

Barbara Campbell_____

John Allen_____

Frank DiFruscio_____

**Board Of Selectmen Meeting
September 28th, 2021
UNOFFICIAL UNTIL APPROVED**

Present: Barbara Campbell, Chairman; John Allen, Selectman, Frank DiFruscio, Selectman

Attendees: Town Administrator Assistant Julie Atwell, Town Administrative Assistant Julie Hoyt, Building Inspector Kevin Bennett, Town Engineer Burr Phillips, Videographer Hank Benesh, Eileen Honen, Dotti Aiello, Frank Benesh, Anne Pillion, Ellen Chandler, Chris Bridge, Jim and Claire Lewkowicz, Jill Edelmann, Ron Kleiner, Steve Langevin

1. Meeting called to order at 3:30 P.M.
2. Chairman Campbell led the attendees in reciting the Pledge of Allegiance.
3. **Approval of Minutes:** Minutes from the September 14th meeting were reviewed. **Selectman DiFruscio moved to approve the minutes, seconded by Selectman Allen. Motion approved unanimously.**
4. **Valley Cross Road Bridge:** Chairman Campbell summarized the background of the Valley Cross Road Bridge project. Jill Edelmann, Cultural Resource Manager with the New Hampshire Department of Transportation (NHDOT), Ron Kleiner, Bridge Engineer with NHDOT, and Steve Langevin with GPI attended remotely via Zoom, and were recognized to address issues regarding truss mitigation and blueberry preservation.
Jill gave detailed information about preservation of the bridge trusses and the respective associated costs and responsibilities of keeping the trusses for the new bridge or removing and preserving them elsewhere. Chairman Campbell voiced her concerns about the potential costs to the Town of removing, disposing of, and/or preserving the trusses. She asked if, supposing an interested party(ies) stated their desire to preserve the trusses themselves, said interested party(ies) would be able to incur the full cost of the preservation and spare the Town the expense. Ellen Chandler, from the Jackson Ski Touring Foundation (JSTF), offered to store the

trusses on a short-term basis during the bridge's construction. Steve clarified that some level of mitigation would be necessary for the Town to take advantage of state funding. Chairman Campbell requested Steve, Burr Phillips, and Anne Pillion, from the Jackson Historical Society, to review bridge designs, determine their respective costs, and determine if other feasible ideas to mitigate and store the trusses elsewhere in town existed. Lastly, Jill mentioned that both the Division of Historical Resources and Corp of Engineers would need to be informed if the Town planned to restore the trusses anywhere but on the bridge.

The Board also discussed the presence of rare dwarf blueberry bushes along the existing wing wall on the northeast side of the bridge, near to a utility pole. The bushes would need to be temporarily relocated and tended to preserve them, due to their rarity. Burr Phillips stated his intent to contact the Connors family, who owns the abutting property, to make them aware of the bushes.

5. Update on Action Items:

- a. Benesh Driveway Permit: The Board was asked to reconsider their previous reconsideration for the Benesh driveway permit during the September 14th meeting, thereby returning the decision to a denial of the permit. Chairman Campbell and Selectman Allen were against the new request for reconsideration. Selectman DiFruscio stated he would stand by his dissent to the first reconsideration but did not dissent to denying the new reconsideration. **Chairman Campbell moved to deny the reconsideration of the September 14th reconsideration of the Benesh driveway permit, seconded by Selectman Allen. Motion approved unanimously.**

Chairman Campbell stated the Board had received a number of letters from members of the community regarding the Board's recent decisions on the Benesh driveway permit (see Addendums A, B, C, D). She continued that the Board had carefully considered the points made in the letters and had reviewed several legal opinions and received legal advice from the town attorney before making their decision.

6. For Selectman Discussions and/or Motions:

- a. Gray's Inn Garage: Chairman Campbell had appointed Selectman DiFruscio to coordinate with road agent Pat Kelley, Fire Chief Jay Henry, and other interested parties in efforts to clean up and organize the contents of the Gray's Inn garage. No further updates were available at time of meeting.
- b. Public Parking: The Board discussed a request from Dotti Arello to hold a Zumba class in the public parking lot near the Public Library. There were no concerns about nor opposition to the request, but the Board requested that Dotti complete the associated access forms and follow the necessary process..

