

TOWN OF DURHAM



Office of the First Selectman

P. O. Box H

Durham, Connecticut 06422

**BOARD OF SELECTMEN'S MEETING
in joint session with the
PLANNING AND ZONING COMMISSION**

February 2, 1989

The meeting was called to order at 7:01 p.m. by First Selectman Maryann P. Boord; Board of Selectmen members present: Francis E. Korn; Absent: Hugh A. Curley. Town Counsel Kenneth Antin was also present. A sign-up sheet is attached.

Discussion on several matters held jointly with the following Planning and Zoning Commission members: S. Kotowski, H. Robinson, L. Hinman, B. Curtis, G. Paganetti, A. Parmelee, P. Berten, G. Eames, and Town Planner G. Colegrove.

- 1) Discussion re D. Evensen's (ZEO) requests for petty cash fund and more timely payment of his mileage chits.
- 2) Consideration of proposed on-demand light at the post office/library and the possible realignment/change in traffic flow patterns. Midstate Regional Planning Agency will set up a traffic count at Maple Avenue/Town House Road/Library driveway.
- 3) Discussion with Town Counsel Kenneth Antin re the new road policy and the Board of Selectmen's role in it. The following is a letter from him stating his opinion.

In light of the David Road controversy and its settlement, I propose that the selectmen consider adopting the following clarifications to the town road policy:

I. Determination of Status of Road.

RECOMMENDATION #1 - That the Board of Selectmen hold no public hearings to determine whether any unimproved old road is part of a town highway. The Board of Selectmen should base their response to the Planning & Zoning Commission upon the TR-37 map and the Department of Transportation mileage charts that accompany the TR-37.

The Durham subdivision regulations define a lot as a plot or parcel of land with frontage on either (1) a state highway or approved town road as shown upon the TR-37 map or (2) a road built as part of a subdivision. When the planning & zoning commission has been uncertain whether the land for a proposed

subdivision fronts upon a town road, it has referred the question to the board of selectmen. If the road the subdivision fronts on is not clearly on the TR-37, the selectmen have held hearings to determine whether to add the road to the TR-37.

The TR-37 map depicts the improved and unimproved town roads which the town receives aid from the State Department of Transportation (DOT). For each such road, the DOT has a record of its length to the nearest hundredth of a mile. I suggest that the selectmen consult the TR-37 map and the DOT mileage chart to determine whether any old road as it runs by a proposed subdivision is part of an unimproved highway that the town has obligated itself to maintain. The function the board of selectmen would perform would be similar to that the planning & zoning commission or the zoning enforcement officer perform when they must determine whether a particular property falls within a certain zone on the zoning map.

By following this recommendation, the selectmen would accomplish the following: (1) They would advise the planning & zoning commission whether any plot or parcel of land fronts upon a town road shown on the TR-37 map; (2) they would not act in excess of their legal authority; and (3) they would avoid the expense and delay of legally inconclusive proceedings.

As the body duly charged with maintaining and repairing the town's highways; Connecticut General Statutes Secs. 13a-103 and 13a-107; and advising the State of Connecticut of the highways the town maintains; C.G.S. Secs. 13a-175b and 13a-175d; the selectmen can certainly determine whether a piece of land fronts on a road that they maintain. More than that they should not do. By themselves they have no authority to turn an unaccepted road into a town highway. The town meeting has that authority under C.G.S. Sec. 13a-48. By themselves they do not have full authority to discontinue a town highway. They share it with the town meeting under C.G.S. Sec. 13a-49. Neither do they have authority to abandon a town highway. Only the general public can abandon a town highway through disuse. Although the selectmen may believe a public highway has been abandoned through long disuse, their conclusion to that effect is legally inconclusive.

We may contrast the selectmen's conclusion that a road has been abandoned with their decision under C.G.S. Sec. 13a-39 defining the bounds of a lost or uncertain highway. If the selectmen follow the statutory procedure, their decision defining the lines and bounds of the highway has the force of law unless it is appealed to and modified by the superior court. By contrast, the conclusion that a highway has been abandoned by disuse has no binding legal effect. It is at best only a piece of evidence that a judge may consider in a suit to determine the status of the road.

