

ADOPTED

City of Keene
New Hampshire

CONSERVATION COMMISSION
MEETING MINUTES

Tuesday, February 21, 2017

4:30 PM

**2nd Floor Conference Room,
City Hall**

Members Present:

Thomas P. Haynes, Chair
Jan Manwaring, Councilor (Left at 5:45 PM)
George Hansel, Councilor
Andrew Madison (Arrived at 4:34 PM)
Dr. Brian Reilly

Staff Present:

Tara Kessler, Planner
Thomas Mullins, City Attorney
Don Lussier, City Engineer (Left at 5:06 PM)

Members Not Present:

Sadie Butler
Denise Burchsted
Eloise Clark, Alternate

3:30 PM SITE VISIT: In advance of the meeting, Commission members attended a site visit of 99 and 0 Wyman Road for the wetland permit application for Hillside Village. Commission members present included Chair Haynes, Councilor Hansel, Councilor Manwaring, and Dr. Reilly. Staff present included Tara Kessler, Thomas Mullins, and Don Lussier. Representatives speaking on behalf of the wetland permit application for this project were Jim Phippard of Brickstone Land Use Consultants and Attorney Tom Hanna.

1) Call to Order

Chair Haynes called the meeting to order at 4:30 PM.

2) Minutes – January 17, 2017

Chair Haynes noted a correction to the minutes of January 17, 2017 – Andrew Madison is no longer an alternate.

Councilor Hansel made a motion to accept the minutes of January 17, 2017 as amended, which was seconded by Dr. Reilly and carried unanimously.

3) Election of Vice Chair

Chair Haynes said he will be speaking with Ms. Butler about her willingness to be Vice Chair. Because she was unable to attend this meeting, this matter is tabled until the March meeting.

4) Communication and Notifications

a. Babbidge Dam Wetland Permit Application

Ms. Kessler was informed this land is actually in Roxbury, not Keene. This matter will be passed to the Roxbury Conservation Commission.

b. Hillside Village Wetland Permit Application

Jim Phippard of Brickstone Land Use Consultants, representing Prospect Woodward Place, noted he came before the Commission a few months ago to talk about impacts to wetland buffers and steep slopes on the proposed Hillside Village property. Many of the Commission members present at the meeting had previously received a detailed presentation on the project, so he presented a summary. He submitted the Wetland Application to the NH Wetland Bureau on January 20, after pre-mitigation meetings with the NH Department of Environmental Services (DES) Wetland Bureau, Army Corps of Engineers, and the United States Environmental Protection Agency (EPA). Because the proposed wetland impact is greater than 10,000 square feet, these pre-mitigation meetings are mandatory to justify the impact before submitting an application.

Mr. Phippard continued providing history of the project. After an extensive site search over a four-year period, this site was chosen based on preliminary designs, layouts and mitigation feasibility for site constraints. The two properties are owned by Molly and Kendall Lane and total 49 acres with 12 acres to the west of and 37 acres to the east of Wyman Road. To the west of Wyman Road there are steep slopes causing drainage to run down the hill, traveling north to a wetland area with proposed impacts. East of Wyman Road, one isolated wetland will be impacted and a large peat wetland will not be impacted. The peat wetland has many ecological values and the developers would like to have a conservation restriction placed on it. There are also no proposed impacts to Black Brook. The total proposed wetland impact is 35,410 square feet, placing it in the major wetland impact category. Many of these wetlands have been altered by historical use of the property, so they are not ranked high for function and value; they mostly capture storm water and there is no infiltration.

The major agencies reviewing the proposal were glad the large peat wetland was being preserved because it is an important habitat and water source for the stream passing through, and there may be some vernal pools. Mr. Phippard noted vernal pools would not be impacted elsewhere on the property. The agencies use a wetland mitigation calculator to calculate the monetary value of creating new wetland to replace the impacted wetlands. The result is different for each community and their underlying land values. Hillside Village proposed several types of mitigation:

- Public access to preserved parts of the property: the federal agencies were pleased to see the plan for a gravel parking lot and 3,500 linear feet of walking paths on the property. The resource agencies require the hay fields be maintained for habitat.
- Planting 27 Sugar Maple trees to replace some of the maple trees that will be lost as part of the construction of the proposed development.
- Historic Mitigation: the property was deemed eligible for the Federal Historic Register because of the setting of the buildings. Although most of the buildings on the property have lost many of their historic features, the NH Division of Historical Resources (DHR) felt that the property's setting and placement of buildings is the historic aspect they want to recognize. It was also operated under agricultural use for almost 200 years. Mitigation will include a gazebo with a plaque recognizing the property and its historic name, a display in the community room for the public. These efforts have been accepted by the DHR and the Army Corps of Engineers and a memorandum of agreement is being finalized, which will include the support of the Keene Heritage Commission. This memorandum of agreement will be included with the Wetland Permit if and when it is approved.

