

**TOWN OF KENDALL**  
**RECESSED TOWN BOARD MEETING**  
Thursday, August 27, 2009 7:30 P.M.

Supervisor Gillman called to reconvene at 7:30 pm, and led the Pledge of Allegiance.

**ROLL CALL**

Councilman Gaesser	present
Councilman Joseph	present
Councilman Schuth	present
Councilwoman Szozda	present
Supervisor Gillman	present

OTHERS PRESENT: Mr. and Mrs. Palermo, Charles Scroger, Wendy Balka, Mr. and Mrs. Pulver, Mr. and Mrs. Brenna, Mr. and Mrs. Minigiolo, Mr. and Mrs. Ellis, Pat Condo, Jeff Vick, Rich Miller, Donna Dangler, Mr. and Mrs. Soanes, Mr. and Mrs. Hollis, Mr. and Mrs. McNally, Chris Gerken, Mr. and Mrs. Gillett, Mr. and Mrs. Nelson, Mr. and Mrs. Lofthouse, John Ulmen, Ron Arndt, Vince Flow, Sharon Cammarata, Linda Stout, Mr. and Mrs. Butler, Geaorge Vito, Pat Howell, Anthony Basso, Mr. and Mrs Kohlmeier, Mr. and Mrs. Pawlak, Mr. and Mrs. Hurley, Mr. and Mrs. Kruger, Mr. and Mrs. Seaman, Gertrude Hauck, Mr. and Mrs. Presutti, Mr. and Mrs. Hamilton, Mr. and Mrs. Cocuzzi

Supervisor Gillman asked the public to respect a 2-minute time limit for speaking, and to act courteously. This month's committee and boards and department head reports will be combined with next month's.

**PUBLIC PARTICIPATION**

Mr. Brenna, acting as Attorney for the Banner Beach association, tendered quick claim deeds to Attorney Leone, along with other documents, and gave a speech supporting taking Banner Beach Road, by use, into the Town's inventory.

Charles Scroger, Kendall Road, concerned that the Town may put itself in a liable situation, cited and submitted a document concerning a case in law which he feels is pertinent to this decision. See attached document.

Chris Gerken, Kenmor Road, spoke in opposition to the Town of Kendall accepting this road, based on the current condition of this road in comparison to other private roads, and on the additional tax burden this acquisition will create for Kendall taxpayers. Mr. Gerkin suggested this question be brought to public vote, since the majority of Banner Beach residents are not, and should not be speaking for, the majority of the Town of Kendall.

Mr. Brenna said that Banner Beach Road residents' taxes go to pay for all the roads.

Mr. Gerken responded that he lives on a county road, not a town road, and his taxes also pay for every town road.

Supervisor Gillman closed public participation, but was advised by Attorney Leone not to do so, and so chose to allow further public comment.

Attorney Leone cited case laws which he felt supported the takeover by use, and opined that there is sufficient evidence to support this action.

Mr. Scroger asked the Board to consider that this decision will be setting a precedent as to how other private lake roads may be heeded, and wants the town to avoid difficult situations in the future.

Councilman Joseph reiterated that all sides have been considered, research has been thorough, and all who have wanted to express their opinions have had opportunities to do so. Lakefront residents pay a high percentage of taxes, and he is trying to act as an agent for the people. Tax effect has been considered.

Vince Flow, Norway Road, expressed that all taxpayers pay for the roads, not only in front of their homes, but the roads to get there. Taxes are based on a property's value. Lakefront properties have higher values.

Mr. McNally said the goal is to have the road brought to a class III road, not to be paved, and so should not result in a lot of extra cost.

Rich Miller, Brockport, said all property owners pay, all need services, and as property values increase, the proportion of taxes paid also increases. Value of some real estate on private roads has been hindered because of the condition of the roads. As the values are increased, the tax base increases, and it is therefore in the interest of all Kendall property owners to have this road taken.

Councilman Gaesser spoke about case laws and their applicability to this decision. He asked Mr. Kruger for clarification as to how much road maintenance has routinely been done on Banner Beach by the Town. After that clarification was given, Councilman Gaesser asked Supervisor Gillman if he had reviewed the case law provided by Attorney Leone. Supervisor Gillman replied, "I haven't totally reviewed it. No." Councilman Gaesser said the case cited was a significant reference to the factual nature of this law. The determination as to whether this case fits the law is a local decision.

After interruption by Mr. Brenna, Attorney Leone gave a review of the case law he provided the Town Board, and reiterated Councilman Gaesser's statement that it is the determination of the Board as to whether Kendall's situation meets the parameters of this case.

Councilman Gaesser stated that when the resolution to consider dedication was presented two years ago, his vote was in favor. He is still 100% in favor of taking Banner Beach Road, but wants it done correctly. The avenue of dedication has been and should continue to be pursued. He said he does not think Kendall's situation fits the criteria of the case presented by Attorney Leone as the determining case. Mr. Gaesser delineated the points which differ from the presented case: school buses do not use Banner Beach, there are no retail businesses, widening of the road by the Town has not occurred, installation of culverts, brush trimming, and overhang removal are not done on Banner Beach, and the issue of plowing snow is open to interpretation. This case law does not fit the case of Banner Beach, and

Councilman Gaesser feels the board would have a difficult time defending its position in taking the road by use.