- c. Trustees of the Trust Funds - Withdrawal Request: The Board considered a request for withdrawal of \$130,000 from the Highway Road Reconstruction Capital Reserve Fund 0064 (invoice #3386 (dated September 1st, 2021) for Central Asphalt Paving Co., LLC). **Selectman Allen moved to approve the request, seconded by Selectman DiFruscio. Motion approved unanimously.**

7. Short-Term Rentals (STRs):

- a. New: No new applications were received for this meeting.
- b. Pending:
 - i. Carter Notch Inn: The owners of Carter Notch Inn refused to apply for a Conditional Use Permit. The Board was advised by legal counsel to file a notice of violation and consult with an attorney to take the owners to court. After some discussion, the Board decided to continue discussion to the next meeting and receive further clarification from the town attorney.
 - ii. Zerveskes, Troy and Kelly - 30 Red Barn Road: Because STR applications with online advertisement pending approval had been approved at the September 14th meeting, Chairman Campbell called for a motion to decide on the application for 30 Red Barn Road. **Selectman DiFruscio moved to approve the application, seconded by Selectman Allen. Motion approved unanimously.**
 - iii. O'Brien - 7 Hurlin Drive: No updates were available at time of meeting.
- c. Complaints: No new complaints were received for this meeting.

8. Upcoming Meetings: The Board confirmed the following dates and times for their upcoming meetings. Chairman Campbell stated her intent to set up Zoom sessions to allow for optional remote attendance at the next meeting, with further use of Zoom to be determined at later meetings.

- a. October 12th at 3:30 P.M.
- b. October 26th at 3:30 P.M.

9. Public Comment: Claire Lewkowicz was recognized to voice her disappointment with the Board. She stated her opinion that, as gatekeepers of the Town, the Selectmen were not protecting the Town's natural and open spaces.

10. Other Business: **Selectman Allen moved to adjourn the meeting, seconded by Selectman DiFruscio. Motion approved unanimously.**

Meeting adjourned at 4:29 P.M.

Respectfully submitted by Will Reisig

Addendum A: Letter to Board of Selectmen from James and Claire Lewkowicz re: Motion for Rehearing Regarding the Benesh Driveway Application RSA 677

“Dear Ms. Campbell and Messrs. DiFruscio and Allen:

We are requesting a rehearing regarding the Beneshes’s driveway application as Mr. Eggleton, the Beneshes’s attorney, in his second letter repeatedly stated that Lot R08-11-D is “Open Space” (See his footnote 1). Even Mr. Benesh has stated it is “Open Space” in meetings with both the Planning Board and Board of Selectmen (Board). Therefore, all parties agree that Lot R08-11-D is “Open Space” and, therefore, per Town regulations no construction can occur on Lot R08-11-D.

Mr. Eggleton then goes on to assert that the Board can only approve the specs written in the driveway application, but must ignore the actual driveway location. Nothing could be further from the truth. The driveway location is an integral part of the application and it cannot be ignored; it must be considered. A simple analogy demonstrates the folly of Mr. Eggleton’s premise.¹

It is also irrelevant if the driveway permit meets all of the application requirements such as proper property ownership and proper recording because the easement was granted on land that is designated by the Town as “Open Space”. To reiterate, no construction is allowed on “Open Space” land, regardless of the validity of any easement.

The final decision that the Board comes to regarding this matter has implications far greater than the Beneshes’s driveway application. The Board initially voted unanimously to deny the driveway permit. But reversing its own earlier unanimous decision sends a disturbing message for the residents of Jackson. It calls into question the Board’s willingness and ability to enforce the Town of Jackson’s own regulations. Land that Jackson residents believed to be protected may, in fact, not be.

One other piece of new information is that the Beneshes’s have had their lot surveyed. When we asked the surveyor why he was surveying, he said it was to mark lot lines. Apparently the Beneshes’s plan to subdivide their 4+ acre lot into two lots but require a new driveway to provide access to the subdivided lot. So, it appears that the need for the easement and driveway was not a safety issue.

¹ For example, a builder could apply for a Jackson building permit that requires a site plan describing the location of the building (exactly the same as a driveway application.) Then after the building permit is approved, according to Eggleton’s scheme, the builder could then construct the building in whatever location he desired. If the Town objected, citing the Town regulated setbacks, the builder could simply assert that the precedent had been established that driveway and building permits have nothing to do with where either the driveway or the building location. That is what the Beneshes’s attorney wants to Board to believe. His premise is entirely contrived and indefensible.

In conclusion, we urge the Board to carefully review the actual facts in this matter and ignore the irrelevant and erroneous information provided to them.

We thank you for your time and effort.

