

AGENDA
TOWN COUNCIL WORKSHOP
WEDNESDAY, FEBRUARY 1, 2017
DISCUSSION ON AVENUE TWO
5:30 P.M. - CHAMBER A

Item 1. Call to Order.

Item 2. Those Present.

Item 3. Discussion on Avenue Two.

Item 4. Adjournment.

Wayne T. Adams
Christian L. Barner
Milda A. Castner
Susan Bernstein Driscoll
Scott M. Edmunds
William J. Gallitto, III
Courtney Michalec Hart
Jason G. Howe
Erin K. Kalakowsky
Brin M. Moore
Sarah B. Neault



Durward W. Parkinson
Leah B. Rachin
Laura H. White
Of Counsel
Jonathan Bangs
Barbara I. Belik
Bruce W. Bergen
Earle J. Patterson
In Memoriam
C. Wesley Crowell

December 21, 2016

dparkinson@bergenparkinson.com

VIA FIRST-CLASS MAIL AND E-MAIL

Town Council, Town of Scarborough
Attn: Thomas Hall, Town Manager
259 U.S. Route 1
PO Box 360
Scarborough, ME 04070-0360

Re: Charles P. Gendron Property, 37 King Street, Pine Point, Scarborough

Dear Members of the Council:

You have asked us to look into the legal status of a portion of Avenue 2 abutting the property of Charles P. Gendron (the "Property Owner"), Map/Lot Number U022098 (the "Parcel"). It is our understanding that the Property Owner has approached the Town in hopes clarifying the issue of title to Parcel. In particular, the Property Owner has proposed that the Town discontinue this portion of Avenue 2, which would cause private ownership to revert back to the Property Owner. In return, the Property Owner proposes granting an easement to the Town, enabling members of the public to traverse Avenue 2 in order to reach the Atlantic Ocean.

To this end, the following attempts to navigate a number of legal and historical issues involving the Parcel. Many of these issues have been raised by the Property Owner's counsel, Attorney John Bannon, in a letter to us dated March 4, 2016. As such, we have attempted to explore these issues in turn, based on our understanding of the situation, and the facts presented by Mr. Bannon. Based on exploration, we think it likely that the Property Owner has title to the Parcel (either by deed or by operation of law). As such, the Town is *not* forfeiting any rights or losing any leverage by accepting the grant of a public easement over the Parcel as proposed.¹ The following explores how we reach this tentative conclusion.

¹ This letter does not present an ironclad conclusion, as the facts available are far too uncertain to make such a conclusion possible. Of course, it is also worth noting that litigation is often a minefield, and could lead to a different outcome than what is suggested below. This analysis is instead meant to provide a check on the

I. The Property Owner's Private Property Rights in the Avenue 2: The Historical Evidence is Insufficient to Conclude that the Property Owner or His Predecessor-in-Interest Has Always Held Title to the Parcel.

Maine law lays out that prior to October 3, 1973, when a person conveyed real estate that abutted a town way, that conveyance transferred *all* rights held by that person.² This generally means that in addition to the lot itself, the owner would transfer legal title from the boundary of his property to the centerline of such a road or way.³ However, the law creates clear exceptions, which apply: (1) when the person conveying the real property reserves title in the right-of-way for himself; or (2) when the conveyance is made in reference to a recorded plan.⁴

The crux of the Property Owner's argument here is that *he* owns the western half of Avenue 2 up to the centerline because neither of these exceptions apply. However, while this *could* be the case, we find that the issue is far more unsettled than the Property Owner argues.

First, it should be noted that we do not dispute the Property Owner's stance that the first exception does not apply. We attempted to trace the Parcel's title, beginning with the original conveyance to Mary S.C. Libby in 1875.⁵ Nowhere within our search was any interest in Avenue 2 reserved by the grantor.⁶⁷ Based on this, the Property Owner would own title to the Parcel through his chain of title, unless the second exception applies.

Property Owner's analysis, and provide a number of practical solutions to help the Town achieve its desired outcome.

² 33 M.R.S.A. § 461 (emphasis added).

³ 33 M.R.S.A. § 465.

⁴ 33 M.R.S.A. § 461.

