

Selectmen

From: Clara Weloth <cweloth@gmail.com>
Sent: Thursday, July 16, 2020 1:51 PM
To: selectmen@townofcarroll.org
Subject: Notice of Intent to Carroll Select Board re: Old Cherry Mountain Road South
Attachments: Weloth_Comments_Right_to-Know_Law (1).docx

Dear Carroll Board of Selectmen,

I am unable to attend the next scheduled Town of Carroll Select Board Meeting. Therefore, please enter this email with my letter (Attachment 1) into the meeting minutes as a matter of public record for legal standing, and as an informal notice of intent pursuant to the pending legal matter of "Plowing of the Old Cherry Mountain Road South".

Thank you in advance for your attention to this important public safety matter. Also, thank you for your continued public service during this horrible pandemic. Please stay strong and be well.

Respectfully,

/s/ Clara J. Weloth

Long-term, year-round, tax-paying resident
129 Old Cherry Mountain Road South

cc
W. Long, Esquire, No. CW-681-A
NHOTA

Attachment (1)

Office of Selectmen
Town of Carroll
92 School Street
Twin Mountain, NH 03595

To: Town of Carroll Select Board

Based on the New Hampshire Attorney General's Office update to the "Right To Know Laws, RSA Chap 91-A", and under advisement of my counsel, I am submitting my concerns and right to know requests in writing to the Select Board pursuant to the matter of "Plowing the Old Cherry Mountain Road South" in the Town of Carroll, NH. The NH RSA appears in *italicized text* followed by my concerns and requests in yellow highlighted text.

**TITLE VI, PUBLIC OFFICERS AND EMPLOYEES
CHAPTER 91-A, ACCESS TO GOVERNMENTAL RECORDS AND MEETINGS**

Section 91-A:3 Nonpublic Sessions.

I. (a) Public bodies shall not meet in nonpublic session, except for one of the purposes set out in paragraph II. No session at which evidence, information, or testimony in any form is received shall be closed to the public, except as provided in paragraph II. No public body may enter nonpublic session, except pursuant to a motion properly made and seconded.

(b) Any motion to enter nonpublic session shall state on its face the specific exemption under paragraph II which is relied upon as foundation for the nonpublic session. The vote on any such motion shall be by roll call, and shall require the affirmative vote of the majority of members present.

Concern: Closed Nonpublic Sessions (Town of Carroll Select Board Meeting Notes 10/17/2019)

Pursuant to the matter of plowing the Old Cherry Mountain Road South, we believe the nonpublic session the Carroll selectmen entered into on 10/17/19 was improperly made and illegal under RSA 91-A:3. Furthermore, the criteria the selectmen used to extend plowing only until May 15th 2020 was arbitrary and capricious.

Specifically, the meeting notes reflect the selectmen did not "*state on its face the specific exemption under paragraph II which is relied upon as foundation for the nonpublic session*". In fact, plowing a public Class II Road does not meet any RSA 91 nonpublic session criteria. The Select Board had already attained legal counsel before sending their certified letter to affected residents, and the decision to not plow the road was already made. At the 10/17/2019 meeting residents merely expressed their concerns and asked the Select Board to reconsider their decision. Therefore, the agenda topic of plowing the Old Cherry Mountain Road South should never have entered into nonpublic session. Subsequently, the selectmen's closed-door discussion and arbitrary decision to plow only until May 15th 2020 were out of process and illegal. All of which were based on the Town's original illegal decision in July 2019 to not plow the Old Cherry Mountain Road South in the first place.

Furthermore, the following excerpt from a recent Select Board member statement (6/15/2020) clearly demonstrates that plowing an unimproved Class II Road (which the town is responsible to maintain per RSA 230.3-4), does not meet the criteria for entering nonpublic session... {"*As members of the Select Board, we are responsible for "managing the prudent affairs of the town." That sometimes requires that we go into non-public session. We do that when divulging certain matters would be an invasion of privacy, or would adversely affect the reputation of some person other than a member of the public body, or would render proposed municipal action ineffective.*"}. The selectman's statement indicates divulging certain matters would render the Town's action of not plowing the road an illegal decision based on the Town's misinterpretation / violation of the RSA 230.3-4. The Select Board decision to not plow the road was based on their interpretation of not having the authority. But, it is clear the Select Board's motivation to not plow was instead based on avoiding a lawsuit from residents on the north-end of the road. Are their motivation/action violations of Right to Know Law in bad faith?

Right to Know Request: Please send me a copy of the selectmen's illegal nonpublic session discussion, and the arbitrary and capricious criteria they used to determine plowing the Old Cherry Mountain Road South until only May 15th 2020. Define which certain matters divulged would render proposed municipal action ineffective.

Section 91-A:2-a Communications Outside Meetings.

I. Unless exempted from the definition of "meeting" under RSA 91-A:2, I, public bodies shall deliberate on matters over which they have supervision, control, jurisdiction, or advisory power only in meetings held pursuant to and in compliance with the provisions of RSA 91-A:2, II or III.

