



Wellfleet Selectboard

Note: Executive Session Start Time of 5pm

The Wellfleet Selectboard will hold an Executive Session meeting on **Tuesday, February 25, 2020, at 5:00 p.m. at the Wellfleet Senior Center, 715 Old Kings Highway, Wellfleet, MA 02667**. *It is anticipated that the meeting will be recorded by the Town. Anyone else desiring to record the meeting may do so only after notifying the chair and may not interfere with the conduct of the meeting in doing so.*

- I. **Executive session** – pursuant to G.L.c. 30A, s21(a)
 - (3) To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and the chair so declares.
 - a. Wellfleet Employees Association, Units A, B & C
 - (6) To consider the purchase, exchange, lease or value of real estate, the Chair has determined that (1) an open session will have a detrimental effect on the negating position of the Town, and (2) this agenda item was not reasonable anticipated 48 hours prior to the meeting on the negotiating position of the public body.
 - a. High Toss Road
 - I. Approval of Executive Session Meeting Minutes – November 26, 2019.
 - II. Adjournment Executive Session and move into open meeting.



BOARD OF SELECTMEN

AGENDA ACTION REQUEST
Meeting Date: February 25, 2020

EXECUTIVE SESSION

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| REQUESTED BY: | Town Administrator |
| DESIRED ACTION: | Executive session – pursuant to G.L.c. 30A, s21 |
| PROPOSED MOTION: | <p>I move to open the meeting with announcements, open session, and public comment at 5:00 pm.</p> <ul style="list-style-type: none">• Roll Call Vote <p>I move close announcements, open session, and public comment and go into Executive Session, pursuant to G.L.c. 30A, s21 (3): To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and the chair so declares.</p> <p>a) Wellfleet Employees Association, Units A, B & C</p> <p>(6) To consider the purchase, exchange, lease or value of real estate, the Chair has determined that (1) an open session will have a detrimental effect on the negating position of the Town, and (2) this agenda item was not reasonable anticipated 48 hours prior to the meeting on the negotiating position of the public body.</p> <p>a. High Toss Road</p> <p>I. Approval of Executive Session Meeting Minutes – November 26, 2019.</p> <ul style="list-style-type: none">• Roll Call Vote |
| VOTED: | <p>Reinhart _____ Wilson _____ Carlson _____</p> <p>Bacon _____ Houk _____</p> |



BOARD OF SELECTMEN

AGENDA ACTION REQUEST
Meeting Date: February 25, 2020

EXECUTIVE SESSION

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| REQUESTED BY: | Town Administrator |
| DESIRED ACTION: | Executive session – pursuant to G.L.c. 30A, s21 |
| PROPOSED MOTION: | <p>(3) To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and the chair so declares.</p> <p>a) Wellfleet Employees Association, Units A, B & C</p> <p>I move to approve the Town Administrator’s recommendations for the Union Contract for the Wellfleet Employee Association, Units A, B, & C.</p> |
| VOTED: | <p>Reinhart____ Wilson _____ Carlson _____</p> <p>Bacon _____ Houk _____</p> |



BOARD OF SELECTMEN

AGENDA ACTION REQUEST
Meeting Date: February 25, 2020

EXECUTIVE SESSION

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|-------------------------|---|
| REQUESTED BY: | Town Administrator |
| DESIRED ACTION: | Executive session – pursuant to G.L.c. 30A, s21 (6) To consider the purchase, exchange, lease or value of real estate, the Chair has determined that (1) an open session will have a detrimental effect on the negotiating position of the Town, and (2) this agenda item was not reasonable anticipated 48 hours prior to the meeting on the negotiating position of the public body. a. High Toss Road |
| PROPOSED MOTION: | |
| VOTED: | Reinhart ____ Wilson ____ Carlson ____ Bacon ____ Houk ____ |