⁵ The records show that the Property Owner's parcel was originally owned by Seth Scammon and Ezra Carter, both of Portland. They, we believe, were the original subdividers of Pine Point (as detailed on the 1888 Moulton Plan). The original conveyance to Mrs. Libby can be found in Book 426, Page 267, in the Cumberland County Registry of Deeds.

⁶ Upon Mrs. Libby's death, the property in question was devised to Winston Churchill (*see* Docket No. 10228, at the Cumberland County Registry of Probate). Mr. Churchill appears to have owned the property for his entire life, devising equal shares to his three children (Creighton Churchill, Jonathan Churchill, and Mabel Butler). These three children sold the parcel to Louis Vorias in 1970 (*see* deeds from the above-mentioned persons to Louis Vorias, recorded in the Cumberland County Registry of Deeds at Book 3132, Pages 532-536). Mr. Vorias transferred the property to Jean and Lorraine Johnson in 1972 (*see* deed from Louis Vorias to Jean and Lorraine Johnson, recorded in the Cumberland County Registry of Deeds in Book 3297, Page 249). Finally, Mrs. Johnson transferred the property to the Property Owner on June 6, 2013 (*see* deed from Lorraine Johnson to Charles Gendron, recorded in the Cumberland County Registry of Deeds in Book 30715, Page 193).

⁷ It should be noted that the deed references in Footnote 6 were drawn primarily from the Property Owner's letter. While these references were checked for accuracy, this is *not* a substitute for a full title search, or report on the chain of title.

There is, however, far more ambiguity with regards to the existence of a recorded plan. The original conveyance of the property to Mrs. Libby contained reference "to a plan of Pine Point drawn Nov., 1875." If this plan had been recorded, Mrs. Libby, and eventually the Property Owner, would not have received any title to Avenue 2. Yet, as the Property Owner points out, no such plan of Pine Point was *recorded* in 1875, nor has, in his opinion, such a plan *ever* been recorded. Nonetheless, unlike Mr. Bannon, we are not comfortable in ending the analysis here.

Some thirteen years after the conveyance to Mrs. Libby, a new plan of Pine Point, dubbed the "Moulton Plan," was recorded.⁸ The Plan itself is undated, but there is still evidence to suggest that it is in fact the "1875 Plan" referred to in Mrs. Libby's deed. First, the copy we reviewed for the purposes of this letter has been altered to state "Drawn on Nov. 1875 (per deed references)." To be clear, this inscription has not been authenticated, and it is not our position to vouch for its definite authenticity, but it does suggest that these separate plans are in fact the same document.

Second, the Moulton Plan is explicitly referred to in *every single* deed within the Property Owner's chain of title following the original grant to Mrs. Libby. For example, all of the deeds from the children of Winston Churchill to Louis Vorias (noted in Footnote 6) refer to "a Plan of Pine Point, dated 1888." This reference suggests that all subsequent deed drafters within this chain of title *assumed* that the "1875 Plan" and the "Moulton Plan" were one-in-the-same. Were this to be the case, the Property Owner would not own the western portion of Avenue 2, and would need to find his ownership rights by way of another manner.⁹

Mr. Bannon deems this conclusion to be "speculative," particularly given the lack of a verifiable date for the Moulton Plan. Nonetheless, it would be equally speculative to dismiss the possibility out-of-hand. The fact remains that while the Property Owner *may* have title to the western portion of Avenue 2 by operation-of-law, it is equally feasible to conclude that he *does not* have such title due to the presence and operation of the Moulton Plan. To make an ironclad conclusion either way would be improper.

Given this discrepancy, we cannot conclude with sufficient certainty that the Property Owner has title to the western portion of Avenue 2 pursuant to Title 33 M.R.S.A. §§ 461 and 465, and the Council should not proceed under the assumption that he does.

⁸ The plan is recorded in the Cumberland County Registry of Deeds in Plan Book 6, Page 36.

⁹ In order for the Property Owner to assert ownership to the centerline of Avenue 2 under 33 M.R.S.A. § 465, he must affirmatively show that the original conveyance from Scanlon and Carter to Mrs. Libby was *not* accomplished in reference to a recorded plan, like the Moulton Plan. The Maine Supreme Judicial Court is clear that when a prior conveyance was accomplished in reference to such a plan, § 465 cannot operate. *Watts v. Watts*, 2003 ME 36, ¶ 5, 818 A.2d 1031.

