

**RECORD OF SPECIAL MEETING
ELLSWORTH CITY COUNCIL**

DATE: SEPTEMBER 13, 2019

TIME: 8:00 AM

PLACE: ELLSWORTH CITY HALL COUNCIL CHAMBERS

**CITY COUNCIL PRESENT: BLANCHETTE, GRINDLE, HAMILTON, MOORE,
AND PHILLIPS.**

CITY COUNCIL ABSENT: FORTIER AND HUDSON

**KEY SPEAKERS PRESENT: CITY MANAGER DAVID COLE, TAMMY MOTE,
JENNIFER MERCHANT, DWIGHT TILTON, LARRY GARDNER, DUSTIN
LEYENDECKER, ADAM WILSON, REGGIE WINSLOW, LISA SEKULICH,
AND HEIDI GRINDLE.**

Call to Order.

Chairman Blanchette called the special meeting of the Ellsworth City Council to order at 8:00 AM.

Council Order #091900, Discussion and action on taking by eminent domain an easement to clear the title of an existing road leading from Christian Ridge Road to Leonard Lake.

David Cole, City Manager explained this is the access road from Christian Ridge Road out to Leonard Lake; formerly known as the Branch Lake Stream Dam. The Downeast Salmon Federation approached the City approximately three years ago with the idea of removing reminisces of the Dam to unblock the river to allow for better fish migration. Given this is a liability to the City, it made sense for the Council to approve an agreement which allows the Downeast Salmon Federation and their contractors to enter this area and remove the Dam. They competed in a competitive process for federal funding which was later received for this project. The Federal Government saw the merits of the proposal and the City has been planning over the last year for this project. The Downeast Salmon Federation has hired a contractor which Cole believes is scheduled to start work next weekend. Cole noted this is tricky because they are coordinating with the Dam operators for a time while the water levels are optimal as well as the DEP which restricts the time of year this area is accessible for work due to fish spawning, and a contractor who needs to mobilize. The root of the problem is the property owner, Steven Joy, has placed no trespassing signs on the road. This came about when the Downeast Salmon Federation had a survey completed to ensure they did not encroach on Joy's property. The survey indicated the alignment of the road doesn't correspond to the original easement taken in 1889; this is not uncommon. Cole noted the City's legal counsel believes the City has prescriptive rights to that road. After using that road for over a century the City believes they have a legal right to use it; the problem is the contractor does not want to cross over the road marked with no trespassing signs. The contractor does not want to be in the middle of this dispute between the City and the property owner. Legal Counsel suggested the City could go to court and request a quiet title action which would establish the City's rights to use the road through prescriptive rights; this would take time. There is a contractor

Call to Order.

Approved - Tabling discussion and ask Manager Cole to try and acquire that agreement with Mr. (Steven) Joy so we can complete the project without having to take the land and then we table the discussion and revisit this on Monday night (September 16, 2019) at the Regular meeting.

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currently waiting to start work on this project. On the advice of Legal Counsel the quickest way to solve this problem is to establish another easement along the road which would really re-establish the rights the City already believes they have. Cole noted basically beyond re-establishing rights the City already believed they have, they are proposing to add .12 acres just to ensure the construction equipment would have room to turn around. Cole stated on the plan (attached to the minutes as attachment #1) there is a loop in the road that provides an additional road way that the City could have taken but did not. There is less being taken now than was available previously. Dwight Tilton, Code Enforcement Officer stated originally the City had a 16.5' easement going straight down to the water. Tilton noted when the survey was completed the actual easement went down with corners extending out of the easement. Over the years the loop at the end was developed and maintained. This has been used and is still gravel. Currently, the issue is trying to fit an excavator and large dump truck into this area and not add to the contentious nature of this situation. There may not be enough room within the 16.5' easement to adequately fit all the equipment as well as turn them around. Tilton clarified the intention is not to take the entire loop, just enough so that the equipment can be coordinated with the removal of the concrete. See attachment #1 for the schematic and complete request. A number of communications have been sent to the landowner expressing the City's intent to move forward with re-establishing their rights. Cole read a portion of the letter dated August 16, 2019 into the record. He noted "taking" as indicated in the letter is not fee simple; this is not taking the land it is only taking a right to transverse a road that the City has been using for a century. If the City no longer has this right the piece of property owned by the City will be land locked. A federal grant has been awarded for this project, there is a contractor waiting to access this property, and the City needs access to this property. Cole shared an email received from the property owner at 3:18 PM September 12, 2019 within the letter the owner states he will be taking the signs down as of 9:00 AM on 9/13/2019. He will not stand in the way of the City using the existing road for the removal of the dam or other uses that deal with the original granting of the right-of-way; if the City continues with the eminent domain of taking his property then he rescinds this approval. He will seek a stay to stop work on the land he owns. Cole had previously received a piece of correspondence which was shared with the Council a week ago. This letter was similar but not as restrictive and still did not recognize the City's rights. Cole noted the choice before the Council today is whether to move forward as proposed in attachment #1 in light of the information that has been provided by the landowner (Mr. Joy). The

