

## PEPPERELL CONSERVATION COMMISSION

Minutes – April 15, 2008

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, Tzanoudakis, Rand, and Rice; member absent: Moody. Sauer arrived at 7:15; Steeves arrived at 7:35.

7:10 p.m.      Public Meeting re RDA filed by Frank & Denise Hoffman for construction of a deck at 101 Brookline Street

Frank and Denise Hoffman attended the meeting to explain their project. 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 noted that the deck is shown 30 feet from the wetland edge on the plan. Elliott asked if the deck is being proposed for an area that is existing lawn. F. Hoffman said yes. F. Hoffman said that the lawn was flat where the deck would be, but beyond the lawn edge the land sloped down to the wetland. Fisher confirmed the description and said that the slope itself is not lawn, but covered with dense shrubs. Rice asked if the deck would have a roof. F. Hoffman said no. She asked if there would be stairs to the deck, beyond the footprint shown on the plan. F. Hoffman said no. On a motion from Elliott, seconded by Rand, all

VOTED: to issue a Negative 3 & 6 Determination.

A Request for a Certificate of Compliance for DEP File # 259-651 for the Sewer Pump Station at 51 Heald Street had been received from the DPW Director. Fisher reported that the site is stable and that the drip bed on the back of the building had been constructed. On a motion from Elliott, seconded by Rice, all

VOTED: to issue a Certificate of Compliance.

Fisher reported that the Finance Committee would not be recommending approval of the warrant article to transfer the By-Law filing fees collected over the past year into the Conservation Fund at the Annual Town Meeting. Sauer volunteered to read the motion.

7:25 p.m.      Continued Public Hearing re NOI filed by John Kimball for construction of a driveway and installation of a water line at 23 Heald Street

Sauer, Rice, Elliott, Tzanoudakis, Rand, Steeves, and Fisher had visited the site of this project on either April 3 or 8, 2008.

The hearing was opened at 7:35 p.m. after Steeves arrived. Mary Trudeau, representative of the applicant, and Kevin Eriksen of the law firm Deschenes & Farrell attended the hearing to present the project. Under the Pepperell Wetlands Protection Bylaw, the Commission determined that

the project area involves BVW. Kimball's application had stated that the proposed activity was a Limited Project under 310 CMR 10.53 (d) & (e). The Commission did not decide whether it agreed that the project was a Limited Project under the WPA and By-Law. The Commission determined that the lots (21 & 23 Heald Street) were created before May 6, 2002.

Trudeau apologized for having forgotten to bring the abutter notification cards. She said that she had them at home, however. Sauer asked what the Commission's usual way of dealing with this was. Elliott said that the Commission was usually lenient, noting, however, that there were no abutters present. Trudeau offered to mail the green cards to the Conservation office the following day. The Commissioners agreed.

Fisher had noted that the NOI Wetlands Fee Transmittal Form had listed one activity, but that the applicant had paid the Town By-Law Filing Fee as if it were two activities. Elliott asked Trudeau to explain the discrepancy. She said that in the NOI directions said that installation of a water line and a driveway were considered one activity, but that she had been unsure if that was true of the By-Law so she had asked the applicant to pay fees for 2 separate activities. The Commissioners had no objection.

Eriksen began a presentation about the project, saying that Kimball was proposing to construct a driveway and to install a separate water line to serve 23 Heald Street (Lot 4). He said that the project is a Limited Project. He said that currently access is via a common driveway which also serves Lots 1, 2 & 3. He said that Lot 4 has a 15-year license for use of the driveway. The license expires in 2009. Eriksen said that Lot 4 will have neither access nor a water line after that time. Sauer asked who created the license. Trudeau said that a variety of people created the license, including the applicant. She pointed out the Affidavits about the intention to not renew the license, included with the NOI.

Trudeau continued the presentation, showing the aerial photograph included with the NOI, which shows the present driveway configuration for Lots 2 & 4. She said that apparently at the time it was built, it was advantageous to have the driveway as it exists today, but that it is no longer advantageous. She suggested that disputes about maintenance costs are one reason.

Trudeau said that the wetland delineation had been approved with the previous NOI (DEP File #259-658). She asked how much review of the delineation would be needed. She said that the previous wetland flags had been re-located by survey on February 8<sup>th</sup>.