II. Public Rights in Avenue 2: Avenue 2 Was Likely Dedicated to the Town, But The Town Likely Does Not Maintain Any Public Property Rights At Present.

Next, with the issue of the Property Owner's ownership of the Parcel through his chain of title up for debate, the question remains whether Avenue 2 may be considered to be a current town way that would have to be *discontinued*. Based on the following—and admittedly lengthy—analysis, it appears more likely than not that the portion of Avenue 2 in question *is not* a current town way, but is either an unaccepted way, or a now-abandoned way. The Town would *not* hold a valid interest in either scenario.

a. Dedication of Avenue 2.

The Maine Supreme Judicial Court has defined “dedication” as “the intentional appropriation of land by the owner to some proper public use, reserving to himself no rights therein inconsistent with the full exercise and enjoyment of such use.”¹⁰ Effectively, when a landowner decides to record a plan of a proposed subdivision, all the right-of-ways contained within the plan are “incipiently dedicated” to the Town. This, however, only offers the land to the Town; the Town must later accept the dedication “within a reasonable time.”¹¹ Given this, there are two pertinent questions: (1) whether the land was dedicated; and if so (2) whether such dedication was valid.

First, it appears likely that Avenue 2 itself was dedicated. Despite any ambiguity regarding its effective date, the eventual recording of the Moulton Plan (discussed above) was sufficient to dedicate the land to the Town no later than 1888 (its date of recording).

We do, however, diverge from the Property Owner with regard to the second issue. While Mr. Bannon acknowledges the recording of the Moulton Plan in 1888, he argues that the Plan was insufficient to dedicate Avenue 2 to the Town, because the recording party *did not own* the right-of-way itself, thereby making any attempt to dedicate it to the town ineffective. It was, Mr. Bannon argues, already under the ownership of Mrs. Libby.

Again, based on the uncertainty found in Section I above, we are uncomfortable in accepting such a definitive conclusion.¹² Instead, we find it wholly possible that the original conveyance of the Property Owner's parcel was accomplished in reference to a recorded plan. Assuming this to be the case, then William Moulton, the recorder of the Moulton Plan *would* have accomplished an incipient

¹⁰ *Comber v. Plantation of Dennistown*, 398 A.2d 379, 378 (Me. 1979).

¹¹ *Callaghan v. Ganneston Park Dev. Corp.*, 245 A.2d 274, 278 (Me. 1968).

¹² See Section I above.

dedication of the ways laid out in the Plan, including Avenue 2, as they would have maintained title to the ways notwithstanding previous conveyances of the abutting parcels.¹³

Thus, for the purposes of this analysis, we can conclude that there is a strong possibility that Avenue 2 was incipiently dedicated to the Town no later than 1888.¹⁴

b. Acceptance of Avenue 2.

Assuming for the sake of this analysis that Avenue 2 was dedicated to the Town at some point in time, it would still be necessary for the Town to accept this dedication in order to create a town way. Based on the evidence available, however, we cannot conclude with sufficient certainty that the Town ever accepted Avenue 2.

After a thorough review by Town staff, there appears to have been only one vote of the Town council that could have constituted an “acceptance” of Avenue 2. This was not a vote concerning acceptance of the Moulton Plan, but instead concerned the Pillsbury Plan on March 6, 1950. Here, the Town considered and accepted a series of maps of Pine Point, including a rendering of Avenue 2. As we noted in our letter to James Wendel, the Town Engineer, dated April 30, 2014, the question of whether the acceptance of the Pillsbury Plan led to the formal acceptance of Avenue 2 is far from clear.

First, as the Property Owner points out, the Pillsbury Plan does not include the same dimensional measurements as are included in the Moulton Plan. However, as we noted in our April 2014 letter, the notation “575’ to H.W. Jan. 50” could be read to denote the length of the Avenue 2 right-of-way to the high water mark. These inconsistencies are not definitive, but they do make it possible that the Town did not properly accept the Parcel in the past.