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construction activities need to get underway. The email received on September 12, 2019 in Cole's mind does not constitute an agreement by Mr. Joy and it leaves to interpretation what the original use of the right-of-way was. The Water Department has indicated that the easement could be ideal for a redundant waterline loop into the City. Cole stated if the Council decides not to move forward today on this request, the process can be repeated at another time when it is determined the City needs to clear the title. This action will re-establish the right to use the road which the City already believes they have, with the addition of the small piece at the end which will strictly be used to turn equipment vehicles around. Cole noted under the agreement with the Downeast Salmon Federation they are required to have insurance; if there is any damage caused through this project it will be repaired. The City does not expect there will be any damage caused; it will be covered in the event anything happens. Councilor Moore clarified the wording used within Mr. Joy's email concerning the "taking" of his land. Cole noted the City would be taking an easement rather than fee simple property; however, the City's attorney believes that there is little to no chance Mr. Joy would be granted a stay in this regard. In a previous correspondence Mr. Joy questioned the public purpose and whether it passed a public test; Cole stated clearly it does. According to Cole, Mr. Joy could contest the valuation. Cole invited him to offer his own valuation and that is within his right to contest or negotiate an amount he feels is fair. This can be taken to Superior Court; however, the City is willing to work with Mr. Joy on this determination if he can show it was calculated in error. The City would consider another valid valuation. Moore noted the Council is stating publically that the City is not "taking" his land. Cole stated the City is only taking back the right it already has. This places a cloud over the project, the City could go to court, spend more money fighting this situation out and getting the judge to re-attest the City's right to use the road. Anyone in the State of Maine who has to use a private road to access their camp and has been using those roads for years falls into this same situation and therefore understands how this process works. Moore questioned if the value of the piece of land being discussed as "taking back rights" and not actually physical property will be devalued through this process; as it can no longer be developed. Cole stated the City already felt they have this right as the road already exists in this location and therefore should not impact anything. Moore stated he was referring to the new area the City was looking to extend into for the purpose of trucks being able to turn around in. Larry Gardner, City Assessor stated any easement over property is negative versus not having any easements over your property. The Assessing Department would need to take this into consideration;

