



**Town of Concord**  
Finance Committee  
22 Monument Square  
Concord, Massachusetts 01742-0535

**AGENDA**

**Concord Finance Committee**

**January 23, 2020**

**Select Board Meeting Room  
Town House  
7:00PM**

1. **Minutes-** January 16, 2020; others as available
2. **Town Manager: FY20 Reserve Fund Transfer**
3. **Town Manager: FY21 Budget Update, if any; FY21 Capital/ Debt Plan**
  - Clarification on FY21 Town Guideline percent increase
4. **2020 Annual Town Meeting Warrant Articles: review**
5. **Follow up discussion on open action items**
6. **Chair's Report**
7. **Observer Reports**
8. **Finance Director's Report-** update on Free Cash as of 7/1/19
9. **Citizen comments**

**Reminders**

- **Next Regular Meetings:** February 6, 13, 20, 2020
- ***When Finance Committee members anticipate being absent from a meeting, it would be appreciated if they would notify Chair Dean Banfield by email at: [dbanfield.fincom@gmail.com](mailto:dbanfield.fincom@gmail.com)***

Supporting materials for agenda items are available online at [www.concordma.gov/fcmtgdocs](http://www.concordma.gov/fcmtgdocs) . Materials are generally uploaded on the Tuesday prior to the Regular Meeting.

**Town of Concord  
Finance Committee  
Meeting Minutes – January 16, 2020**

**Present:** Greg Guarriello, Mary Hartman, John Hickling, Richard Jamison, Dee Ortner, Karle Packard, Parashar Patel, Christine Reynolds, Thomas Tarpey and Andrea Zall

**Absent:** Dean Banfield, Peter Fischelis, Wade Rubinstein, Phil Swain and Brian Taylor

**Others Present:** School Committee Member Cynthia Rainey; Finance Director Kerry Lafleur; Recording Secretary Anita Tekle

**Meeting Opened**

Ms. Hartman called the meeting to order in the Select Board Meeting Room at the Town House at 7:00 pm. She announced that the meeting was not being televised or recorded.

**Approval of Minutes**

On a **MOTION** made by Mr. Packard and seconded by Mr. Patel, the Finance Committee (FC) Guidelines Subcommittee minutes of November 21, 2019 were unanimously **APPROVED**, as amended.

On a **MOTION** made by Ms. Ortner and seconded by Ms. Reynolds, the FC Guidelines Subcommittee minutes of December 5, 2019 were unanimously **APPROVED**, as amended.

On a **MOTION** made by Mr. Hickling and seconded by Ms. Ortner, the FC minutes of December 5, 2019 were unanimously **APPROVED**, as drafted.

Ms. Ortner inquired how follow-up items come back to the FC. Ms. Lafleur responded that some information items come back to her or to the Chair. Ms. Ortner asked that the Town's financial policy to spend 2-3% of the operating budget annually on capital projects without debt funding and 5-6% of the operating budget on debt financed capital projects be brought back to the FC at a future meeting for discussion. In addition, Ms. Ortner agreed to review the minutes for the past six months to make a list of items that required follow-up, to be sure that they have been completed.

**Follow-Up:** Add to future agenda an item to review the Town's financial policy on capital projects. Ms. Ortner to compile a list of follow-up items from the previous six months of FC meetings.

**Review of 2020 Annual Town Meeting Warrant Articles**

The group reviewed the preliminary list of Warrant Articles, noting that the order has not yet been determined by the Select Board (SB). The purpose of the review was to determine which articles are of sufficient interest to the FC that the proponent may be invited to come before the FC prior to the public hearing. Ms. Lafleur noted that five public hearings are scheduled, as follows:

- Select Board – February 24
- Planning Board – February 25 (Zoning Articles)
- Finance Committee – March 9 (Town Budget & Town Capital Articles)
- Finance Committee – March 16 (School Budget & School Capital Articles; CPC Articles)
- Finance Committee – March 23 (Enterprise Fund Budgets & Articles)

Ms. Lafleur noted that she had tentatively assigned the articles to one of the five hearings, but that is subject to change by the SB. The following articles were discussed:

