



**TOWN OF DURHAM**  
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**Town Planner's Review**  
**Wednesday, January 23, 2019**

IX. **23 Newmarket Road –Road Improvement.** Request for authorization to issue building permits, subject to other required approvals, for 23 Newmarket Road (Map 6, Lot 11-6) under RSA 674:41 I. (d). Authorization from the Town Council, with a recommendation from the Planning Board, is required for building permits for lots accessed from a private road. The gravel road providing access to the lot is a private road situated on Town property (Map 6, Lot 11). The owner of 23 Newmarket Road will likely be required to upgrade a portion of the gravel road. (A design for a single family house at 23 Newmarket Road is also being reviewed by the HDC.) Alan and Debi Garlick, applicant. Doug and Susan MacLennan, property owners. Mike Sievert, engineer.

- I recommend the board consider these options:
- 1) Discussion and continuation to February 13
  - 2) Vote simply to recommend to the Town Council authorization of building permits pursuant to RSA 674:41 but with no conditions
  - 3) Vote to recommend to the Town Council authorization of building permits pursuant to RSA 674:41 with appropriate conditions regarding the gravel road.

Please note the following:

- Alan and Debi Garlick have a contract to purchase the vacant lot at 23 Newmarket Road, Map 6, Lot 11-6. They hope to build a single family house on the lot. The lot is in the Historic District so their proposal is now being reviewed by the Historic District Commission.
- Access to 23 Newmarket Road would be from an existing gravel road situated on Town property, Map 6, Lot 11 (or 11-0). The Town does not maintain this gravel road so it is considered a private road (or perhaps a Class 6 road but Mike Lynch, Public Works Director, does not believe it is a Class 6 road) even though it is situated on a Town lot. The gravel road also provides access to the historic General Sullivan House situated on Map 6, Lot 11-1 and the historic John Mighell House situated on Map 6, Lot 11-2. **See the tax map at the bottom.**
- RSA 674:41 requires that the Town Council authorize issuance of any building permit for a house that will take access from a private road, with a recommendation from the Planning Board. Note that this is a permanent one-time general authorization by the

*Town Council.* It is not contingent upon any review of the specific development proposal for the lot itself. Here is the RSA:

<http://www.gencourt.state.nh.us/rsa/html/LXIV/674/674-41.htm>. It is pretty standard in my experience for a town council to require an appropriate upgrade to the private road as part of this authorization, usually to 20 feet of gravel. However, a town council may simply authorize issuance of building permits with no requirements if it sees fit. Because this is an existing lot of record and is clearly large enough for construction, ultimately I believe the Town would need to authorize issuance of a building permit.

- I met with the Town Administrator, Public Works Director, and Fire Chief to discuss this issue on December 20 and we agreed that 20 feet of gravel was appropriate, subject to obtaining acceptable test pits on the existing gravel. Mike Sievert submitted plans for the improvements. (See the plan for improvements to the gravel road and the site plan for the lot at 23 Newmarket Road showing the proposed development of this lot with a driveway and house. **See the proposed road improvement and the site plan for the subject lot.**
- Given that 20 feet of gravel is the typical requirement in these situations and that 20 feet of width is the minimum required by the Fire Department, I thought this review by the Planning Board and Town Council would be fairly straightforward. The HDC also has purview over improvements to this gravel road because the Town lot is in the Historic District and the HDC has purview over roads and driveways. The HDC held a public hearing on the proposed house last night and there were also several comments about the gravel road. Members of the public and the HDC were concerned about the impact of the proposed improvements with the roadbed raised 16", 20 feet of gravel, and 4 foot gravel side slopes on each side.
- The HDC continued its review of the house and lot and also its review of the gravel road to the February 7 meeting. But the HDC voted 5-0 (with Bill McGowan abstaining because this issue is going to the Planning Board and he is the board's rep on the HDC) to recommend that the gravel road be left as it is at 10 feet, or at least be widened as little as possible, but much less than 20 feet. This vote was a statement by the HDC and not a final decision and is subject to change, but the commission wanted to convey their concern. There was a strong sense that the proposed design would be inappropriate and harmful to the historic character of the Town's monument and the setting which includes the General Sullivan House. HDC members noted that the existing 10-foot wide gravel road has functioned fine for many years. The application to the HDC for the house includes a 14 foot asphalt driveway on the subject lot. The HDC was also concerned about the width of that driveway and possibly about the use of asphalt.
- The staff now needs to discuss this further. I do not know what flexibility the Fire Department may or may not have.
- A requirement to widen the gravel road could be imposed either as part of the Council's authorization for building permits or through the Fire Department's own review of a building permit for this vacant lot taking access off a private road. So it is not necessary that the Town Council include any condition about the gravel road. Also, the Town Council's authorization is independent of any HDC review and any specific building

application. Regardless of what happens with this specific HDC application, the Council authorization would be needed for this lot for any future construction there.

