

PEPPERELL CONSERVATION COMMISSION

Minutes – April 20, 2010

The Pepperell Conservation Commission (PCC) held a regularly scheduled meeting under the Massachusetts Wetlands Protection Act, MGL Ch. 131, §40 and the Pepperell Wetlands Protection By-Law. The meeting was held in the Town Hall at 7:00 p.m.

Members present: Elliott presiding, Moody, Rice, and Sauer; members absent: Masterson, Rand, and Steeves.

7:00 p.m. Public Hearing re NOI from Patricia Huckery of MA Div. of Fisheries & Wildlife for the replacement of culverts on Gulf Brook at Oak Hill and Chestnut Streets

At the request of the applicant prior to the meeting, this hearing was continued until May 18, 2010 at 7:00 p.m.

7:10 p.m. Public Hearing re NOI from the Pepperell Highway Division for the replacement of a culvert on Cranberry Street

At the request of the applicant prior to the meeting, this hearing was continued until May 18, 2010 at 7:10 p.m.

Other Business, Part 1

Upon a motion by Elliott, seconded by Sauer, with Moody abstaining, it was

VOTED: to approve the minutes of March 2, 2010 as drafted.

Upon a motion by Elliott, seconded by Rice, with Sauer and Moody abstaining, it was

VOTED: to approve the minutes of March 16, 2010 as drafted.

Upon a motion by Elliott, seconded by Rice, with Sauer abstaining, it was

VOTED: to approve the minutes of April 6, 2010 as amended.

Conservation Administrator's Report

Certificate of Compliance Request, DEP File #259-711, 7 Julia Lane

A Request for a Certificate of Compliance for DEP File # 259-711 for 7 Julia Lane had been received. Fisher reported a satisfactory site inspection. On a motion from Elliott, seconded by Sauer, all

VOTED: to issue a Certificate of Compliance.

Filing needed for DPW repairs on West St.?

Fisher reviewed a series of repairs and replacements proposed by the DPW for drainage structures on West Street prior to a full-street paving scheduled for 2011. The Commissioners agreed that no filing was necessary.

Beaver activity at Keyes Conservation Land, Oak Hill St.

Fisher reported that the beaver exclusion fence protecting the culvert under the driveway to Keyes Conservation Land had failed in the last week. She had called Mike Callahan of Beaver Solutions who had fixed it under the annual maintenance contract within a day. He said that two of the metal fence posts supporting the wire mesh had bent over, apparently in the recent floods, allowing beavers access to the culvert. Fisher reported that the exclusion device seemed to be working fine after the repair.

Trails reports from volunteers

Fisher reported that reports of trails problems have been coming in from volunteers. Oftentimes the volunteers have already taken care of the problems before making the report. She said that 2 reports had been received about trees down and flooding on the Jeff Smith Trail just north of Jewett Street. Jim Casserly had volunteered to take care of the trees. If the flooding continues after the spring high water season, the trail may need to be adjusted.

Other Business, Part 2

The Selectmen's Office had asked sponsors of warrant articles for the Annual Town Meeting to identify the individual who would read the motion at the meeting. The Commission is sponsoring an article requesting that filing fees collected under the Wetlands By-Law in the past year be transferred to the Conservation Fund. Sauer had read similar articles in the past, but he was unsure if he would be able to do so this year. Elliott agreed to read it if Sauer could not. On a motion from Elliott, seconded by Rice, all

VOTED: to ask the Town Meeting to pass over the article because of the current financial crisis.

Sauer asked Fisher to request that the Finance Committee not publish a recommendation against the article, but to instead say that the members would make their recommendations at the meeting.

7:20 p.m. Public Hearing re NOI from Keith Babin for the construction of a single family house at 40 Lawrence Street

Keith Babin and Jack Visniewski attended the hearing. Under the Pepperell Wetlands Protection Bylaw, the Commission determined that the project area involves BVW, and the proposed activity must meet the 50' setback requirement to the fullest extent possible as a lot created before May 6, 2002. This lot had contained a house, which had burned to the ground in December 2009. Visniewski described the wetland resources in the area. In the front of the lot there is BVW, which brings the entire building area into the 100' buffer zone. In addition, the building area is in the Outer Riparian Zone (100' to 200') of the Riverfront. Visniewski said that the Estimated Habitat area boundary also seemed to come close to the project area. He had sent the NOI to Natural Heritage for review and was not expecting to close the hearing until the NHESP comment letter had been received.

