



**SELECT BOARD
MEETING MINUTES
SEPTEMBER 15, 2015**

1.0 EXECUTIVE SESSION - 5:00PM

1.1 Legal [Pursuant to Title 1, Chapter 13, Subchapter 1§405.6.E]

The Executive Session was cancelled.

2.0 CALL TO ORDER: 6:00-8:00PM

Meeting called to order at 6:00PM.

Members present: Barbara Dailey, Chair
John Daley, Vice Chair
David Barton
Robert Winn, Jr.

Members absent: Gary Latulippe

Motion made by Robert Winn and second by David Barton to excuse the absence of Gary Latulippe from the Select Board meeting; approved 4-0.

Others present: Thomas A. Fortier, Town Manager

2.1 Pledge of Allegiance

The Pledge of Allegiance was led by Selectman Winn.

3.0 TOWN MANAGER'S REPORT

Summer has come to end but it is still very busy here in town.

Capriccio is occurring this week; Tim Sample performed this past weekend and held a concert with local artists. Tonight there are \$25 discounted tickets for the

"Million Dollar Quartet" at the Ogunquit Playhouse, on Thursday night "Harry Langdon Silent Comedy" at the Leavitt Theatre and Saturday it is "A day at the Museum" with open houses at galleries around town.

Route One Project has started up again with a lot of night work. By the end of next month both bridges will be complete and both ends of town will be complete, once done they will start working towards the center of town.

Ogunquit Sewer District is installing over 400' of new pipe in the vicinity of Kingfield Avenue in anticipation of the Route One work.

There will be a workshop, Wednesday, September 16th at 6:00PM at the Dunaway Community Center in regards to "Dogs on the Beach". Ben Hershenson will be facilitating this workshop.

The "Lobster Dash" will be held this upcoming weekend, Saturday. All funds go to support the Frannie Peabody Project.

Tomorrow the Marginal Way Committee, September 16th, will be working with their licensed herbicide applicator to spray invasive vines and plants to control the growth. This is dependent upon weather.

4.0 APPOINTMENTS, RESIGNATIONS, PROCLAMATIONS, RESOLUTIONS

There were no appointments, resignations, proclamations or resolutions for the Select Board to act on.

5.0 PUBLIC INPUT (Any Topic)

Bill Woods, Chestnut Road

- Comments regarding the plowing of private roads, specifically his road which has a plowing easement. Mr. Wood gave a brief history of how the plowing of his road came about.

Ben Hershenson, Myrtle Circle

- Explained the purpose of the workshop tomorrow regarding "Dogs on the Beach". He stated that he will be moderating the workshop.

6.0 PUBLIC HEARING - LICENSE RENEWALS

Public Hearing called to order at 6:18pm; approved 4-0, Latulippe absent.

6.1 Angelina's Ristorante - Malt, Spirituous & Vinous License Renewal Application

Recommended for approval by the Police Chief, Fire Chief and Code Enforcement Officer; there were no comments or questions from the public in attendance.

David Giarusso was in attendance to represent Angelina's Ristorante.

Town Manager Fortier voiced a complaint that had been brought to his attention regarding tables and chairs blocking the emergency exits. He asked for assurance from Mr. Giarusso that this matter will be taken care of.

David Giarusso explained the issue that had occurred over the past weekend with the table blocking the emergency exit. He stated that the table was not in the way anymore.

091515-01 Motion made by Robert Winn and second by David Barton to approve the Malt, Spirituous & Vinous License Renewal Application for Angelina's Ristorante; approved 4-0, Latulippe absent.

- 6.2 Maxwell's Pub - Malt, Spirituous & Vinous License Renewal Application
Recommended for approval by the Police Chief, Fire Chief and Code Enforcement Officer; there were no comments or questions from the public in attendance.

William Hludik was in attendance to represent Maxwell's Pub.

091515-02 Motion made by Robert Winn and second by David Barton to approve the Malt, Spirituous & Vinous License Renewal Application for Maxwell's Pub; approved 4-0, Latulippe absent.