Article #	Title	Comments
8	FY20 Town Budget Adjustment	May be necessary to adjust FY20 Legal Services budget, as expenses are expected to exceed budgeted amount. Options are: Reserve Fund transfer; Year-End transfer; or Budget Adjustment. Town Manager will discuss at the Jan 23 FC meeting.
10	FY21 Town Capital Improvement Plan	Ask the Town Manager to be prepared to discuss on Jan 23 or Feb 6
12	Retirement COLA Base Adjustment	Currently, an annual COLA is added to the first \$12,000 of the pensions of retirees. For many years, the COLA adjustment has been 3%. Pension amounts above \$12,000 are not adjusted for COLA. This article proposes to increase the pension amount to which COLA is applied from \$12,000 to \$14,000. Retirement Board Chair will be invited to attend the March 5 FC meeting.
13	FY21 Minuteman Technical HS Budget	Expected to be \$1,227,684; assessment has increased by 19%. MM staff and/or rep will be invited to attend meeting, possibly on Feb 6 or 13.
14	FY21 CPS Budget	School Committee (SC) & School Supt scheduled to attend Feb 13 FC meeting.
15	FY21 CPS Capital Improvement Plan	Embedded in Town Manager's FY21 capital budget
16	FY21 CCRSD Budget	SC & School Supt scheduled to attend Feb 13 FC meeting
17	CCRSD Capital Budget/Parking Lot	Request is \$848,410; SC & School Supt scheduled to attend Feb 13 FC meeting
19	Community Preservation Com Appropriations	Funding for two churches is included—does the Town have legal exposure? Invite Chair to attend Feb 6 FC meeting.
22	Appropriate Funds for Affordable Housing	Second year of this request; no need to invite to FC meeting.
24	Tax Increment Financing (TIF) Agreement for Junction Village	Junction Village developer requested this article be placed on the Warrant to allow them to seek property tax relief. Invite SB and/or Junction Village developer to FC meeting (possibly March 5, to allow ample time for information to be gathered).
31	By Petition: Healthy School Buses for Schools	Request for \$200,000 for electric buses; invite petitioner to attend on Feb 13, in conjunction with SC and School Supt
36	Zoning Bylaw Amendment—2-family dwelling units	These two proposals may affect Town's finances, since the # of school children may increase with additional housing units.
43	Zoning Bylaw Amendment—Additional Dwelling Unit	If units are small, the impact on schools may be negligible, but unknown at this time. Invite Planning Board Chair to come to FC meeting to discuss possible financial impact.

During the discussion of **Article 8**, Ms. Lafleur noted that the Town Manager wishes to discuss the option of a Reserve Fund transfer for Legal Services, since he doesn't anticipate using the Reserve Fund for any other budget items, and the funds have already been appropriated. Mr. Hickling noted that the Town Manager had been asked for a Legal Services expenditure estimate for FY20. Ms. Lafleur responded that Mr. Crane will provide that information when he meets with the FC on January 23. Ms. Lafleur also agreed to put together a memo explaining the options for funding the anticipated Legal Services overage. Ms. Hartman emphasized the importance of televising next week's FC meeting, in the ongoing goal of transparency regarding legal expenses. Ms. Lafleur noted that legal expenses for Estabrook Woods are separately tracked in her accounting records. Ms.

Hartman noted that an additional appropriation for Legal Services for FY21 could be made at a fall 2020 Special Town Meeting, should one be called for the new middle school.

**Follow-Up:** Ms. Lafleur will ask Mr. Crane to be prepared to discuss the FY20 legal services budget/estimated expenses and the Town's Capital Improvement Plan at the January 23 FC meeting. Ms. Lafleur to prepare a memo explaining the options for funding the anticipated Legal Services overage. Ms. Lafleur to confirm with MMN that the Jan. 23 FC meeting will be televised.

During the discussion of **Article 12**, Ms. Lafleur noted that most Retirement Boards across the state provide a COLA adjustment on a higher base than Concord. Ms. Lafleur was asked to provide information about the number of retirees, the median retirement benefit, and a projection of the cost of increasing the base going forward. Ms. Lafleur agreed to discuss these items with the Retirement Board's actuary.

**Follow-Up:** Ms. Lafleur to invite Retirement Board Chair to attend FC meeting on March 5. Ms. Lafleur to obtain information noted above from Retirement Board actuary.

**Follow-Up:** Ms. Reynolds to invite Minuteman Rep and/or Finance staff to attend FC meeting either Feb 6 or 13.

**Follow-Up:** CPC Chair will be invited to attend the February 6 FC meeting to discuss recommendations of Article 19 prior to the hearing.

**Follow-Up:** Ms. Lafleur to invite Brian Foulds (petitioner for Article 31) to attend Feb 13 FC meeting to discuss his proposal for more funding for electric buses.

**Follow-Up:** Ms. Lafleur to invite Matt Johnson (PB Chair) to attend FC meeting to discuss possible financial impact of Articles 36 and 43.

### **Finance Committee Write-Ups for FC Report**

Ms. Hartman reminded attendees that drafts for the FC report are due next week. She suggested that members look at last year's FC Report (available online, with hard copies available at the Town House) in order to see a template of what is expected. It is expected that the Feb. 20 meeting may be cancelled, if agenda items can be moved to other scheduled meetings.

### **Middle School Building Committee Update**

Ms. Hartman thanked Mr. Fischelis (liaison) for information provided about the public hearings for the proposed new middle school. Several FC members were in attendance. It was noted that the MS Building Committee has a Finance Subcommittee. Some concern was expressed that the public hearings are turning into "wish list" forums. Ms. Hartman urged the FC to get involved sooner rather than later on the issue of the proposed scope of the building project, providing any data or information that may be helpful to them. Among the issues being considered are a larger auditorium (to accommodate Concord's Town Meeting), a larger gymnasium, a central kitchen for the CPS District, security measures, and a design that meets the educational goals for the 21<sup>st</sup> century. Mr. Guarriello noted that his wife is the Co-Chair of the MS Building Committee, and that the hearing attendees are making requests for additional design elements without understanding the cost implications. He noted that constructing a fully sustainable, "net zero" building will increase the building's cost.