The City Attorney asked how the pathway will be memorialized. Mr. Phippard replied the intention is to include it in conservation easements and then the path will connect with Hillside

Village's public sidewalks and community center. All of these things will be memorialized in a document held by the Registry of Deeds.

Chair Haynes asked about the status of the proposed conservation. Mr. Phippard replied they are proposing a conservation easement on the property and are planning to ask the Conservation Commission to make a recommendation to City Council to accept the easement. A third party willing to monitor the easement is necessary, and an agency like the City of Keene is ideal. Mr. Phippard noted that the City would take on the responsibility to monitor and enforce the easement after the first five years. Prior to this time, the Army Corps of Engineers will have this responsibility because they sign off on the permit. During the first five years, they will conduct an annual inspection and file a report with the DES and EPA. If there are violations to the easement, notice will be provided in writing with a time limit to correct the violations before fines are issued. After five years, Hillside Village hopes the City of Keene will take over monitoring the easement on an annual or biannual basis. Monitoring involves walking the easement area, checking for encroachments or violations, and notifying DES. If there is any complaint, DES has to inspect it and file a violation, for which fines are significant. Chair Haynes suggested the Monadnock Conservancy as a partner organization to take over monitoring of the easement. Mr. Phippard replied that he has not yet approached the Conservancy. He spoke with the Society for the Protection of NH Forests first, and now the City. He thinks there is good cause for the City to agree because of the proposed public access to the property.

Mr. Phippard continued that the EPA wants certain mitigation on the property; specifically, discontinuation of maintenance cutting along Black Brook. Approximately 1,500 feet of Black Brook runs through the property and the City holds an easement along the Brook. The EPA, DES, and Army Corps are in favor of this mitigation strategy and Hillside Village would receive credit for this work, which would reduce their payment into the Aquatic Resource Mitigation (ARM) Fund. Mr. Phippard explained that it is unusual for a developer to provide enough mitigation to avoid paying into the ARM Fund. This Fund collects impact fees from projects. After receiving credit for the proposed mitigation strategies, the remaining impact fee Hillside Village needs to pay into the ARM Fund is \$77,278.61. Once the permit is issued, they will have 120 days to make this payment to the ARM Fund.

The City Engineer asked about the implications of releasing the maintenance requirement along Black Brook. He questioned whether the City would have to retain access through the area until all downstream residents release their rights, if the City's requirement to maintain the drainage feature is released. Mr. Phippard replied that the release does not extinguish the easement, it just releases the obligation of the City to the landowner to maintain the channel. He said there is a standard release that he will share with the City Attorney. The City Attorney said he would like to understand the release better and asked for clarification. He noted there are two parts of an easement, maintenance and access, and the EPA wants to extinguish both those rights so that the Brook can go back to a natural, undisturbed condition. Mr. Phippard replied yes. The City Engineer asked if releasing that obligation satisfies the mitigation requirement. Mr. Phippard replied yes, and it reduces the ARM Fund payment. The City Engineer asked if the City has to do something proactively to say they will not maintain it. Mr. Phippard replied there are no actions required from the City. The City Attorney said the release would run from the property owner to the City, it would not go to DES or the EPA and would say that the landowner releases the City from any liability for lack of maintenance.

The City Attorney stated, if City Council decides not to accept the conservation easement and the release on Black Brook is accepted, the project will still move forward, but Hillside Village will have to pay more money into the ARM Fund. Mr. Phippard replied yes. He said another

alternative to the easement is a deed restriction from the current owner. The current landowner is willing to put restrictions on the land that would mimic a conservation easement before the property becomes Hillside Village. He said a deed restriction provides no mechanism for enforcement. Whereas, the conservation easement would have monitoring and enforcement included. The City Attorney said it is his understanding that the holder of the easement in the first instance is looked to for enforcement. He asked if this easement will be drafted in a way that state and federal agencies will be responsible for enforcement. Mr. Phippard replied, because the easement is a condition of the wetland permit, if the conditions of that permit are violated, they will be fined. The City Attorney replied that the permit is different than the easement. Mr. Hanna said in all his year in conservation, he has not been involved with a conservation easement where the grantee did not have responsibility for enforcement. He said the difference is the City would not have to enforce, only monitor annually. The City Attorney said his concern is enforcement over monitoring. He asked if this easement could be written in a way so that enforcement falls to the state and federal governments. Mr. Hanna said he can write it that way but he has to find out if the EPA and NH DES will recognize the grantee of an easement as only having monitoring but not enforcement obligations.

