

**Zoning Board
Goshen, NH
Minutes of February 8, 2023
Goshen Town Hall**

Attendance (*quorum* = 3): Alicea Bursey (Chair), Ray Porter (Vice-Chair), Judy Martz and Bruce Nadeau

Guest (s): None

Meeting called to order at 7:00 pm.

Minute Review (January 11, 2023)

Ray Porter suggested an edit to page one under Variance and Special Exception. The Board agreed to the change.

Judy Martz motioned to accept the meeting minutes from January 11, 2023 'as amended'. Bruce Nadeau seconded the motion. All were in favor, minutes approved. Bruce Nadeau abstained.

Variance and Special Exception

The Board discussed the response that was given by the town's attorney in regards to the variance or special exception at the Caron's property at 163 East Mummary Road (email correspondence attached below).

The Board reviewed the responses and also looked into the definition of 'gates and bars' as referenced on the NHMA website, being defined as, "*Prior to 1903, a town could only discontinue a highway completely, meaning it was no longer a public way. Only after the state legislature enacted Laws of 1903, Chapter 14:1 could a town discontinue an 'open' highway and subject it to gates and bars. The term "gates and bars" is not expressly defined by statute. Nevertheless, the term historically refers to an owner's right to enclose premises for his or her own benefit—usually to confine livestock. The owner required public travelers to open and close the gates or bars as a condition to travel. The term 'gates and bars' first became associated with Class VI highways in 1925, when the legislature enacted Laws of 1925, Chapter 12:1, which provided that a town had no duty to maintain any highway that had been closed subject to gates and bars.*"

The Board reviewed the Caron's property record folder, the items submitted by Mr. Dombroski including the proposed plat and it was noted that the attorney suggested that the waiver to build on the class VI highway (that was signed by the Board of Selectmen) should be reviewed by the Planning Board. Melissa Salinardi will bring the comment regarding Planning Board weigh-in to the Planning Board for review during their next meeting on February 13, 2023.

After reviewing all the information and looking over the responses from the town's attorney, the Board determined they needed Mr. Dombroski to provide the date when the lot was created. Once that information is known, the Board will determine the next steps for the project.

Melissa Salinardi will reach out to Mr. Dombroski and ask him when the lot was created and make sure that information is presented in the application. No other actions were made at this time.

Member Discussion – Update

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Additional alternates and board members are needed for the Zoning Board of Adjustment. If anyone is interested in becoming a member, please stop by at a meeting on the second Wednesday of any month. This will remain a standing item until filled.

Other Business

- **Transfer Station:** Judy Martz mentioned that she would like to wait to present her findings to the Board of Selectmen until a later date. No discussion was had at this time.
- **Meeting Schedule:** Chair Bursey mentioned that the recording secretary would be unavailable for the months of April and May and she suggested to moderate the agenda during those months to accommodate her absence and to allow focus on the transfer station project. The Board agreed to only discuss current agenda items during those months.
- **Boat Storage (Messer Road):** Chair Bursey shared with the Board that the Board of Selectmen's administrative assistant had been notified that Mr. Grant, who had been given an approval for a home-based business by the Zoning Board in 2018, has not changed the property out of current use. Although the issue is not a Zoning Board matter, Chair Bursey agreed with Melissa Salinardi that the Board should be made aware as they were the ones to grant the approval. Melissa will share the information with the Board of Selectmen at their next meeting. No actions were made by the Zoning Board.
- **Property Question:** A question regarding whether there was a zoning map and table of use of each zoning area in Goshen was brought before the Board through email correspondence by Ms. Hanson. Chair Bursey stated that she had never seen a table and was unsure of what Ms. Hanson was referring to. The other Board members agreed with Chair Bursey and were unsure if a zoning map existed. Descriptions of zones and what can occur there are described in the Zoning and Building Regulations. Chair Bursey will reach out to Ms. Hanson and recommend her to look at the Zoning and Building Regulations. She will also ask if there is a more specific question that the Board can address.
- **Board Member Term Discussion:** Chair Bursey mentioned that she has placed her name in the running for the Board of Selectmen position and if she wins she will have to remove herself from the Zoning Board.
- **Broadband:** There are no new updates.
- The next regular meeting will be the second Wednesday of March – March 8, 2023.