II. Communications outside a meeting, including, but not limited to, sequential communications among members of a public body, shall not be used to circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1.

Concern: Outside Meetings / Conflict of Interest (Select Board Meeting Notes 06/01 & 15/2020)

Several meeting notes and local newspaper articles document a Select Board member raised "conflict of interest concerns" in which they claim a selectman constantly met with legal counsel and discussed town matters outside of public meetings. We highly suspect that plowing the Old Cherry Mountain Road South was one of the Town matters the selectman illegally discussed with legal counsel in an effort to "avoid law suits". Plowing Old Cherry Mountain Road South did not even meet specific exemption criteria for entering the nonpublic sessions per Para II, RSA 91. We firmly believe the selectman's illegal communications will be "used to circumvent the spirit and purpose of RSA 91" as related to plowing Old Cherry Mountain Road South. The selectman's actions are illegal and the residents have a right to know what selectmen discussed outside of public meetings. The following excerpt from a Select Board member statement (06/15/2020) clearly demonstrates there is enough reasonable doubt in the legality of the Town's decision to not plow the Old Cherry Mountain Road South... { "We try to control legal costs. Legal advice is most useful as an ounce of prevention. In the long run, making sure we handle things properly helps us avoid more expensive problems later. Sometimes we need lawyers because legal problems come up that we have no control over. Like when someone threatens to sue the town or actually does sue the town. We try to avoid those situations- and a lot of times our lawyers solve those problems before they get to that point. But sometimes we get dragged into a legal fight that couldn't be avoided. And there can be times where we have to bring a case to make sure the town's interests are protected. Like any town expense, depending on the issues that come up, legal fees can be less than we budget or more" }. Residents on the north-end of the Old Cherry Mountain Road asked why does the Town plow the south-end of the road. The selectman's statement clearly demonstrates the Town tried to prevent a law suit from residents living on the north-end by arbitrarily and capriciously deciding to not plow the south-end after 60+years of plowing!

Right to Know Request: Please send me copies of all selectmen discussions outside of public meetings referenced in meeting notes 06/01 & 15/20, including all discussions pertaining to plowing Old Cherry Mountain Road North and South. There were no active law suits re: not plowing the road that warranted nonpublic session.

Concern: Plowing Standards (Town of Carroll Select Board meeting notes 05/20 & 09/16/2019)

A lawyer will argue and a judge will agree the Select Board's decision not to plow Old Cherry Mountain Road South based on having no authority and that the road is "not up to town specifications for plowing" is illegal, arbitrary and capricious, especially since the town plowed the road over the past 60+ years (see Exhibit 1, Summation of Information, pg. 3)! As a long-term, year-round, tax-paying resident for over 28 years, why didn't the Town of Carroll use my tax dollars to upgrade the Old Cherry Mountain Road South to plowable specs? Tax paying residents living in the north country have a reasonable expectation for basic services of plowing a public town road. My letter (09/2019) to the Select Board cites RSA 230.3-4, that clearly states the Town is responsible to maintain Class II Roads (unimproved). The Select Board did not answer any of my questions related to public safety, liability, signage, and plowing standards if residents are forced to plow the Old Cherry Mountain Road South. Based on the Select Board's illegal meeting procedures, it is unclear to residents if the Select Board's certified letter (07/2019) stating the Town would no longer plow the road (which was an illegal decision in the first place) is still in effect for this winter 2020-2021? Under the Right to Know Law, residents are entitled to public access to know if the Select Board heard back from NHDOT, and to know the answers from the Town's legal counsel in this matter that are outstanding since the 10/17/2019 Select Board meeting!

Right to Know Request: Please send me....

- A certified letter restating the Town's intent re: plowing Old Cherry Mountain Road South this winter 2020-21.
- Estimate of my property tax reduction for basic services not rendered if the Town does not plow the road.
- Copy of all records describing Town specifications for plowing that are not being met for the road.
- Cost estimate to improve the Old Cherry Mountain Road South to Town plowable specifications.
- Written answers to all my questions documented in my letter (09/2019) that I sent to the Select Board.

In closing, I thank the Carroll Board of Selectmen in advance for your written responses to my requests regarding NH Right to Know Laws and plowing the Old Cherry Mountain Road South. As a remedy to avoid formal legal action in this important public safety issue, I respectfully request the Town of Carroll continue plowing the Old Cherry Mountain Road South since the town has set a precedent by plowing this road for over the past 60+ years.