- The improvement on this gravel road would extend from Newmarket Road to the driveway serving 23 Newmarket Road and not beyond to the General Sullivan House. The owner of 23 Newmarket Road would be required to pay for the upgrade. The question arises why the owners of the two other lots with access on the gravel road do not need to participate. The reason is that these are existing houses. The statute requiring Council authorization was not in place when those houses were built.
- Prior to issuance of any building permit at 23 Newmarket Road the owners of the vacant lot will need to execute other agreements with the Town for use of the gravel road – an easement for access similar to what was executed with the owners of the General Sullivan House - and an indemnification form as specified in the RSA.
- The design shows a turning radius for a vehicle existing the private driveway toward the right (R=15). This would lead only to the General Sullivan House. I don't think this radius is needed.

#### **674:41 Erection of Buildings on Streets; Appeals. –**

I. From and after the time when a planning board shall expressly have been granted the authority to approve or disapprove plats by a municipality, as described in RSA 674:35, no building shall be erected on any lot within any part of the municipality nor shall a building permit be issued for the erection of a building unless the street giving access to the lot upon which such building is proposed to be placed:

(a) Shall have been accepted or opened as, or shall otherwise have received the legal status of, a class V or better highway prior to that time; or

(b) Corresponds in its location and lines with:

(1) A street shown on the official map; or

(2) A street on a subdivision plat approved by the planning board; or

(3) A street on a street plat made by and adopted by the planning board; or

(4) A street located and accepted by the local legislative body of the municipality, after submission to the planning board, and, in case of the planning board's disapproval, by the favorable vote required in RSA 674:40; or

(c) Is a class VI highway, provided that:

(1) The local governing body after review and comment by the planning board has voted to authorize the issuance of building permits for the erection of buildings on said class VI highway or a portion thereof; and

(2) The municipality neither assumes responsibility for maintenance of said class VI highway nor liability for any damages resulting from the use thereof; and

(3) Prior to the issuance of a building permit, the applicant shall produce evidence that notice of the limits of municipal responsibility and liability has been recorded in the county registry of deeds; or

(d) Is a private road, provided that:

(1) The local governing body, after review and comment by the planning board, has voted to authorize the issuance of building permits for the erection of buildings on said private

road or portion thereof; and

(2) The municipality neither assumes responsibility for maintenance of said private roads nor liability for any damages resulting from the use thereof; and

(3) Prior to the issuance of a building permit, the applicant shall produce evidence that notice of the limits of municipal responsibility and liability has been recorded in the county registry of deeds for the lot for which the building permit is sought; or

(e) Is an existing street constructed prior to the effective date of this subparagraph and is shown on a subdivision plat that was approved by the local governing body or zoning board of adjustment before the municipality authorized the planning board to approve or disapprove subdivision plats in accordance with RSA 674:35, if one or more buildings have been erected on other lots on the same street.

II. Whenever the enforcement of the provisions of this section would entail practical difficulty or unnecessary hardship, and when the circumstances of the case do not require the building, structure or part thereof to be related to existing or proposed streets, the applicant for such permit may appeal from the decision of the administrative officer having charge of the issuance of permits to the zoning board of adjustment in any municipality which has adopted zoning regulations in accordance with RSA 674, or, in municipalities in which no board of adjustment exists, to the local legislative body, or to a board of appeals, whichever is appropriate, in accordance with RSA 674:14 and 674:15, including the requirement for a public hearing. In a municipality which does not require building permits, direct application may be made to the zoning board of adjustment, or the local legislative body, or the board of appeals for permission to erect the building. In passing on such appeal or application, the board of adjustment, local legislative body, or board of appeals may make any reasonable exception and shall have the power to authorize or issue a permit, subject to such conditions as it may impose, if the issuance of the permit or erection of the building would not tend to distort the official map or increase the difficulty of carrying out the master plan upon which it is based, and if erection of the building or issuance of the permit will not cause hardship to future purchasers or undue financial impact on the municipality. Any such decision made in this connection by a board of adjustment, local legislative body, or by a board of appeals pursuant to this section and RSA 674:14 and 674:15 shall be in writing, together with the reasons for the decision, and shall be subject to review in the manner described in RSA 677.

II-a. Municipalities may except any lot, including island lots for islands served exclusively by boats, from the requirements of paragraphs I and II by an affirmative vote of the local legislative body pursuant to RSA 675, first submitted to the planning board for its approval and:

(a) If approved by the board, approved by a majority of those present and voting at a regular or special meeting of the local legislative body; or

(b) If disapproved by the planning board, approved by not less than 2/3 of those present and voting at a regular or special meeting of the local legislative body.

III. This section shall supersede any less stringent local ordinance, code or regulation, and no existing lot or tract of land shall be exempted from the provisions of this section except in accordance with the procedures expressly set forth in this section. For purposes of paragraph I, "the street giving access to the lot" means a street or way abutting the lot and upon which the lot has frontage. It does not include a street from which the sole access to

the lot is via a private easement or right-of-way, unless such easement or right-of-way also meets the criteria set forth in subparagraphs I(a), (b), (c), (d), or (e).