- 6.3 Maxwell's Pub - Amusement License Renewal Application
Recommended for approval by the Police Chief, Fire Chief and Code Enforcement Officer; there were no comments or questions from the public in attendance.

091515-02 Motion made by Robert Winn and second by David Barton to approve the Amusement License Renewal Application for Maxwell's Pub; approved 4-0, Latulippe absent.

Public Hearing was closed at 6:26pm, approved 4-0, Latulippe absent.

7.0 PUBLIC HEARINGS & PRESENTATIONS

8.0 ADMINISTRATIVE ITEMS - UNFINISHED BUSINESS

8.1 Plowing of Private Roads - Thomas A. Fortier, Town Manager
Select Board Policy Review of the Plowing of Private Roads

Chair Dailey commented on the information from Bill Wood which was new to her.

Town Manager Fortier reviewed the information with the Select Board regarding public easements, stated that it was all about semantics; public easement is not referencing a private road. There are unaccepted streets, public egress, public necessity, accepted streets, paper streets; we are talking about private roads.

Chair Dailey referenced the information in the Select Board packet that has been available to the public for the last two weeks.

Town Manager Fortier gave an overview of the issue, private roads. The town staff has identified a real significant liability for the Town. Mr. Fortier suggested that take the time to digest the information and not jump to any conclusions. He also brought up the subject of political risk.

According the Maine State Constitution, it is unconstitutional to plow private roads and we (town) lose all Maine Tort protection. The town also loses its liability protection for its employees.

In general, there are 105 private roads in this town; 19 of them are being plowed by the town. There are 71 town roads that are being plowed and 2 State roads. The 19 that are being plowed have plowing public easements on them. These were originally approved by a Select Board and every year there is a warrant article at the Annual Town meeting that asks the voters to allow the plowing of these private roads.

According to Maine Municipal Legal Services Department, Amanda Meader, Staff Attorney:

"Under Maine Law it is unquestionably illegal for a town to spend taxpayer money plowing a private road. To do so would be to run afoul of the "public purpose doctrine" that arises out of our state's constitution. A town vote may not override the constitution. The creation of an easement may not override the constitution. There is absolutely no way around this law. Only in the rare instance of an emergency circumstance (fire, illness) may a town run a plow down a road ahead of a fire truck or ambulance to help someone."

One of the questions is that people on private roads pay taxes, aren't they entitle to have their roads plowed...the answer is "no". A municipality is not legally required

to provide identical services to all roads, just as some parts of town may have public sewer or water and others don't.

Another question is about emergency access vehicles, busses and other municipal vehicles. It is probably permissible to send a plow down a privately owned road ahead of a fire truck, police car or ambulance since opening the road is necessary to provide the emergency service. This represents an isolated occurrence for the purpose of saving a life or limb and does not constitute therefore a regular practice. We recommend that persons living on private roads keep them open as there is no guarantee that town vehicles can get through there in an emergency. A municipality is not liable for the failure to provide emergency services.

The loss of Tort Claims Protection Act states that if we lose that it does not protect the municipality or the municipality's employees, while performing what is essentially a private service.

The constitutional problem is not avoided by granting permission to the municipality to plow a private road. Consent does not confer a public right of access and can be withdrawn at will. Nor can the prohibition against plowing private roads at public expense be overcome by popular vote, say, by a town meeting or referendum because no such vote can supersede the Constitution. It is irrelevant that the practice has been long standing; there is no grandfathering of a continued constitutional violation. We have a problem now since it has been identified.

Losing Tort Protection limits the liability of municipalities and their agents and employees while engaged in legitimate governmental activities such as plowing public roads. Because plowing private roads is not an authorized public activity, it is conceivable that a municipality and its agents and its employees would not be protected by the coverage under the municipality's insurance policy (Maine Tort and the town's own insurance). In other words a municipality, its employees and its agents may be held liable without limitation and without insurance coverage for personal injury or property damage cause while plowing private roads.

