Board of Selectmen Meeting Notice,
May 24, 2017

The Board of Selectmen will hold a Meeting on Wednesday, May 24, 2017 at the Island Hall beginning at 6:00 PM with a Workshop, followed by Regular Business beginning at 7:00 PM

I. Call Meeting to Order

II. Workshop: Bennett’s Cove

III. Public Comment for items not on the agenda

IV. Regular Business

   17-117 Action from Workshop
       To take any action required by the Workshop

   17-118 Letter from Atty. Scott Anderson regarding Capps Road Drainage

   17-119 Kim Boehm’s letter re: emergency vehicle lane at Stone Pier

   17-120 Policy regarding Board of Selectmen’s Agendas

V. Communications

VI. Review and approve prior meeting minutes
   May 10, 2017

VII. Approval of Expense Warrant(s)

VIII. Other Business

IX. Adjourn Meeting
Marjorie Stratton

From: Natalie L. Burns <nburns@JBGH.com>
Sent: Friday, May 19, 2017 1:31 PM
To: 'Marjorie Stratton'
Subject: RE: Ongoing Road Drainage Issue

Marjorie,

I've looked at the materials provided and am pretty much in full agreement with the advice that Anne gave you on this. One of the applicable statutes is 23 M.R.S.A. Sec. 3251, which states that a municipality is responsible for the maintenance of culverts, ditches and drains and that a property owner can bring an action for any damages resulting from failure to maintain. It does not sound in this case as though there has been any failure to maintain, though.

Scott's arguments appear to be based largely upon case law involving private development resulting in stormwater issues. One of the cases did involve a water district, but in that case there was significant evidence of damage having occurred over a period of time, that the defendant knew about the problem and did not fix it and that it installed a drain onto private property without the right to do so. The facts are very different from those presented here, where a culvert has been in this location for in excess of 20 years.

Thanks,

Natalie

Natalie L. Burns, Esq.
Jensen Baird Gardner & Henry
Ten Free Street
P.O. Box 4510
Portland, Maine 04112-4510
207-775-7271 or 800-756-1166
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nburns@jbggh.com
www.jbggh.com

-----Original Message-----
From: Marjorie Stratton [mailto:townadmin@chebeague.net]
Sent: Thursday, May 11, 2017 10:52 AM
To: Natalie L. Burns
Subject: Ongoing Road Drainage Issue

Hi Natalie,

Attached are documents related to an issue that has been going on for some time. Most recently, we received the attached letter from Scott Anderson representing Richard Hubbell.

The basic issue is a culvert and runoff from Capps Road that travels onto private property and out to the ocean. The culvert was placed more than twenty years ago. Over the years, the water from the culvert has created a little gully. The property owners want the town to pay 75% of the cost to mitigate the drainage issues.
May 5, 2017

Ms. Marjorie E. Stratton
Town Administrator
Town of Chebeague Island
192 North Rd.
Chebeague Island, ME 04017

Dear Marjorie,

Thank you for your letter telling me of the Selectmen’s actions after Peter Maher’s and my presentation and proposal at the March 22, 2017 Board of Selectmen’s Meeting. I appreciate the addition to the Drainage and Easements Reserve Fund as a potential start to solving the Capps Rd. drainage issue. I am disappointed, of course, that the Selectmen did not act further on my request for a 75% funding the plan drawn up by Peter Maher, but do look forward to further discussions.

At the March meeting there was considerable discussion and questions about the Town’s responsibility for the fixing the drainage problem as well as questions about the legality or appropriateness of spending public funds for work on private property. To gain some clarity on these critical issues, I asked my lawyer, Scott Anderson of Verrill-Dana to research the issues and provide some guidance based on Maine laws and court cases related to these issues. Enclosed is his letter to me, which I ask you to share with the Board of Selectmen. With the provision of this new and expanded information about municipal responsibility for repairing drainage damage, I would like to schedule another meeting with the Board to continue discussions how to implement the drainage remediation work designed by Peter Maher.

