

Duxbury Selectboard Regular Meeting Minutes
Monday, February 24, 2020

Note: The complete audio recording of this meeting may be found at www.duxburyvermont.org

SELECTBOARD MEMBERS PRESENT	Bob Magee, Mari Pratt, Dan Schillhammer, Kevin Garcia, Jerry McMahan
MINUTES PREPARED BY:	Jonathan DeLaBruere
CALL TO ORDER	The meeting was called to order at 6:00 PM by Bob Magee.
INTRODUCTION OF SELECTBOARD MEMBERS	Selectboard members introduced themselves and attendees were reminded to sign in using the sign-in sheet.

CHANGES TO THE AGENDA

DISCUSSION	None	
ACTION ITEMS	PERSON RESPONSIBLE	DEADLINE

CITIZENS AND VISITORS TO ADDRESS THE BOARD

DISCUSSION	None	
ACTION ITEMS	PERSON RESPONSIBLE	DEADLINE

APPROVAL OF MINUTES

DISCUSSION	Motion by Dan, second by Jerry, all in favor of approving the 02/10/2020 Selectboard regular meeting minutes as posted.	
ACTION ITEMS	PERSON RESPONSIBLE	DEADLINE

REVIEW OF SELECTBOARD MAIL

DISCUSSION	Letter from the State of Vermont regarding the intersection analysis of VT Route 100, Main Street, and Crossett Brook Middle School. The letter is included as an attachment to the minutes.
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ACTION ITEMS	PERSON RESPONSIBLE	DEADLINE

REPORT: HIGHWAY FOREMAN

DISCUSSION	Report is attached	
ACTION ITEMS	PERSON RESPONSIBLE	DEADLINE

REPORT: TOWN TREASURER

DISCUSSION		
ACTION ITEMS	PERSON RESPONSIBLE	DEADLINE

REPORT: SELECTBOARD ASSISTANT

DISCUSSION	Motion by Kevin, second by Dan, all in favor of approving the VTrans reimbursement request for a total refund of \$188,640.	
ACTION ITEMS	PERSON RESPONSIBLE	DEADLINE

NEW BUSINESS

DISCUSSION	None	
ACTION ITEMS	PERSON RESPONSIBLE	DEADLINE

OLD BUSINESS

DISCUSSION	<ol style="list-style-type: none"> River Road Paving RFP – The board agreed to spend the grant money fixing the part of River Road that is in the worst condition. This is beginning at the Winooski Street intersection, and continuing just past the waterfall culvert. The length is exactly 1 mile. Stormwater runoff damage to private property – The board discussed what the statute says regarding stormwater runoff of town 	
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	<p>roads and onto private property. The board agreed to continue reviewing these instances on a case-by-case basis.</p> <p>3. Salt Storage Building – The board discussed that there might be a new board after town meeting day and didn't want to make any decision until the next meeting.</p> <p>4. Town Meeting Day Preparation – The board discussed that they need to be ready to answer any questions residents have at town meeting day.</p>
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ACTION ITEMS	PERSON RESPONSIBLE	DEADLINE
Add Salt Storage Building to next Selectboard regular meeting	Selectboard	3/9/2020

ADJOURNMENT	Motion by Kevin, second by Dan, all in favor of adjourning the meeting at 7:52 PM.
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State of Vermont
Operations & Safety Bureau
2178 Airport Rd
Barre, VT 05641
vtrans.vermont.gov

[phone] 802-371-8827
[fax] 802-828-2437
[ttd] 800-253-0191

Agency of Transportation

February 14, 2020

Duxbury Select Board
5481 VT Route 100
Duxbury, VT 05676

RE: Reduced School Speed Limit, VT-100

Dear Board Members:

This letter is in response to your October 28, 2019 letter requesting a review of the intersection of VT-100, Main Street, and the Crossett Brook Middle School driveway, including review of the existing school zone speed limit.

Per my letter of January 8, 2020, Traffic Operations has conducted an engineering study of the speed limits in this area, including conducting two speed studies at different times, and recommends reducing the school speed limit "when flashing" to 30 mph in this area. Other portions of the request are outside the purview of the Traffic Committee but have been forwarded on to the appropriate entities within VTrans.

We found that the 85th percentile speeds (the speed below which 85% of free-flowing drivers were traveling) on VT-100 when the School Speed Zone beacons were not flashing to be 47 mph, and 42 mph when flashing. In the course of conducting the studies, we also identified some maintenance needs with the beacons, which have been addressed. Increasing enforcement presence may also help address speeds in this area. The Town's request references future development; we cannot base our recommendation on these considerations, however this location can be revisited at a later date if roadway characteristics change.