Second, there is the issue of ownership of the land itself. As detailed above in Subsection A, a valid dedication under Maine law can only be accomplished by the *owner* of the subject land. In this regard, based on the information we have been presented, it does not appear that the drafters of the Pillsbury Plan had sufficient title to affect a valid dedication. Thus, without dedication, the Town could not have legally accepted any streets laid out within the Pillsbury Plan itself. However, notwithstanding this potential defect, there is no explanation for *why* the Town Council acted the

¹³ Mr. Bannon does admit that despite his arguments regarding ownership, William Moulton was an owner of land at Pine Point. This would be sufficient in and of itself to allow dedication pursuant to the Moulton Plan.

¹⁴ Again, as pointed out in Footnote 7, we have not conducted an extensive analysis to determine exact ownership of the Parcel throughout its history. Because the ability to dedicate a right-of-way is directly tied to one’s ownership interest, we cannot definitively conclude this issue without specifically determining ownership in this fashion.

way it did in 1950.¹⁵ Unfortunately, the records available are insufficient to explain what effect the Council intended at this point, making any such conclusion no more than a mere guess.

In sum, our conclusion in this regard remains unchanged. While the law is clear as to what is required to *accept* a public right-of-way, the facts available to us are not sufficient to indicate whether or not acceptance occurred.

c. Lapse and/or Abandonment of Avenue 2.

Notwithstanding the undecided issue above, the fact remains that in its current state, the portion of Avenue 2 in question is not being used as a public way. Instead, as we noted in our April 16, 2014 letter, “[i]t definitely appears that historically, the Parcel has never been developed or maintained by the Town as a road for passage of vehicles. Rather there is a meandering foot path from King Street to the Ocean.” Given this reality, it appears likely that no matter which theory the Town accepts (and both are equally feasible) title to the Parcel does belong, or will soon belong, to the Property Owner.

i. Lapse: If the Town Never Accepted the Parcel.

Again, we must reiterate that we cannot definitively conclude whether or not the Parcel had been accepted by the Town by way of its acceptance of the Pillsbury Plan. However, assuming that the Town *did not* formalize such acceptance, title to the Parcel has passed to the Property Owner by operation-of-law.¹⁶

Pursuant to 33 M.R.S.A. § 469-A:

Any conveyance made before September 29, 1987 that conveyed land abutting upon a proposed, *unaccepted way* laid out on a subdivision plan recorded in the registry of deeds is deemed to have conveyed all of the grantor’s interest in the portion of the way that abuts the land conveyed, unless the grantor expressly reserved the grantor’s title to the way by a specific reference to this reservation in the conveyance of the land [emphasis added].

Simply put, if the Town *did not* accept the Parcel in 1950, then the conveyance from Lorraine Johnson to the Property Owner in 2013 would have necessarily included title to Parcel (being the western portion of Avenue 2 to the centerline), as Mrs. Johnson did not expressly reserve that interest for herself. If this scenario were to have occurred then the Property Owner would, as he

¹⁵ For example, it would be helpful to know for what purpose—other than acceptance of a right-of-way--the Town Council was looking at the Pillsbury Plan.

¹⁶ This conclusion is *different* from the conclusion reached in Section I above. There, we found that it is unlikely, or at least not possible to conclude, that the Property Owner’s *chain-of-title* included the Parcel. However, this does not preclude the Property Owner from receiving title by another means. Here, we find it much more likely that due to the Town’s action—or inaction—with regard to the Parcel has triggered portions of Maine law that will transfer title of the Parcel to the Property Owner.

espouses, have no need for the Town to issue a discontinuance order for the Parcel, as the Town would not currently hold any interest which could be discontinued.

ii. **Abandonment/Discontinuance: If the Town Accepted the Parcel, It Has Long Since Been Abandoned.**

Alternatively, if the Town *could* be deemed to have accepted the Parcel in 1950 then it is *likely* that the Parcel has been abandoned, and we would suggest that the Town adopt an order of discontinuance to formalize this status.

Pursuant to 23 M.R.S.A. § 3028, “it is prima facie evidence [of abandonment] that a town or county way [has] not been kept passable for the use of motor vehicles at the expense of the municipality for a period of 30 or more consecutive years” While another party could choose to rebut this presumption, there has been no suggestion that the Parcel has ever been anything more than a narrow walking path since *at least* 1986, the time when the necessary 30-year period would have lapsed. This is one conclusion that all the parties involved in this matter seem to be in agreement on.