Visniewski said that the lot is relatively flat near the street, but drops off sharply behind where the previous house had been. He said that Babin had previously cleared portions of the lot, including debris left by the previous owner and some shrubs and trees. Recently he had had the foundation of the previous house removed without a demolition permit. Since the previous house had been non-conforming to Zoning, Babin was going to have to appear before the ZBA for a variance to build the proposed replacement house.

Visniewski said that the proposed house was bigger than the previous house. It included a porch on the front, a deck on the back, and a breezeway with a 2-car garage on the north side. Babin planned to use most of the existing paved driveway and the existing septic system (as long as he received BOH approval). The house would be served with Town water. Visniewski acknowledged that there had been disturbance on site and said that Babin was offering a restoration area that would become a no-disturbance buffer along the wetland edge. The plan included a plant list which Visniewski said seemed to contain some non-natives, which Babin would be willing to revise. He said that the intention was that the trees and shrubs on the plan would be inter-planted with a conservation seed mix, or, on the steep slopes, covered with bark mulch. Visniewski said that the back deck was to be in place of a backyard.

Visniewski pointed out a lined drip trench on the back of the breezeway that was designed to drain to an infiltration trench along the back of the deck. Visniewski said that Babin wanted to remove several white pines which were scorched in the fire.

Rice asked about the hexagonal symbols on the plan. Visniewski said they were no-disturbance area markers. Moody asked if the driveway was to be paved—even over the leach field. Visniewski said that it was already paved in that area although the paving did not cover the entire leach field. He said that with some of the field paved, Title V does require a vent, which is not currently in place. Visniewski reviewed several alternatives that had been considered for this design, including eliminating the garage and/or back deck and placing the proposed house differently, concluding that the present proposal best meets Babin's needs.

Rice asked if the driveway was sized and shaped so that Babin would be able to back out of the garage. She noted that "restoration" did not seem to be the correct word for the proposed buffer zone plantings. She said that she would like to view the site. Sauer asked about how the roof runoff at the south front corner would be handled. Visniewski said that he would look into that.

Abutter Haley Laken questioned the topography of the site and how high off the ground the proposed back deck would be. Abutter Jim Alger agreed and asked if there would be a door under the deck from the basement. Visniewski said no and explained the topography of the site again. Elliott suggested that the proposed house might need to be staked so that Commissioners visiting the site could evaluate the grades.

Alger said that he was concerned that the many trees that had been cut on the back side of the building area might make the large white pines near the street more apt to fall onto his lot. H. Laken said that the appearance of the lot had been significantly altered since the time of the replacement of the septic tank. She said that the drainage in the area had been affected.

Abutter Steven Laken said that the excavator went into the delineated wetland during the removal of the foundation. He asked who would be overseeing the work if the proposed new house is built. Elliott said that the erosion control barrier on the plans would be the limit of work for the project. Fisher said that she also monitors on-going projects working under an Order of Conditions. H. Laken asked if there could be Permanent Conditions governing activities in or near the wetlands on this lot. Elliott said that the Commission usually included Permanent Conditions on Orders of Conditions.

Fisher said that there were several layers of concern on this lot. She had first spoken to Babin about disturbance in the wetland in September 2009. He had cooperated and hired Leah Basbanes to delineate the wetland, but had not yet submitted an NOI for a restoration when his house had burned in December. Fisher said that the restoration of the disturbed wetlands themselves was not included in the plan. She noted that many trees, especially along the steep slope behind the house, had been removed prior to the fire. Visniewski said that the current plan includes no significant changes to the topography of the site. He also noted Leah Basbane's report from October 2009 in which she suggests plantings for restoration within the disturbed wetland areas. The Commissioners decided to visit the site individually and that no staking of the new house location would be needed. The hearing was continued until May 18, 2010 at 7:30 p.m.