We will forward this recommendation to the Vermont Traffic Committee, who makes the final decision. This topic will be on the agenda of the next Traffic Committee meeting on Monday March 9, 2020 at 1:00 pm in the 25-person conference room at the VTrans Dill Building, 2178 Airport Rd, Berlin, VT. Please attend if you wish to present testimony on behalf of the town. If you or members of the public are unable to attend but would still like to participate, please let me know and we can arrange a telephone connection.

Please do not hesitate to contact me at (802) 371-8827 or at ian.degutis@vermont.gov if you have any questions or require additional information.

Sincerely,



Ian Degutis, PE, PTOE
Traffic Operations Engineer

cc: Dave Blackmore, DTA, AOT District 5 (via e-mail: david.blacmore@vermont.gov)
Dan Currier, Central Vermont Regional Planning Commission (CVRPC) (via e-mail: currier@cvrpc.com)
Zoe Neaderland, VTrans Planning Coordinator (via email: zoe.neaderland@vermont.gov)
File, via Tyler Guazzoni



Foreman's Report

February 24th, 2020

Board Meeting

Road work/Crew work

- Plow/Sand/Salt when needed
- Fix equipment
- Maintain shop and equipment
- Check roads while Kyle was sick

Foreman Work

- Plow/Sand/Salt when needed
- Check roads
- Fix equipment
- Go to engineers meeting on Ryan rd project
- Work with crew in shop
- Push snowbanks back with the grader

Equipment

- Truck 1 (2014 Freightliner) had all but 3 lug studs break off last Wednesday. We had to replace the hub and two rims.
- Truck 3 (2019 International) had the sander go down. Problem was solved in house. On the same day at the end of the day this truck also lost another front tire. The rim was not damaged and we had a tire on hand.
- The pickup went to Lanphear's for a starter issue. The issue was that the power and ground wires going to the starter were rotted almost completely off and because of the tight location trying to get them replaced without a truck lift would have been almost impossible.

- Truck 2 (2016 Freightliner) is scheduled to go to Charlebois for the body repair work next Monday. It will be there about a week so for next week we will be down to two trucks.

Submitted by

Kyle Guyette

Road Foreman

**Town of Duxbury
Selectboard Assistant Report
2/24/2020 Selectboard Meeting**

1. Grants – In Process

a. Crossett Hill Road Slide – FEMA (DR-4330)

- i. FEMA Region 1 is reviewing our scope change request. Our project is currently in the mitigation review phase. After mitigation completes their review, it will go through both the insurance and environmental & historic preservation review like all projects. We are being told that this project will obligate by the end of this month or the beginning of March, but FEMA public assistance leadership will not sign the approval letter until all reviews have been completed and no issues identified. The next step after approval will be to finalize the RFP, and publish for 30 days.

b. Scrabble Hill Road Stabilization – Municipal Highway & Stormwater Mitigation FY19/FY20

- i. No Update

c. Salt Storage Building – Municipal Highway & Stormwater Mitigation FY19

- i. Now that a determination has been made on the grant application for the Highway Department Material Storage Facility, the town needs to decide how we are going to move forward with the Salt Storage Building project.

d. Camels Hump Road Scoping Study – Transportation Alternatives FY19

- i. No Update – Wait until after July 1, 2020

e. River Road Paving – Class 2 Town Highway Road Program

- i. A draft RFP was distributed to the Selectboard for review on Friday, February 7, 2020. This item will be discussed further during the New Business portion of the meeting.

f. Ryan Road Culvert Replacement – Better Roads FY20

- i. Bids will be opened at the March 9, 2020 Selectboard Regular Meeting.

g. April 2019 Flooding Event – FEMA (DR-4445)

i. No Update

h. November 2019 Storm – FEMA (DR-4474)

i. No Update

2. Grants – Under Review

- a. Main Street/River Road Intersection Improvements – Transportation Alternatives FY20
- b. Duxbury Road Erosion Inventory – Better Roads FY21
- c. Camels Hump Road Culvert Replacement – Better Roads FY21
- d. Ryan Road Culvert Replacement – Better Roads FY21

3. Grants – Future

- a. Atwood Road Culvert Replacement
- b. Stevens Brook Road Culvert Replacement
- c. River Road Culvert Replacement
- d. River Road Paving (Main Street to Winooski Street)

4. Other Items

- a. **Town Plan Public Hearing** – The Town of Duxbury Planning Commission will present a draft of the town plan February 27, 2020 in the town garage meeting room at 6:30 pm. The public is encouraged to attend.