In response to a question from Mr. Patel, it was noted that the Middle School Finance Subcommittee is not responsible for arranging the financing of the project—that is the responsibility of the Town’s Finance Director (this is a Town project). Ms. Rainey noted that in many other communities, the FC partners with the school building committee to provide financial information. It was suggested that the Finance Subcommittee Chair be invited to a FC meeting, along with the School District’s Director of Finance & Operations.

Mr. Hickling questioned why a large item like a new middle school would be considered at a Fall 2020 special town meeting rather than at the 2021 annual town meeting. It was noted that the timing of the Middle School project vote would be hard to slow down at this point, given project momentum. Ms. Ortner suggested that a brief presentation be made at the 2020 annual town meeting about what is scheduled to come up at a fall 2020 special town meeting.

Mr. Hickling suggested that benchmark data may be helpful to the Finance Subcommittee (the Town of Harvard, MA recently put out some benchmark information that may be useful). He also noted that the range and scope of debt service in our peer group towns would be helpful. Mr. Packard noted that Ms. Lafleur had provided information last spring about the tax impact of a new middle school.

Ms. Hartman suggested that the FC consider revising/refining its debt policy, in light of the growing debt that the Town has incurred in recent years. Ms. Ortner suggested that the FC assign an observer/liason to the Finance Subcommittee. Mr. Guarriello noted that the focus of the Finance Subcommittee is not the cost of debt to the Town. Ms. Hartman responded that the FC could provide a financial context for the work that the Middle School Finance Subcommittee is doing. She noted that most Concord households do not have school-aged children. She emphasized the importance of the SC considering the financial impact of all school proposals—we are all in this together, and capital planning is essential. Mr. Packard commented that Concord’s real estate values are positively impacted by the quality of Concord’s schools, so we should proceed cautiously.

Mr. Tarpey commented that the proposed new middle school project would most likely be approved at a special town meeting, which would have a lower attendance than an annual town meeting. He felt it important that the FC remind the SC that we all represent Concord residents in our work as Town and School Officials. We need not build the finest school possible, but rather the finest school that we can afford to build.

**Follow-Up:** Invite Chair of Middle School Building Committee’s Finance Subcommittee to attend a FC meeting, along with the District’s Director of Finance & Operations to discuss the costs and tax impact of the proposed new middle school. Invitation should come from the FC Chair (Mr. Banfield), with the suggestion that the FC may be able to provide assistance and/or data.

**Follow-Up:** FC consider revising/refining its debt policy.

**Follow-Up:** Suggestion that FC consider assigning a liaison/observer to the Middle School Finance Subcommittee—to be discussed.

### **Chair’s Report**

Ms. Hartman reported that she had participated on a panel about the Town’s finances and capital planning, sponsored by the LWV. It was excellent, and may be viewed on MMN. She met with the Editor of the Concord Journal, Robert Fucci to discuss with him opportunities for op-ed space in

the Journal. Ms. Hartman agreed to discuss with Mr. Banfield the idea of a conversation with the Town Moderator about the FC making a presentation at Town Meeting.

### **Observer Reports**

Public Works Commission – Mr. Jamison reported that a recent meeting was cancelled. As of a few weeks ago, about 50% of snow removal funds had been expended. While the department had not received funding for all of its proposed FY21 capital projects, they did receive a sufficient amount.

Board of Health – Mr. Guarriello reported that he attended a public hearing on flavored vaping products and flavored cigarettes. The Board of Health’s proposals may have financial implications for increased legal costs, but it is too early to tell.

Capital Planning Task Force – Ms. Ortnier reported that the group is making significant progress. She reported that Mark Kost, Chair of Westford’s Capital Planning Committee, had provided useful information about capital planning committees. Westford’s group looks at all capital requests greater than \$10,000. The Task Force is also looking at Arlington’s and Lexington’s capital planning process, along with Concord’s past capital planning reports. A public hearing is scheduled for March 2. The task force is aiming to provide a report to the SB by the beginning of April.

Planning Board – Mr. Patel reported that the proposed PRD on Main Street in West Concord required that the developer include a narrative of the cost impact to the Town in its application, and this was not included. Mr. Patel noted the omission at the public hearing, which he felt should be included in the Planning Board’s letter to the Zoning Board of Appeals. It was agreed that Mr. Patel will draft a letter to be sent from the FC to the Planning Board about this issue.

**Follow-Up:** Mr. Patel to draft a letter from the FC to be sent by Mr. Banfield to the Planning Board, concerning the incomplete application from the developer.

Minuteman Regional School – Ms. Reynolds reported that Minuteman has received 303 applications for 180 freshman slots, including 225 from member communities. It appears that few if any out-of-district applicants will be able to be accepted. Given the increase in applications associated with the new school building, the updated admission policy will be of greater interest to member towns. It was requested that Minuteman representatives cover this topic when they meet with the FC in February.