7:40 p.m. Public Hearing, in compliance with Superior Court Civil Action No. 09-0470, re NOI filed by John Kimball for construction of a driveway and installation of a water line at 23 Heald Street

John & Molly Kimball, Attorneys Douglas Deschenes and Julie McNeill, and Town Counsel Ned Richardson attended the hearing. Under the Pepperell Wetlands Protection Bylaw, the Commission determined that the project area involves BVW, and the proposed activity must meet the 50' setback requirement to the fullest extent possible as a lot created before May 6, 2002. Elliott reviewed the procedure for this hearing as outlined on, "Suggested Administrative Procedure for *De Novo* Hearing, Per Superior Court Civil Action No. 09-0470, From Town Counsel Ned Richardson." A copy of the procedure was given to Deschenes, who agreed to it. The procedure is attached to and becomes a part of these minutes.

Fisher said that she had received a list of documents to be included in the record for this hearing from Deschenes' office. The list was entitled "Cross Brook Realty Trust vs. Town of Pepperell Conservation Commission, Middlesex Superior Court – Docket No. 09-00470-L; Index of Administrative Record filed by Town of Pepperell." Fisher had compared this list with the list of Documents noted in the Order of Conditions Denial for this project, issued October 2, 2008, noting that there were two errors between the two lists. 1) The Documents in the Denial had incorrectly listed the date of the Site Evaluation for Notice of Intent submitted by EcoTech to the Pepperell Conservation Commission. The correct date was June 16, 2008. 2) Minutes of the Pepperell Conservation Commission meetings on August 8 & 22, 1994 were omitted from the Index of Administrative Record, but should have been included. All agreed to the corrections as noted.

Attorney Deschenes gave the presentation for the applicant. He said that the hearing was narrowly focused on the judge's comments in the "Memorandum of Decision and Order on Plaintiff's Motion

for Judgment on the Pleadings.” Deschenes described the existing common driveway currently serving 4 lots and its covenant, drawn up in 1994, that had granted only a 15-year license for use of the driveway to Lot 4. He said that the current driveway is no longer viable. He said that the judge’s first question focused on the ownership of Lots 2 and 4. The 2 lots are owned by separate real estate trusts which happen to each have the same trustee, John Kimball. Deschenes said that he had shared information about the beneficiaries of the two trusts with the Town Counsel, showing that they are different parties, and that the Town Counsel had shared the information with the Commission in an Executive Session previously. Deschenes said that this was done because his clients did not want the identities of the beneficiaries of the two trusts to become public information. Deschenes said that since the beneficiaries were not the same, the two lots were not in common ownership.

On the judge’s second question about how an easement by Lot 4, but not Lots 1 & 3, affects the value of Lot 2, Deschenes said that Kimball believed that continued use of the present driveway for Lot 4 would have a detrimental effect on both Lot 4 and Lot 2. He said that the situation was initially set up because the two houses were to be occupied by family members. Deschenes read from a December 22, 2009 letter written by Roger Goscombe and Greg Plummer, Realtors, expressing the opinion that the market values of Lots 2 and 4 are both less than they would be in a theoretical arrangement where each had its own driveway. Deschenes said that Kimball’s fiduciary duty as trustee for both trusts would be violated if he allowed the present conditions to continue because of the diminution of value of the respective parcels.

The judge’s third question concerned the objections of the owners of Lots 1 and 3 to renewing the license. Deschenes said that when the covenant was created in 1994, it had been signed by John & Margaret Kimball (Lot 2 owners), Peter & Angela Kimball (Lot 4 owners) and John Veysey as Trustee of Field Realty Trust (owner of lots 1 & 3). Deschenes said that the current owners of Lot 3, Ann & Thomas Komer, had purchased their lot the day after the covenant had been signed so they must have known about and agreed to it also. Deschenes said that it had been understood by all the parties that Lot 4 would be a temporary user of the driveway. Deschenes referred to Affidavits signed by the owners of Lots 1 & 3 saying that they would not agree to a renewal of Lot 4’s license to use the common driveway. He said the other lot owners signed those affidavits because the lesser the number of people on a common driveway, the better.