November 27, 2019

Town of Duxbury Selectboard
Duxbury Town Office
5421 VT Route 100
Duxbury VT, 05676
VIA EMAIL: duxbury.sb.assistant@gmail.com

RE: Damage to private property due to town highway culvert and ditch overflows

Dear Duxbury Selectboard:

Thank you for requesting this legal opinion from Stitzel, Page & Fletcher. My understanding is the Selectboard wishes to know whether (1) there is any obligation for the Town to compensate property owners who incur damage to private property, such as a washed-out driveway, due to overflow from a town highway culvert or drainage ditch; and (2) what are the issues around whether the Town should/should not compensate affected property owners irrespective of whether it has any such legal obligation.

(1)

As long as the culvert or ditch which caused the overflow is a part of the surface water drainage systems installed to protect the Town's roads, there can be no tort (i.e., negligence) liability to property owners who suffer damage from an overflow. This rule is based on municipal sovereign immunity relating to government functions which include maintaining town roads. See *Graham v. Town of Duxbury*, 173 Vt. 498 (2001). This rule should apply without exception when the overflow is claimed to be due to inadequate maintenance, including failure to clear debris, of a culvert or ditch and likely applies to most other scenarios such as flawed design, poor condition, etc.

Several points bear mention. First, there is no municipal immunity relating to a town's duty to maintain a passage for a natural stream because a town has no implied authority to dam up or otherwise obstruct natural water courses. *Id.* Thus, if a town does not repair a passage constructed for a natural stream after receiving notice that the passage is blocked, municipal immunity will not bar recovery for damages caused by failure to take remedial action. *Id.* This point does not mean that a municipality is automatically liable in such a scenario; it only means that

municipal immunity is not a bar to a negligence claim against a town.

Second, while it is clear based on the *Graham* case that a negligence claim against a town cannot be pursued in the case of a clogged highway culvert or drainage ditch, it is unclear, though we believe it highly unlikely, whether a claim could be maintained for a clogged culvert under 19 V.S.A. § 985 (“Injuries from defective bridges and culverts”). The Vermont Supreme Court has never expressly addressed 19 V.S.A. § 985 in the context of a “clogged culvert” case.¹ On its face, the statutory language arguably could be read as covering an overflow situation resulting from a clogged culvert: “If damage occurs to a person, or his or her property, by reason of the insufficiency or want of repair of a bridge or culvert which the town is liable to keep in repair,² the person sustaining damage may recover in a civil action.”

Despite this language, it is unlikely the statute applies to property damage due to a culvert overflow resulting from failure to keep it clear because the statute most likely only applies to structural failures of a culvert. First, § 985 covers both culverts and bridges, both of which are structural features of a highway. Second, the language of the statute states it applies only when repair is insufficient or wanting. The plain meaning of the word “repair” concerns the structural condition of a culvert (or bridge), not whether it is clogged due to lack of maintenance. The Legislature has used the word “maintenance” in other areas of the highway statutes, so if it meant for a failure to keep a culvert clear to result in liability under § 985, it would have used the word “maintenance” instead of “repair.” Section 985 also has several references to incidents involving damage connected with motor vehicle travel, again suggesting the intent of the statute is to impose an exception to statutory immunity in cases where users of a road are injured or suffer property damage because of a culvert or bridge failure.

Most importantly for Duxbury’s current situation is that § 985 does not have any possible application to drainage ditches. Indeed, the omission of other storm water management apparatus such as ditches or perhaps drainage grates again suggests that failure to keep drainage cleared-out of a culvert does not create liability under § 985. Otherwise, there would have been no logic in listing only “culverts” and not

¹ In *Graham*, the Town (of Duxbury, ironically) had argued that a defense against the Grahams’ property damage claim was that, prior to filing a lawsuit, the Grahams failed to follow the requirements of 19 V.S.A. § 985, including the requirement (set out in 19 V.S.A. § 987) of giving written notice to a town within 20 days of the incident. The Supreme Court specifically decided not to address the Town’s argument that failure to follow § 985 foreclosed the Grahams’ lawsuit because it ruled that sovereign immunity and lack of negligence maintenance prevented any possible liability on the part of the Town.

² A town is not liable to maintain bridges or culverts on Class 4 highways and trails unless it adopts a policy to do so.

including ditches.

One final note of caution is that if the Town were to design its town highway drainage system in a way to purposefully direct water flow onto private property, the possibility of liability for an uncompensated taking (a so-called “inverse condemnation”) could exist depending on other circumstances. See, e.g., *Ondovchik Family Ltd. Partnership v. Agency of Transp.*, 996 A.2d 1179, 1185, 187 Vt. 556, 566, 2010 VT 35, ¶ 18 (intermittent flooding of private land can constitute a taking of an easement in some cases).