Middle School Building Committee – Mr. Hickling expressed concern that the MS Building Committee is apparently not planning to apply for MSBA funding. He noted that they had applied twice and had been rejected. He was concerned about the transparency of this decision, given the significant financial consequences of the Town forgoing possible state funding of this project. He noted that this project is historically the second costliest project for the Town of Concord, and other affluent communities have received MSBA funding

### **Finance Director’s Report**

Ms. Lafleur reported that the proposed FY21 budgets represent a tax impact of 2.76%. This estimate includes the projected increased cost for Minuteman high school. She also noted that the PILOT for the Light Plant is higher than budgeted, so we are in good shape. The projected cost of the Retirement Board proposed article is not yet known—additional funds may be needed. Ms. Hartman asked Ms. Lafleur to provide an update on free cash at the next FC meeting.

**Follow-Up:** Include on the agenda for the next FC meeting an update on free cash.

**Adjournment**

The meeting adjourned at 9:20 pm.

Respectfully submitted,

Anita S. Tekle  
Recording Secretary

*Documents Used or Referenced at Meeting:*

- Finance Committee Schedule January-June 2020
- Annual Town Meeting and Election Calendar 2019-2020
- Finance Committee Town Meeting Planner
- Draft Articles for 2020 Annual Town Meeting

**FinCom Town Meeting Planner**

		updated to reflect discussion on 1/16/2020					
		<b>23-Jan-20</b>	<b>6-Feb-20</b>	<b>13-Feb-20</b>	<b>20-Feb-20</b>		
1	FY21 Town Budget Review	Planning Board Articles	FY21 CPS Budget Review				
2	FY21 Capital/ Debt Plan	FY21 Minuteman Budget	FY21 CCRSD Budget Review				
3	FY20 Reserve Fund Transfer Request	FY21 CPC Budget	FY21 CCRSD Capital				
4		Affordable Housing Articles	Petition Article: Brian Foulds				***meeting only if needed***
5							
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10							
		<b>5-Mar-20</b>	<b>9-Mar-20</b>	<b>16-Mar-20</b>	<b>19-Mar-20</b>		
1	FY21 Guidelines Review	Public Hearing: Town Budget, Warrant	Education Budgets, CPA, Warrant				
2	Retirement COLA	Articles, including capital	Articles				FinCom recommendations
3	Tax Increment Financing Agreement						
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## Kerry Lafleur

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**From:** Kerry Lafleur  
**Sent:** Monday, January 20, 2020 12:38 PM  
**To:** Andrea Zall (andrea@frame-ables.com); Brian Taylor (bjtemail@gmail.com); Christine Reynolds (FinComCR@gmail.com); Dean Banfield; Dee Ortner; Greg Guarriello; John Hickling (jrhickling@yahoo.com); Karle Packard; Mary Hartman (maryhartman7@gmail.com); Parashar Patel (pacoiconn@gmail.com); Peter Fischelis (pfischelis@yahoo.com); Philip Swain; Richard Jamison; Thomas Tarpey; Wade Rubenstein  
**Cc:** Anita Tekle; Kerry Lafleur  
**Subject:** FW: letter to Select Board, please distribute to members of the Finance Committee

Good Afternoon-

This LWV has asked that the letter below be forwarded along to you.

Kerry

**From:** Ardis Bordman <[abordman@comcast.net](mailto:abordman@comcast.net)>  
**Subject:** letter to Select Board, please distribute  
**Date:** January 17, 2020 at 4:50:26 PM EST  
**To:** [jromanul@concordma.gov](mailto:jromanul@concordma.gov)

To: Members of the Concord Select Board:

At this past week's meetings of both the League of Women Voters' Town Government Committee and of its Housing Issues Subcommittee, members discussed the proposed Town Meeting Article to allow Grantham Corporation to apply to the State for designation as a TIF project. If approved, the TIF would change the relationship between Grantham Corporation and the Town of Concord.

Our Committee understands the Board's rationale for placing this Article on the Warrant. While we understand that placing the Article on the Warrant does not constitute an endorsement, the request came just hours before the warrant closed so there was no opportunity for a comprehensive discussion, as the Board has done for other articles. For that reason, we would like to request the Select Board hold a public in-depth discussion so that the financial ramifications of the TIF request could be explained prior to the Public Hearing on Feb 24. And because this issue deals specifically with property assessment and potentially more tax dollars from citizens if it passes, we suggest that Town Assessor, Lane Partridge be present to help clarify the issue.

We thank you for your attention to this matter.

Ardis Bordman, LWV Town Government Committee

## Kerry Lafleur

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**From:** Kerry Lafleur  
**Sent:** Tuesday, January 21, 2020 7:02 AM  
**To:** Andrea Zall (andrea@frame-ables.com); Brian Taylor (bjtemail@gmail.com); Christine Reynolds (FinComCR@gmail.com); Dean Banfield; Dee Ortner; Greg Guarriello; John Hickling (jrhickling@yahoo.com); Karle Packard; Mary Hartman (maryhartman7@gmail.com); Parashar Patel (pacoiconn@gmail.com); Peter Fischelis (pfischelis@yahoo.com); Philip Swain; Richard Jamison; Thomas Tarpey; Wade Rubenstein  
**Cc:** Anita Tekle; Kerry Lafleur  
**Subject:** FW: A letter to the finance committee re Estabrook lawsuit costs  
**Attachments:** Dear FinCom re Estabrook Expense.pdf

Good Morning all-

The below and attached is correspondence was received today on your behalf, and is being forwarded to you as requested.

