

Conservation Commission
 One Liberty Lane
 Norfolk, MA 02056
September 25, 2019
 7:00 P.M.

TOWN CLERK
 NORFOLK

2019 NOV 14 AM 10: 20

Commission Members	Other
David Turi, Chairman ----- Present	Janet DeLonga – Agent ----- Present
Jim Wilson – Clerk ----- Present	Amy Brady–Administrative Assistant ---- Present
Alexandra Fraher – Member ----- Present	Daniel C. Hill, Attorney ----- Present
Alex Weisheit – Member ----- Absent	Elizabeth Pyle, Attorney ----- Present
Fred Laberge – Member ----- Present	
Allen Phinney – Member ----- Present	
VACANT – Member ----- VACANT	

The duly posted meeting of the Norfolk Conservation Commission convened at 7:00 P.M. in Room 124 at the Norfolk Town Hall. Mr. Turi opened the meeting and announced that the meeting was being audio- and videotaped.

PUBLIC HEARINGS:

39 Mirror Lake Ave, NOI #240-618 (cont'd from 9/11/19)

Present was William Gottwald, engineer. Plans presented and referred to were entitled “On Site Sewage Disposal System, 39 Mirror Lake Ave, Norfolk MA,” dated June 21, 2019, revised through 9/19/19, prepared by DMG Associates, Berkley, MA.

Mr. Wilson made a motion to close the hearing; Mr. Laberge seconded the motion; the vote on the motion was 4 -0 -1, with Ms. Fraher abstaining.

Mr. Wilson made a motion to issue the Order of Conditions for 39 Mirror Lake Ave, #240-618; Mr. Laberge seconded the motion; the vote on the motion was 4 -0 -1, with Ms. Fraher abstaining.

ACTION ITEMS:

Lake Street Paving, NOI #240-613, Order of Conditions

Mr. Turi said that one of the members who voted to issue the Order of Conditions at the last meeting was actually ineligible at that time to vote, due to a previous absence.

Mr. Wilson made a motion to issue the Order of Conditions for 39 Mirror Lake Ave, #240-618; Ms. Fraher seconded the motion; the vote on the motion was 4 -0 -1, with Mr. Phinney abstaining.

Elizabeth Maitland, Lake Street, stated that she had asked for and not received a draft copy of the Order of Conditions for Lake Street, and wanted to note that she had not received any responses to letters sent to the Commission; Mr. Turi responded that communications received were generally responded to during open meeting, and Ms. Maitland could pick up a copy of the Order of Conditions from the Administrative Assistant.

OLD BUSINESS:

Review consultant report dated 8/8/19 re: 144 Seekonk Street property

Mr. Turi announced that only wetland issues were to be discussed tonight, and no other subjects regarding the property. Mr. Turi read the passage regarding "Jurisdiction" from Article VII, Section 2 of the Town of Norfolk Bylaws, stating that it is the Commission's duty to follow up on comments made to them in this regard.

Mr. Turi said that on August 21, 2017, the Building Commissioner sent a letter to Mr. O'Harte stating that the property had been cleared of trees and roads graveled in, and he issued a Cease & Desist, which was appealed to the ZBA. On April 12, 2018, the ZBA issued a determination, and town counsel informed the ZBA that the jurisdiction of resources belonged to the Conservation Commission. On December 12, 2018, the Commission voted to hire a professional wetlands expert to assess the site for possible wetlands violations, and to send a letter to the applicant requesting access. On March 11, 2018, the Commission voted to accept the proposal from Patrick Garner Company. A warrant was obtained to grant access to Patrick Garner Company on May 29, 2019, and a report was received from him on August 8, 2019. On September 11, 2019, the Commission voted to release the report, having not released it to the public earlier in order to not create bias. Mr. Turi then asked Mr. Garner to provide a summary of his findings.

Mr. Garner said he was first involved with this project when he was hired by the ZBA in early 2018 to do a peer review of the appeal that had come before them. When on the site in February of 2018, he noticed what he characterized as extensive clearing, as had been cited by the Building Commissioner. At that time he made note of at least two, possibly three, areas that might have been wetland alterations. Mr. Garner said he has not drawn conclusions at this point, he has merely made observations. The Conservation Commission subsequently hired him to revisit the site and make assessments using various methods including soil samples, which he had not done previously. Assessments were to be made with regard to both state and local bylaws and a written report prepared.