One exception to this recommendation would be the case where the selectmen have good reason to believe that a proper statutory discontinuance took place for the road in question. If the selectmen have discontinued in writing any highway, and received the approval of the town meeting for that discontinuation, then when any applicant for subdivision approval claims the

discontinued road is still a public highway, the selectmen should clearly advise the planning & zoning commission that (1) not only is the road not on the TR-37 but (2) it is not on the TR-37 because it has been discontinued as a highway.

II. Response to Lawsuit Seeking Declaratory Judgment on the Status of an Old Road.

RECOMMENDATION #2. - That when the town is named a defendant in an action seeking a declaratory judgment on the status of an old road, it limit its active defense to (1) obtaining proof that the road was dedicated and accepted as a public highway and (2) presenting any available evidence (a) that the town has formally discontinued the highway and (2) about the length of time during which the town has not maintained the road as a highway.

Should the board of selectmen follow recommendation #1, the planning & zoning commission will often have no choice but to rule that the land in question does not front upon a road shown on the TR-37 map. The applicant who believes his land fronts on a public highway can then bring a declaratory judgment asking the superior court to determine the status of the road. As we have learned from the David Road lawsuit, the declaratory judgment must name the town and every owner abutting that portion of the alleged highway that the town refused to recognize.

Once sued, the town has three alternatives. It can ignore the lawsuit, take the lead in defending against it, or play a subordinate role in the defense.

I propose that the town leave the primary burden of the defense to those defendants who abut the road and believe it is not a highway. The town should limit its defense to an insistance upon receiving proof of the dedication and acceptance of the highway. Once this proof has been presented, town counsel can advise the town of its persuasiveness.

Once dedication and acceptance of the highway have been shown, the defendants would have the burden of showing that the highway has been discontinued or abandoned. The only instance when the town should carry the burden of the defense is when the town has good reason to believe that the highway was validly discontinued at a town meeting. The defense of abandonment through public disuse is one that more probably falls within the province of those who own property along the disputed road. The town can most suitably and readily present evidence from the public record: has it maintained the disputed area? has it formally discontinued the disputed road?

To sum up, should an applicant for subdivision approval along one of these disputed road bring an action for a declaratory judgment to determine the status of the road, the town should not

ignore the suit but neither should it take the primary role in defending against it. It should limit its defense to an insistence upon proof of the dedication and acceptance of the road and to presenting available evidence (a) that the town meeting formally discontinued the road as a highway and (b) that the town has not maintained the road. Other than that, it should leave the defense to the other defendants.

III. Alternatives to Declaratory Judgment Litigation Available to the Town when Dealing with Old Roads.

RECOMMENDATION #3 - When the town is named a defendant in a lawsuit seeking to declare the status of an old road, the board of selectmen should seriously consider whether to formally discontinue the old road. The road may be formally discontinued before or after the trial.

The selectmen may with the approval of the town meeting discontinue any highway that no longer serves the common convenience or necessity. C.G.S. Sec. 13a-49. It is probably easier to discontinue an ancient highway than prove it was never accepted or prove it has been abandoned by disuse. The fact that a road may be convenient and necessary to abutters, their families and a few neighbors does not prove that it is required by common convenience and necessity. Scutt vs. Town of Southbury, 55 Conn. 405 (1887).

In both key cases where the Connecticut Supreme Court defined the rights of abutting owners after a highway has been discontinued, the abutters had first appealed from the discontinuation of the highway and lost. In Cone vs. Waterford, 158 Conn. 276 (1969), the Cones succeeded in 1957 in getting the county commissioners to rule that the road running by their home was a public highway and should be repaired. Within a month after the county commissioners' ruling, the board of selectmen and the town meeting of Waterford discontinued the public highway. The Cones appealed from the discontinuance and lost. The trial court found that the road did not serve the common convenience and necessity even though it was the only access the Cones had to get to their property. The Cones did not appeal from the court decision upholding the discontinuance but instead successfully sued for damages from the total and permanent destruction of their access to the public highway system.