Kerry

**From:** Neil Rasmussen <neil@saveourheritage.com>  
**Sent:** Tuesday, January 21, 2020 12:46 AM  
**To:** finance mail <finance@concordma.gov>  
**Subject:** A letter to the finance committee re Estabrook lawsuit costs

Dear Finance Committee

I hope members of the committee will have the opportunity to review the attached letter as you consider the costs and benefits of the ongoing Estabrook lawsuit.

Thank you for your consideration

Neil Rasmussen  
Estabrook Road

Jan 19, 2020

To: The Town of Concord Finance Committee  
Re: Escalating Estabrook Woods Litigation Costs

Dear Finance Committee,

I am one of the named defendants in the Estabrook lawsuit, and one of a group of private owners, including Harvard, who own the majority of Estabrook Woods and manage it as a nature preserve. I had the opportunity to review some of your recent meetings and heard some of the questions that were raised. Now that the Estabrook Trail lawsuit is nearing the milestone of \$1,000,000 spent by the Town (paid plus incurred), it is important to reflect on what has been learned, before the Town commits the *next* millions that will be required to take this suit to completion.

When the Town initiated this lawsuit, officials stated the suit was based on two key claims: first, that the Estabrook Trail was an old abandoned public road that retained some public rights, and second that “long-standing use” gave rise to new rights for public use. As of today, the Town has abandoned **both** of those claims, and is essentially starting over.

On October 22, 2019, as reported in the Concord Journal, the Town dropped the claim that long standing use gave rise to public rights, a claim which never had any basis in the law. The right to make such a claim, called a prescriptive easement, is only available to individuals, and not to “the public” or to a class or town.

Just last week, on January 10, 2020, the Town admitted that the Town of Concord road documentation that they had based their case on *was not* documentation of the Estabrook Trail, as they had claimed, but is actually the documentation for Monument Street, a fact the defendants had pointed out to the Town *33 months ago* in a letter dated May 1, 2017. The law is clear that a road is public *only* when a Town has official records of such. The evidence that has emerged in this case shows that the portion of the Trail through the defendants’ property was never made a public way but was a private logging and agricultural road originally made by and used by the owners on private property. If the Trail was never a public way to begin with, then no public easement could remain under any interpretation of the discontinuance actions taken in 1932, because there was never any easement to begin with.

The evidence gathering, depositions, affidavits, and interrogatories to date have focused *almost exclusively on the above matters that the Town has now abandoned*, and involved over 40 witnesses, 12,000 documents, and multiple experts. Not only does this demonstrate that the work to date has been a tragic and unnecessary waste of taxpayer funds, but it also placed the financial burden of defense on long-standing Concord residents, some in their eighties whose family has stewarded the land with love and care for three generations.

Yet none of this waste was necessary. The prior Town administration, with just a few hours of due-diligence, could have learned what has now taken the *first* million dollars to find out. If the Town had only engaged in an open fact-finding process to learn the facts, the outcome could have been much different. Instead, we now know the prior Select Board met improperly in executive session and considered input from special interests in secret. Town officials made false statements like “the land is not private” which inflamed people (the Select Board has now admitted the land and the Trail are privately owned). The Select Board could have tried to find out the history of the Woods from people whose families have been in Concord for generations, but instead chose the path of secrecy in order to, as their counsel said, “preserve our strategic legal position.” This is **not** how people behave who are interested in facts. This is **not** how open government behaves. This is **not** how a Town should ever treat their citizens.

By abandoning the central original claims in this case, the Town is now faced with **restarting this case from the beginning** with some new claims. Perhaps before the Town embarks on spending the *next* million dollars on this imploding lawsuit, it should seek a second opinion on the merits of whatever vague or new claims the Town is intending to propose regarding this privately owned land.

Our Town’s loss here is more than financial. The current legal action is teaching private landowners of the devastating financial and personal consequences of allowing people to visit trails on their lands, with the predictable result that trails around Concord are quietly closing.

For three years straight, legal fees paid to the firm of Andersen Kreiger have exceeded our Town legal budget by approximately 100%. The record shows how the Town’s Counsel has misled our leaders and the taxpayers of Concord:

- The Town Counsel told Town leaders that our Trail was a public road, *despite knowing at the time of filing the lawsuit in 2017 that they did not have the required documentation to support that assertion.*
- The Town Counsel told Town leaders in 2016 that the public was entitled to access due to “long-standing public use” and wasted hundreds of thousands of dollars on this claim prior to abandoning it in the fall of 2019.
- In 2018 Town Counsel engaged and has paid nearly \$100,000 for an expensive expert who produced a large report testifying that he found the definitive documentation of the Trail as a Town public way, but in January of 2020 recanted those claims and admitted there is no such documentation.
- The Town Counsel provided financial estimates to the 2018 special Town Meeting stating that the total cost of the lawsuit would be \$550K; it is now approaching \$1,000,000 and potentially spiraling to \$2,000,000 or more, *even without consideration of any judgement awarding legal fees to the defendants.*
- The Town Counsel told the presiding judge and the former Town Manager that they would move for summary judgement on the case in March of 2019; there are now no plans for such a motion, meaning that the case is likely to go to a long and costly trial.