Mr. Garner focused on three areas, labeled 1, 2, and 3 from his report dated August 8, 2019. In Area 1, he had noticed pooling water during his February 2018 visit, in this area that appeared to have been fairly recently cleared (likely within a year); there was no vegetation. The same area in May of 2019 was totally dry and beginning to be vegetated; there were no definitive hydric soils. Mr. Garner said that areas of flooding are protected under the town bylaws. In Area 2, he stated there is a fill area of 6'-12" of fresh sand; in 2018 there was not herbaceous growth, but it is coming in now. Mr. Garner continued through the presentation, detailing information from his 8/8/19 report, and discussing an intermittent stream. He pointed to an area upgradient of the stream (Figure 11 in his report) that has been filled, but might have been bordering vegetated wetland (BVW). If indeed it was BVW, then that area and the stream would both be protected under the state Wetland Protection Act (WPA) as well as local bylaws. If it is not BVW, then neither resource is protected under the WPA. He said that the vast majority of soils he augered up did contain wetland soils. He determined that Area 3 was not an area of concern.

In conclusion, Mr. Garner suggested that if a Notice of Intent comes before the Commission, Area 1, a potential ephemeral pond, should be survey-located in late winter to determine its maximum extent and square footage, and Area 2, possibly filled BVW, would warrant detailed investigation.

Christopher Agostino, attorney for the applicants, said that it is very unusual for a 40B applicant to appear before ConCom. Atty. Agostino said that the timeline really began long before August, 2017, and he believes it's critical to know the history of the site, beginning with 2007. At that time a prior owner/developer who was evaluating wetlands on the site, asked Dan O'Driscoll, a Professional Land Surveyor (PLS) and Certified Soil Evaluator (CSE) to delineate the land; one BVW was determined at that time; one of their test pits is still there, with a monitoring well, near Area 2. He said quite a bit of site clearing was done at that time, which Atty. Agostino suggests was mistaken for work done in 2017.

OLD BUSINESS: (cont'd)

Review consultant report dated 8/8/19 re: 144 Seekonk Street property (cont'd)

Atty. Agostino said that since the current applicant applied for 40B to Mass Housing, there were several visits to the site by town personnel including the Conservation Agent, Janet DeLonga, and additional wetland areas were never brought up. The Project Eligibility Letter (PEL) received by the applicants in July, 2017, stated concerns with ledge and the level of groundwater, and instructed them to be prepared with extensive soil test data, which is what prompted the current testing, including looking for ledge. Atty. Agostino contends that the ZBA is the only board in front of which the 40B applicant should be appearing, and in fact has filed with the courts to get a declaration that they shouldn't be here. The ZBA referred this to ConCom, it was not initiated by ConCom. Atty. Hill said that during the ORAD hearing, there were announcements made that there was no credible evidence that wetland resource was disturbed by the soil testing, and that information was relayed back to the ZBA who was at that time hearing the appeal of the Building Commissioner's letter. He said the ORAD hearing would have been the time for ConCom to raise questions of possible alterations. Ms. DeLonga said that the ORAD only looked at the area requested, and it says right on the form that it doesn't negate the possibility of there being other resource areas or buffer zones. Atty. Agostino introduced Dr. John Rockwood, who has a PhD in soils and plant science and is a Certified Professional Wetland Scientist, from the Society of Wetland Professional Certification Program, which is the only certification program for wetland scientists; Stephen O'Connell, who presented the ANRAD to the Commission; Dan O'Driscoll who did the previous delineation; David Crossman, wetland scientist who saw the site before any alterations were done in 2017. Atty. Agostino said that the Vice ZBA Chair, Mike Kulesza, said that the reason this was referred to the Commission was to "reduce the scope of the Chapter 40B development," and there are emails saying that the Garner investigation needed to be coordinated with the Commission "in order to side-step 40B." Mr. Turi reminded Atty. Agostino that most of the current ConCom members were not aware those emails. Atty. Agostino said that Mr. Wilson, at the time of Mr. Kulesza's statement, said the Commission would only look at what was within their jurisdiction. Atty. Agostino said that members of both boards are welcome on the site, but Mr. Garner is not, whom he referred to as "not credible," and who had an open investigation with the licensing board for allegedly exceeding the scope of this license. Mr. Wilson interjected that the applicant was given the opportunity to have their own wetland scientist go with Mr. Garner to witness his testing, but they chose not to cooperate, resulting in ConCom moving forward with obtaining an administrative warrant. Atty. Agostino said they didn't cooperate because they felt that they shouldn't be in front of this board, since they filed for a Comprehensive Permit with the ZBA.