Please call me at 671-3647 or email me at hubbell.rich@gmail.com to discuss a suitable date. For the next several weeks after May 10th my Wednesday evenings are open, though I suspect your agendas may not open up for several weeks. I look forward to hearing from you and meeting with the Board.

Sincerely,

Richard N. Hubbell
May 1, 2017

Richard Hubbell
274 West Main Street
Yarmouth, ME 04096

Re: Stormwater Impacts
52 Capps Road/13 Ben Webber Road, Town of Chebeague Island

Dear Rich:

The following is a summary of the rules in Maine regarding (1) liability for impacts caused by stormwater erosion from one property to another, and (2) the use of public funds for work that impacts private property.

Existing Conditions and Summary of Conclusions

Based on our discussion and my review of the Seavey & Maher survey, stormwater flows currently run down and along Capps Road and then are discharged onto property owned by you and your wife. Capps Road is a town road, maintained by the Town of Chebeague Island, and the ongoing stormwater flows have led to erosion and damage to your properties. You have worked with S&M on a solution to the damage caused by these stormwater discharges, and you have asked the Town to contribute 75% of the cost to implement this solution.

The Town’s current response is that they are not obligated to contribute funds to this project. Further, the Town has suggested that it would be inappropriate to commit public funds for a project that would benefit and improve private property.

For the following reasons (1) the Town is responsible for 100% of the costs of mitigating the impacts of stormwater that originates from Capps Road and is discharged onto your land, and (2) this mitigation project is necessary to stop a problem caused by the Town and, therefore, this is not a situation where public funds are being used to provide a private benefit.

Liability for Stormwater Flows

Under Maine law there is no liability for stormwater impacts that occur due to a “natural condition” of land or a “natural occurrence.” Bedell v. Cole, 642 A.2d 169 (Me. 1994). The Bedell case involved torrential rains associated with Hurricane Bob in 1991, which resulted in a mudslide onto a neighbor’s property. Because the hurricane and the mudslide were both the result of a “natural” condition, the neighbor could not collect damages from the owner of the
May 1, 2017
Page 2

property where the mudslide originated.

However, although property owners are allowed to make improvements to their property that alter natural stormwater flow, such as construction of houses, driveways, fences and other development, a landowner cannot artificially collect stormwater and discharge it onto property upon which the stormwater would not have flowed but for the artificial collection. *McRae v. Camden & Rockland Water Co.*, 22 A.2d 133 (1941). Development constitutes the “artificial collection” of stormwater when it accumulates stormwater and is not intended to drain such stormwater. *Harris v. Woodlands Club*, 55 A.2d 449 (Me. 2012).

In this matter the road constructed and maintained by the Town is collecting stormwater and discharging it onto your land. Such discharges would not be occurring but for the construction of the road, so the Town is liable for damages to your property due to stormwater discharges from the road system. Further, the road was not constructed to manage or drain stormwater, it was constructed to allow the passage of motor vehicles and, as such, is “artificially” collecting stormwater.¹

Given these rules, the construction and maintenance of the Town’s road is artificially collecting and discharging stormwater on to your property, and this stormwater would not be on your property but for the road. As such, the Town is responsible for 100% of the costs of fixing the damage to your property caused by these discharges.²

**Use of Public Funds**

Although the Maine Constitution requires that public tax funds be used for a public purpose (see *Common Cause v. State*, 455 A.2d 1 (Me. 1983)), use of Town tax funds to mitigate damages caused by the Town is a “public purpose.” Maine law requires towns to maintain and repair roads so as to be “safe and convenient” for motor vehicle travel. 23 M.R.S.A. § 3651. In doing so, the Town is not permitted to construct a sub-standard road that results in unlawful stormwater discharges, erosion, and damage to abutting properties. Because the Town has caused damage to your property and because the Town is required to cease these stormwater flows, these public expenditures are simply a necessary investment to ensure the Town’s road

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¹ In the *Harris* case, involving stormwater discharges from the Woodlands golf course, the club’s stormwater mitigation system, consisting of a series of ponds and holding basins, was collecting stormwater that ultimately ran onto the neighboring property. Because this system had been constructed for the purpose of managing stormwater, and because it was, in fact, reducing the rate of stormwater flows onto the abutting property, the club was not liable to the neighbors for damage due to these flows. In contrast, the Town’s road was not constructed to manage or mitigate stormwater flows. It’s just a road.