This is a situation that doesn't fit any longer...now how did we get here. A private road is just that, a private road. Some communities have unaccepted streets and some have paper streets. Public necessity is a reason you can plow a private road and public easements. Blue Heron is an example of public necessity, a private road that gets plowed. Roads that have pumping stations, crossovers to other roads are roads that need to be plowed that may be private roads.

In 2002, the Select Board accepted many roads under the auspices of public easement. Nineteen roads have been identified as private being plowed by the town:

Briar Bank Road	Kingfield Avenue
Cedar Lane	Maxwell Acres Road
Chestnut Road	Partridge Drive
Chickadee Lane	Towhee Lane
Dixons Run Road	Valley Brook Road
Ocean Heights Lane	Vinton Road
Hemlock Lane	Whip-o-will Drive
Highland Avenue Extension	Winter Hill Road
Jothams Lane	Woodland Hills
Juniper Lane	

Chair Dailey referenced material in the Select Board packet as to what landowners can do. Landowners can request that the municipal legislative body accept a road as a public easement which could then be maintained at public expense. This option depends on three events: 1. all the abutters must agree to grant the easement, 2. the legislative body must vote to accept it as a public easement, and 3. the legislative body must vote to authorize maintenance of the public easement as it is not required by law.

The question for further research before this issue comes back to the board is to figure out how the information that guided the 2002 actions syncs up with other information before the Select Board.

Bill Woods

- Comments regarding definitions of town roads and acceptance of roads that houses have been built on. Some of these roads have been approved by planning board approval of subdivisions in past years. Questions about road standards.

Selectman Daley stated that the Maine Law does not seem that it wasn't written with small towns and villages in mind. Ogunquit has more private roads than public roads; this law is unfair to the Town of Ogunquit. If there is any way around it, would like to find it...should speak to town attorney about this issue.

Town Manager Fortier found the answer to "Landowners can accept the Road as a Public Easement"; it is under the caption of "What can landowners do to private roads to get road maintenance?" A town can do road maintenance for certain reasons but cannot do plowing.

Selectman Winn had a question about the "road maintenance" and how it would affect the town.

Selectman Barton read the policy addendum to Title V:

It was the consensus of the Board of Selectmen, at a meeting held on November 19, 2002, that the Town will plow and sand the following private roads as part of winter maintenance operations for the 2002-2003 season ending April 1, 2003, because of past practices and to avoid creating "last minute" hardships that could result in public safety detriments:

*Cedar Lane
Chestnut Road
Hemlock Lane
Juniper Lane
Partridge Lane
Towhee Lane*

*Valley Brook Road
Village Highlands
Whip-Poor-Will Drive
Woodland Hills*

And furthermore, the above list of roads shall cease being eligible for any and all Town maintenance operations as of April 1, 2003; after which date they must comply with all applicable provisions in Article IV of this Highway Maintenance Policy to be considered for winter plowing and sanding in the future.

The Select Board is the policy maker for the town; staff has informed the board that there is a real liability issue. It is up to the Select Board to determine if they will continue to plow private roads for the upcoming season.

Chair Dailey would like to work to determine over the next couple of board meetings, to see what the status of the 19 roads is...is there a public necessity, are some of the roads in a good enough condition to fall into one of the other categories that might allow us to re-categorize them without risk and what to do where the liability is rather obvious by the nature of the quality of the roads.

Selectman Winn asked that the town provide to the residents what criterion is utilized to deem a road meets town standards. Question about older developments and what codes used at the time to determine road standards and can those standards supersede the existing standards.

9.0 ADMINISTRATIVE ITEMS - NEW BUSINESS

- 9.1 Ogunquit Historic Preservation Committee - Selectman David Barton, Liaison
Request for Legal Counsel to Represent the Historic Preservation Commission

The Historic Preservation Commission (HPC) has run into, is a legal opinion that the Planning Board had received that unless there are architectural changes the HPC has no jurisdiction and the Historic Preservation Commission Ordinance is too vague to be enforceable. The Maine Historic Preservation Society stated that the legal opinion is wrong.

The request before the Select Board is to allow the HPC to have an attorney available to advise the commission on how to re-establish the commission and get past the legal opinion by Natalie Burns.