Respectfully,

Jim and Claire Lewkowicz”

Appendix B: Letter to Board of Selectmen from Peter B. Schoch re: Benesh Driveway Application, Lot R08-11-D

“Dear Ms. Campbell, Mr. Allen, and Mr. DiFruscio,

Thank you for agreeing to take another look at the referenced application, which first was denied by the Selectboard’s unanimous vote, and then subsequently approved by 2-1 vote. I appreciate the opportunity to add these additional thoughts for your consideration.

The Selectboard’s sudden reversal seemed to follow quickly after receipt of the letter (dated 3 September 2021) from Jeremy Eggleton, a litigation attorney who represents the applicants, so my comments are directed toward that letter. Although I’m sure Mr. Eggleton gets high marks for aggressive advocacy in trial court, the issue at hand is more straightforward: should the Town permit a driveway be built across Open Space? While the arguments in Mr. Eggleton are superficially plausible, and possibly attractive under cloud of lawsuit, they are actually wrong and should be rejected.

False: given that the owner, Ellis River Village Association (ERVA), only built 14 of 16 approved dwelling units, it should be allowed to build a driveway across designated Open Space. The fact is that the subdivision approval for 16 units was specifically conditioned on Lot R08-11-D being set aside from development as Open Space. In any case, the current permit application is not to allow ERVA to build the missing 2 units. Even if it was, those 2 units would need to be built in the cluster where the other 14 units exist - not on the small parcel that was promised by ERVA to be preserved as Open Space.

False: since ERVA has the right to build on land (which was promised to the Town as Open Space), ERVA can grant an easement to anyone to do the same. Of course this would be true if the premise were correct - that ERVA had the right to do as it pleases with Open Space. But ERVA does not have that right (see above) and, therefore, ERVA cannot legally grant to anyone else a right that it does not have. Under our common law, this principle is known by its Latin name, *nemo dat quod non habet*, meaning (roughly) that one cannot transfer more rights than one has. It is the same rule of law that denies me ownership of stolen property that I might purchase from a scoundrel. The applicant’s easement is invalid because ERVA itself has no right to build a driveway on Open Space and, accordingly, ERVA has no right to grant another an easement to do so.

False: the “sole basis” by which the Town may review the driveway permit application is restricted to the face of the application, and the Town cannot consider any applicable land use regulations because the land is private property. This position seems spectacularly naive in light of land use regulations that have existed and been supported by court

decisions in the United States for 100+ years. While property may be owned by private individuals, our social compact has come to mean that private property rights should be and are subject to reasonable restrictions on the development and use of land. For example, I could probably get a permit to build: a McDonald's restaurant, but not in a neighborhood zoned for single-family homes, or a parking lot, but not in the middle of wetlands. The same is true for a driveway applications - it should not be built on protected Open Space (especially when 4 acres of other options exist).

False: the title deed for the lot in question does not detail an Open Space restriction, therefore no restriction exists and the lot cannot be subject to any of Jackson's Open Space regulations. Maybe you have a different experience, but I have never owned any property where the deed recited all possible local regulations that might permit or restrict my personal rights to develop and use that property. Government regulations - local, state, or federal - are not required to be recorded in deeds to be effective. This is for good reason, as Mr. Eggleton reminds us in his letter, because regulations can change over time.

False: the Town's regulations for Open Space (cited by Mr. Eggleton, Section 9.07 of the subdivision regulations) are only aspirational, not binding, and should be ignored because they could be changed at any time. Actually, these regulations are binding, not suggestions, and unless I'm mistaken, have not been revoked or modified. Until they are changed, the Town is obligated to enforce these requirements as currently written. Else, what other purpose was intended when the regulations were enacted?

I urge you to reject this application. I understand that denial could result in the real (and possibly threatened) risk of litigation. But is that the benchmark by which Jackson should be governed? I value your service to the Town, and also would like to remind you that your obligations as Jackson's leaders are as stewards for every citizen.

Respectfully

Peter B. Schoch"

Addendum C: Letter to Board of Selectmen from Kate Schoch re: Benesh Driveway Application, Lot R08-11-A and Lot R08-11-D, RSA 677

“Dear Ms. Campbell, Mr. Allen, and Mr. DiFruscio,

On September 7, 2021, the town selectman voted unanimously to deny the proposed driveway permit. I assume the board wanted to both prevent irreparable harm to the open space and to prevent setting a precedent of making open space available to the whims of individuals.

I was shocked, that after receiving a threatening letter from a lawyer, two of the three Selectmen, reversed their decision. Only one stood up for what was right. I understand that the threat of a lawsuit is anxiety provoking. But voting against what you know to be right and shirking your responsibility to the town’s provisions regarding open space, leaves the town more vulnerable. Not protecting open space is also much more detrimental to our community.