² You mentioned that the Town has voiced concern that this might create a bad precedent, and require the Town to pay for other stormwater mitigation projects on the island. Given that you are proposing to contribute 25% towards the costs of a project that the Town is 100% responsible for, there should not be any concern about precedent.
May 1, 2017

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system is properly constructed and complies with the Town’s legal obligations.\(^3\)

Further, you and other abutters are offering to give the Town an easement for the
construction of a stormwater channel that will help reduce the Town’s costs to fix this situation.
By right, you could charge them for the easement, or force the Town to mitigate its stormwater
flows without the use of your property. This would very likely increase the cost of compliance
for the Town. Given this, the complained-of “improvements” to your property are no
improvements at all. The Town will have a permanent right to use your property to handle
stormwater flows from the road system, and you will not be allowed to make use of your
property within this easement area.

The Town could elect to manage its stormwater flows in some other way, which might
require the Town to pay abutting property owners to widen the ROW to install level spreaders or
other improvements to manage stormwater. The fact that the Town would elect to manage its
stormwater problems by accepting free private property does not make this a project that benefits
such private property.

Please let me know if you have any questions regarding any of these issues.

Very truly yours,

Scott D. Anderson

SDA/mtt

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\(^3\) The only relevant prohibition is to the contrary—you may not use your private funds to fix the
stormwater problems associated with the public road system. See *Lamb v. Euclid Ambler Assoc.*, 563
A.2d 365 (Me. 1989).
April 3, 2017

Richard Hubbell
274 West Main Street
Yarmouth, ME 04096

Dear Rich:

The Board of Selectmen (BOS) asked me to write and thank you for your presentation on March 22, 2017. They met on March 28th in an effort to finalize the proposed 2017/2018 budget. While they are proposing an additional $5,000 for the Drainage and Easements Reserve Funds, this would only increase the total available to approximately $15,700.

The BOS would like to continue discussions, but the current proposal for the Town to cover 75% of the cost of the project is not feasible at this time. There is also still concern about a project largely on private property. As stated above, there are some funds available and the Town is always willing to assist on town property.

Please don't hesitate to contact me if you have any questions.

Sincerely,

Marjorie E. Stratton
Town Administrator
Marjorie Stratton

From: Anne M. Torregrossa <ATorregrossa@branlaw.com>
Sent: Monday, September 21, 2015 8:43 AM
To: Marjorie Stratton
Subject: RE: Road Drainage Issue

Marjorie,

I apologize for the delay. When you said that you weren’t in a great hurry, this fell to the bottom of the pile. My fault.

As I recall, you were a little unclear on who had installed the original ditching, whether it was the Town or private property owners. From our conversation previously, it sounds like there are still many historical details that are missing, all of which makes it much harder to give a straightforward answer to the Board’s questions, but below are some basic principles that might help.

• First, as to what the Town’s rights are, if the project is to address the drainage from a public road, even if you need to access private property, the Selectmen have the right to do that. If the project is to address the drainage from a private road, even if it is an extension of the public road, the Town may not use public funds to do that. As I recall, you were going to inquire about the “public stairway,” which might put a wrinkle in this.

• Second, as to obligations, if the Town installed the ditches and culverts, it has the obligation to maintain them. If the flooding is due to a failure of the Town-owned culvert, it must be repaired. However, if the flooding is due to a privately installed culvert, the Town has no obligations. Additionally, if it is a Town-owned culvert, and was simply inadequate to deal with the water flow, the Town is not required to upgrade the system.

• Third, as to potential liability if the property owners sued, the Town would likely be immune under the Maine Tort Claims Act for any claim of trespass or nuisance as a result of the water flow.