- The Town Counsel, before dropping the core claims, told Town officials that they had a good case, but failed to warn the Town that no court has ever found a Trail with the history of Estabrook Trail to have public access.
- The Town Counsel articulated two core claims as the basis for their case in 2017 and now has abandoned both of them, restarting the case with new and vaguely defined claims.

This is what happens when public officials delegate due-diligence to lawyers who know nothing of the situation- and are not even qualified land-law specialists.

While there are serious questions regarding the motivations of the people who originated this lawsuit, whether they did their due-diligence, or whether the legal guidance was competent, these are difficult matters for a finance committee to consider. I bring them to your attention because it is clear that the information you and the public have been provided regarding these matters has not been forthright (see attachment). Nevertheless, the Finance Committee is clearly charged with assessing cost-benefit financial matters, and I submit the following for your consideration:

The most similar case to this case is known as the "Rexhame Beach" case which lasted 18 years, and recently ended with a decision that favors the Estabrook landowners. Knowing that future costs will be extraordinarily high, and the probability of success questionable, such costs and risks are only prudent if significant potential benefits could be achieved. Yet the potential benefits have effectively evaporated since this lawsuit began, as explained below:

There were two political factors driving this lawsuit: First, some citizens strongly objected to the posting by the landowners of leash requirements for dogs on private lands, and sought to have the Town overturn those leash requirements. Second, rapidly growing demand of users of the Woods was overloading the limited available parking and some citizens demanded that the Town create more parking to access private lands.

*Circumstances have changed since the start of this lawsuit that have rendered these issues moot.* If the Town were to prevail it would not result in off-leash dogs being permitted, since the Town has reached an agreement with Harvard to require dogs be on leash, independent of the results of this case. If the Town were to prevail it would not solve any parking problems, because the public parking available at the Town and Land-Trust entrances greatly exceeds the current volume of use (the volume of use has dramatically decreased after leashes were required and because private landowners have closed miles of trails as a result of this lawsuit). In fact, the NRC reported to the Select Board that planned parking additions at Punkatasset were no longer needed.

What is the potential return to the Town for the *next* millions of dollars investment in this suit? The Town is seeking some kind of public rights on an access trail *that goes only to private land*. The record shows that many of the people who exhorted the Town to take action mistakenly believed the land along the Trail was public and they had a right to use it as a dog park. *There is no Town land on this trail*, so it is a trail leading to no Town resources. The landowners have

managed the use of that trail for years and have allowed the public to use it. The Town has admitted that they believe the landowners are good stewards of the land, that the landowners own the Trail, and that the rules the owners have set for use of their lands are reasonable and appropriate. Why does the Town need to force access into private land?

Even if the Town were to obtain some kind of access easement over and into the defendant's land, the owners would still be able to establish reasonable rules for the nature and volume of use, so the Town is seeking to gain a right that might be extremely limited. Any disagreements over that issue would likely take the form of additional lawsuits.

The likelihood of success of the lawsuit should be considered in evaluating the cost/benefit ratio. **The finance committee should ask if the Town has obtained a second opinion regarding the merits of the lawsuit, now that it has abandoned the two original central claims.**

For a tiny fraction of the funds the Town will need to further press this suit, the Town could significantly improve quality, handicapped accessibility, and safety of the parking at all Town-owned lands, and make necessary trail improvements on public lands and trails all around Concord.

In summary, this is a lawsuit to attempt to take control of **one** of the 17 access points into private land that the defendant owners are trying to protect as a nature preserve. What is the point of getting access into private land? The original goals of this suit have been made moot by the Harvard settlement and circumstances. It is a very high-priced gamble, with large uncertainty, in which the Town has now abandoned the two central claims made to justify the suit and the suit does not seem to really yield anything that is needed any more. Yet it rides on like the "headless horseman" of mythology. It is hard to imagine that the cost/benefit ratio of this investment makes sense when compared with other Town priorities.

We remain happy to address any questions you may have on this subject in writing or in person at a FinCom meeting.



Neil Rasmussen  
393 Estabrook Road

For additional documentation on the history of Estabrook Woods and the trail lawsuit, and the answer to many frequently asked questions, go to [www.estabrookfacts.org](http://www.estabrookfacts.org)

**Attachment:** Analysis of the minutes of the Finance Committee relating to appropriation of supplemental funds related to the Estabrook lawsuit

## **Analysis of the minutes of the Finance Committee relating to appropriation of supplemental funds related to the Estabrook Lawsuit**

It has come to our attention that the Finance Committee has been misled regarding the Estabrook lawsuit matter. In particular, misrepresentations were made to justify FinCom support of additional funding at the 2018 Special Town Meeting. Below are minutes of the Finance Committee from Sept 27, 2018, along with factual information that can be used to examine the veracity of the claims made by the Town Manager at that meeting.