The lawyer’s argument that the Selectmen's job was to merely to assess the validity of the driveway permit is false. It is the board of selectmen's duty to enforce the town’s regulations regarding open space. As clearly stated on the Jackson town website “The Board is also responsible for enforcing the provisions of the Zoning Ordinances.”

You are our gatekeepers. We rely on the steadfastness of your judgement. If not the town Selectman, who will protect the land? How do we protect our natural spaces if our Selectmen do not enforce the town’s legitimate rules? Should we allow bullies to change the town as we know it, for their own personal gain?

I compel the board to re-evaluate the proposed driveway permit, and to perform one of their most important responsibilities, and enforce the town regulations regarding open space by denying this driveway permit.

Sincerely,

Kate Schoch”

Appendix D: Letter to Board of Selectmen from Chris Bridge re: Benesh Driveway Application, Lot R08-11-A and Lot R08-11-D, RSA 677

“Dear Ms. Campbell, Mr. Allen, and Mr. DiFruscio,

I’m writing to ask that you reconsider your decision made in the September 14th meeting of the Board of Selectmen to grant the driveway permit to Frank and Martha Benesh. I do not believe you considered all the relevant facts affecting the decision to grant the permit, and instead were reacting to the September 3rd, 2021 letter sent by Mr. Eggleton, the Benesh’s Attorney.

In the September 14th meeting, Mr. Allen and Ms. Campbell mentioned attorney Eggleton’s letter, in particular referencing a passage where attorney Eggleton argues that the Board of Selectmen can only judge the application on its merits, e.g. what is written on the application itself. Having read attorney Eggleton’s letter, I notice that attorney Eggleton doesn’t quote any case law in this determination, therefore this viewpoint can only be interpreted as *his personal opinion*. I’m certain if there was existing case law, the attorney would have quoted from the case law supporting his opinion. As we all agree, there are many more issues with this driveway proposal that are not on the permit.

Attorney Eggleton’s letter also mentions lot 11-D is not open space, and as supporting evidence, he mentions the latest plot plan for Ellis River Village, recorded in Plan Book 64, page 43. The latest plot plan makes minor lot line adjustments, and merges two lots together to form the Benesh property as it exists today. Again, no case law is quoted, and in Attorney Eggleton’s opinion, this minor lot line adjustment obviates and nullifies all previous Ellis River Village plot plans on file in both the town office and in the Carroll County Registry of Deeds. I personally find that very hard to believe. In the August 24th meeting of the Board of Selectmen, Frank Benesh himself said that the lot is open space (as he has said in previous planning board meetings), but that he has an easement to use that open space for a driveway. The residents on Beech Hill Rd have never questioned that the easement was (without our knowledge) granted, rather we have always questioned whether the members of Ellis River Village and the Beneshes understood the restrictions on the common land when they voted to approve the easement.

One of the issues which has not been considered by the Board of Selectmen is the potential impact to the well on lot 11-D which serves the three homes on Beech Hill Rd. The residents on Beech Hill Rd have an easement to use the well which we believe was installed in the 1960’s on what is now Lot 11-D. Our well “building” is a subterranean structure made of dry laid cinder block. And, not shown on the driveway permit is any mention of the well, nor any sketch of where the roadway would be built relative to the well. What is our

recourse should our water quality be negatively impacted by your approval and the subsequent construction of this driveway?

The driveway permit form which the town has created is only adequate for the typical use: that is, a property owner would like to construct a driveway wholly on their own property. The residents on Beech Hill Rd have always been in favor of the Beneshes putting the driveway on their own property, it is the impact to the common and open space land for future generations and the impact on our drinking water quality which concern us. I'm attaching the copy of the Benesh Driveway Permit Application. Note that our well is not mentioned, no approximate driveway location is described, and even lot 11-D is not referenced. How can this be the only document you can consider in granting this application?

I understand how difficult this decision is for the board members. This issue has come before the planning board twice, and the planning board has ruled the use of Ellis River Village land in this way is an enforcement issue, and the Board of Selectmen is the enforcing body in the town. I'm respectfully asking you to reconsider your decision to grant this driveway permit. Granting this permit will set a precedence that common land of a subdivision and open space are not regulated nor enforced by the town of Jackson. I believe the Board of Selectmen have a responsibility to enforce the town's approved subdivisions with their common land, and open space. This enforcement benefits the entire community for generations to come.

Best regards,

Christopher Bridge"