Notwithstanding this presumption, we would suggest that the Town still take formal action, in the form of an order of discontinuance, in order definitively clarify the position of the parties, and formalize legal title in the Parcel.¹⁷ Following its adoption and filing in the Registry of Deeds, title in the Parcel would pass to the Property Owner by operation of law.¹⁸

¹⁷ The abandonment statute (23 M.R.S.A. § 3028) does provide a mechanism to file a formal notice of determination of presumption of abandonment, which would effectively cede municipal control of the Parcel; however, we feel that using an order of discontinuance to formally terminate the Town’s interest in the parcel is preferable for two reasons.

First, the legal abandonment process is murky, and does not specify *how* title to the Parcel would be conveyed back to the Property Owner. Conversely, 23 M.R.S.A. § 3026-A, which controls issues relating to discontinuance, is far more clear. Here, the Town would consider the order of discontinuance, issue the order, and then consider the order one final time at a public hearing. Once approved, the order would be filed with the Registry of Deeds, and title to the Parcel would revert under § 3026-A(6) to the Property Owner.

Second, any challenge to an order of discontinuance would have to be brought within 30 days under Rule 80B of the Maine Rules of Civil Procedure, or within 60 days if such challenge regards the Town’s calculation of statutory damages (23 M.R.S.A. § 3029). Conversely, a finding of a presumption of abandonment could potentially be challenged up to six years after the Town acts. *Paul v. Town of Liberty*, 2016 ME 173, ¶¶ 11-12, ___ A.3d ___. This makes discontinuance preferable for both the Property Owner and the Town, allowing both to put this issue behind them.

In sum, the difference between these two processes is minor, and will ultimately lead to the same legal conclusion. However, we feel that given possible, yet remote issues, utilizing the process of discontinuance is preferable under these facts; we simply wanted to clarify our thinking to prevent any future confusion.

¹⁸ 23 M.R.S.A. § 3028 states that abandonment has the same effect on ownership as the Town moving to discontinue the right-of-way pursuant to 23 M.R.S.A. § 3026. Section 3026(6) states that upon the right-of-

iii. In Sum, the Property Owner Likely Has A Rightful Claim to the Parcel Regardless of Whether or Not The Town Accepted the Parcel.

Once again, we highlight the lack of certainty regarding the Town's possible acceptance of the Parcel, and reiterate the fact that our conclusions in this regard are based *only* on the limited information presented by the Property Owner and the Town. While it appears that the Town has never used the Parcel for motor vehicle traffic, the possibility—however small—remains that the Town Council's action on the Pillsbury Plan was a sufficient acceptance for these purposes. Nonetheless, as the above highlights, both issuing an order of discontinuance and a finding of "non-acceptance" ultimately lead to the Property Owner retaining title to the Parcel, although they require different procedures to get there.

III. Public Easement Rights: The Town Should Rely on the Property Owner's Express Grant, Not Prescription, to Establish Public Rights to Use the Parcel.

Ultimately, the Town's goal is to ensure that it protects any rights that it may already have in the Parcel, and make sure that the public remains able to use the Parcel to access Pine Point Beach and the Atlantic Ocean. Based on these goals, as our tentative conclusions above, we would suggest that the Town accept a grant of a public easement from the Property Owner. This is a conservative approach that accomplishes the Town's goals while avoiding further litigation to settle the issue of the Parcel's ownership.

a. Easement Granted by the Property Owner to the Town.

While the Town may assert a public easement over the Parcel,¹⁹ it does not appear that it stands to forfeit any legal right, or lose any leverage it may have in regards to the Parcel by allowing the Property Owner to grant an easement to the Town. Accepting a public easement is merely a method for the Town to hedge its bets in this regard. Regardless of *how* the Town receives an easement over the Parcel, the fact remains that the Property Owner is, absent any information we have not seen, vested with legal title to the Parcel, either through his chain of title, through the Town's non-acceptance of Avenue 2, or ultimately through the Town's rightful discontinuance. Thus, in this regard, accepting an easement from the Property Owner is simply an alternative means for achieving the same goal. The Town is likely not disavowing itself of any legal title in the Parcel depending on which method it chooses to maintain this easement.

ways discontinuance/abandonment, "all remaining interests of the municipality, if any, pass to the abutting property owners in fee simple to the center of the way."