Standing Items:

- Transfer Station
- The Board would like to review the areas where septic design guidelines are posted.
- Broadband Internet Update
- Bike Path Discussion – Pending
- Member Discussion – seeking alternates and full-time members (Ongoing)
- *Budgets will be due 12/1/2023 (2022 has been submitted)*
- *Annual report is due 1/1/2023 (Report has been submitted)*

Bruce Nadeau made a motion to adjourn. Judy Martz seconded the motion. All were in favor; motion carried.

The meeting adjourned at 8:08 pm.

Respectfully Submitted,
Melissa Salinardi
Recording Secretary

Attachments:

Email Correspondence with Town's Attorney:

Good morning,

Thank you for all the answers to my questions. That is what I needed to know, and I have some conclusions about the situation.

1. What kind of road is this? I believe it is most likely a private road at this point, assuming the following things are true:
 - a. This is the road that was the third road in Article 10 of the 1898 town meeting vote to "discontinue".
 - b. The general public did NOT use this road after it was discontinued for general travel for at least 20 years between 1898 and 1968 (because that could have caused it to pop back into existence as a Class VI public road by accident).
 - c. There is no indication anywhere that the intent of the 1898 vote was to discontinue the road subject to gates and bars. When there is confusion about whether a town intended to completely discontinue a public road or to just make it Class VI (subject to gates and bars, not maintained, but still public), courts will err on the side of NOT discontinuing a road completely. The warrant article didn't say "discontinue completely" but neither the article nor the meeting minutes indicate that there was any intent to keep it as a non-maintained public road, so I think it is more likely than not that a court would find it was discontinued completely.

If the road was completely discontinued in 1898 but there was a lot which needed the road for access, or if the lot was created sometime after 1898 but before the Town began regulating subdivisions, then a private easement for travel across this road likely exists because it would be necessary to reach the lot. (Please note that there is not much of a legal difference between a private road and an easement for travel, because they are essentially the same thing.)

2. Do they need a variance from the front setback requirement at all? I think they do. Assuming, as you have told me, that the 50-foot front setback from roads generally applies to both public and private roads, then I believe this road is a private road and the 50-foot setback would be required. As to whether you can grant such a variance, obviously that would depend on whether the applicant satisfies the 5 variance criteria. The fact that it is a pre-existing lot on a private road that likely was created before the Town regulated subdivisions, and has no other access to the road system, is probably the "special condition of the property" that can be used to analyze the unnecessary hardship factor.
3. Do the property owners need to sign and record the acknowledgement of limited Town liability to build on this lot? You didn't ask me this, but the answer is "yes," and they ***also*** need to get approval from the Board of Selectmen under RSA 674:41.
 - a. Section VI.D of the zoning ordinance says that a nonconforming lot which existed prior to 1970 and was rendered undersized by the Ordinance is exempt from the lot size and length of frontage requirements, so long as it meets the other setbacks AND provided that the lot has access and some frontage satisfying RSA 674:41.
 - b. This lot (I presume) existed prior to 1970 and was rendered nonconforming when the minimum 3-acre size requirement was enacted. Therefore, it has to meet the setback requirements (which a variance would handle), plus it must satisfy the access road requirements of RSA 674:41.

- c. Generally, RSA 674:41 requires every lot to have access directly from a Class V or better public road. This obviously is not the case here, so we have to look at what other kinds of roads might satisfy the access requirement and what steps are required.
- d. RSA 674:41, I(d) allows building on a lot whose access is a “private road,” so long as certain steps are followed. This part of the statute was added in 2004 to deal with private roads that existed prior to subdivision regulations being adopted by a town and which therefore never was approved by the Planning Board because, at the time, no such approval was required. I believe that this road likely falls into this category – a private road that was created in 1898 when the public road was discontinued and left this lot landlocked. Even if this lot was created later than 1898, so long as it was created before the Town regulated subdivisions, I think it fits this provision.
- e. The ZBA shouldn’t need to handle the waiver because it is supposed to be part of the approval process with the Board of Selectmen:
 - i. The owners will need to request approval from the Board of Selectmen ***before*** they can get a building permit.
 - ii. Selectmen submit the proposal to the Planning Board for review and comment.
 - iii. After receiving the PB comment, the Selectmen vote to grant or deny permission to build on the private road.
 - iv. If approved, the applicant must sign and record an acknowledgement of the limits of the Town’s liability and responsibility regarding the road (no Town maintenance, no Town liability for maintenance or damages, etc.).

