

These minutes were approved at the October 24, 2022 meeting.

DURHAM CONSERVATION COMMISSION
Monday, September 19, 2022
DURHAM TOWN HALL, COUNCIL CHAMBERS
7:00 p.m.

MEMBERS PRESENT: Jake Kritzer (Chair), John Nachilly (Vice Chair), James Bubar (Planning Board Rep), Erin Hardie Hale, Roanne Robbins, Neil Slepian, Carden Welsh (Town Council Rep)

ALSO PRESENT: Town Planner Michael Behrendt; Land Stewardship Coordinator Tom Brightman and Minute Taker Lucie Bryar

I. Call to Order:

Chair Jake Kritzer called the meeting to order at 7:02 p.m.

II. Land Acknowledgement Statement

The Chair read the Land Acknowledgement Statement.

III. Roll Call

Roll call attendance was taken.

IV. Approval of Agenda

Ann Welsh, chair of the Land Stewardship Committee, had asked if the Commission would review and appoint a candidate-at-large for the committee this evening.

Mr. Bubar MOVED to approve the agenda with an adjustment after Item V (V-a) to allow review of the candidate; SECONDED by Vice-Chair Nachilly, APPROVED unanimously 7-0, Motion carries.

V. Public Comments: There were no public comments.

V.a) Review/Appointment of New Land Stewardship Committee Member Marty Gorham.

The Chair read the nomination for Mr. Gorham sent by Ms. Welsh. Mr. Nachilly said Marty has volunteered on land stewardship projects for years and he would recommend him.

Vice-Chair Nachilly MOVED to recommend the appointment of Marty Gorham as a new at-large member of the Land Stewardship Committee; SECONDED by Ms. Hale, APPROVED unanimously, 7-0, Motion carries.

VI. Land Stewardship. Review of proposed budget for 2023 and update from Tom Brightman, Land Stewardship Coordinator.

Mr. Brightman gave updates on two items before reviewing the budget:

- 1.) There's a UNH Extension program this Friday at Thompson Forest on invasive species. It was opened to conservation commissions from other towns with the goal to foster discussion about invasive species management. The max of 15 people registered. Commission members may still attend but should carpool, if possible.
- 2.) Mr. Brightman talked with U.S. Fish & Wildlife Service about potential grant funding for a brontosaurus to manage seven acres at Thompson Forest for early successional habitat. If it's not done within a year or so, the brontosaurus won't be able to do the job. He's received a bid of \$8,950. If funding is approved, work can take place in late December/early January.

Mr. Welsh asked if the Town has an obligation to do the work and if it's to clear habitat for rabbits. Mr. Brightman replied there's no obligation to do the work. There are evolving views on managing habitat for New England Cottontails. Whereas clear cutting was done in the past, the science now points to retaining a more mixed layer – primarily to deter Eastern Cottontails, since the two vie for territory.

Mr. Brightman said the entire N.E. Cottontail project is being revisited – in part because they've had issues breeding them in captivity. There was further discussion about N.E. Cottontails and Eastern Cottontails.

Mr. Nachilly asked if it would be better to find suitable areas [for rabbits] that could be managed simply by mowing and Mr. Brightman agreed this could be an option. Regarding management of Thompson Forest –it's about choosing what's appropriate for the site and what the Town can afford.

Mr. Brightman added that early successional habitat can be managed for many different species, including birds, snakes and other small mammals besides rabbits.

3. Review of Budget: Due to the Commission's lengthy discussion anticipated tonight, Mr. Brightman offered to highlight items from the general fund on the spreadsheet. It was clarified later in the discussion that the Commission does not need to vote to approve the budget.

Mr. Welsh asked him to highlight anything new that's not being funded by the Town. Items discussed included:

- Mowing at Thompson Forest (mentioned earlier) would possibly be funded by U.S. Fish & Wildlife.
- Mowing of Wagon Hill: It generally takes Durham's DPW several weeks to mow, primarily for monarchs, milkweed and bobolinks. He's looking into hiring a contractor, if U.S. Fish & Wildlife funds can be used. A guesstimate for the work is \$5,000. If outside funding isn't received, DPW will continue mowing.
- Beaudette/Laroche Brook Bridge: \$5K has been received from Eversource. The State is reviewing the status and management of a rare crested sedge found there. The cost of the survey hasn't been invoiced yet, but is estimated to be about \$2100. Clearing in that area done by Eversource apparently benefited the sedge.