Selectman Barton stated that he had spoken with Earl Shuttlesworth, Director, at the Maine Historic Preservation Society in Augusta. He directed Mr. Barton to Hillary Bassett, Director, Greater Portland Landmarks, who recommended an attorney named Barbara Vestal who played a major role in drafting the current Portland Historic Properties Ordinances. She would be familiar with what a Historic Preservation Commission can and can't do. This would be a second opinion on the legal opinion by Natalie Burns.

Basically, the HPC needs help getting an opinion of what the Historic Preservation Commission Ordinance allows. The HPC gives advisory opinions; they have no power and are strictly advisory. Any opportunities that the HPC has to speak with people that are going to put in applications, the applicants are willing to make the changes recommended by the HPC. No one has to fear this commission, they are only advisory. Right now the Planning Board feels that there is very little jurisdiction until a town attorney tells them differently.

The Planning Board is trying to come up with a plan to require an applicant to come and get some advice from the HPC prior to filing an application with the Planning Board.

The HPC is looking for another legal opinion, not to burden the town with legal fees. Mr. Barton would like to have Attorney Barbara Vestal available to consult with the HPC and render an opinion independent of the town's counsel.

Selectman Daley stated that there have been issues between the Planning Board and the HPC in the past, concerned about giving two town boards lawyers to abate something. Selectman Daley suggested that the Select Board, Planning Board and HPC meet for a workshop to fix the issues. Selectman Daley stated that he had no problem supporting it as a one-time item.

Chair Dailey asked if the root of the problem is that the Planning Board does not listen to the HPC. Mr. Barton stated that he feels that the HPC does not get the credibility that the voters intended them to have.

Chair Dailey asked if Mr. Barton had a sense of what this would cost. He estimated that it would cost \$600-\$700. Chair Dailey stated that she would like to have a conversation with the Chair of the Planning Board to get a "lay of the land" from the concerned parties.

Selectman Winn stated that he would really like to see the HPC have more "teeth". Mr. Winn would like the groups to get together to hash the issue out.

The case was thoroughly vetted and the issue was tabled until a full board could be present to vote on the item.

9.2 Consent Agreement/Perkins Cove Lobster - *Thomas A. Fortier, Town Manager*
Select Board Action to Authorize the Town Manager/Code Enforcement Officer to enter a Consent Agreement with Perkins Cove Lobster.

Town Manager Fortier gave an overview of the agenda item. A business was determined by the Code Enforcement Officer to have been operating without a license for approximately 34 days.

The town ordinance calls for a \$100 per day up to \$2500 per day fine, this means that the fine could range from \$3400 to \$85,000. At a previous meeting the Select Board authorized the Town Manager and Code Enforcement Officer to negotiate with the business owner.

Mr. Fortier recommended to the Select Board a consent agreement with the total of \$4,000 as a fine to satisfy a violation and to bring Perkins Cove Lobster into good standing.

Selectman Winn stated that he felt the amount of the fine was excessive. He also asked if the business was in compliance now.

Selectman Barton stated that he had figured the fine at \$20,000. It's not a capricious amount; he stated that he had done his homework to derive at this number.

091515-03 Motion made by John Daley and second by David Barton to authorize the Town Manager and Code Enforcement Officer to enter into a Consent Agreement with the Perkins Cove Lobster as settled upon; approved 3-1, Winn in opposition.

10.0 MISCELLANEOUS BUSINESS - ORAL & WRITTEN COMMUNICATIONS - FOLLOW-UP

10.1 Select Board

Selectman Winn

- Stated that he had his first liaison meeting to the Senior Center, they do a lot of things there!

Chair Dailey

- Tomorrow evening there will be a workshop on the dog ordinance proposal at the Dunaway Community Center at 6:00pm.

11.0 ADJOURNMENT

Motion made by Robert Winn and second by David Barton to adjourn the meeting at 8:07pm; unanimous vote to adjourn.

Respectfully submitted,

Cheryl L. Emery, Administrative Assistant to the Town Manager