

Minutes of the Westmoreland Selectmen's Meeting
Thursday, November 17, 2016

BOARD MEMBERS PRESENT: Russ Austin, Jack Zeller, Clayton Stalker

1. The meeting was called to order at 6:00PM by Chairman Austin.
2. Approval of Minutes: November 3, 2016. A motion was made by Clayton Stalker, second by Jack Zeller to accept the minutes as printed. Motion passed 3-0.
3. Guests/Public Business:
 - A. Ernie Perham dropped off a draft drawing of changes that he would like to see done to the veterans monument on the town common. The proposal will be voted by the town.
 - B. Andy & Maryellen Russell distributed a packet of material (attached) in regard to the access to Reynolds Road located off River Road. Using *A Hard Road to Travel* (published by the NH Municipal Association) as a reference, Mr. Russell stated that he believes the private right-of-way on a portion of Reynolds Road can be used by the public because it has been used for more than 20 years. Mr. Russell contends that Reynolds Road was discontinued in error by the Selectmen, but Reynolds Road has always been a Class VI road. Jack Zeller stated that the matter will be given to the town attorney and added that the right thing will be done. Mr. Russell will be notified of the opinion of town council.
4. A motion was made by Russ Austin, second by Jack Zeller to enter into non-public session per RSA 91-A:3,II(d) at 6:25pm. Motion passed.
5. A motion was made by Russ Austin, second by Jack Zeller to seal the non-public session minutes and return to public session at 6:41pm. Motion passed.
6. Accounts Payable: A motion was made by Russ Austin, second by Jack Zeller to approve a manifest of \$108,050.55 for the highway department and \$8,725.92 for all other bills for a total of \$116,776.47. Motion passed 3-0.
7. Old Business:

Fire Department Building Committee: Selectmen are in the process of asking for volunteers to be on the committee. The Fire Department will also bring forth three names of people on the Fire Department to serve.
8. New Business:

Signature Approval was given for the following:
Intent to Cut Timber: R9-22, R10-7
Timber Tax Warrant: R14-61
Cemetery Deed
Petition & Pole License: Eversource Energy/Fairpoint
Equalization Certificate

 - A. Highway Truck Loan: The loan for the truck will be \$105,000. The Selectmen decided on a 3-year loan. The treasurer is checking with banks for interest rates.

- B. LCHIP Grant: Grant money is available yearly for historic buildings. The town administrator has met with two elevator companies regarding the possibility of installing an elevator in the town hall so the upstairs room can be used by the public. It currently does not meet the Americans with Disabilities Act. The Selectmen are in agreement that applying for the grant should proceed.
 - C. Aldrich Road turnaround: The Selectmen signed a letter to property owners Rolland and Elaine Hall stating that vehicles and other obstacles must be moved so that the town trucks can turnaround at the end of the road for plowing purposes.
 - D. Assessment Booklet: The Selectmen decided against printing and sending an assessment booklet showing values of all properties in town. The information is available in the Selectmen's office.
 - E. Charles Kathan (Earl Kathan's son) left a message for Russ Austin to contact him regarding the possibility of dedicating the shed at the Recycling Center to his father and also hanging a picture of Earl in the shed. Russ has left messages for Charles and will wait for him to call again.
 - F. Ron Fish, Recycling Center supervisor, reported to the Selectmen that after the demolition bin was emptied, someone got into the facility and dumped a large load of windows, doors, etc. in the bin. The lock was not broken. The lock will be changed.
9. Correspondence: *All correspondence is available for review in the Selectmen's office.*
Patricia Rodrigues & John Corduff: On Nov. 8, Ms. Rodrigues delivered a copy of a letter that she sent to the DES Legal Unit regarding an appeal of the After-the Fact Alteration of Terrain permit issued to George Graves.
10. The Selectmen adjourned the meeting at 7:35PM.

Respectfully submitted,

Jo Ann LaBarre
Town Administrator

BOARD OF SELECTMEN

Russ Austin, Chairman

Jack Zeller

Clayton R. Stalker

NEXT MEETING – Thursday, December 1, 2016, 6:00PM
MINUTES ARE INITIALLY POSTED AS UNAPPROVED
SIGNATURES BY SELECTMEN DENOTE APPROVAL OF
MINUTES

State Of New Hampshire
Town of Westmoreland Selectmen
Westmoreland NH Reynolds Road, River Road entrance status.