Please let me know if there are follow-up questions or if you would like to discuss any aspect of this.

Regards,

Christine

C. Christine (Fillmore) Johnston

Attorney

603.792.7417 Direct

CJohnston@dwmlaw.com

670 N. Commercial Street, Suite 207, Manchester, NH 03101

800.727.1941 | 603.716.2899 Fax | dwmlaw.com

DrummondWoodsum
ATTORNEYS AT LAW

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From: Zoning Board <zba@goshennh.org>

Sent: Saturday, February 4, 2023 8:14 PM

To: C. Christine (Fillmore) Johnston <CJohnston@dwmlaw.com>

Cc: Zoning Board <zba@goshennh.org>

Subject: Re: Property Question

Zoning Board
Goshen, NH

February 8, 2023
FINAL

Good evening Ms. Johnston,

Response to your questions are below in caps.

I have some questions on this matter that I am hoping you can help with:

1. What exactly did the property owners apply for?

WE ARE TRYING TO DETERMINE IF THEY NEED TO APPLY FOR ANYTHING AT ALL. THE WISH TO BUILD A TWO BEDROOM STRUCTURE ON A NON-CONFIRMING LOT (LESS THAN 3 ACRES) ON A DISCONTINUED PORTION OF ROAD.

2. The Board's question seems to be whether the ZBA can grant a variance to allow less than the usual required 50-foot front setback under Section III.D.1 of the ordinance, is that correct?

YES, CAN WE GRANT THIS VARIANCE BUT ALSO IS A VARIANCE EVEN REQUIRED? WE ARE UNCLEAR AS TO WHAT THIS ROAD TYPE IS CONSIDER FOR INTERPRETATION OF ORDINANCES.

3. The minutes note that the lot is "grandfathered" – in what respect? Size? Frontage? Anything else?

ITS IS GRANDFATHERED WITH RESPECT TO SIZE AS IT IS LESS THAN 3 ACRES. IT HAS SUFFICIENT ROAD FRONTAGE FOR THE CURRENT ORDINANCE REQUIREMENTS.

4. Although I have some significant questions about how to interpret the various references in the ordinance to roads, streets, highways, and rights of way (because they are defined and used in inconsistent ways), ultimately I don't think those things will matter if this lot really is nonconforming, meaning it existed in its current size and configuration in March 1970, because Section VI.D says that nonconforming lots which existed as of 1970 are exempt from lot size and the length of frontage requirements so long as certain other requirements are met. Am I correct that this is the section at issue here?

WE BELIEVE SO.

On Feb 2, 2023, at 16:26, C. Christine (Fillmore) Johnston <CJohnston@dwmlaw.com> wrote:

Good afternoon,

I have some questions on this matter that I am hoping you can help with:

1. What exactly did the property owners apply for?
2. The Board's question seems to be whether the ZBA can grant a variance to allow less than the usual required 50-foot front setback under Section III.D.1 of the ordinance, is that correct?
3. The minutes note that the lot is "grandfathered" – in what respect? Size? Frontage? Anything else?
4. Although I have some significant questions about how to interpret the various references in the ordinance to roads, streets, highways, and rights of way (because they are defined and used in inconsistent ways), ultimately I don't think those things will matter if this lot really is nonconforming, meaning it existed in its current size and configuration in March 1970, because Section VI.D says that nonconforming lots which existed as of 1970 are exempt from lot size and the length of frontage requirements so long as certain other requirements are met. Am I correct that this is the section at issue here?

Any information you can provide on these questions will be very helpful.

Thank you,
Christine

C. Christine (Fillmore) Johnston

Attorney

603.792.7417 Direct

CJohnston@dwmlaw.com

670 N. Commercial Street, Suite 207, Manchester, NH 03101

800.727.1941 | 603.716.2899 Fax | dwmlaw.com



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From: zba@goshennh.org <zba@goshennh.org>

Sent: Thursday, January 26, 2023 11:38 AM

To: C. Christine (Fillmore) Johnston <CJohnston@dwmlaw.com>

Subject: RE: Property Question

Thank you for your quick response, the next Zoning Board meeting is Feb. 8th. It would be great if we could get you thoughts before that.