Councilor Hansel asked if the City monitors any other easements. Ms. Kessler replied the City is obligated to monitor five easements and with limited staff capacity, they have not been able to monitor them annually. In the past, Emily Hague, who worked for the Monadnock Conservancy and was a Conservation Commission member, was able to help with monitoring; however, even then, it was not conducted annually. Councilor Hansel asked what would happens if the City agrees to monitor and does not. The City Attorney said the City already has that problem. The City Engineer asked if down the road, DES will still be involved with the enforcement of a decades old permit. The City Attorney said it will not matter to Keene if they actually enforce it as long as DES agrees to enforcement in the wetland application and easement. The City Engineer asked if DES will accept an application that says the City is not obligated.

The City Attorney noted that it was his understanding that DES would accept a deed restriction, but there is still the issue of enforcement. Ms. Kessler said she spoke with Lori Sommer at DES and they are open to a deed restriction knowing it is hard to find a third party to hold an easement. Mr. Phippard added they preferred the easement because enforcement is more effective but they are willing to consider the deed restriction. Mr. Hanna said the deed restriction can be made relevant to neighbors so they have a right to enforce but not the obligation. He asked if any of the neighbors, or the City, would be interested in that.

Chair Haynes noted there are some unanswered questions and more information needed. Councilor Hansel said he is still not convinced the City has much interest in any of this activity. He encouraged the applicants to seek out other organizations like the Monadnock Conservancy to be the easement holder. Mr. Hanna said he was a trustee at the Monadnock Conservancy for 15 years and is now with the Nature Conservancy. He said a private non-profit conservation organization has to constantly prioritize what it does with donations. He said this is the type of project, regardless of conservation value, that the Monadnock Conservancy will stay away from because it is both in the backyard of a private development and they have competing projects and resources. Mr. Hanna said the Monadnock Conservancy also trains volunteers to monitor conservation easements and could possibly train volunteers from the City. Councilor Hansel said the Conservation Commission does not offer these types of accommodations to many projects that come in, the City Attorney agreed.

The City Attorney noted the three possibilities moving forward:

- The City does nothing and the applicants pay the full amount into the ARM Fund

- The City considers taking the easement and working out enforcement
- The applicants consider a private deed restriction that may or may not include another enforcement mechanism and/or an option for the public to still have access

The City Attorney noted documents he needs to see moving forward:

- The standard release from maintenance of Black Brook
- The proposed conservation easement

Mr. Phippard said he thinks an easement is the best way to go because of solid enforcement. It is a federal permit so all of those agencies are in line for enforcement and he thinks that leaves the City in the best possible position. The City Attorney said after review of documents, they will continue to address these questions. Councilor Manwaring noted she agrees with the idea of a conservation easement and thinks the City could find a way to monitor annually.

Councilor Hansel made a motion for the Conservation Commission to not intervene on the Hillside Village Wetland Application, which was seconded by Mr. Madison and carried unanimously.

Chair Haynes said he is not ready to make a recommendation on the easement and tabled that until the March meeting. Mr. Phippard said it is now in the NH Wetland Bureaus hands and they can now issue the permit whenever they are ready. He hopes to have the permit by the March meeting and he will have 120 days to meet the conditions of that permit, including paying the ARM Fund. Therefore, the City Attorney said the City has 90 days to consider these things once the permit is passed. Mr. Phippard will speak with the Monadnock Conservancy before the next meeting as well.

c. Pre-Application meeting summary – Liberty Utilities’ proposed gas plant on Production Avenue

Ms. Kessler noted this item is informational only. Included in the meeting packet was a brief summary from the pre-application meeting for Liberty Utilities’ wetland permit application for a proposed liquefied natural gas facility at the end of Production Avenue. A site plan was approved in 2001 for this project, and significant wetland impacts were proposed. The owner of the property at the time, placed land in conservation as part of a wetland mitigation package. However, the land was never developed.

At the pre-application meeting, DES determined that Liberty Utilities will not receive as many mitigation points for that conservation easement now as they did in 2001 because the mitigation rules have changed. DES encouraged Liberty Utilities to work with the City or Monadnock Conservancy to look at local mitigation projects. Liberty Utilities is now trying to decide if they want to move forward with the full development or pursue a temporary fueling station that would minimize wetland impacts. Ms. Kessler said they have not yet submitted a wetland permit application.

Councilor Manwaring asked if that is near where the City monitors an easement. Ms. Kessler replied yes, adjacent to the property there is a 15-acre City-monitored easement and this application will not impact that land.

d. Variance from the provision of NH RSA 277-J:9 for the Keene Airport

Ms. Kessler said this is also informational. There is no opportunity to intervene.

5) Greater Goose Pond Forest Stewardship Plan RFQ Update

Ms. Kessler met with Andy Bohannon, Director of Parks, Recreation and Cemeteries, who oversees Goose Pond. He reviewed the RFQ and is excited about the opportunity. He provided some minor edits to the RFQ, which has now been sent to a local consultant for a cost estimate. The estimate is necessary to request from City Council an amount of money to be available through the Land Use Tax Fund. Councilor Hansel noted because those funds are already set aside, they do not need to be put into the Capital Improvement Program (CIP), just requested from the City Council. Ms. Kessler replied yes.