The judge’s final question concerned the viability of Alternatives 2 & 3, as previously presented, assuming that Lots 2 & 4 are in common ownership. Deschenes said that Alternative 2 had been dismissed since the extent of the wetland had been increased by the Site Evaluation performed by EcoTech. Deschenes said that Alternative 3 would also be a violation of Kimball’s fiduciary duty as trustee for the trusts which own both Lots 2 & 4, in the same way that allowing the current situation to continue would be. Deschenes concluded his presentation by reminding the Commission that the judge had focused narrowly on the ownership issues in this situation.

Town Counsel Ned Richardson said that there was a massive amount of information that had been referred to in the exhibits listed in “Cross Brook Realty Trust vs. Town of Pepperell Conservation Commission, Middlesex Superior Court – Docket No. 09-00470-L; Index of Administrative Record filed by Town of Pepperell,” as corrected previously in the hearing. Richardson suggested that these exhibits be placed as part of the record. On a motion from Elliott, seconded by Rice, all

VOTED: to place all of the exhibits listed above in the record.

Elliott then asked if any of the members of the audience had comments. Abutter Laurie Blagdon of 27 Jewett Street, owner of 25 Heald Street, said that the wetlands on 23 Heald Street extend onto her property at 25 Heald. She asked about the impacts to the wetlands which could be expected from the construction of the proposed driveway. Deschenes outlined the plans for the proposed driveway including the use of the existing culvert and the proposed replication area. He said that conditions would be imposed, if a permit were to be issued, that would assure that there would be no impact on a neighboring lot. There were no further comments from the audience.

Elliott then asked for comments or questions from the Commissioners, beginning with Sauer. Sauer pointed out the judge's first question, about ownership of Lots 2 & 4. He asked for clarification about the ownership of the two lots. Deschenes said that Kimball had submitted an affidavit to the Town Counsel saying that the beneficiaries of the 2 trusts are not the same. Deschenes said that he understood that the Town Counsel had shared that information with the Commission in Executive Session. Richardson said that, because of the request for confidentiality, he had destroyed the records that had been shared with him. Sauer said that not everyone was present for that Executive Session, or perhaps some details had been forgotten. He asked for the details to be entered into the public record, noting that the judge had written that Kimball had the burden of proof. Richardson pointed out Footnote #1, saying that it is also important to determine when common ownership diverged.

Deschenes reiterated that when the covenant was signed there were 3 parties: John & Margaret Kimball (Lot 2 owners), Peter & Angela Kimball (Lot 4 owners) and John Veysey as Trustee of Field Realty Trust (owner of lots 1 & 3). Deschenes also said that the Komers bought Lot 3 the following day. Richardson asked if Lots 2 and 4 were owned by parents and children. Deschenes said yes. Deschenes said that the Kimballs would be willing in Executive Session to again show the beneficiaries of the two trusts that currently own Lots 2 & 4. Richardson said that that would not be allowed under the Open Meeting Law. It had previously been done in Executive Session because of the possibility that it could have resulted in settling of on-going litigation, but that was no longer the case. Richardson again suggested that a schedule of ownership changes would be helpful.

Deschenes requested a private conference with the Kimballs. Deschenes, McNeill, and John & Margaret Kimball left the room. After Deschenes, McNeill, and the Kimballs returned to the hearing room, Deschenes said that the beneficiary of Cross Brook Realty Trust (Lot 4) was Joan Kimball (John & Margaret Kimball's daughter) and the beneficiary of Brook Realty Trust (Lot 2) was the John & Margaret Kimball Family Limited Partnership of which John & Margaret Kimball were the general partners. The trusts were created in June 1997 and the current beneficiaries were assigned in 2005. Moody asked when the houses and driveways were actually built. The Kimballs said that the house on Lot 2 was built in 1982, and the house on Lot 4 was built in 1988.

Elliott asked to clarify the roles of the trustee and beneficiary in realty trusts. For example, can the trustee sell the property without the permission of the beneficiary? Deschenes and Richardson said no. Sauer asked who the beneficiaries of the two trusts had been prior to 2005 when the current beneficiaries had been assigned. Deschenes said that the general partners of the Limited Partnership had been the same for both trusts before 2005. Sauer asked who the general partners were. Deschenes said they were John and Margaret Kimball. Richardson cited the

common ownership doctrine for effective control for finding viable alternatives. Sauer asked if there had been common ownership when the license had been set up in 1994. Deschenes said no.