From: C. Christine (Fillmore) Johnston <CJohnston@dwmlaw.com>

Sent: Thursday, January 26, 2023 10:42 AM

To: zba@goshennh.org

Cc: [REDACTED]

Subject: RE: Property Question

Good morning, Ms. Salinardi,

I will certainly take a look and provide you with my thoughts. It may be a few days as I am wrapped up in a litigation filing deadline this week. What is your timeframe for this?

Regards,

Christine

C. Christine (Fillmore) Johnston

Attorney

603.792.7417 Direct

CJohnston@dwmlaw.com

Zoning Board
Goshen, NH

February 8, 2023
FINAL

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From: zba@goshennh.org <zba@goshennh.org>

Sent: Thursday, January 26, 2023 10:31 AM

To: C. Christine (Fillmore) Johnston <CJohnston@dwmlaw.com>

Cc: zba@goshennh.org; [REDACTED]

Subject: Property Question

Greetings, Ms. Fillmore,

I was given your email by our Town's Tax Collector, Cindy Williams, and she suggested that I reach out to you first. I am the recording secretary for the Goshen Zoning Board and I am reaching out on their behalf. I am hoping you or someone on your team can assist us with this question.

The Goshen Zoning Board is reviewing a property at Tax Map [202-015-000](#) for a proposed dwelling which is situated on the discontinued portion of East Mummery Road (#163). The Zoning Board is asking what type of access now exists (easement, right of way, private road, etc.). This section of the road was discontinued in 1898 by warrant article. If the current access turns out to be a highway right-of-way, the Board needs to know if they can grant the variance for a setback per our Town regulations. The property is land-locked and if the discontinued road is now a private road or right-of-way would a variance of the 50ft front setback be necessary?

After reviewing the article in the link below, the Board began to formulate the above question.

Subject: An Easement Exists Over a Discontinued Highway When the Easement is Reasonably Necessary for Access | New Hampshire Municipal Association

<https://www.nhmunicipal.org/court-updates/easement-exists-over-discontinued-highway-when-easement-reasonably-necessary-access>

I have attached the following items to assist you:

1. The Minutes from Dec. 14th which indicate some of the original questions that the Board wanted to address.
2. The draft Minutes from the most recent meeting, January 11, 2023.
3. The scanned original warrant article from 1898.
4. The scanned original Town minutes from 1898 where the discontinued road is voted upon.
5. The NHMA response (pasted below) to a question the Board had originally asked them.
6. State Right of Way Source Records which match the original town minutes confirming the discontinuation of the road.
7. The map of the land layout as it was in 1898.

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Hopefully all of this information will help you. Please let me know if you need anything else.

Thank you,
Melissa Salinardi
Goshen ZBA Recording Secretary

Email exchange with the NHMA:

From: Legal Inquiries <legalinquiries@nhmunicipal.org>

Date: January 5, 2023 at 11:46:30 EST

To: zba@goshennh.org

Subject: Goshen: Waivers to build on class VI

Hello Alicea,

As for your second question, I cannot advise you whether or not you should grant a variance for this individual. NHMA cannot provide a legal opinion on town specific ordinances and regulations and you would need to consult with the town attorney if there is confusion on how to interpret the towns zoning ordinance or what authority the ZBA has under the ordinance.

As for your first question, there is a legal distinction between a discontinued and a Class VI road, however in many circumstances these terms are used interchangeably even though they are very different. If a road was truly discontinued, that means the property was returned to the original property owner(s). In this instance, the public would have lost any right to travel on the road and it would have reverted to being completely private property. In most instances, when a road has been "discontinued" it means that the town no longer maintains the road, however the public still retains the right to travel on the road. In this situation, the road is still a Class VI road. To determine which situation you find yourselves in, you would need to find the warrant article presented to the town for a vote to discontinue the road and look at the actual language of the article.