    Maine does allow a claim for failure to keep roads and related structures in good repair, etc. however, there is a statute that requires that lawsuits for property damage resulting from roads be brought within one year. Arguably, the property damage has been occurring for the past 25 years. The property owner might have an argument that this is an ongoing damage, but his decision to wait that length of time weighs heavily in the Town’s favor.

    Additionally, if the drainage has been constant for the past 25 years, and it was the result of a Town-owned system, the Town has likely obtained a prescriptive drainage easement where the water flows.

• Finally, if the Board does decide to do the work, they should obtain easements from all of the property owners affected. If they are unable to obtain the easements, they could take them by eminent domain, but that’s probably not a direction they want to go.

Even assuming that the undesirable drainage is the result of Town work, the Town has the better of the arguments that the property owner is 1) too late to bring a claim; and 2) the Town has acquired a prescriptive drainage easement. Both of those defenses are, of course, subject to challenge in court and the prescriptive easement defense is highly fact-specific, so I would need additional information to determine how strong that claim would be. Give me a call if you’d like to talk through the various pieces that will make up the Board’s decision. I’m available from 9:30-11 and after 12:30 today.

Anne
Capps Road Drainage Project
Funding Comments
to
Board Of Selectmen
Chebeague Island, ME

March 22, 2017

With the Sevee and Maher Engineers design complete and all the abutters having signed off on the design, now comes the issue of paying for the project. In virtually all drainage projects in the state in which water comes from public roads and related drainage ditches and from private lands that discharge water into those ditches, the cost of handling and disposing of this water falls on municipalities and the state. In this case the situation is complicated because the normal discharge route for the waters collected on the public road and by its ditches traverses private land, which also collects and rids itself of surface and ground water toward the ultimate disposal site - the ocean.

From the beginning of my quest to have the Town of Chebeague take responsibility for the discharge of these public road and ditch waters onto my wife’s property at 52 Capps Rd., I have indicated that I wanted to work with the Town to solve this problem. While I ask that the Town reroute the drainage which currently passes through the middle of the 52 Capps Rd. property, I believe that it is reasonable for myself and abutters to share the costs of the final disposal of the drainage, as depicted in the Sevee and Maher’s plan. This is because the abutters, the Town and other landowners in the watershed will benefit from the proposed drainage work.

As part of the engineering work, Peter’s firm prepared a watershed map and I have asked him to calculate on it several area calculations to aid in consideration of the cost sharing. This watershed information is on the exhibit presented here tonight. This exhibit shows that of the roughly 9 acre watershed, approximately 1.3 acres, or 15%, is owned by people over whose land the remediation project would traverse. Clearly not every drop of rain that falls on the watershed finds its way to the ocean and not every drop that runs off does so at the same speed. While relatively little of the precipitation that falls in the wooded upper sections of watershed finds its way to the ocean except under the most severe runoff events, the road and its related ditches likely contribute a volume of water greater than its area proportion to the watershed.

All of the water on the road and also that which is collected in the road ditches from the road and adjacent private land can be considered “public” water, while the water from private lands directly contributory to the ocean can be considered “private.” Calculating the exact percentages of such “public” and “private” water would require considerable extra analysis and is further complicated by the nature of the runoff events. However,
large, extended and rapid precipitation events create more “public” water from relatively impervious road services and collecting ditches, and it is for these events that the engineered ditches and outfall structure of the proposed remediation are built. It is these larger events that increase the scope and cost of the project.

While it is not practical to calculate the exact proportions of “public” and “private” water, I believe it is quite clear that most of the project cost is driven by the “public” share of the water, mostly because 85% of the contributing area is from non-abutter owned property. Therefore, I am proposing for discussion that the Town Of Chebeague pay for 75% of the cost of the project outlined by Sevee and Maher as “Eastern Ditch and Culvert” and “Bank Stabilization” and that the abutters pay 25% of the cost. I propose that $3000 of the “Dock[stairs] Removal and Replacement” be considered the replacement portion, be excluded from the project cost, and be paid by the roughly 10 neighborhood property owners with deeded beach access. Because we are still at the concept stage for funding, I have yet to receive approval from the abutters and neighbors for such cost sharing. Furthermore, I propose that The Town of Chebeague pay for the “Western Ditch” relocation and repair work, much of which can likely be done by the Town Highway crew and equipment. In addition I propose that the Town of Chebeague Highway crew and equipment regrade Capps Road and its ditches to better control water flow and prevent the considerable water flow onto Ben Webber Rd. In essence this would get the watershed runoff into the structures that are proposed for handling the runoff, rather than let it erode Capps and Ben Webber Roads.