### Minutes of the Finance Committee

Sept 27, 2018

*"Article 11. Legal Services—Appropriation of Funds Mr. Whelan reported that he has asked Town Counsel for a budget for expenses related to Estabrook Woods, and he anticipates that he will have that number on Monday and will report it at Town Meeting. The legal services budget has been funded at \$225,000/year since 2002, with an increase to \$250,000 in FY19. The fund has been managed effectively over the years. While the Reserve Fund was used in its entirety to fund the overage in FY18, Mr. Whelan has made this request in the interest of transparency. Without this requested \$100,000 supplemental appropriation, then the only source of extra funds would be the Reserve Fund, as was done last year. In response to a question from Ms. Hanson, Mr. Whelan noted that the Estabrook Road case has not yet reached the discovery phase. Mr. Whelan briefly reviewed the Town's interest in Estabrook road."*

Note there is no explanation regarding the expected total cost of the lawsuit. In fact, based on discussions Mr. Whelan had with one of the defendants, in 2016 he was well aware that the total expense to the Town would be well over \$1M, and possibly much higher if the defendants are awarded their legal expenses. According to the minutes of the meeting, Mr. Whelan continues:

*"Although the Town abandoned maintenance of the unpaved roadway in 1932 (following the lean budget years of the Depression), the roadway itself was not abandoned by the Town, and has been in continuous public use for 300+ years."*

This statement is not based on any facts. The Town has not been able to provide evidence that the portion of the Trail through the defendant's property was *ever* a public way. The historic evidence that has been found contradicts the claim that the Trail has been in "continuous public use for 300+ years." Uncertain of the Trail's history, the owners in 1932 requested the Town's permission to formally close it. The **complete record** of the Town action related to this is contained in the minutes of the Concord Road Commissioners of 1932:

Neil and Anna Rasmussen

393 Estabrook Road, Concord, MA 01742

TOWN OF CONCORD, MASSACHUSETTS  
Board of Road Commissioners  
Wednesday, April 13, 1932.

A meeting of the Board of Road Commissioners was held this evening at 7:30 o'clock. All members present. Superintendent Joslin present.

Mr. Robert Bygrave appeared before the Board representing Raymond Emerson, Stedman Buttrick and Russell Robb and requested the Road Commissioners to petition the County Commissioners for the closing of Estabrook Road from a point just northerly of Raymond Emerson's bungalow to the Carlisle line as a public way. His reasons for this being that the road is now almost impassable and is used only by picnickers and is a serious fire hazard. There are no houses on this stretch of road in Concord. The Board voted to grant Mr. Bygrave's request and requested him to draw the necessary petition and submit it to the Board for their signature.

As can be seen from these minutes, there is absolutely no mention of abandoning maintenance, and in fact there is no mention of maintenance or budgets at all. The petitioners mentioned in the minutes are the prior owners of the land on the Estabrook Trail. The owners are petitioning to close the road to exclude "picnickers" and based on a concern with fire hazard.

Following the granting of the request of the owners to close the Trail, the Town then submitted to the county a request that the road be discontinued under the following statute:

AN ACT RELATIVE TO THE DISCONTINUANCE OF CERTAIN WAYS *Chap.289*  
AS PUBLIC WAYS.

*Be it enacted, etc., as follows:*

Chapter eighty-two of the General Laws is hereby amended by inserting after section thirty-two the following new section: —  
**Section 32A.** Upon petition in writing of the board or officers of a town having charge of a public way, the county commissioners may, whenever common convenience and necessity no longer require such way to be maintained in a condition reasonably safe and convenient for travel, adjudicate that said way shall thereafter be a private way and that the town shall no longer be bound to keep the same in repair, and thereupon such adjudication shall take effect; provided, that sufficient notice to warn the public against entering thereon is posted where such way enters upon or unites with an existing public way. This section shall not apply to ways in cities.

G. L. 82, new section after § 32.

Discontinuance of certain ways as public ways.

Proviso.

Not applicable to ways in cities.

*Approved April 24, 1924.*

As you can see from the applicable statute, it was required that the Trail be posted to "warn the public against entering thereon." This formally permitted the owners to close the Trail to the public, and since 1932 use of the Trail has only been by permission. This statute is used when the owners along the way seek to close the way to the public but retain their access rights, like a shared driveway. The Town made an announcement regarding the discontinuance in the Concord Herald which is shown in the column to the left on the next page.

COMMONWEALTH  
OF MASSACHUSETTS

Middlesex, ss.

To the County Commissioners for  
the County of Middlesex.