Using the aerial photograph again, Trudeau said that a path into the property was evident, roughly following the proposed driveway location. She said that the existing culvert within the proposed driveway is a replacement in the same place of an historic culvert used for access to the property. Trudeau said that the proposed driveway would involve about 3000 square feet of BVW disturbance, plus an additional 150 square feet of disturbance for the water line, which would be restored. She said that the driveway construction would take advantage of an opening that had been cut through the trees. Trudeau said that while this opening has been mowed, it is still an intact wetland. She pointed out the wetland replication area which the applicant proposes to establish as a wet meadow, but she said that if the Commission prefers, the applicant would consider shrub plantings instead. Trudeau said that the area of the historic culvert has had some

disturbance in the past and that that is the reason for the fragment of wetland, flags A – G, which probably was connected to the existing wetland corridor in the past.

Elliott then presented a chronology of the site he had put together via recorded plans. The first plan (#1039 of 1975) was “Proposed Relocation of a Portion of Heald St. & Willow St., Pepperell Mass., Surveyed for the Town of Pepperell by Charles A. Perkins Co., Inc., Dec., 1974.” He said that the plan showed that the entire area, between land owned by Janie S. Maynard and the Town Pound on the north side of Heald Street had been one lot owned by John K. & Margaret Kimball. This plan showed one 18” conc. pipe installed within a “brook” that crossed the property, roughly east-west. Elliott said that he believed that the pipe shown on the plan is at the location of the culvert under the existing common driveway, rather than the proposed separate driveway for Lot 4. This plan showed that John K. & Margaret Kimball had also owned the land and buildings on the southeast corner of the intersection of Heald and Willow Street.

The next plan (#800 of 1979) was “Land in Pepperell, Mass. Surveyed for John Kerr Kimball & Margaret Kimball by Charles A. Perkins Co., Inc., May, 1978.” Elliott said that it showed the Kimball’s property as one 15.9 ± acre lot on the north side of Heald Street at the intersection with Willow Street.

The next plan (#1206 of 1986) was “Plan of Land in Pepperell, Mass. for Field Realty Trust, John J. Veysey, Trustee, by Bill Boston Survey, West Groton, Mass., March 1986.” This plan showed an approval-not-required subdivision of land into Lot 2 (containing 2 existing buildings), Lot 4, various parcels, and an easement (apparently for access from Heald Street across lots 4, 2, and several of the parcels.)

The final plan (#610 of 1994) Elliott presented was “Plan of Land in Pepperell, Mass. for Field Realty Trust, John J. Veysey, Trustee, by Bill Boston Survey, Inc., 2 sheets, June 16, 1994.” This plan showed an approval-not-required subdivision of land including an existing house on Lot 4, 23 Heald Street, in addition to the buildings on Lot 2 included on the 1986 plan listed above.

Elliott said that the house at 23 Heald Street had been built in 1987 and existed 7 years without a common driveway special permit from Planning. Elliott said that although there had been dealings with the Conservation Commission prior to 1994, no Orders of Conditions for construction of the driveway to serve 21 and 23 Heald Street had ever been recorded. Fisher confirmed that in 1982 a Notice of Intent (assigned DEP File #259-54) to build a driveway had been issued, then appealed by Kimball to DEP. The appeal had been denied. In 1986 a Notice of Intent (assigned DEP File #259-128) had been filed, but an Order of Conditions had never been issued.

Elliott read from the Planning Board’s Special Permit decision (94-7). This Special Permit was issued for improvements to and an extension of an existing common driveway, then serving the 2 houses on Lots 2 & 4, to serve 2 additional lots. In the Planning Board’s “Statement of the Case” Kimball is quoted as having said that the path of the driveway is to be over an existing dirt drive that has always served as the traffic area to the back land of the old farm. Given this,

Elliott said that the culvert shown on the 1974 plan listed above was likely to have been at the site of the current existing common driveway, rather than at the site of the new proposed driveway for Lot 4. In 1994 Kimball had also filed a Notice of Intent (DEP File #259-658) with the Conservation Commission for the construction of the extended common driveway that proposed filling approximately 4600 square feet of BVW. Elliott said that since the Commission had felt that there had been an alternative driveway location with less wetland impact, an Order of Conditions had been denied. On appeal DEP had issued a Superseding Order of Conditions, later amended, which did permit the construction of a driveway in the Pepperell Conservation Commission's recommended location. Official records of the project listed 3900 square feet of wetland alteration associated with that project.

Elliott said that in 2005 Kimball filed a Notice of Intent (DEP File #259-658) for construction of a new separate driveway for Lot 4, 23 Heald Street. The Order of Conditions was denied for various reasons, including that the project did not meet BVW performance standards and that Kimball had been unwilling to consider alternative driveway locations with less wetland impact. Kimball had appealed; DEP had upheld the denial. Kimball had then asked for an adjudicatory hearing, but because there had been no appeal under the Town's By-Law, the adjudicatory hearing was denied under DEP Policy 89-1.