January ____, 2020

Katharine Lord Klein
kklein@k-plaw.com

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EXECUTIVE SESSION MATERIAL

Hon. Janet Reinhart and
Members of the Selectboard
Wellfleet Town Hall
300 Main Street
Wellfleet, MA 02667

Re: High Toss Road

Dear Members of the Selectboard:

You have requested an opinion regarding the status of High Toss Road, a dirt road with an approximately 15 foot wide traveled surface that commences at its intersection with Pole Dike Road, and meanders, for approximately one mile, southwesterly, southerly and then westerly to Duck Harbor Road, where it terminates. For the last 1000 feet or so, starting at its intersection with Rainbow Lane (also known as Way 672), it becomes an approximately 10 foot wide rough dirt road with potholes that flood, and then crosses a culvert just before intersecting with Duck Harbor Road.¹ High Toss Road serves a few houses on Rainbow Lane, as well several lots on Hopkins Drive, which is a subdivision road that extends to Old Chequessett Neck Road. Although High Toss Road is maintained by the Town, it is not included on the Town list of public ways.

This opinion arises in connection with the Herring River Restoration project (the "Project"), and has been requested by the Herring River Restoration Committee. In order for High Toss Road to remain passable when the gates at the new Chequessett Neck Road tide control structure are raised, the road must be elevated above the design high water elevation used by the Project, as measured during the storm of record, being the Blizzard of 1978. In order for the Project to apply for state and federal permits, and receive federal construction money to elevate High Toss Road, it must be determined what party(ies) has control over High Toss Road. Specifically, the question is whether High Toss Road is a public way in the Town of Wellfleet.

¹ The Wellfleet Selectboard voted to _____ the portion of High Toss Road between Rainbow Lane and Duck Harbor Road at its meeting of _____.

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Wellfleet Selectboard
January ___, 2020
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In my opinion, the evidence is inconclusive as to whether High Toss Road is a Town road.

Status of High Toss Road

There are three ways to establish that a road is public, i.e., a road which the Town has a duty to maintain free from defects. These are: (1) a laying out by public authority in the manner prescribed by statute (for example, G.L. c. 82, §§1-32); (2) prescription; and (3) dedication, prior to 1846.

There is evidence that a portion of the High Toss Road was laid out, commencing at a point approximately 200 feet easterly of Rainbow Lane, running westerly to Duck Harbor Lane, by virtue of a layout in 1847. A preliminary survey by Outermost Land Survey, Inc. of the description in the 1847 layout does not, however, coincide precisely with the location of High Toss Road. I have not been able to locate evidence of a layout of the eastern portion of the road.

In order to establish that a public way has been created by prescription, there must be a showing of actual public use, general, uninterrupted, and continuing for the prescriptive period. In addition, there must be a showing that the general public used the way as a public right, and that this use exists separately from use by those who have a permissive right to travel over a private way. Fenn v. Middleborough, 7 Mass.App.Ct. 80, 84 (1979). Mere use by persons who own land along the way is not sufficient to establish a public way by prescriptive use. Carmel v. Baillargeon, 21 Mass.App.Ct. 426, 430 (1986). There is not sufficient evidence, in my opinion, that a Town way has been created public use, adverse to those persons with property adjacent to High Toss Road.

Finally, it cannot be said with certainty that the road was dedicated as a public way, which requires, prior to 1846, a showing of a deliberate, unequivocal intent by the owner of the underlying fee to abandon the property to public use and, in addition, of the assent and acquiescence by the public authorities to accept the road. Loriol v. Keene, 343 Mass. 358 (1961); Hayden v. Stone, 112 Mass. 346 (1873).