¹⁹ See 23 M.R.S.A. § 3026-A.

b. The Town Likely Does Not Have An Easement By Prescription Over the Parcel, and Should Not Rely On This Means to Preserve Public Access to the Beach Over the Parcel.

In our past letter of April 30, 2014, we suggested that the Town likely had a claim to a prescriptive easement over the Parcel. However, because on emerging case law in Maine, establishing these prescriptive rights is a highly fact-intensive process.

In *Almeder v. Town of Kennebunkport*,²⁰ otherwise known as the “Goose Rocks Beach case,” the Maine Supreme Judicial Court severely restricted the ability of the public to claim a prescriptive easement over private land. In order to establish a prescriptive easement, a Town must prove—among other things—that the public’s use of the easement over the requisite twenty year period was without the landowner’s express or implied permission. More importantly, when a public prescriptive easement is involved, the municipality must show examples of public use that was *specifically objected to* by the landowner.²¹ The Law Court further upped the ante in this regard in *Cedar Beach/Cedar Island Supporters, Inc. v. Gables Real Estate LLC*,²² where despite pages and pages of factual findings demonstrating public use of a beach without the landowner’s permission, the Court refused to find that a public easement had been established.

Under *Almeder* and *Cedar Beach*, the Town would likely struggle to prove the existence of a public prescriptive easement. While the public’s use of the Parcel is certainly of sufficient duration to establish such an easement, there is no evidence in the Town records, or directly from a prior landowner, that shows specific objection to the public’s using the Parcel to reach the beach—following *Cedar Beach*, even having such facts would not guarantee success. The fact that the Property Owner is offering to convey an express easement to the Town is further proof that of the lack of such an objection, which would further dent the Town’s case.

Ultimately, because the Town would struggle to establish a prescriptive easement given the stringency of Maine case law, we would not suggest that the Town pursue this approach to preserve future public use of the Parcel.

²⁰ 2014 ME 139, 106 A.3d 1099.

²¹ These rulings overturned the long tradition established in *Eaton v. Town of Wells*, 2000 ME 176, 760 A.2d 232, which presumed that any use of private land, either by a public or private party, was *without* permission, thereby making it easier to establish such a prescriptive easement within twenty years. *Almeder* created dual standards, whereby the public (but not a private party) would have to overcome a presumption that its use of private land was done *with* the landowner’s permission.

²² 2016 ME 114, 145 A.3d 1024.

IV. Conclusion and Suggested Next Steps

In an attempt to be as thorough as possible, this letter explored the full width and breadth of issues surrounding the Parcel.²³ Nonetheless, our ultimate conclusion is simple: The nature of ownership of the Parcel has not been well documented over the years. Likewise, the question of whether or not the Town ever accepted the Parcel is far too speculative to give a definitive legal opinion.

However, notwithstanding this uncertainty, we find it likely that the Property Owner either does, or could prove in court that he holds title to the Parcel. Because of this, the Town does not stand to lose any public land, or forfeit any certain legal right to the Parcel, by accepting the Property Owner's offer of a *carefully* drafted public easement over the parcel. Instead, accepting this offer will likely prove advantageous to both parties, especially by avoiding the need for further determination of these issues by the court system. However, it is ultimately the choice of the Council how to best proceed in order to achieve maximum benefit for the Town.

Please let me know if I can be of further assistance with any of these issues.

