts then that are available today. He noted prescription is different from dedication and acceptance. With prescription, there has to be evidence of maintenance for 20 years prior to 1968. He referred to *A Hard Road to Travel*. He feels the 1911 deed is clear and there is evidence of prescription. There are many roads in town that were created long ago that are considered public. There is no evidence to support that. The residents are asking that because of the descriptions in the deeds, the recorded subdivisions, and the maintenance, that the town has treated this as a public road for 100 years.

John Gill, 17 Worthley Road, explained that his family is trying to convey that they are the only house on the road subject to dirt and dust during the summer. This is putting their house closer to the road and it will create a hardship. Eight years ago, a semi truck felt his driveway was a turn around as it is a circular driveway. Many service vehicles turn around in their driveway. If the town goes by the plan that was laid out and the dedicated easement, they will lose 16 feet of frontage. Everyone seems to use their driveway for a turnaround. The property is burdened by the fact that they own property on both sides of the road. He wants to work with everyone, but does not want to be disadvantaged. He knows the importance of EMS and wants to be looked at the same as everyone else. If the town would entertain returning land to them, they would do that. The issues with the drainage and the silt are ongoing. Mr. Côté has laid out suggested improvements for the drainage. Mr. Wetherbee has said he would work with them because he owns property on the other side of the street. They want to work with everyone, but can't give up that piece of property. Mr. Chirichiello inquired as to the location of the well on the property? Mr. Gill said it was to the side of the house, not close to the road; the propane tank is comparatively closer.

Mr. Stenhouse said that based on the information before the Board, it appears that up to #14, Worthley is a public road. He is not convinced it is public after that, although it may be. He does not feel the Gill's request is unreasonable and does not want to hold this matter up. If the road has been laid out under RSA 674:40, then the right of way is what the right of way is.

Mr. Fowler commented with regard to prescription. The Board this evening is focusing on an expedited petition. The residents still have the ability to petition to Town Council for prescription. The right of way can be defined after the fact. That is a harder road to travel, but it can be entertained.

Mr. Corliss seconded the comments made by the Gills. He does not want to see changes to the road. He would like to address Mr. Stenhouse's dilemma. There is a lot

of evidence to support the bottom half of Worthley as public. It is important to note that when he employed Mr. Pearson, Mr. Pearson surveyed all of Worthley and that information was supplied to the Planning Board in the past. He also surveyed all of Mr. Corliss' land, including parcels 12007, 56004, and 12006 down to the bottom of North Shore Road. He did review all of the records and provided to Mr. Corliss documents when he developed the subdivision plan for parcel 12006. The Planning Board at the time stated the frontage was on a public road. Mr. Pearson has done extensive survey work for the entire length of Worthley.

Mrs. Roach noted at some point, the Planning Board approved Orchard and access onto Worthley and that would have been public. Mr. Sioras concurred, and that is on the portion above #16. Mr. Corliss stated the road was originally laid out as a horseshoe. Mr. Sioras recalled the subdivision in 1985. It was a large parcel that abutted the Ben Adams parcel and contained prime wetlands. What was left over was the lot on Orchard. The Planning Board approved it as a valid lot with frontage on Worthley. Mr. Corliss reiterated the road was paved by the residents.

Mr. Gill asked if the town finds the road to be public, or has been public, would that not make the provision for the dedicated easement disappear? Would that erase the need for that? The intent of the easement was to allow access for the home on a private way.

Mr. Stenhouse asked if at any time was Worthley accounted for in the list for town aid? Mr. Fowler stated it may have been at one time. He would need to confirm that. Mr. Stenhouse felt this road may have been on the state road aid list.

Mr. Chirichiello advised he would not be voting on this matter, as he sits on the Council with one of the affected residents, Mr. Wetherbee.

Mr. Park asked if the Board could postpone ~~this hearing~~ the vote to the next meeting for contemplation? Mr. Stenhouse noted the rules don't require the Board vote this evening. Mr. Granese felt that in light of everything, he hoped the Board will come up with a consensus tonight. Mrs. Heard felt the Board needed to vote on this tonight. She would not want to inconvenience the residents any more than necessary.

Motion by Heard to approve the petition for Worthley Road and send it to Town Council. The motion was seconded by O'Connor.