David Crossman, B&C Associates, Inc., said he was hired by Andrews Survey and Engineering (ASE) in 2015 to delineate the property and any resources within 100' of the property for the ANRAD filing. He said that Area 1 was not disturbed at the time, and it was oak and pine forest. He walked the site with Ed Hutchinson, BETA peer reviewer for ConCom at the time, and said Mr. Hutchinson agreed with his flagging, and although he indicated there might be another area extending a little farther up, he did accept Mr. Crossman's flagging. The ORAD was appealed to DEP and Gary Dulmaine from DEP came and walked the site with Mr. Crossman. He also indicated an area farther up and added an Isolated Vegetated Wetland (IVW) resulting in a Superseding Order of Resource Area Delineation (SORAD). He said that no one who walked the site thought there were other resource areas. He said he augered in Areas 1 & 2 and didn't find anything but bright, upland soils up to 12"-18". Mr. Crossman presented pictures which were discussed.

Next, Mr. O'Driscoll discussed the soil evaluations he did in 2007, and on September 12, 2006. At that time, he did not notice any wetlands at Area 1 or Area 2. He indicated the pipe where he had put in a monitoring well, saying he would not have done that in a wetland area. A track excavator was used, leaving a path about 12'-15' wide.

OLD BUSINESS: (cont'd)

Review consultant report dated 8/8/19 re: 144 Seekonk Street property (cont'd)

Dr. Rockwood said he was contacted 4 days prior to do a peer review of Patrick Garner's report of August 8, 2019. Referring to his own review letter of September 25, 2019, he said he disagrees that DEP methodology for delineating BVW for soil evaluations was properly followed. He said the 8 borings taken were described as very similar, even though 3 were done in areas not purported to have been filled. He said the thickness of the A horizon was not described, nor were the redoximorphic features. The B horizon was not mentioned. It was Dr. Rockwood's opinion that each of the 8 auger samples should have been described individually rather than generally. It is his opinion that conclusions were reached based on incomplete information. Ms. Fraher said that it was her understanding that Mr. Garner was not drawing conclusions, but rather recommending that further investigation is warranted. Dr. Rockwood said that a conclusion as to hydric soils was reached. Referring to the SORAD plan, Dr. Rockwood emphasized that DEP reviewed the area and did flag an IVW, without mentioning a potential stream between it and the nearby delineated BVW.

Mr. Garner indicated where a pipe from previous testing is in relation to where he said the BVW may be; he said he thinks the area was first disturbed back in 2007, and again more recently covered over. Area 1 appeared recently excavated in 2018, with vegetation just beginning in 2019. He clarified that he did not find wetland vegetation in the stream channel identified, just a potential BVW at the top of it. He detailed how he first saw the stream in the delineated area, and followed it up, until he came to an area of fill crossing it. He said the stream contours are very obvious, and the stream is very ephemeral flowing maybe only a couple of weeks per year; the first time he was out there, it was flowing at 1-2 c.f.s and it wallowed out to a flat area with no definable bank, which he said is inconsequential.

Attorney Hill asked Mr. O'Driscoll if he was the one who delineated the plan, dated March 8, 2007, and if Mr. O'Driscoll was a Professional Certified Wetland Specialist, which he is not. Atty. Hill said that this plan shows more extensive wetlands than the current delineation. Regarding the area where a test pit was dug (detention pit 2), Mr. O'Driscoll said the whole area was not cleared at that time. Atty. Agostino said his client dug the hole in Area 2 that was filled with water while looking for ledge. In response to Atty. Agostino, Mr. O'Driscoll said he was sure that he had not done the clearing in '06-'07, and the road heading to the South was not there at that time. Atty. Agostino said that aerial photos from 2006-2007 that showed a full canopy; photos from '07-'08 show a cleared area.