Rice asked if the Commission's consultant's wetland delineation (June 2008) was included within the record. Deschenes and Fisher said yes. Rice asked if any other alternatives were being considered. Deschenes said that every viable option had been presented. He reviewed the alternatives, 1 through 4, which had previously been presented. Rice asked if there had been or are any off-site alternatives under consideration. Deschenes said no. Rice said that she wanted to note for the record that the replication area that had been presented in the original proposal was neither a good shape nor a good location.

Moody said that the types of "hardships" that make proposals into Limited Projects do not include economic hardships such as described by the letter Deschenes had brought from the realtors, Goscombe and Plummer. Deschenes said that he had sought that opinion of value because the judge had asked for an explanation of Kimball's violation of fiduciary duty between Lots 2 & 4. Sauer said that there is no diminution of value here. He said that the actual value of the 2 lots was what it was with the existing driveway configuration. Sauer pointed out that Kimball was claiming that the value was diminished when actually Kimball had applied to build a new driveway in order to increase the values of the 2 lots.

Moody asked for a clarification of a "non-exclusive permanent easement." Richardson said that an exclusive permanent easement is when the owner of the easement is the only person who can use the land that is covered by the easement. In a non-exclusive permanent easement, this is not the case.

Elliott stated that the 15-year driveway license was issued on November 17, 1994 and expired on November 17, 2009 (5 months ago). Elliott asked if Lot 4 was still using the common driveway and the access through Lot 2. Deschenes said that they did not have a choice but to continue using it. Elliott asked him to explain, in that case, why they "don't have access" since that gets to the question of effective control of the driveway. Deschenes said that the neighbors are accommodating temporarily, but that the expectation has always been that Lot 4 would have separate access.

Elliott said that when the probable selling prices of Lots 2 and 4 had been evaluated, this had not taken into account the big picture, from the time that the original one lot had been subdivided into 4 lots. He said that when Lots 1 & 3 had been created and sold, the owners had realized considerable profit. Elliott said that he had been on the Conservation Commission when construction on Lot 4 had originally been discussed. Elliott said that the owners had been cautioned about the limitations that the present driveway setup imposed. He also said that an alternative to the location of the driveway extension to Lots 1 & 3 (which would have had no wetland impact) had been identified, but that Kimball had refused to consider it. Also, at anytime up to the extension of the common driveway for Lots 1 and 3, before almost 5000 square feet of wetlands filling had occurred, a wetland crossing to Lot 4 had been an option.

Going back to the question of a schedule of ownership changes, Fisher asked what would be the pertinent time that common ownership of the lots should be considered. Richardson said that, for Limited Project status, the burden is to demonstrate that access was effectively cut off. This would run from the time that the situation was created up to the present. He pointed out Footnote #1, in the “Memorandum...and Order...” from the judge. Rice asked what specific date would be relevant. Richardson said that the houses on Lots 2 and 4 were built in 1982 and 1988. From the time they were built, they were accessed substantially in the same way as they are accessed now. The Special Permit issued by the Planning Board and Driveway Covenant adopted in 1994 were primarily about the inclusion of Lots 1 & 3 into an existing arrangement on Lots 2 & 4.

Sauer noted that the Lot 2 owner is the applicant on the Notice of Intent. He asked how the Lot 2 owner could be advocating for Lot 4 and how the owner of Lot 2 could be refusing himself the use of Lot 2 for access. Richardson said this was a good point. Deschenes said that other parties may apply as long as they have ownership permission.

Richardson said that this dispute is about real world control of access. He said that if real world control of access to an existing lot were denied by the Conservation Commission, that might constitute a taking. This case, however, does not fit that model. Moody said that the Pepperell Conservation Commission is not denying access.

There were no further comments from any of the parties. Elliott said that the hearing was closed. The Commissioners decided to review the record individually over the next few days and to deliberate on their findings at the next scheduled meeting, May 4, 2010 at 7:30 p.m. In case the meeting were to be cancelled because of the Annual Town Meeting extending into a second evening, Fisher was asked to schedule a Special Meeting of the Commission on Wednesday, May 5, so that the deliberation could take place then.

The meeting adjourned at 9:35 p.m.

Respectfully submitted,

Ellen L. Fisher