Attorney Leone restated that based on the Highway Superintendent's comments, he feels the case does fit.

Mr. Brenna interjected arguments while the board was in discussion and Supervisor Gillman asked for order to be restored.

Councilman Gaesser said he is in favor of the road being dedicated to the town, not for it being taken by use.

Mrs. Palermo, Banner Beach, addressing Mr. Gaesser, believes he is saying the road cannot be taken by use, because not all of the maintenance has been done as though it is a public road. Councilman Gaesser responded, I am not saying that it has to be done; I am saying that is what the law says. We have to make sure that we are within the law, so that we can defend our position. That is to protect all the taxpayers of this town."

Councilman Gaesser addressed the issue of a precedent being set here. There has been a longstanding, unwritten procedure that we would not consider taking a road without 100 % of the owners of the road being in agreement. Now, that will be changed; it will be established that 100 % is not necessary. This is a dangerous precedent, if other private roads which do not have 100% seek dedication. There is an ethical issue to this situation. Many people on private roads buy their property for that very reason. Does the Town of Kendall have a right to take that from those people?

Supervisor Gillman closed the floor to public comment.

## ***RESOLUTIONS***

Councilman Schuth made the following motion, seconded by Councilman Joseph:

### **RESOLUTION 75-809 APPOINTING MR. ERNENWEIN TO KENDALL MEDICAL OFFICE OVERSIGHT BOARD**

Be it hereby resolved, to fill the vacancy on the Kendall Medical Office Oversight Board by appointing Raymond Ernenwein, effective immediately, for a term ending 12/31/2011.

Supervisor Gillman called for a vote, resulting in all ayes; motion carried.

Supervisor Gillman made the following motion, seconded by Councilwoman Szozda:

### **RESOLUTION 76-809 ACKNOWLEDGEMENT OF BANNER BEACH ROAD AS A TOWN ROAD BY USE**

WHEREAS, this action by the Town Board is deemed a Type II action for purposes of the State Environmental Quality Review Act; and

WHEREAS, Banner Beach Road has been used consistently by the public for more than ten (10) consecutive years; and

WHEREAS, the Town of Kendall has consistently performed certain maintenance of Banner Beach Road including, but not limited to, yearly grading of the road, and has performed snow plowing as the Highway Superintendent has deemed necessary, and such maintenance has been done for more than ten (10) consecutive years; and

WHEREAS, the Town of Kendall Highway Superintendent has recommended to the Town Board that it would promote the health, safety and welfare of the people of the Town of Kendall for Banner Beach Road to be deemed a public road; and

WHEREAS, the Town Board finds that it does benefit the health, safety and welfare of the Town of Kendall to declare Banner Beach road a public road by use;

NOW, THEREFORE, BE IT RESOLVED, that pursuant to New York State Highway Law section 189 that the Town Board of the Town of Kendall declares Banner Beach Road, as defined by the 2006 survey by Ottney and Miller P.C., to be a public road, and further directs the Town of Kendall Highway Superintendent to take all necessary and proper actions consistent with this resolution.

Discussion: Councilman Gaesser asked Attorney Leone if this resolution is passed, and at a later date, 100% agreement for dedication is obtained, can this resolution be rescinded so that the precedent can be reset?

Attorney Leone said at that point the resolution would be moot. This resolution is really just an acknowledgement of what has been. A precedent can be changed simply by stating so.

Councilman Gaesser brought up earlier advice given by Attorney Leone to the Town Board to refrain from beginning any work on the road, if taken by use, for the statutory time of four months, in case anyone were to file an Article 78. Attorney Leone acknowledged that advice was given. Councilman Gaesser asked if such action were to be brought, would Attorney Leone be the representative of the town. Attorney Leone stated he would be willing to do that if asked. Councilman Gaesser asked if those legal fees would be outside the agreed upon cap amount. Attorney Leone said they would. Councilman asked Attorney Leone to share his hourly rate. Attorney Leone responded that through special rate, it is \$150 per hour.

Councilman Joseph asked Mr. Brenna if he would be willing to assist the town if suit were brought. Mr. Brenna said no, he would not. Councilman Joseph reiterated that he is conscious of keeping taxes down. He has tried to contact Mr. DePasquale, the only "holdout". Councilman Joseph is surprised by the last-minute concerns brought forth

tonight, and feels everyone had ample time to contact him earlier. 100% could not be obtained. The precedent being set is sound. He called for immediate vote. Councilman Schuth expressed concern with the wording of Resolution 77-809 not including anything about it being subject to passage of the Resolution 78-809. Supervisor Gillman said that is not necessary, as the issues are independent of each other. Councilman Schuth asked why this resolution is not subject to referendum. Attorney Leone said an acknowledgement is not subject to referendum. A purchase of real property is. Councilman Schuth expressed his concern that a decision involving a large expenditure of money will not be subject to public input. Attorney Leone said that this resolution does not address any upgrades to this road, and no indication of expenditure. If, after the road is taken into the Town's inventory, a decision is made to improve the road, that is a separate decision.