Atty. Hill said that he wanted to make some corrections to the record. He said that the ZBA decision was a zoning enforcement matter upholding the Building Commissioner's finding that clearing was done in excess of what due diligence would necessitate. He said the comment attributed to Mr. Kulesza was not correct, and Mr. Wilson added that he recalled it was more to the effect that whatever decision the ConCom makes will affect the scope of the project. Atty. Hill said the 2018 finding against Mr. Garner was retaliation by someone who didn't like a decision he had made, which did not result in a license suspension. In response to Atty. Agostino's characterization of Mr. Garner's access on the property as "trespassing," he said that the ZBA hired Mr. Garner to confirm or dispute the Building Commissioner's finding, and his access to the property at that time was to give the applicant the benefit of the doubt; his entry on to the property more recently was by administrative warrant, which was upheld through a motion to quash and a notice of appeal (which was withdrawn without prejudice.) He said that the ORAD and SORAD processes did not say that there was no stream and the fact that the IVW was put on the plan is not all encompassing of wetlands on the site.

Lorraine Sweeney, 14 Stop River Road, said she spoke with Mr. O'Driscoll and recalled that he said he surveyed the delineation, but he did not actually do the delineation. Ms. Sweeney said some of what was stated tonight did not match her recollection of things. Regarding a letter written by Mr. O'Harte, dated September 9, 2019, she said many statements were inaccurate, and she brought a recording of a previous ConCom meeting. She said she appealed the ORAD to DEP (Superior Court was not an option because only one BVW was being sought to be delineated) and she spoke to the Section Chief who said the IVW

was only shown because it was observed, but typically they do not look outside the requested delineation area. Larry Clark, 130 Seekonk Street, said he traveled that property on his ATV up until Mr. O'Harte bought it, and he had never seen any clearing like what is seen recently. Karen Clark, 130 Seekonk Street, asked if all areas being discussed were disturbed by Mr. O'Harte, and Mr. Turi said that is what the Commission is trying to determine. Ms. Clark referred to a previous developer who wanted to put in a development and was basically cutting the property in half due to wetlands. Edward Sweeney, 14 Stop River Road, said he hoped the neighbors would have time to prepare a response to all of the testimony tonight. Lorraine Sweeney said that in August of 2017, when the ANRAD was filed, the Existing Conditions plan filed at the time did not match the Existing Conditions, and revisions were made through December 2017, and at no time during that period did they show any construction and its impact on the grading.

Atty. Agostino said that they will likely not appear before the ConCom again; they have litigation against the Commission to shut this investigation down. Mr. Turi reiterated that the Commission is solely looking at the facts being presented, and is not concerned with the 40B process. Mr. Garner asked for it to be put on record that he has not seen the 40B filing and has no information on what it being proposed.

Atty. Agostino said that the applicants had intended to undertake extensive soil testing shortly after August, 2017, which was put on hold due to the stop work order and subsequent allegations of wetland violations, and nothing has been done since then. The intent is to begin that work again next week. Full soil horizons will be documented and witnessed by consultants on behalf of the ZBA. In response to Ms. DeLonga, Atty. Agostino said he will courtesy copy ConCom; in response to Mr. Turi, Mr. O'Harte said it may take 2-3 weeks. Mr. Wilson reiterated that he would like to see samples not only from the disturbed areas, but from surrounding areas as well.

Mr. Laberge made a motion to continue the discussion on October 9, 2019; Ms. Fraher seconded the motion; the vote on the motion was unanimous.

Ms. Fraher made a motion to close the hearing; Mr. Wilson seconded the motion; the vote on the motion was unanimous.

The meeting adjourned at 9:55 P.M.

James Wilson, Clerk

In accordance with the requirements of G.L. 30A § 22 approval of these minutes by the Board constitutes its certification of the date, time and place of the meeting, the members present and absent, the matters discussed, and the action taken by the Board with regard to those matters (if any). Any other information contained in these minutes is included for context only. Notes memorializing deliberation or discussion of any matter are in the summary form and may include inaccuracies or omissions. Where proof of the content of a statement is required, a tape recording or transcript should be consulted, if available.