As I have previously explained, C.G.S. Sec. 13a-55 superseded Cone vs. Waterford. C.G.S. Sec. 13a-55 gives any property owner bounding a discontinued highway a right of way over it to the nearest or most accessible highway. Luf vs. Town of Southbury, 188 Conn. 336 (1982) decided that landowners abutting a discontinued highway could not claim damages from loss of their access to the public highway system because C.G.S. Sec. 13a-55 now preserved that right of access. But before they brought the Luf suit, the abutters had challenged the discontinuance of the road. Even though the entire road had been shown as a primary collector road in the town plan of development, and its use had been reaffirmed as late as two years before its discontinuance, the

Superior Court found that the common convenience and necessity did not require a continuance of the unimproved portion of the road. See also Doolittle vs. Town of Preston, 5 Conn. App. 448 (1985) in which the court found that the Town of Preston had validly discontinued roads in 1966 "before people began to build upon them as they were too expensive to maintain."

Of the dozen or so ancient and unmaintained roads that are similar to David Road, I believe it likely that most if not all of them no longer serve the common convenience and necessity even if they are technically still public highways. I conclude that the town would be within its rights to discontinue any of the ancient roads even after a court has ruled that it is a public highway. Once a public highway has been successfully discontinued, an abutter who seeks to develop land along it would bear the entire expense of improving the road to meet standards set by the subdivision regulations.

Let me emphasize that discontinuing a road does not mean the town will avoid all litigation over the status of the road. C.G. S. Sec. 13a-49 gives abutting owners the right to appeal to the superior court to overturn the discontinuance. But an appeal from the discontinuance of a public highway would be a less complicated lawsuit than a declaratory judgment over whether the road is a public highway. As the Scutt, Cone, Luf and Doolittle cases all show, it would also be a lawsuit that the abutting landowners would be unlikely to win.

RECOMMENDATION #4 - If the selectmen do not wish to discontinue an ancient road as a public highway, they should consider assessing abutting owners for improvements a town may make to the road.

Suppose the selectmen do not wish to discontinue the highway, or the town meeting does not approve the discontinuance, or a court on appeal finds that the road serves the common convenience and necessity. Even then the town is not without remedy for relief against the expense of improving the road to meet the demands of additional traffic. C.G.S. Sec. 13a-83 permits the selectmen to assess benefits accruing to any person by the layout, grading or alteration of any highway within the town. If the town must improve any ancient road to a level suitable for traffic to and from a subdivision or subdivisions, we recommend that the town assess abutting owners for the benefits that will accrue to them from the improvement of the road.

2-2-89.BSM

-6-

4) M. Boord explained the time frame in the delay in approval of the water and sewer agreements for Laurelwood and Woodland Manor.

Motion M. Boord, second F. Korn, that the Board of Selectmen accept in form and content the Laurelwood water and sewer agreement; 2 ayes.

Motion M. Boord, second F. Korn, that the Board of Selectmen accept in form and content the Woodland Manor water and sewer agreement; 2 ayes.

Discussion with Town Planner re Recycling Feasibility Study and proposed fee ordinance.

Discussion with Robert Melvin, Chairman, Conservation Commission re town's open space land.

Motion M. Boord at 8:40 p.m. to adjourn the joint meeting of the Board of Selectmen and Planning and Zoning Commission, second F. Korn; 2 ayes. Regular meeting of the Board of Selectmen resumed at 8:52 p.m.

Motion M. Boord to amend the Agenda of the Call to the upcoming Special Town Meeting for inclusion of additional items 1 and 2; second F. Korn; 2 ayes. (see Town Meeting 2-6-89.)

Motion M. Boord, second F. Korn, to approve the minutes of the following Board meetings: 11/30/88, 1/18/89, 1/19/89; 2 ayes.

Motion M. Boord that the Board of Selectmen move forward on the approval for the housing planning grant up to \$15,000, second F. Korn; 2 ayes.

Motion M. Boord, second F. Korn, to adjourn at 9:02 p.m.

dda
3-2-89

B/S mtg

Sign up Sheet
2/2/89

<u>Name</u>	<u>affiliation, etc</u>
Steve Schuman	P+Z
W. H. Schuman	P+Z
Fran Kane	P+Z
Chris Colegrove	Selectman
John D. Dwyer	FS
Gwen Bellassee	MRPA
Sam Antalile	P+Z
D. B. Leming	Unit. Union
Nick Terry	The Middletown Press
Robert A. Farnley	RESIDENT
NICK POTERANZ	RESIDENT
Ed Burz	RESIDENT
Kurt Bober	DEVELOPER - ITAGAHUM RD.
Patricia Bertin	Town Inspector
Bob Bescorn	RESIDENT.
Kenneth H. Antin	G.W.A., P+Z
Brian Curtis	?
Steven Kotowski	Town ATTYS OFFICE.
Valerie Harrod de	P+Z
Maia McManus	P+Z
Sam. Sumner	Librarian
	Attorney
	P+Z