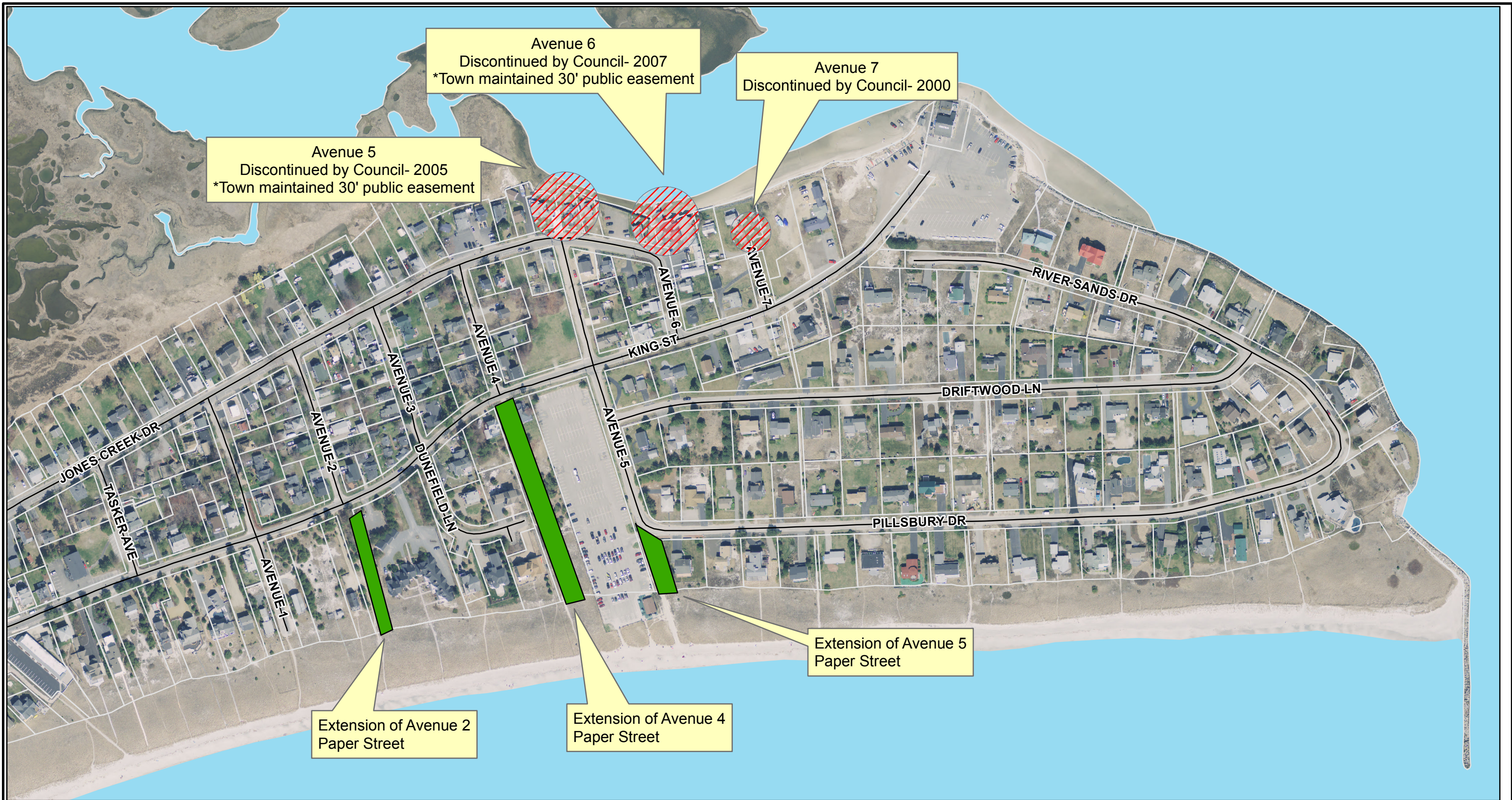
Very truly yours,


Durward W. Parkinson

DWP/btm

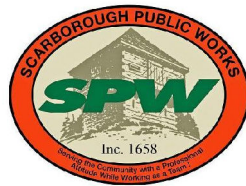
cc: John C. Bannon, Esq. [via email]

²³ This general analysis would also apply to the easterly portion of Avenue 2.



**Town Of
Scarborough
Maine**

<http://www.scarborough.me.us/dpw/>



Disclaimer: The data contained within the Scarborough GIS is intended as a public resource of general information. The Town of Scarborough makes no warranty or representation as to the accuracy, timeliness or completeness of any of the data, and shall assume no liability for the data contained, for omissions, or any decision made or action taken or not taken in reliance upon any of the data. Parcel data is intended for general map reference only and is a general representative of approximate lot configuration, and is not intended for boundary determination, legal description, delineation, or transfer. Any service utility information shown is intended for general information only. Other utilities may be present, and the appropriate utility owner should be contacted for detailed information. GIS data is not intended for engineering design. Field verification is recommended.



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**Pine Point
Paper Streets**