Supervisor Gillman requested a roll call vote, with the following results:

Councilman Gaesser	no
Councilman Joseph	yes
Councilman Schuth	no
Councilwoman Szozda	yes
Supervisor Gillman	yes

Motion carried.

Mr. Brenna thanked the entire Board for its work, apologized for his tone of voice earlier in the meeting, and recommended that all keep in mind that reasonable people can disagree.

Mr. Vito thanked the Board, particularly those who voted in favor of the resolution.

Mrs. Balka, Lakeland Beach, asked for her statement to be recorded – “the Supervisor openly admitted that he did not read the case law provided completely and in its entirety, and felt the need to okay the vote tonight.”

Supervisor Gillman said he did read it, but may not have retained it as well as Councilman Gaesser. He said he has listened to many aspects of the case.

Councilman Joseph made the following motion, seconded by Councilwoman Szozda:

**RESOLUTION 77-809 RESOLUTION FOR THE PURCHASE OF LAND IN RELATION TO BANNER BEACH ROAD**

WHEREAS, this action by the Town Board is deemed a Type II action for purposes of the State Environmental Quality Review Act; and

WHEREAS, the Town Board of the Town of Kendall has determined that it is in the best interest of the residents of the Town of Kendall to acquire certain property for the improvement of Banner Beach Road more fully described as follows,

ALL THAT TRACT or parcel of land situate in the Town of Kendall, County of Orleans, State of New York distinguished as being part of Lot 14, Township 4 of the 100,000 Acre Tract, so-called, bounded and described as follows:

BEGINNING AT AN angle point in the southerly bounds of Banner Beach Road, Said point being a distance of 1149.41 feet north 38°-13'-10" west from the westerly bounds of Kendall Road;

THENCE SOUTH 38°-13'-10" EAST along the southwesterly bounds of Banner Beach Road a distance of 42.06 feet to a point;

THENCE NORTH 66°-36'-38" WEST along a line a distance of 74.01 feet to a point in the southerly bounds of Banner Beach Road;

THENCE NORTH 84°-59'-55" EAST along the southerly bounds of Banner Beach Road a distance of 42.06 feet to the point or place of beginning, containing 0.02± acres;

and

WHEREAS, the Town Board of the Town of Kendall finds that such improvements will positively contribute to the health, safety and welfare of the residents of the Town of Kendall; and

WHEREAS, the owner of such parcel of property is willing to accept the following in kind transfer of town labor and materials in exchange for said property,

To run a waterline from the road connection to his residence for a cost to the Town of Kendall of \$940.00 in labor and equipment and \$1,150.00 in materials and supplies, for a total purchase price of \$2,090.00;

And

WHEREAS, the Town of Kendall Highway Superintendant has recommended the acquirement of above-described property for the price as a fair and equitable exchange; and

WHEREAS, the Town Board of the Town of Kendall finds that such price for the property purchase is fair and equitable;

NOW, THEREFORE, BE IT RESOLVED, that the Town Board of the Town of Kendall hereby approves the purchase of the above-described property for the in kind exchange value of \$2,090.00 as listed above and authorizes the Supervisor to enter into a contract for the purchase thereof. The Town Board further directs the Town Clerk to post and publish a notice within ten days a copy of this resolution and to specify that such resolution was adopted subject to permissive referendum.

Discussion: Councilman Gaesser asked if this property was deeded yet. Councilman Joseph said no. Councilman Schuth suggested the resolution be subject to Mr. Schultz'

signature deeding this property. Councilman Joseph said the agreement was reached, and the deed would be signed the next day. Councilman Gaesser had spoken to Mr. Schultz, who was unaware that this was subject to a permissive referendum. Councilman Gaesser said the Town Board was not aware of that fact until 3:30 p.m.

Councilman Gaesser explained what permissive referendum means. If petitions are filed within 30 days of this resolution being passed, this issue would have to go to public vote.

Councilman Gaesser asked Superintendent Kruger how the value of this piece of property was determined. Superintendent Kruger said it was determined by Mr. Schultz' asking price. Councilman Schuth had contacted the assessor, and feels the trade is not equitable. Superintendent Kruger said it is up to the seller, and feels this would be well worth it to the Town. Councilman Joseph said that this questioning just before the vote is an attempt to take advantage of the road association for \$1500. Councilman Gaesser asked if a \$400 fee had been waived. Councilman Joseph said not yet. Councilman Gaesser asked who would be liable for that if it is not waived. Councilman Joseph offered to pay that fee, if not waived.

Supervisor Gillman requested a roll call vote, with the following results:

Councilman Gaesser	no
Councilman Joseph	yes
Councilman Schuth	no
Councilwoman Szozda	yes
Supervisor Gillman	yes

Supervisor Gillman acknowledged that Councilmen Joseph and Gaesser have done a great deal of work, and expressed appreciation to the "supporters" in the spectator group.

Councilwoman Szozda motioned for adjournment, seconded by Councilman Schuth; all ayes; meeting adjourned at 9:03 p.m.

Respectfully Submitted,

Amy K. Richardson  
Kendall Town Clerk