TOWN OF DURHAM

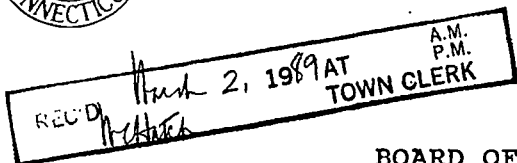
Office of the First Selectman

P. O. Box 428

Durham, Connecticut 06422

(203) 349-3625

Maryann P. Boord
First Selectman



BOARD OF SELECTMEN'S MEETING in joint session with the PLANNING AND ZONING COMMISSION

February 2, 1989

The meeting was called to order at 7:01 p.m. by First Selectman Maryann P. Boord; Board of Selectmen members present: Francis E. Korn; Absent: Hugh A. Curley. Town Counsel Kenneth Antin was also present. A signup sheet is attached.

Discussion on several matters held jointly with the following Planning and Zoning Commission members: S. Kotowski, H. Robinson, L. Hinman, B. Curtis, G. Paganetti, A. Parmelee, P. Berten, G. Eames, and Town Planner G. Colegrove.

- 1) Discussion re D. Evensen's (ZEO) requests for petty cash fund and more timely payment of his mileage chits.
- 2) Consideration of proposed on-demand light at the post office/library and the possible realignment/change in traffic flow patterns. Midstate Regional Planning Agency will set up a traffic count at Maple Avenue/Town House Road/Library driveway.
- 3) Discussion with Town Counsel Kenneth Antin re the new road policy and the Board of Selectmen's role in it.
- 4) M. Boord explained the time frame in the delay in approval of the water and sewer agreements for Laurelwood and Woodland Manor.

Motion M. Boord, second F. Korn, that the Board of Selectmen accept in form and content the Laurelwood water and sewer agreement; 2 ayes.

Motion M. Boord, second F. Korn, that the Board of Selectmen accept in form and content the Woodland Manor water and sewer agreement; 2 ayes.

Discussion with Town Planner re Recycling Feasibility Study.

Discussion with Robert Melvin, Chairman, Conservation Commission re town's open space land.

Motion M. Boord at 8:40 p.m. to adjourn the joint meeting of the Board of Selectmen and Planning and Zoning Commission, second F. Korn; 2 ayes. Regular meeting of the Board of Selectmen resumed at 8:52 p.m.

Motion M. Boord to amend the Agenda of the Call to the upcoming Special Town Meeting for inclusion of additional items 1 and 2; second F. Korn; 2 ayes. (see Town Meeting 2-6-89.)

Motion M. Boord, second F. Korn, to approve the minutes of the following Board meetings: 11/30/88, 1/18/89, 1/19/89; 2 ayes.

Motion M. Boord that the Board of Selectmen move forward on the approval for the housing planning grant up to \$15,000, second F. Korn; 2 ayes.

Motion M. Boord, second F. Korn, to adjourn at 9:02 p.m.

dda
3-2-89

B/S Mtg

Sign up Sheet
2/2/89

Name	Affiliation, etc
Steve Schuman	P+Z
John Schuman	P+Z
Fran Kane	P+Z
John Coleman	Selectman
John Coleman	FS
John Coleman	MRPA
John Coleman	P+Z
John Coleman	Quit. Union
John Coleman	The Middletown Press
John Coleman	RESIDENT
John Coleman	RESIDENT
John Coleman	RESIDENT
NICK POTERANZ	DEVELOPER - 1166 HAVEN RD.
Ed Burns	Town Inspector
Kurt Bober	RESIDENT
Patricia Bertin	S.W.A., P+Z
Bob Boscorn	?
O'Connell & Antin	TOWN ATTYS OFFICE.
Brian Curtis	P+Z
Steven Kotowski	P+Z
Valerie Harrod de	Librarian
Vincent Mc Manus	Attorney
Tom Sumner	P+Z