On Behalf of the town of Westmorland's Public use of Reynolds Road and Andy and Maryellen Russell

On September 29, 2016, the Westmoreland Selectmen correctly stated

"Russ Austin reported that a resident of town wanted to verify the status of Reynolds Road that begins at the Little Red School House and comes out on the River Road. Reynolds Road is a Class VI road, subject to gates and bars. There is a gate on the River Road end, but it is not locked. It is a non-maintained town road and is open to the public. Someone has put no trespassing signs up on the River Road end and they should not be there."

On October 20, 2016 the Westmoreland Selectmen incorrectly changed their previous decision stating: "Reynolds Road entrance: After further review, it was learned that the current entrance to Reynolds Road from the River Road is actually a right-of-way that goes across private property currently owned by David and Lauren Bressett (R1-5). The original entrance to Reynolds Road from River Road, which is a Class VI road, was washed out years ago and is impassable. A right-of-way was given by Donald Blood to New England Lumber Company in 1963 and has passed on to the current owner, 3R Realty, who is the only person(s) that has permission to cross on the private property. Anyone wanting to access Reynolds Road will have to use the Poocham Road entrance by the Red Schoolhouse."

1. The Selectman do not have authority to discontinue a class VI road, this can only be done by a town vote.
2. The Selectman cannot take away a public right of way without a vote by the town.
3. A deeded right of way to one land owner does not justify or limit the public's use on a public right of way.
4. The current or previous owners have allowed the use of Reynolds Road in its current location for more than the 20 years, required to make it a public right of way.
5. There are many towns people who have lived in the town of Westmoreland their whole life enjoying the public right of way on Reynolds road and will attest to its location and unrestricted use.
6. By restricting the Reynolds Road, River Road entrance, the Selectmen are overly burdening land owners by limiting their access to their land and could be held liable.
7. Even if a private owner restricts use of a public right of way after it has been allowed to be used for more than 20 years does not discontinue the public's right of way to travel on the road.
8. The Selectmen erred when they did not acknowledge the usage of Reynolds Road in its current location for more than 50 years. Thus creating a public right of way.
9. A public right of way can and will exists regardless of land ownership. See A Hard Road to Travel documentation in the below Appendix A:
10. There has been no discontinuance of Reynolds road and we kindly request that the Selectman reverse their previous decision and recognize their mistake.

The Law Favoring Highway Continuance

A well-established principle of law is that public highways should be preserved; once public rights of way are established, the rights of the public should last indefinitely, unless a formal public decision is made to discontinue them.

This chapter will cover the discontinuance of local highways. On the issue of state highway discontinuance, see Chapter 3. The Class VI designation itself reflects this policy by allowing a highway to remain in existence, even though there is no present public need to maintain it. Two other legal rules also reflect this "highway conservation" policy.

Although an owner of private property can lose it by 20 years of adverse possession by others (the principle sometimes called "squatter's rights"), this doctrine does not apply to public property, including highways. RSA 477:33 and 34. In *Williams v. Babcock*, 116 N.H. 819 (1976), the Court held that once a road had been established by 20 years public use (by prescription), its status was not changed by the fact that an abutting property owner subsequently barricaded it for more than 20 years. Thus, public rights, once acquired by prescription, cannot be lost by prescription. RSA 236:30 specifically provides that no person may acquire rights, as against the public, by enclosing or occupying any part of a highway for any length of time. See also *Windham v. Jubinville*, 92 N.H. 102 (1942).

THE PRESUMPTION AGAINST DISCONTINUANCE

Because the law recognizes a presumption against discontinuance, proving a discontinuance is a difficult proposition. In *Davenhall v. Cameron*, 116 N.H. 695, 697 (1976), the Court wrote, "Highway discontinuance is not favored in the law...and the burden is upon the party who asserts discontinuance to prove it by clear and satisfactory evidence." In the *Davenhall* case, there was circumstantial evidence that the road had ceased being used by the public, and certain deeds referred to the road as "old" or "discontinued," but this evidence was not sufficient to prove a discontinuance, in the absence of a formal vote of the town.