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there is already an easement over the property and that was part of the assessed value currently on file. Gardner stated in his experience if the City were to take in fee the .12 acre of land he has seen the two neighbors agree on a split. The value that the one neighbor pays to get that piece of land from the other neighbor is approximately double what the assessed value drops for that subject property. As this is just an easement, Gardner is calculating this as \$200 in value. If this was a fee based transaction for the .12 acres to be added to the City's piece of property it would be worth maybe \$400. The City will physically pay Joy \$200 for the easement. Councilor Hamilton had two questions: 1) Relating to the email, it is mentioned the uses related to the dam or the original granting of the right-of-way. In the original right-of-way, Hamilton wondered if he was correct that it included the entire loop that is shown on attachment #1. The easement that is currently in place includes the land going into the property and then loops around onto the .12 acres of property the City is considering adding. Hamilton wondered if it extended out, looped back, and connected back; or is it just to the end of that. Gardner stated the attached plan does not show the exact original easement. There was a discussion between Gardner, Dwight Tilton (Code Enforcement Officer) and Lisa Sekulich (Public Works Director) concerning the original easement. Tilton stated what he has seen is a straight line following the property line 16.5' on the stream side extending straight down to the water. Tilton did not believe it even showed the right-of-way to the pump house. This confusion is one of Hamilton's questions as Joy's email is very specific about the granting of the original right-of-way and whether the original right-of-way will get the City to where they need to be with this project. The email is very specific to that and not knowing what that is leaves Hamilton unsure. Cole was concerned with the email stating the uses associated with the original right-of-way; Cole believes Joy feels this means servicing the dam because he has made claims that the right-of-way has been abandoned because the dam is no longer in operation. The City as well as their legal counsel believes they have a prescriptive easement to include all uses of a public way. This email leaves it up to interpretation. Cole noted the .12 acres accommodates this construction project because the City cannot be in the position of having that little piece of land shutoff to the City during the construction phase. The Council could choose at a later time to release that .12 acres. The other factors are the City has an original easement of 1889 which is not where the road was built; the City could consider releasing that easement over the property as well. There are a lot of positive things the City could do; however, right now the City is trying to get through the construction project. The .12 acres is only for the purpose of being able to turn the

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trucks around. Cole believes this road is a public way although it is a simple dirt road. Cole noted he tried to reassure Joy that the City did not have plans for developing the City's piece of property located at the end of this road; the only goal was to get through this construction project. The property is not large enough to accommodate anything. Councilor Phillips inquired when the red flag went up that there may be an issue with this project in relation to the easement. Sekulich and Cole believed late July was the timeframe when concerns started coming to light. Phillips inquired when the no trespassing signs were installed and questioned whether there was notification prior to that act. Sekulich explained the no trespassing signs were installed once Downeast Salmon Federation contracted with the Contractor. The Downeast Salmon Federation started notifying adjacent property owners and then once those property owners were notified this project was going to be happening that is when the flags went up. Then the Contractor called Joy just to be sure he was aware they would be going over his property and that everything would be okay. Once that discussion took place the no trespassing signs were posted. Sekulich stated the Downeast Salmon Federation started the notification process in June. The Contractor spoke to Joy in July and fairly quickly after that the no trespassing signs were posted. Cole stated he was told Joy was concerned with potential development happening at the end of that road on the City's property. Cole wrote an email to the Downeast Salmon Federation stating the City did not have plans to develop that property at this time, which Cole requested they share with Joy. The Downeast Salmon Federation is the point of contact for this project as it is their project and Contractor. Phillip noted this is a City easement and the Downeast Salmon Federation is planning on using it. At this point the City did not have any direct contact with Joy concerning this matter. Once this is finished the easement becomes a public easement which is not really a public way as Phillip understands it; this gives the City the right to use it but not a required right to use it. This is a right not a responsibility, which is permanent and forever. Phillips felt the bottom line is the City would be taking Joy's property, which concerns him. Phillip believes the City has the easement there and this matter has gotten out of hand without negotiating back and forth; in the end the easement exists whether Joy believes it exists or not. This matter will cost the City money either way, Phillips would like to see an agreement negotiated rather than taking property. Phillips will not vote for the taking of property; he feels there is the ability to complete what needs to happen in this location by working with Joy. Hamilton wondered if the City could just use the existing right-of-way; his understanding is there is a concern that the City does not have enough property to