For summary purposes if the costs were allocated as suggested above they would look like this:

<table>
<thead>
<tr>
<th>Project Item</th>
<th>Total</th>
<th>Town</th>
<th>Abutters</th>
<th>Neighborhood</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bank/East Ditch/Permit w/ 15% contingency</td>
<td>$43,125</td>
<td>$32,344</td>
<td>$10,781</td>
<td></td>
</tr>
<tr>
<td>Stairs Construction</td>
<td>3,000</td>
<td></td>
<td></td>
<td>$3,000</td>
</tr>
<tr>
<td>Western Ditch (1)</td>
<td>4,700</td>
<td>4,700</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Road Grading (1)</td>
<td>?</td>
<td>hwy.Budg</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Totals</td>
<td>$50,825</td>
<td>$37,044</td>
<td>$10,781</td>
<td>$3,000</td>
</tr>
</tbody>
</table>

(1) Much of the $4700 could be covered by Highway Crew and Equipment; road regrading would be covered as normal maintenance/repair by Highway Crew. Link to manual for road and ditch maintenance: https://www.epa.gov/sites/.../files/.../2003_07_24_nps_gravelroads_gravelroads.pdf

I hope this proposal meets the spirit of trying to solve the Capps Rd drainage issue in a joint manner among the Town and involved and affected land owners. This would be a
change from the typical way of dealing with such issue, in which the costs fall totally on
government. Several times in the discussions regarding this issue over the past six
years, Town officials have stated that they were worried about setting a precedent in this
project that would support the case that the Town should take care of all of the many
similar projects on Chebeague. Rather, I believe this cost sharing approach creates a
precedent and a template for how to deal with such problems in a reasonable and
responsible manner that shares the costs and benefits among all affected parties.

Thank you for the opportunity to present this revised drainage remediation plan.

Respectfully presented,

Richard Hubbell
13 Ben Webber Rd
52 Capps Rd.
James K. Boehm  
49 Meeting House Lane  
Chebeague Island, ME 04017

March 27, 2017

Board Of Selectman  
Chebeague Island, ME 04017

Dear Sirs:

I am requesting that you re-consider establishing a “Emergency Vehicle Lane” at the Stone Pier. My letter of April 3, 2015 outlined what I had envisioned.

I still believe this lane would be a benefit to the safety of Island residents as well as, eliminate frustration, and vehicle congestion on the pier during peak traffic times. There would be no loss, or change in parking spaces and some simple signage and re-striping would be adequate, to indicate the changes.

Enclosed is a simple drawing. I ask that this be implemented as soon as possible, if only on a trial basis.

James K. Boehm
TO FLOATS

PACK THIS SIDE ONLY

FILE LANE

TO CTC + COMM

DATE 0292
Proposals to the Board of Selectmen

1. Purpose
The Board of Selectmen encourages municipal entities, private or civic organizations and citizens to make formal recommendations to the Board for their consideration. Recommendations come out of the budget process, public hearings or comments at public meetings however they sometimes come as spontaneous ideas and sometimes come out of context and may get lost in the process. The Selectmen wish to provide an option for a slightly more formalized recommendation process that would help to keep good ideas afloat.

This policy outlines the guidelines for a formal recommendation to, or a request for action from, the Board of Selectmen.

The purpose of this policy is to assure that the Board will take timely action regarding all recommendations that meet the guidelines in section 5.

2. Definitions
   Municipal Entity – For the purpose of this policy a Municipal Entity is defined as anybody or group working on behalf of the Town. Examples include the: employees, boards, committees, commissions, task force or workgroups.