The mere fact that a highway has been physically abandoned, and trees have been allowed to grow in the right of way, has never been held to constitute a termination of the highway. *Thompson v. Major*, 58 N.H. 242 (1878). As the law stands today, the only legal consequence of nonuse and non-maintenance is to convert the highway to Class VI, and not to discontinue it. RSA 229:5, VII; *Glick v. Town of Ossipee*, 130 N.H. 643 (1988).

PROCEDURE

The complete discontinuance of a local highway (Class IV, V or VI) takes a vote of the legislative body. RSA 231:43. In towns, that means a vote of town meeting upon an article properly inserted in the warrant of the meeting. Action by the selectmen is not sufficient to discontinue a highway. *Marrone v. Hampton*, 123 N.H. 729 (1983). The best evidence of a past discontinuance is a vote recorded by the clerk in the town report.

Be aware that prior to 1945 the law required permission from a court, as well as the town vote, before certain highways could be discontinued. See *New London v. Davis*, 73 N.H. 72 (1904); *Williams v. Babcock*, 121 N.H. 185 (1981). This is no longer required. Presently, the only time a discontinuance requires court permission is when proceedings are pending in court against the town for neglect or refusal to lay out or repair that same highway. RSA 231:47. This historical perspective becomes important when researching the status of older roads.

Before a town may vote to discontinue a highway, written notice must be given to "all owners of property abutting such highway, at least 14 days prior to the vote of the town." RSA 231:43, II. Obviously, the selectmen will not know in advance whether the warrant article will pass, so notice must be given any time there is an article in the warrant calling for a highway discontinuance, regardless of how unlikely it is that the article will pass. Since the statute requires written notice to be sent to all abutting property owners, the best practice will be to research the registry of deeds immediately prior to sending out the notices to ensure that the town has an accurate abutters list.

Whenever a town votes to discontinue a highway that joins a highway in another town, the selectmen must notify the selectmen of that adjoining town, by registered mail within 15 days of the vote, that such discontinuance has taken place. RSA 231:44.

When drafting a warrant article to discontinue a highway, it is best to use words like "discontinue completely" or "discontinue absolutely." Never use words like "abandon," "close," "throw up" etc., because these words are not in the statute, and years from now there will be confusion over the intent of the warrant article. In fact, given the presumption against discontinuance, these other words are unlikely to achieve a complete discontinuance.

In *New London v. Davis*, 73 N.H. 72 (1904), the New Hampshire Supreme Court upheld a discontinuance that was conditioned upon a new highway being built. On the other hand, in *Cheshire Turnpike v. Stevens*, 10 N.H. 133 (1839), the Court ruled that a town could not discontinue a road while reserving the right to reopen it (although today this same result could be accomplished by making the highway

Class VI). In *Grossman v. Dunbarton*, 118 N.H. 519 (1978), an old discontinuance vote where the voters clearly intended, as a condition, to create a private way, was held to be an unconditional discontinuance. Therefore, the best approach is to either completely discontinue a highway or discontinue it subject to gates and bars. Do only one or the other, without conditions. Placing conditions on the discontinuance creates too great a legal risk that either the conditions will be declared invalid, or the discontinuance itself will be declared invalid.

Uninterrupted Use. Public use during the 20-year period must have been "continuous." That doesn't mean travelers must have been present the whole time. Indeed, travel may be "intermittent and of slight volume" (*Blake v. Hickey*, 93 N.H. 318 (1945)), especially when such infrequency is "characteristic of the type of road claimed." See *Leo Foundation v. State*, 117 N.H. 209 (1977), a case about a road to a swimming hole at a lake. But there must not have been any breaks long enough to suggest that people stayed away because the underlying "soil" owner was keeping them away. "Uninterrupted," in other words, means uninterrupted *by the owner*. Of course, if the owner's attempts to interrupt the use don't occur until after the 20-year period, that's too late to prevent the creation of a highway because an owner cannot acquire any adverse rights against the public once highway status has legally been established. *Windham v. Jubinville*, 92 N.H. 102 (1942). Also, see Chapter 4.

Definite Line of Travel. A public highway is not created by prescription across a parcel of land unless the route of public travel has a well-established consistency. Slight deviations from the path, however, do not defeat the running of the prescriptive period. *Weare v. Paquette*, 121 N.H. 653 (1981).