6) Development of an Aquatic Resource Mitigation Local Priority List

Chair Haynes noted how important this is in light of the Hillside Village discussion of the ARM Fund. Ms. Kessler said she brought this idea up at the last meeting and said if this money were to become available, there is the possibility of it being used locally instead of going into the ARM Fund. She spoke with the person who oversees the ARM Fund program at NH DES. She provided a handout about what DES generally looks for in a project that would be eligible for ARM dollars. She also met with the Monadnock Conservancy to find out if they have a priority list in place for possible collaboration. She went through a number of old documents for background and there were priority lists from 2009 when the Natural Resources Inventory took place for the City. A list of parcels were identified then based on a number of conservation values. She went through NRIs and other plans for projects already identified to add to the master list. Ms. Kessler presented a Keene map of important wildlife habitat from the 2015 Wildlife Action Plan data to see areas the Commission should be focusing on in the City.

According to DES, Eligible ARM Fund Project Categories include:

- Restoration/enhancement of wetland functions and values
- Permanent conservation of important wildlife habitats with a goal to connect existing protected lands
- Preservation of vernal pools and associated terrestrial habitat
- Replacement/removal of deficient culverts/dams to improve aquatic organism passage
- Salt marsh restoration including eel grass beds, living shorelines
- Water quality improvements – i.e. storm water treatment
- Manage and re-vegetate riparian buffers
- Invasive species management/habitat improvement

According to DES, ARM Funds can be used for:

- Acquisition of land and costs associated with conservation easements
- Legal fees as well as monitoring and stewardship fees
- Development of final engineering plans
- Construction costs including construction, planting, monitoring, and follow-up remedial measures
- Other: dam removal and/or stream restoration projects, culvert replacement work to provide habitat improvement

Ms. Kessler indicated important areas in Keene – Ashuelot River, Beech Hill, Stearns Hill, among others. She said the Monadnock Conservancy does not have many priorities for Keene beyond expanding the California Brook Natural Area and possibly the Ashuelot River Green Space. Councilor Manwaring noted the Friends of Open Space also have a list of priority properties. Chair Haynes said Ms. Clark has shared this list. Ms. Kessler said she does not have tax map parcel numbers from Ms. Clark's list yet and Chair Haynes suggested waiting to collaborate with her on that directly.

Ms. Kessler showed a map of priority areas identified adjacent to already protected areas (Keene NRI Priority Parcels 2006; not all City owned). Some are not actually in conservation easement but are zoned for conservation or have a deed restriction.

Councilor Hansel stated he would like more information on storm water treatment opportunities in the City. Mr. Madison agreed storm water should be a priority. Councilor Hansel said a lot of that will have to be done at some point anyway so the Commission could get the ball rolling.

Ms. Kessler said she has learned that it is not enough to have projects identified, in order to get funds, the project has to be shovel ready. One reason for that is the applicant needs to complete these improvements or projects before getting a permit to move on with the work. Councilor Hansel asked if they can partially fund another project, for example, could this funding be used to add a storm water treatment component to a Public Works project. Ms. Kessler replied based on the eligibility criteria, she thinks it might be possible but will find out. Councilor Hansel suggested going through the CIP to see if something can be added to any existing projects. Chair Haynes said to remember if there is some choice for land acquisition opportunities we should work toward them in the long-term. This could be an opportunity to have a public access corridor along Black Brook with Hillside Village. Councilor Hansel asked for an idea of the corridor between Hillside Village and Maple Avenue. The Commission looked at parcel opportunities for creating a larger conservation corridor in conjunction with Hillside Village.

Ms. Kessler said she has gone through the City's Hazard Mitigation Plan, the Beaver Brook Restoration Plan, Friends of Open Space list, all land management plans, and the Conservation Commission priority lists developed through the Natural Resources Inventory process. Next she will consolidate and map these projects. She will develop a map with parcels highlighted with a key, information on what plans things came from, and what is proposed. She will also go through the CIP and hold a meeting with the Director of Parks, Recreation and Cemeteries, the Planning Director, the Public Works Director, and the City Engineer to see what projects might have the potential for ARM Fund add-ons. The next ARM Fund grant program will not be for another year or two because they have been backlogged with projects. Ms. Kessler will look into whether the City has to contribute a local match to any ARM Fund grants – they like to see a match for local investment but she is unsure if it is a requirement.

- 7) **Conservation Master Plan**
- 8) **New or Other Business**
- 9) **Adjournment** – Next meeting date Monday, March 20, 2017

Hearing no further business, Chair Haynes adjourned the meeting at 6:00 PM.

Respectfully submitted by,
Katie Kibler, Minute Taker

Reviewed and edited by,
Tara Kessler, Planner