Elliott said that the current Notice of Intent seemed to be the same plan submitted in 2005. Fisher said that the November 23, 2005 letter from DEP in which the 2005 denial is upheld stated that plans on file with MassDEP and the Pepperell Conservation Commission depict resource areas that have been altered without an Order of Conditions. The letter said that this activity would need to be addressed in any refile of a Notice of Intent. Fisher said that this had not been done in the current NOI.

Tzanoudakis said that she had studied the documents submitted with the Notice of Intent. She said that 21 and 23 Heald Street were owned by two separate trusts, but that John Kimball is trustee of both. She said that the trusts had common control, and because of this Kimball had himself created the license that is his hardship now. She said that she was aware of the affidavits from the other 2 lot owners, but she pointed out that the wording of the covenant shows that the question of access for Lot 4 does not concern those other lot owners. It is between the owners of Lot 2 and 4. She said that the license does not include utilities, such as a water line. The covenant grants rights to utilities within the common driveway to Lot 4 in perpetuity.

Tzanoudakis said that there had been 7 years of access before the common driveway covenant had been created. She said that that might have created other rights such as easements from prior use and necessity if the license expires. She said that, therefore, there may be other options besides the construction of a new, separate driveway.

Tzanoudakis asked who Kimball is bringing this application forward to benefit. If #23 Heald Street is to benefit from an Order of Conditions, does #21 Heald Street have standing to make the application? On the other hand, would #21 Heald Street be the beneficiary?

Elliott said that no DEP file number had yet been issued for this project. Fisher said that she had contacted DEP to determine what the problem was, but had not received an answer. She said

that Phil Nadeau said the usual reason for delay was that the applicant's check had not been received or had not cleared. Trudeau said that she would look into this.

Rice said that the self-imposed hardship in this case dates back to even before the common driveway covenant to the way that the original lot was laid out into 4 lots and the locations that Kimball had chosen for the houses.

Trudeau addressed the issue of unpermitted wetland alteration mentioned in DEP's November 23, 2005 letter, stating that the path cut through the forested wetland was what was meant. Fisher disagreed, saying that she had shown a 1994 "Existing Conditions" plan to Mary Ann DiPinto during the DEP appeal review in 2005. That plan shows the location of the existing culvert, which the application describes as "historic access to the fields" and which the proposed driveway would use, as a pond. No culvert is shown on that plan.

Sauer pointed out that the question of the delineation had not yet been answered. Various Commission members said that they had seen evidence on site, including ponding in the field and mats of sphagnum moss in the forested area, which brought into question the previous 2005 delineation. Elliott said that he would like to know how the pond on the 1994 "Existing Conditions" plan had come to be a wetland crossing with a culvert today. Rice said that soil in the area should be checked since if it was previously a wetland, wetland sediments would show in soil cores of the area. On a motion from Sauer, seconded by Tzanoudakis, all

VOTED: to hire a consultant to review the wetland delineation and to analyze the soils in the area of the existing "historic" culvert under the Commission's "Rules for Hiring Outside Consultants Under GL Ch. 44 § 53G."

Kimball's representatives were given copies of the "Rules..." cited above. Trudeau asked for clarification about where wetland lines would be reviewed. It was agreed that wetlands on 21 & 23 Heald Street (Lots 2 & 4) would be examined as well as any wetlands on adjoining lots that might have buffer zones on those 2 lots. Trudeau asked who the Commission would hire as a consultant. The Commissioners asked Fisher to get 3 proposals for the consulting work. Fisher said that the Commission had often used Michael Turgeon of Turgeon Environmental. Trudeau suggested that Turgeon could have a conflict of interest in this case since he had previously worked for DEP. Trudeau asked how the review would be done and who would participate in the review. Elliott said that Trudeau and Fisher should be there, and anyone else from the Commission or the applicant's representatives who would like to. Sauer said that the Commission would want to keep the process as open as possible.

Trudeau asked for the hearing to be continued until May 20, 2008 at 7:10 p.m.

#### Other Business

Upon a motion by Elliott, seconded by Rand, with Elliott abstaining, it was

VOTED: to approve the minutes of April 1, 2008 as drafted.

The meeting adjourned at 8:45 p.m.

Respectfully submitted,

Ellen L. Fisher