Ms. Hale asked about the design process for the Longmarsh Preserve Bridge and Mr. Brightman said there's money in the general fund but finding consultants to do the work right now has been difficult. Some grant funding might not be available because portions are on a Class 6 road.

Vice Chair Nachilly asked if portions of the road in the marsh could be abandoned by the Town so that more grant funding would be available and Mr. Brightman said that's a possibility.

Townwide knotweed management was discussed and Mr. Brightman said he's had meetings with DPW and State expert Doug Cygan about this. Knotweed is being mapped when it's seen. When it's found in a Town right-of-way that goes to private property, it doesn't make sense to clear only the Town portion.

In other news, Mr. Brightman said it looks like Glyphosate (Round-Up) will be removed from private use next year, bringing a major change to how private citizens manage weeds. It's a known carcinogen. \$12B has been set aside to be paid out.

The Chair thanked Mr. Brightman for his report.

VII. Subdivision off Gerrish Drive. Recommendation on conditional use application for roads, drainage, and other structures within wetlands and wetland buffers for 18-unit subdivision. *The project was remanded by the Superior Court back to the Town for consideration. 16-acre parcel at 91 Bagdad Road situated off Gerrish Drive. Marti and Michael Mulhern, property owners. Mike Sievert, Horizons Engineering. Mark West, Wetland Scientist. Sharon Cuddy Somers, attorney. Map 206, Lot 46. Residence B District.

Recap on Project Status

Chair Kritzer said the project was remanded back to the Town by the Superior Court on the basis of a HISS [soils] map which was unverified and not stamped. The Commission is reviewing it before the Planning Board reviews it again only because of their respective schedules.

Mr. Behrendt noted the Town Attorney suggested the Commission focus on two things: The HISS map, which is now stamped by a certified soil scientist and verified by Strafford County Conservation Commission. He added that soil scientist Mike Mariano provided the original soils map several years ago and re-checked his work recently before stamping it.

Strafford County Conservation Commission hired Soil Scientist Mike Cuomo to review and verify the map and Mr. Cuomo made some notes and sent a letter dated August 5th.

Applicant Marti Mulhern, 91 Bagdad Road, thanked the Commission for reviewing the application again and asked if they had received/read two letters she sent. Commissioners concurred they'd received the letters.

Project Engineer Explains Changes to Maps

Engineer Mike Sievert came forward to discuss changes to the soil maps. He proceeded to explain the soils key on the HISS map and noted the Site Inventory Map, generated over two years ago, includes soils, wetlands, and slopes as well as wetland setbacks, etc. The goal is to identify usable land areas.

There are no material changes on the map – after Mr. Mariano's more recent review. No wetland boundaries have changed. The stamped HISS map accurately represents the wetlands on the site.

He commented some abutters will talk about his incompetence tonight, but the Town's consultant agreed there were only minor issues [with the maps] that are now fixed.

Answering a question from the Chair, Mr. Sievert confirmed he produced the maps using data from outside consultants, including certified soil and wetland scientists. The map was originally submitted on April 10, 2020.

Prior to public comment, Mr. Sievert addressed a letter submitted by abutter Gail Kelley to the Commission. After calling him “completely incompetent,” he said she acknowledged “there is nothing materially different between what was originally approved.” However, she added that the HISS map shows that a road can definitely be built from the Bagdad Road right-of-way, south of the property to the house site, “without destroying any wetland and without having to go through any wetland.” Mr. Sievert said this is a false statement and he proceeded to explain why.

The Chair then opened the meeting to Public Comment, summarized here:

Gail Kelley, 11 Gerrish Drive – said she brought the suit against the Town. She was defending the Town zoning ordinance against the Town itself and now finds herself defending the court ruling against the Town’s unwillingness to comply.

She urged the Conservation Commission (CC) and Planning Board (PB) to do a site walk and not rely only on maps. She maintained the CC and PB were not allowed to see the area, per advice from the Town Planner. Further, the access point where excavators were brought in to dig test pits indicates it’s possible to go over “a small stream,” not through it. A small bridge or culvert, in her view, would work.