The term right of way legally means a way in which the public has a right to travel over. Therefore, a Class VI road would be a right of way, a discontinued road would not be a right of way. Either way, in order to receive permission to build on a lot it must meet the requirements of RSA 674:41. Here are the sections of RSA 674:41 that apply to Class VI roads and private roads:

From and after the time when a planning board shall expressly have been granted the authority to approve or disapprove plats by a municipality, as described in RSA 674:35, no building shall be erected on any lot within any part of the municipality nor shall a building permit be issued for the erection of a building unless the street giving access to the lot upon which such building is proposed to be placed:

(c) Is a class VI highway, provided that:

- (1) The local governing body after review and comment by the planning board has voted to authorize the issuance of building permits for the erection of buildings on said class VI highway or a portion thereof; and
- (2) The municipality neither assumes responsibility for maintenance of said class VI highway nor liability for any damages resulting from the use thereof; and
- (3) Prior to the issuance of a building permit, the applicant shall produce evidence that notice of the limits of municipal responsibility and liability has been recorded in the county registry of deeds; or

(d) Is a private road, provided that:

- (1) The local governing body, after review and comment by the planning board, has voted to authorize the issuance of building permits for the erection of buildings on said private road or portion thereof; and
- (2) The municipality neither assumes responsibility for maintenance of said private roads nor

liability for any damages resulting from the use thereof; and
(3) Prior to the issuance of a building permit, the applicant shall produce evidence that notice of the limits of municipal responsibility and liability has been recorded in the county registry of deeds for the lot for which the building permit is sought

Jonathan E. Cowal, Esq.
Municipal Services Counsel
NH Municipal Association
25 Triangle Park Drive
Concord NH 03301
Tel: (603) 224-7447
Email: legalinquiries@nhmunicipal.org

From: Zoning Board <zba@goshennh.org>
Sent: Wednesday, January 4, 2023 12:47 PM
To: Legal Inquiries <legalinquiries@nhmunicipal.org>
Cc: Zoning Board <zba@goshennh.org>
Subject: Waivers to build on class VI

Good afternoon,

I'm Alicea Bursey, Chair to the Goshen Zoning Board.

We are in the preliminary discussions of an application that would put a small two-bedroom home on grandfathered, non-conforming lot. The lot is accessed by what shows on the plat as a discontinued road.

There are two questions we are researching regarding this project.

1. Is a discontinued road considered the same as a Class VI road in terms of the waiver to build? Or is it a right-of-way (see highlighted non-conforming land language from regulations below)? We are trying to determine if the [waiver to build](#) (674:41) applies here.
2. Can a variance be issued to reduce a front setback to 24ft which is below the town regulation and is located at the edge of the discontinued road?

Our ZBA regulations and ordinances are available [here](#).

Setback language:

B. BUILDING EXPANSIONS Any and all non-conforming buildings, whether commercial or otherwise, may be altered but may not exceed the height limits as defined in Section III.D.3. Any proposed structural expansion that could not conform to provisions of the Zoning Ordinance shall require a special exception from the Zoning Board of Adjustment. No expansions along rights-of- ways shall be approved which decrease setback requirements, or the existing setback if already below minimum. In expansion on undersize lots the Zoning Board of Adjustment may reduce side and rear setbacks to not less than twenty feet (20') from a lot line providing, however, that no structure shall be expanded closer than thirty-five feet (35') of an abutter's building.

D. NON-CONFORMING LAND Any lots that existed at the time that this ordinance was originally adopted on March 10, 1970 and that were rendered undersized by this ordinance for building purposes are exempt from the lot size requirement and the length of frontage requirement for residential or

commercial use provided that setback requirements are met, and provided that the lot has access and some frontage satisfying RSA 674:41. The Zoning Board of Adjustment may grant special exceptions to setback requirements on non-conforming lots; however, no building may be constructed within thirty-five feet (35') of an abutter's building, or within fifty feet (50') of a highway right-of-way. In no case shall the Zoning Board of Adjustment grant special exceptions to reduce side and rear setbacks to less than twenty feet (20') from any lot line. The Zoning Board of Adjustment may grant a special exception to reduce the setback between the right-of-way and a parking lot to less than seventy-five feet (75'), but not less than fifty feet (50'), following presentation of satisfactory evidence that public safety, noise, and visual impact will be adequately addressed.

Cheers,
Alicea