Respectfully represent Oscar E. Beckvold, Hugh F. Leith and Edward W. Sheehan; that they are the duly elected and acting Road Commissioners of the Town of Concord in the County aforesaid, and have charge of the public ways therein; that Estabrook Road, so-called, in said Town of Concord, is a public way and that common convenience and necessity no longer require that such way shall be maintained in a condition reasonably safe and convenient for travel from a point on said Estabrook Road, at the entrance to R. Emerson driveway, as indicated by a drill hole in rock in said way, and shown on the plan annexed to the original petition (which said point is 2,344.05 feet from the middle of the traveled way of Barnes Hill Road, at its junction with said Esterbrook Road), to the boundary line between the Town of Concord and the Town of Carlisle, on said Estabrook Road; that said way from said point at the entrance of said R. Emerson driveway, has for a long period ceased to be in general public use; that there are no residences served by that portion of said way sought to be discontinued as a public way; and that it would be an inordinate and unreasonable expense upon the said Town of Concord to keep said way in a condition reasonably safe and convenient for travel.

Wherefore the said Road Commissioners hereby pray that the County Commissioners adjudicate that said way shall hereafter be a private way, and that the Town of Concord shall no longer be bound to keep the same in repair, upon condition that the said Town give sufficient notice to warn the public against entering thereon by the posting of adequate notice or notices where such way enters upon or unites with an existing public way.

Respectfully submitted,  
OSCAR E. BECKVOLD,  
EDWARD W. SHEEHAN,  
HUGH F. LEITH,  
Road Commissioners of the Town  
of Concord.

Without any justification, Mr. Whelan stated in his presentation to the FinCom that "the roadway itself was not abandoned by the Town." Yet in fact the Town agreed a few days later that the road is privately owned by the landowners (Mr. Lawson's speech at Special Town Meeting).

Mr. Whelan said the Trail had "been in continuous public use for 300+ years." However, their own trial expert subsequently said the north part of the Trail only came into existence as a private way in 1763, and was only able to document the use of the Trail as a logging road by the landowners. A complete set of all known descriptions of the condition and use of the Estabrook Trail prior to 1966, collected by the Town and by the defendants as part of the lawsuit, is found at:

<http://www.estabrookfacts.org/Trail%20Quotes.pdf>.

The minutes show Mr. Whelan then continued:

*"There is a public right to use the land from the end of the paved portion to the Carlisle line, which is what has been disputed by some of the abutters. He emphasized that the Town is not claiming public access to private property outside of the roadway."*

Land law in Massachusetts is clear: a right to use land or a road in Massachusetts *must be documented*. In the case of a roadway, the Town must have either fee ownership or an easement. By law, such ownership or easement must be recorded and documented in Town records. After three years of looking, the Town has never presented any documentation of ownership or easement on the southern section of the Estabrook Trail.

*"Mr. Whelan noted that Concord does not frequently engage in litigation, but retaining the public's right to access of a right-of-way is important."*

The Town has made an unsubstantiated claim of a right-of-way through private land. The public never had a right, they were *granted permission*. This trail is not unique, as other roads in Concord and around the Commonwealth were discontinued using the same procedure that was used to discontinue Estabrook Trail. In every such case, such roads have been eliminated from plans, built over, gated, posted "no

trespassing," converted to private driveways, or obliterated. ***Never in the history of the Commonwealth has any Town ever sought or obtained a public right of access on such a discontinued road.*** The Town of Concord itself, in a previous land court dispute, testified that such a way is a "discontinued public right-of-way" (Barton v Hethrington, 1996). In 1997, in response to a question regarding the public right to access such ways, the Town Planner told a public meeting that using such a way, without permission, would be trespassing.

The minutes show the FinCom reflected on Mr. Whelan's presentation:

*"Mr. Banfield noted that requiring dogs to be leashed at Punkatasset has resulted in decreased use of the land, and perhaps that could be done at the disputed sections of Estabrook."*

The Town in fact settled with the largest owner of Estabrook Woods, Harvard University. In that settlement, the Town formally agrees that dogs must be on leash on the Harvard land, *and further that the Town will help Harvard enforce that rule.* Mr. Banfield was correct and dog leash rules have significantly reduced the use of the Estabrook Trail, particularly reducing out-of-town users. Since the primary purpose and political force behind this lawsuit was to prevent the landowners from posting dog leash regulations, the Harvard settlement has made the single largest issue in the lawsuit moot.

The FinCom further reflected:

*"Mr. Randall inquired as to what would happen if Article 11 is defeated, and whether the Town's litigation position would be affected by such a vote. Ms. Hartman noted that the supplemental appropriation is not exclusively for use on the Estabrook Road litigation, although that is one of the major drivers of the increased costs. Mr. Packard asked that Ms. Lafleur distribute to committee members the two documents related to the Estabrook Road dispute."*

The documents that the FinCom were given were the legal complaint filed against 10 landowners including Harvard University, along with a press release about the lawsuit. The defendant's position was not provided. The complaint is filled with false allegations, unsubstantiated claims, and personal attacks, the facts of which will be demonstrated at trial.

There is additional background information on the Estabrook Trail, the controversy surrounding it, and the lawsuit available at [www.estabrookfacts.org](http://www.estabrookfacts.org).