Options

Assuming the Town desires to cooperate with the Herring River Restoration Committee, and specifically claim ownership of all or a portion of High Toss Road, so that federal funds may be awarded to elevate the height of the road so it remains passable when the tide control structure raises the water level, the Town, in my opinion, has two options. These are:

1. Assert that High Toss Road is currently a public way; or

2. Proceed to layout and accept High Toss Road as a public road.

Although it has not been conclusively established that High Toss Road is a public way, there is a credible argument that the road is public, in light of the length of time the road has existed (since ____ for the western portion, and since sometime between 1848 and 1938 for the eastern portion), the fact that the Town has maintained the road, and the public has used the road, at least to some extent. If the Town does take this position, in my further opinion, the Town's exposure is minimal as, if there is a challenge, the Town could then proceed to establish High Toss Road as a public way by the statutory procedures, discussed below.

The Town may layout and accept High Toss Road as a public way, pursuant to G.L. c. 82, §§21 – 24. The Selectboard would, after laying out the road, put an article on the Town Meeting warrant for the acceptance of all or a portion of High Toss Road.² The Town would seek to obtain waivers of appraisal and damages from the ten or so owners abutting the road on the south. The National Park Service, which owns the land on the north side of the road, has indicated it will not challenge the layout and acceptance of the way as a public road. In the event one or more of the private landowners to the south is unwilling to execute a waiver, the Town could exercise its power of eminent domain, under Chapter 79. The Town would obtain an appraisal of the damages sustained by the property owners, which, arguably, is zero or nominal, in that the road already exists, and, accordingly, the property owners have not incurred damages.

Raising the Elevation of High Toss Road

An ancillary question is whether the Town has the right to raise the elevation of High Toss Road so it will be passable once the Chequessett Neck tide control project is implemented. In my opinion, the Town has the right to elevate a public road in order to improve the way, particularly where the way would otherwise be impassable or useless. See Guillet v. Livernois, 297 Mass. 337, 340 (1937) (an abutter entitled to use a private way has a right to make reasonable repairs and improvements, subject to the rights of others); Post v. McHugh, 76 Mass.App.Ct. 200, 206 (2009) (where an easement or other property right is created, every right necessary for its enjoyment is included by implication). It is my understanding that the elevation of High Toss Road will benefit the abutters thereto, as the road would otherwise be submerged, and no property that currently has the ability to access the road would be prejudiced by the raising of the height of the road. Assuming High Toss Road is determined to be a public way, or the Town takes further action to confirm it is a Town road, in my opinion, the Town may raise the height of the road to prevent it from being submerged by the water from the Chequessett Neck project.

² It is my understanding that the Herring River Restoration Committee has not yet determined whether to elevate High Toss Road from Rainbow Lane to Hopkins Drive, or all the way east, to where High Toss Road intersects with Pole Dike Road.

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Conclusion

I recommend that the Town proceed to layout and accept High Toss Road, pursuant to G.L. c. 82, §§21 - 24, given the genuine concerns that High Toss Road is not currently a public way. My understanding is that a survey of the road could be generated, at no or minimal cost, by Outermost Land Survey – which survey could be used for an acceptance plan. It does appear that one or two abutters, opposed to the Project, will not execute waivers. The Town would exercise its power of eminent domain, under Chapter 79. In my opinion, the Town's exposure for damages is minimal, based on the nominal damages that would be incurred by these property owners, as discussed above.

Please do not hesitate to contact me with questions.

Very truly yours,

Katharine Lord Klein

KLK/jsh

707649/WELL/0173



BOARD OF SELECTMEN

AGENDA ACTION REQUEST
Meeting Date: February 25, 2020

EXECUTIVE SESSION

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| REQUESTED BY: | Town Administrator |
| DESIRED ACTION: | Approval of Minutes from Prior Executive Session Meetings |
| PROPOSED MOTION: | I move to approve and release the minutes of November 26, 2019 as printed. |
| VOTED: | Reinhart ____ Wilson ____ Carlson ____ Bacon ____ Houk ____ |

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| REQUESTED BY: | Chair |
| DESIRED ACTION: | Adjourn Executive Session and move into open meeting |
| PROPOSED MOTION: | I move to adjourn Executive Session and move into open meeting. |
| VOTED: | Reinhart ____ Wilson ____ Carlson ____ Bacon ____ Houk ____ |