Thank you for your continued public service. Stay strong and be well, respectfully,

/s/ Clara J. Weloth

129 Old Cherry Mountain Road South
Twin Mountain, New Hampshire

Cc: W. Long, Esquire, No. CW-681-A
NHOTA

Attachment (Exhibit 1)

EXHIBIT 1 - SUMMATION OF INFORMATION

Attorney General Office – Department of Justice (updated Memorandum 05/20/15): Since the Department last issued its Memorandum, the New Hampshire Legislature has amended the Right-to-Know law in several ways. The law now allows consideration of confidential, commercial, or financial information in nonpublic session. The master jury list is now exempt from the Right-to-Know law. Officers, employees and other officials of a public body or public agency are now subject to a civil penalty of not less than \$250 and not more than \$2,000 if they are found to have violated the Right-to-Know law in bad faith. Such individuals may now also be required to undergo remedial training at their own expense. This Memorandum has been updated to reflect these amendments to the law and recent court decisions. In an effort to enhance the usefulness of this Memorandum, the appendix includes sample motions for use by public bodies when the members want to go into non-public session, seal non-public minutes, or adjourn to consult with legal counsel. It also includes a sample index for use when a person has requested documents that are exempt from disclosure or contain confidential information. The index can be used to inform the requester of which documents have been withheld and the reason for their non-disclosure. For those interested in municipal government records, the statute that establishes the retention period for municipal records is provided. Finally, the appendix includes a list of statutes, rules, and court cases the designate certain information as confidential or privileged.

Right to Know Law: NH's Right to Know Law, RSA Chapter 91-A, states: "Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussion and records of all public bodies, and their accountability to the people." RSA 91-A:1. The Right to Know Law affects every aspect of local government in our state. Every board, committee, commission and subcommittee in every town, city and village district in New Hampshire must comply with this law. As a result, every local official and employee should be aware of the law and what their responsibilities are regarding both public meetings and governmental records.

TITLE VI, PUBLIC OFFICERS AND EMPLOYEES, CHAPTER 91-A, ACCESS TO GOVERNMENTAL RECORDS AND MEETINGS, 91-A:4 Minutes and Records Available for Public Inspection.

I. Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5. In this section, "to copy" means the reproduction of original records by whatever method, including but not limited to photography, photostatic copy, printing, or electronic or tape recording.

Old Cherry Mountain Road South: RSA 230:4 Class II Roads Unimproved Portions. All other class II highways shall be maintained by the city or town in which they are located, and may be improved to the satisfaction of the commissioner of transportation with the use of state aid funds.

07/09/19, NH DOT District Engineer Philip Beaulieu wrote: Thanks for sending a copy of the letter you received from the Town. As discussed over the phone, the portion of Old Cherry Mountain road in question is considered a Class II unimproved secondary route. There has been a long-standing relationship between the Town and State, in which summer maintenance is provided by the State and winter maintenance is provided by the Town. This similar arrangement exists with many other municipalities in NH and similar unimproved secondary routes cover over 900 miles throughout the state.

Historic 1914-1929 Forest Service maps document the Old Cherry Mountain Road was a "good motor road". A 1931 Forest Service map shows the FS Guard Station (currently referred to as Fabyan's Cabin) located near the FS boundary & the public Old Cherry Mountain Road. The road was plowed up to the FS boundary to access the guard station. Based on the sheer facts that the road was named probably well before 1914, has designated 911 address markers, and the Town plowed the road for over 60+ years sets precedent and constitutes "**dedication and acceptance**" of the road by the Town.

Selectmen

From: Clara Weloth <cweloth@gmail.com>
Sent: Saturday, July 18, 2020 8:19 PM
To: selectmen@townofcarroll.org
Subject: Correction to Right to Know Request Letter_Weloth_07/16/20

Dear Carroll Select Board,

I cited the wrong Select Board meeting date (10/17/2019) in the recent Right to Know request letter I sent to the board. The correct meeting date should read (10/07/2019) where it occurs in the text four times. Also, in the very last sentence of my letter the word “president” should be corrected to read...the Town plowed the road for over 60+ years sets “precedence”....

In addition, an important excerpt from the NH Right to Know Law was inadvertently omitted from my letter, which adds context to my right to know concerns that I submitted to the board.

{“...a public body may not move into non-meeting merely to discuss the contents of legal documents or advice previously provided by counsel without contemporaneously communicating with legal counsel. See Ettinger v. Town of Madison Planning Bd., 162 N.H. 785, 789–90 (2011) (finding “consultation” with counsel justifying non-meeting requires the ability to have a contemporaneous exchange of words and ideas between the public body and its attorney). Additionally, public bodies may not “close a meeting whenever its discussion turns to advice received from its attorney who is neither physically present nor present telephonically and therefore unable to participate in the discussion. Id. at 791–92. 73 APPENDIX C - Right-to-Know Request Index of Fully Redacted”}.

Therefore, please include this email as an addendum to my letter (07/16/2020) that I sent to the Select Board to be read into the next meeting minutes.

Aside from the legal arguments, I feel my neighbor who is a Vietnam war veteran deserves a basic Town of Carroll service of having the less than ½ mile of road plowed that is in question (and the Select Board should too)! Please reverse your decision that was based on the Town’s past legal counsel’s misinterpretation of RSA 230.

Thank you for your efforts to resolve the Old Cherry Mountain Road South public safety issue (and for caring about the resident’s safety too).

Respectfully,

/s/ Clara J. Weloth
129 South Old Cherry Mountain Road
Twin Mountain, NH

Cc
W. Long, Esq.