   Private Organizations – For the purpose of this policy a Private Organization is defined as a business, in-formal organization, club or other group that has an interest in doing business or other functions on Chebeague.

   Civic Organizations – For the purpose of this policy a Civic Entity is defined as a not-for-profit corporation typically organized as a 501(C)(3) under federal IRS rules that has an interest in lessening the burden of government or other civic functions on Chebeague.

   Citizen – Tax payer, voter, resident or business person doing business in the Town of Chebeague Island.

3. Enactment
This policy is enacted upon a majority vote of the Board of Selectmen and may be amended or repealed from time to time by the Selectmen or by Town Meeting.

4. Policy
   a. A request to place an item on the Board of Selectmen agenda to be presented orally, should be made to the Town Office 8 days prior to the meeting. Any backup paperwork is to be submitted to the Town Office 8 days prior to the meeting. Requests received after the deadline may be refused or held for a subsequent meeting.

   b. A written recommendation to the Board of Selectmen to be placed on the agenda must be received at the Town Office 8 days prior to the meeting. Requests received after the deadline may be refused or held for a subsequent meeting. A written submittal should include the following:
Town of Chebeague Island – Board of Selectmen Policy Statements

i. Objective (Public Benefit)

ii. Definitions (any terms that need clarification)

iii. Recommendations (what to do)

iv. If possible provide a Cost Analysis and funding options (resources required to implement)

v. Implementation options (how to get it done)

vi. Project schedule (when to implement it)

c. It is the policy of the Board for the Chair or the Chair’s designee to acknowledge the receipt of a written proposal to the submitter in writing and give an indication of when the Board might take up the proposal. This shall be at the Board’s earliest convenience.

d. If the Board decides to take no action on a proposal then it is the policy of the Board for the Chair or the Chair’s designee to notify the submitter in writing that the Board intends to take no further action regarding the recommendation. The notification shall give the reasons and shall also indicate recourse available to the submitter (such as petition procedures for warrant articles).

e. It is the policy of the Board that the Town staff will provide assistance to submitters that is consistent with current policies and practices for providing information to the public.

5. Proposal Guidelines

Recommendations can be simple and general or very complete. A two-step proposal may be advantageous so that a conceptual idea can be brought forward to ‘test the waters’ before a substantial effort is undertaken for a more action-ready proposal is presented.

Formal recommendations should come in written form and include:

- Date and return address for an acknowledgement
- It should be clear which individual, entity or entities are submitting the recommendation.
- The recommendation should be signed by the contact person (usually the Chair of a committee or president of an organization or the requesting citizen).
- If a vote was taken to determine the recommendation(s) the results of the vote(s) should be included.
- The document should contain the headings identified in section 4.a above. The level of detail provided is up to the submitter and may come to the Board in stages from general (conceptual) to specific (detailed project plans).

6. Adoption and Revision History

Adopted on 11/18/2009 YES 5 NO 0 attested by ________________.

Amended on 5/24/2017 YES ____ NO ____ -attested by ________________.
May 17, 2017

Town of Chebeague Island Select Board
Cc: Marjorie Stratton and Penny Asherman
192 North Road
Chebeague Island, ME 04017

Dear Town of Chebeague Island Select Board,

We are pleased to inform you that on May 13th we completed the long-planned "Curit Trail". The trail runs from North Road, along the Right-of-Way, to the Town-owned land (protected by a conservation easement held by the Chebeague and Cumberland Land Trust) on the northwestern shore of Chebeague Island. The trail consists of a no-more-than four-foot-wide footpath that is currently marked by flagging tape. See the included map for a rough sketch of the trail location. Six volunteers generously contributed their Saturday afternoon to creating the meandering path that includes views of the shore and a gully stream. We hope that the new trail will be a recreational asset to the community and we hope that you get a chance to explore it!

Thank you for your support and we look forward to working with you in the future.

Sincerely,

Caitlin Gerber (CCLT Island Volunteer Stewardship Coordinator) and Mark Bowman (CCLT Curit Property Volunteer Steward)