According to Ms. Kelley, NHDES asked the applicants to support their view that the proposed access is the least impacting. She read part of the court ruling in order to challenge the Town Attorney’s advice that the Commission should only review the HISS maps. The Commission has to comply with the court ruling and it does not say, “Let’s put the HISS map in the file.”

Vice-Chair Nachilly responded to Ms. Kelley’s comments, saying he knows the area well and has in fact walked the property twice. Chair Kritzer said he’s also walked the area of the property in question, including walking through the stream.

Diana Carroll, 54 Canney Road, commented no neighbor has said the subdivision should not be built. However, neighbors have asked from the outset if the Bagdad entrance was viable and have been told “no,” due to wetlands and buffers. Walking that part of the property doesn’t seem to connect with what’s shown on the maps. They [abutters] asked for HISS maps at almost every meeting and were never told there was an uncertified map available. Lastly, she said there’s a rush to put this completed certified map in the folder and move ahead. Ms. Carroll said it’s time for a site walk from the Bagdad access point.

John Lewis, 9 Gerrish Drive, is a retired superior court judge; He read Judge Howard's decision and said the Town needs to deal with a full and complete application. It's not a small matter, but an important one. He said the narrative provided by Mr. Mariano suggests it's possible to build a road from Bagdad Road. In her court case, Ms. Kelley showed the Judge photos from the entire area and "he saw how dry it was there." In Mr. Lewis' view, this had a lot to do with his ruling.

John Carroll, 54 Canney Road, said when the Conservation Commission does a site walk from the Bagdad entrance, it's critically important they have an independent soil or wetland scientist with them to answer questions.

The Chair thanked everyone for their comments and turned discussion back to Commission members.

Mr. Bubar and Mr. Slepian asked about a written narrative (referenced by Gail Kelley) in which Mr. Mariano indicated it would be easy to build a road from the Bagdad entrance. Neither one could locate the narrative or recall seeing it. [It wasn't pointed out or produced at this time.]

Vice-Chair Nachilly suggested the Commission focus on the report from NHDES, dated February 10th. Reportedly DES gave the applicants 30 days to describe which alternative access routes had been considered. They also asked for documentation showing the proposed route is the least impactful.

Chair Kritzer said the Commission made it clear in their original decision that they weren't weighing the relative merits of Bagdad vs. Gerrish, because they adhered to a strict reading of the wetlands ordinance – particularly the first criterion. They concluded there was no viable access outside of the WCOD.

Mr. Nachilly and Mr. Bubar asked if the Commission could have access to the applicants/engineer's response to NHDES, which they believe was due by April 11th.

Mr. Welsh invited members to consider the charge of the Conservation Commission, which according to NH regulations, is "to ensure proper utilization of natural resources and protection of the watershed." In his view, a Conservation Commission is considered a local resource for NHDES, since they don't have enough manpower to monitor the entire state. He believes the request from NHDES in this instance should be considered by the Commission.

The Chair said the Commission hadn't received any communication from NHDES and he's reluctant to "read between the lines." Later in discussion, Vice-Chair Nachilly said NHDES typically has one-way communication and doesn't communicate directly with

commissions and boards, but rather with applicants.

The Chair mentioned an email today from applicant Marti Mulhern that discussed access to their property for a site walk. Ms. Mulhern explained they would allow individual members access to the site but would not allow a site walk or anything constituting a quorum at this point. Individuals should request permission in advance. She also said everything had been submitted to NHDES as requested.

Questions continued throughout the discussion about the NHDES request and the applicant's response. Mr. Sievert said the information is public and the Town has all the communication. He added that NHDES hasn't approved the project yet. From the beginning, he's maintained that engineers will do an alternative analysis of other access options, as required.

Following up on some abutters' comments that the maps are not correct, Ms. Hale asked what type of information would be needed to confirm or deny their claims. Commission members walking the property aren't experts.

Mr. Behrendt cautioned against raising questions about the accuracy of the technical information submitted. In the absence of another professional disputing the accuracy of the maps, he said there's no reason to assume the maps aren't correct. The Town uses well-respected, certified professionals.

Ms. Hale said she'd like to hear from the applicants again why they believe [Gerrish] is the least impacting alternative.

Mr. Sievert replied that a close examination of the Wetland Functions and Analysis report shows the [Gerrish] access wetland has a very low score. Only 2.5 out of 16 acres will be developed. All of the remaining land in the high-quality wetland area is being placed into conservation. Referencing the Bagdad access, he said it's a path, not a road and it's not accessible due to ownership issues. It can be deceiving to walk the land, but the wetlands scientist information is the most reliable.