'Adversity.' To become a highway by prescription, public use must have been "adverse." This term means that the public who used the roadway claimed or believed that they had a right to do so and were not relying on the owner's permission. No actual written or oral declaration of adversity is required. *White Mt. Freezer Co. v. Levesque*, 99 N.H. 15 (1954). But the public's use must be open and obvious enough that the owner ought to have known a claim of right existed. *Arnold v. Williams*, 121 N.H. 333 (1981); *Wasson v. Nashua*, 85 N.H. 192 (1931). See also *Mahoney v. Town of Canterbury*, 150 N.H. 148 (2003) (property owners' assertion of claim that prior owners treated the road as private during 1800s actually supported town's position that continuous public use during that time was adverse); *Blagbrough v. Town of Wilton*, 145 N.H. 118 (2000) (nature of use must show that owner knew or ought to have known that the right was being exercised not in reliance upon his permission but without regard to his consent).

If public use of a roadway originally began with the permission of the owner, the burden shifts to the person claiming the prescription doctrine to show affirmative evidence that this permission was actually withdrawn or repudiated before the beginning of the claimed 20-year period. *Town of Warren v. Shortt*, 139 N.H. 240 (1994).

WHAT COUNTS AS EVIDENCE OF PUBLIC USE?

The following types of evidence, among others, have been held to support proof of prescription: authenticated photographs and the testimony of lifelong residents of a community (*Weare v. Paquette*, 121 N.H. 653 (1981), and *Mahoney v. Town of Canterbury*, 150 N.H. 148 (2003)); references to the road as a public highway in documents prepared during the 20-year prescriptive period (*Leo Foundation v. State*, 117 N.H. 209 (1981)); historic maps showing the road before or during the claimed period (*Williams v. Babcock*, 116 N.H. 819 (1976), and *Mahoney v. Town of Canterbury*, above); the existence of cellar holes for houses that seem to have had no other access (*Williams v. Babcock* above); and evidence of town maintenance during the period (*Catalano v. Town of Windham*, 133 N.H. 504 (1990)). Again, see the end of this chapter for a list of sources for highway information.

ROAD BOUNDARY DISPUTES: REESTABLISHMENT OF LINES

The selectmen are given authority by RSA 231:27 to "reestablish the boundary lines" of any local highway "which shall have become lost, uncertain, or doubtful" by following the procedure outlined in RSA 228:35. (The powers given to the commissioner of the Department of Transportation are exercised instead by the selectmen.) The process allows the selectmen to have a surveyor prepare a plan showing the boundaries where the town believes they originally were. Copies of the plan are sent by registered mail to all abutting owners, the Secretary of State and the town clerk. The boundaries shown on the plan then become the legal boundaries of the highway, but any owner can petition the superior court for damages within 60 days. The owner is entitled to a jury trial, but has the burden of showing that the boundaries were originally established in a different location. RSA 228:35.

The statute hasn't been cited in any New Hampshire Supreme Court case, but the Town of Stark used it successfully in reestablishing boundary lines of a road created by prescription in a case where the abutter had attempted to erect stout poles at the edge of the traveled way. *Joyce v. Town of Stark*, Coos Superior Court No. 88-E-62 (July 11, 1990).

CLASS VI

Class VI consists of "all other existing public ways." RSA 229:5, VII. It includes all local highways discontinued subject to gates and bars and all highways that have not been maintained and repaired by the town in suitable condition for travel for five successive years or more. RSA 229:5, VII. Chapter 8 of this book provides a detailed look at Class VI roads. It is important to recognize at the outset that Class VI highways are full public highways in every respect except maintenance. *King v. Town of Lyme*, 126 N.H. 279 (1985). This concept has been codified by the legislature in RSA 231:21-a. That statute grants municipalities the same regulatory authority over Class VI roads that it has over Class V roads regardless of how the road reached Class VI status. RSA 231:21-a also provides that all Class VI highways "shall be deemed subject to gates and bars," and any gates and bars maintained by private land owners cannot be erected so as to prevent or interfere with public use of the highway. The gates and bars must be capable of being opened and closed by users of the highway.