Mr. Stenhouse suggested amending the motion such that under 674:40, yes, there is evidence the road has been dedicated up to #14, and there is other information that might lead to that conclusion. There is evidence of a Planning Board approval of a subdivision on Orchard Drive and at one time the road was subject to the Town Aid Road List. Sewer and other appurtenance have been installed and maintained by the town, including street lighting, and that the road has been plowed and subject to normal maintenance since 2001. O'Connor seconded the amendment.

Stenhouse, Heard, Roach, Park, O'Connor, Choiniere and Granese voted yes; Chirichiello abstained, and the motion passed.

Tobacco Lane – RSA 674:40

The Board motioned to continue this hearing to April 21, 2010, to allow the petitioner time to pay the public hearing fee.

Sarah Lane – RSA 231:8

Susan Shillingburg, 1 Sarah Lane, thanked the Board. She understands the Board is aware this is a private road, but based on the Ordinance is requesting the Board to consider it as public. Sarah, Phase I includes a duplex with frontage on Island Pond Road, which uses the cul-de-sac on Sarah. The residents all signed the petition. The cul-de-sac is maintained and plowed by the residents. It is not a parking area. The duplex has a parking pad, and each home has its own parking spot. There are 4 homes in the Condominium Association. There are young families on the street and the buses access the road. The residents make sure it is sanded for safety purposes. Winter maintenance is very expensive. The police sit at the top of the road, which they would not do if they considered it private. The residents have wells and a septic system. Mail delivery is on street and not at the end of the street. Trucks and buses access the cul-de-sac. Especially in these economic times on such a small road, in the interest of keeping things safe for the children, please consider this a public road.

Mr. Chirichiello asked if there is a Condo Association? There is. The 4 homes pay dues for the shared septic and well. The Condominium documents spell out that the 6 homes shall split the cost of the road and lawn maintenance. The document was approved by the Attorney General's office. Mrs. Shillingburg advised the owners are considering changing to a Homeowner's Association which would preclude those documents. This is a very small neighborhood. Mr. Chirichiello asked if Mrs. Shillingburg was under the impression that the Condo Association could be disbanded? She said that could happen. For fact finding, she did not want that to be a stumbling block. She does not feel that the presence of that document should stop them. Mr. Chirichiello noted it is a legal, binding, document. Mrs. Shillingburg said they can go to the state and adapt the By-Laws. Mr. Chirichiello asked if there is a management company that manages? There is not. The six homes elect the Board of Directors and they hold meetings. The town has not maintained this road in the past. They filed the application for economic and safety reasons. Mr. Chirichiello noted the most Condo Associations look at budgets. Mrs. Shillingburg advised they are too small and don't do

that. Only 4 homes are affected and pay dues. The other two homes (the duplex), pay 1/6 of the plowing and insurance costs. They pay a small fee for the shared septic.

Mr. Sioras advised this is an old PUD (Planned Residential Development). The duplex was there prior to the four homes. It was laid out as a private road. Mr. Stenhouse asked if the Condo documents state the road shall be constructed and maintained to town standards? Mr. Fowler said he would interpret that to mean depths of gravel, pavement and the geometry of the cul-de-sac, and that they should conform to the town standards of the day.

Janet Bhagat, 3 Sarah Lane, said this road is located at the intersection of Island Pond Road and Route 111. Many people turn around in the cul-de-sac. This is a small association and the residents don't have the funds to sand, plow and maintain the road. Mr. O'Connor asked if the school bus turns around in the cul-de-sac? Mrs. Bhagat said on occasion. At other times it might turn around across the street at the Gulf Station, on Island Pond Road if it could not access this cul-de-sac. Mrs. Heard asked if all PUDs are planned to be private roads? Mr. Sioras explained that the way the documents are written it would be a private road, but if the developer wanted the road to be accepted in the future, the road would have to be built to town standards. The developer could make it public or private. A town road is 50 feet wide, with 24 feet of pavement, and 6 feet of shoulder. The road was not built to that standard in this case.

Mrs. Roach said a site plan would state if this is a private road. Mr. Sioras believes that is what was put on the plan in the event an issue arose as to the status. Mrs. Choiniere inquired if there was any precedent for this situation? Mr. Fowler noted that Pemigewasset, Squamscott and Emerson are PUDs that were accepted by Town Council in 1993.

Motion to adjourn by Heard, seconded by Roach. The motion passed and the meeting stood adjourned at 10:04 p.m.