The Chair summarized Mr. Sievert's main points, i.e., the [Bagdad] access is twice as long as the Gerrish one and cuts through a higher value wetland. Also using that access would cut the conservation land in half. Mr. Sievert agreed.

Gail Kelley was given permission to come forward to answer Mr. Bubar's earlier question about a narrative from soil scientist Mike Mariano. She quoted from his notes and said he wrote, "there are few limitations that can't be overcome," in reference to the Bagdad access.

Mr. Slepian commented that any commissioners who have not seen the property should have the opportunity to do so. Mr. Welsh agreed it's hard to draw conclusions from looking at maps.

After further discussion about the analysis requested by NHDES, Mr. Behrendt said because of the language in criterion one, neither the Conservation Commission nor the Planning Board could *require* the applicant to use Bagdad Road or find an alternative.

Mr. Slepian said it appears the Bagdad Road access goes through the property of Greg Embree. The Chair confirmed this and said not using that access wasn't due to engineering barriers but rather questions about ownership. The environmental impact is unclear.

Town Planner Michael Behrendt said in his opinion, the [Bagdad] access doesn't meet criterion one which states it's "reasonably practical," because that access is owned by another party and there's an easement.

Mr. Welsh questioned the Town Attorney's opinion on this and Mr. Behrendt said the Attorney agreed the easement could [possibly] be used. But in conversation with him, she added if it went to court it's uncertain how the court would respond.

Mr. Behrendt commented it would be a long process and a lot of expense for the applicant to get a ruling and for those reasons, he does not believe it's "reasonably practical." He acknowledged differing opinions about the environmental impact.

The Chair said all arguments about legality are moot because the proposed project doesn't cross the WCOD threshold. Seeking to wrap up tonight's review, he asked members what should be reported to the Planning Board about tonight's discussion and/or if a vote should be taken.

Mr. Welsh reiterated he would like to see those who haven't walked the property be given the opportunity to do so. He would also like [wetland scientist] Mark West to come back before the Commission. In response, Mr. Behrendt said he will send out Mr. West's Wetlands Functions & Analysis Report.

Mr. Bubar said he would like to see the NHDES information.

The Chair noted it appears there's nothing in the updated HISS map that would change the Commission's opinion dated March 21, 2021. In light of public feedback and the NHDES request of February 10th, however, he believes a broader discussion of environmental impacts is warranted.

Mr. Behrendt said the applicant is hoping to submit the application to the Planning Board on October 12 and would like to see action at the October 26 meeting. The Conservation Commission next meets on October 24.

The Chair asked if there was consensus to reiterate the Commission's earlier response to the four WCOD criteria. Mr. Welsh said he would be fine with re-affirming it, with a comment that the Commission wants to further evaluate environmental impacts.

Mr. Welsh MOVED that the Conservation Commission re-affirm -- under a strict reading of the criteria -- their finding that the four criteria for conditional use have been met and will therefore not change their recommendation to the Planning Board. However, the Commission will further examine the impact of a selective and potential alternative access point and the impact on the water resources of the Town; SECONDED by Mr. Slepian, APPROVED unanimously 7-0, Motion carries.

VIII. Review of Minutes: April 25, 2022; May 23, 2022; July 25, 2022; August 5, 2022

Mr. Welsh MOVED to accept all four sets of minutes as submitted; SECONDED by Ms. Hale. APPROVED, 6-0-1, with Chair Kritzer abstaining since he said he had not opportunity to review them carefully.

IX. Other Business

X. Roundtable. Updates from Conservation Commission members.

Mr. Bubar reported the Planning Board unanimously denied the application for a parking lot at 19-21 Main Street. The applicants have 30 days to appeal the decision, but it's unclear what they will do.

XI. Adjournment.

With no further business, Mr. Welsh MOVED to adjourn the meeting at 9:58 p.m., SECONDED by Mr. Nachilly, APPROVED unanimously.

Respectfully submitted,
Lucie Bryar, Minute Taker
Durham Conservation Commission

Note: These written minutes are intended only as a general summary of the meeting. For more complete information, please refer to the DCAT22 On Demand videotape of the entire proceedings on the town of Durham website.