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maneuver the equipment. Tilton explained if the City remains with the original 16.5' easement he does not feel it is feasible to back a dump truck around in 16.5'; which means they will need to back the dump truck down each time. In Tilton's estimation there will be friction with such limited space especially with the excavator having a swing exceeding 16.5'. He feels it is safer to take that small piece of property and return it at the conclusion of the project; without it there is a strong possibility property the City does not have the right to be on will get destroyed during the construction process. Hamilton noted at this point, the email from Joy is very restrictive with regards to what he is agreeing to and that is the existing right-of-way only. That statement alone and based on what Tilton just explained is not going to enable the City to complete this project. Hamilton felt that email did not give the City permission to do what is needed in regards to the project. Hamilton would be in favor of describing exactly what the City needs to do, explaining the turnaround is needed, the City needs this exact access as drawn and that the City try over the next two days prior to the City Council meeting on September 16, 2019 to get a formal agreement in writing. This is a legal process and email is not sufficient. Hamilton would like to consider tabling the decision until Monday's meeting and if the formal agreement is not reached then there can be a discussion at that point how the Council would like to proceed. Phillips noted earlier discussions indicated the 1889 easement was very fuzzy other than a description of a certain width, there is no real metes and bounds description. Sekulich noted part of the problem based on the survey that was conducted by the Downeast Salmon Federation is that some of the original pins are essentially in the river because the banks of the river have changed over the last 100 plus years. There is a general description and alignment but certain geographic factors have changed over time making it unclear, there is no mention of an existing road or any roadway. It was difficult to define the outer boundary by the lake because the pins are missing. Phillips noted during construction it is very unlikely there will not be some damage created but generally when that happens it will be reseeded and taken care of when the Contractor leaves. The best management practices will be used for addressing runoff at the same time. This will be handled as environmental sound as possible. The original easement from 1889 does not include the road, it is simply a straight line from the Christian Ridge Road to the river being 16.5' wide from the edge of the stream. Moore asked if the loop portion has been used in the past. Sekulich noted the Water Department since the late 1800's up until 1990 or when the Water Plant was built has used those roads to access that dam. Chairman Blanchette explained the word taking is being misappropriated in this case; he sees

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it as reaffirming of the right the City was given in 1889 to use this road. He does not see it as the taking of property per say in fee, but rather the use of. Blanchette feels it makes sense to approve this request so that the Contractor can access the property, remove the dam, and correct any damage caused by the equipment. Joy would not be losing any ownership of property or any right of use to this property, the City already has a right to use this property with the addition of a simple turnaround area. Phillips noted the City staff stated the easement is 16.5' and the road is 33'so the land being used is twice the size of the original easement, it is basically being reaffirmed and allowing for a safe passage; however, the City is taking Joy's property. The easement is a use of his property; this is basically a property rights issue. Hamilton believes this project needs to be completed and the City needs access to that area. In his opinion the City has a right and responsibility for the dam. Hamilton realizes there is a sensitivity anytime the City needs to acquire land which someone owns and that is never the preferred way to acquire it; although sometimes it is necessary for the greater public good to take it. In this case, if it comes to that, he feels that is what would need to be done and then maybe give it back after. Hamilton hopes the City could describe exactly what they need within a very simple contract to develop between today and Monday, working in conjunction with the landowner, and reviewed by legal counsel.

On a motion by Hamilton, seconded by Phillips, it was

RESOLVED to approve tabling discussion and ask Manager Cole to try and acquire that agreement with Mr. (Steven) Joy so we can complete the project without having to take the land and then we table the discussion and revisit this on Monday night (September 16, 2019) at the Regular meeting.

A final vote was taken with 4 members voting in favor (Grindle, Hamilton, Moore, and Phillips) and 1 member voting in opposition (Blanchette).

After the vote was taken, Chairman Blanchette allowed Jared Wilbur, Ellsworth resident residing on the other side of the stream from this project to explain that last year there was a mailing sent out by the Salmon Federation. This document described the work that would be completed. The surveying was never completed at that point and now it comes back up this year; he questioned why the big rush to complete this project if they are still trying to figure out the easements. He thought as this was not completed last year, maybe the right course of action would be to

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take the time needed to develop an agreement with Joy so that the easement can be used long term. Sekulich noted the rush is due to the fact that the Downeast Salmon Federation has a grant that will expire at the end of this year combined with the DEP and Inland Fisheries will only allow this type of work to be completed within a very short non-fish spawning window; which is this fall. September 30, 2019 is the required deadline to be out of the water; this project can only be completed during the in-water work window. They have a Contractor under contact who is waiting to mobilize in order to complete this project in the allotted window of time.

Adjournment.

On a motion by Phillips, seconded by Hamilton, it was unanimously

RESOLVED to approve adjournment at 8:39 AM.

A TRUE COPY

**ATTEST: _____
HEIDI-NOËL GRINDLE**

**Approved -
Adjournment at 8:39
AM.**