Therefore, we do not believe there is any possible basis for liability on the part of the Town of Duxbury resulting from damage to properties caused by overflows from obstructed town highway ditches or culverts.

(2)

Given our opinion that a town cannot be held liable for damage to a property resulting from a drainage culvert or ditch overflow, we believe that a selectboard faced with such a scenario has two options: (a) refuse to compensate affected property owners or (b) exercise discretion to settle claims by affected property owners under terms that are reasonable. We recommend that option (b) means that a selectboard should not agree to compensate an affected property owner unless certain minimum criteria are met, noted below.

(a)

If the Duxbury Selectboard believes option (a) is the appropriate course, we suggest the Selectboard adopt a formal policy which simply indicates it is the policy of the Town not to offer compensation to property owners affected by town highway culvert and ditch overflows. Such a policy could leave room for an exception where damage to the private property may affect the public good. Examples might include damage to private property which is of benefit to the town (such as a driveway the property owner allows the public to utilize to reach a public trail or pond) or where the property damage could have negative impacts on town facilities (such as where mud flow from a damaged property could plug-up other downstream highway ditches or culverts).

(b)

If the Selectboard wishes instead to have a practice and policy of compensating property owners, i.e., option (b), our suggestion of observing particular criteria is

based on the Selectboard's authority to settle claims against the Town. See 24 V.S.A. § 934 ("The selectboard shall audit and in its discretion may allow claims against the town and draft orders therefor."). This discretionary authority must not be exercised in a way that is arbitrary or capricious, and the best way to protect against any claims of arbitrary and capricious action is to act according to objective criteria established in a written policy. The policy criteria (for allowing a payment) we would recommend are (1) the property owner has asserted a claim for damage; (2) the amount of compensation to be paid is reasonable; and (3) the selectboard secures a "release" on behalf of the Town.

The reason for suggested criterion (1) is self-evident, as there must first be a "claim" before a selectboard has any authority to expend public funds under 24 V.S.A. § 934. A "claim" can be as simple as a property owner reporting to the Town that site damage was caused by a town culvert or ditch and site repair of a certain expense is demonstrated to be reasonably necessary; no explicit threat of legal action is required. We do not recommend a policy that would allow for settling claims based only on an allegation of a reduction in property value.

Regarding criterion (2), we believe a selectboard should first have to make a determination that a town will incur legal expenses if a lawsuit were filed by an affected property owner, even though the town would be expected to ultimately prevail. For Duxbury, a written policy could include a provision that the legal expenses from addressing such claims would be expected to be at least \$500, and that \$500 is the deductible under the Town's liability insurance coverage (assuming that typical amount is in fact true for Duxbury), such that \$500 is the maximum reasonable amount to compensate an affected property owner.

The final recommended criterion (3) for a policy allowing payment to affected property owners is that the Town secure a "release," meaning a signed agreement from a claimant acknowledging that all possible claims related to a subject are waived and released in exchange for receiving compensation. Obtaining a release in exchange for payment would result in the Selectboard actually resolving a potential claim against the Town, whereas payment without a release does not necessarily achieve that result. A release form can be made an appendix to a written policy such that there would be no need to consult the Town Attorney every time the Selectboard issues payment under an "Option (b)" policy.

There are possible pitfalls that may be associated with the Selectboard agreeing or refusing, on a case-by-case basis, to pay for repair of property damage resulting

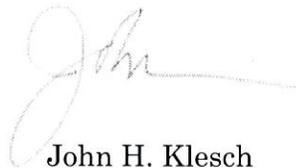
from overflowing culverts or drainage ditches. Thus, the "Option (b)" approach allows for such payments but does so in a way that reduces the potential for different results for similarly situated property owners, insulating the Town from possible claims related to treating property owners differently.

Conclusion

It is highly unlikely the Town of Duxbury would ever be held liable by a Vermont court for damage to private property resulting from an overflow of a town highway culvert or drainage ditch. The Selectboard would thus be justified in adopting a policy that the Town will not compensate property owners affected by these situations except in limited circumstances where public interest is affected. If the Selectboard nonetheless believes it is appropriate for the Town to compensate property owners affected by culvert and ditch overflows, we recommend doing so pursuant to a written policy which sets forth the rationale for such payments, caps the maximum payment amount, and requires the property owner to execute a release in favor of the Town.

We hope this analysis is helpful, please let me know if we can be of any further assistance.

Best regards,

A handwritten signature in cursive script, appearing to read "John", followed by a horizontal line extending to the right.

John H. Klesch

