



**Pembroke Conservation Commission
Minutes of the Meeting of
March 7, 2024**

Disclosure: These minutes are not verbatim – they are the administrative agent’s interpretation of what took place at the meeting.

Open Meeting Law, G.L.c. 30A § 22.

All materials presented during this meeting are available in the Pembroke Conservation Commission office.

At 7:00PM Chair Art Egerton opened the meeting, and stated, “Please note that this meeting is being made available to the public through a video and audio broadcast on Comcast Government Access channel for broadcast at future dates. Comments made in open session will be recorded.”

Members present: Arthur Egerton, Chair; James Campbell, member; Nicole Pelletier member; Robert Clarke, member, and Agent; Gino Fellini, member.

Members not present: Teresa Harling, vice chair; Rick Madden, member

Also present: Administrative Agent, Andrew Wandell

ADMINISTRATIVE BUSINESS

The Administrative Agent provided an update on the test pits being dug for the proposed well at the Edgewood Bogs site. Items discussed were the conversations between Environmental Partners and DEP, management of the site and the removal of brush and a gate.

Mr. Fellini made a motion to accept the minutes of the February 5 meeting: Mrs. Pelletier seconded, and the motion passed unanimously.

There was also a brief discussion about the timely availability of meeting materials and the frequency of meetings.

Hearings:

Enforcement Order and Notice of Intent – 98 Barker St. & 409 Washington St., (Enforcement Order continued from February 5, 2024, DEP number 056-1102 has been provided for the Notice of Intent)

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Chair, Art Egerton opened the public hearing at 7:15PM.

Mr. Spath's attorney Adam Brodsky and Mr. Spath were in attendance. Brad Holmes was also in attendance along with John Zimmer, the commissioner's peer reviewer and Town Counsel Amy Kwesell.

Attorney Brodsky addressed the commissioners stating that since the last meeting he has submitted several documents to the Commission including his letter dated February 29 which was in response to several issues raised by Mr. Zimmer. In addition, Mr. Holmes has submitted a letter in response with additional exhibits supplementing the wetlands restoration submittal including an updated wetland restoration schematic on February 28. Attorney Brodsky requested that at the end of any discussions that Mr. Spath be given the opportunity to address the Commission and that the Commission approve the restoration plan, close the public hearing this evening and vote on the Notice of Intent.

Attorney Brodsky also mentioned that he had a conversation with town counsel who suggested that perhaps we may wish to continue because there may be some ideas to bridge the gap between the Conservation Commission and the Trust.

Mr. Holmes addressed the Commission stating that there really weren't any changes to the restoration plan and that there were some modifications made to add more detail in response to Mr. Zimmer's comments.

Mr. Egerton asked that the restoration include the entire 100 feet of buffer zone not the 25 feet proposed. Mr. Holmes said that the additional area could be restored with loam and conservation seed mix.

Mr. Zimmer addressed the Commission. He mentioned his review of the materials submitted. Specific to Attorney Brodsky's letter he stated that the fundamental question before the Commission is does the work going on within the property meet the performance standards under the act. The maintenance exemption they are seeking is associated with the forestry provisions. There are three separate sections of the exemption language that deal with land and forestry. Attorney Brodsky says they were not looking to use that exemption, but they are using a different exemption that is associated with access roads. The exemption they are seeking is the repair and replacement of existing access roads and livestock crossings. So that is separate from the exemption for maintenance activities associated with forestry. Those access roads would be associated with land in agriculture. Under the definition, that would be land used for commercial purposes in agriculture like growing vegetables for sale, livestock, and forestry. There needs to be demonstrated that the land was used for agricultural purposes other than forestry and that the land did not lie dormant for up to 5 years before being considered as land in maintenance. That provision does not apply to forestry as it takes longer to grow trees for commercially viable timber than other agricultural products. So, if that's the case then it needs to meet the performance standards for the exemption under the forestry provisions in a DCR approved cutting plan. There has never been a DCR approved cutting plan for the property. The only use under chapter 61 has been forestry and no other agricultural use. Since the five-year period has elapsed the exemption for repair and replacement roads does not apply. No additional information or comment has been received for the Notice of Intent based on questions raised about the stormwater report, the grates and other issues and the commission should consider that if it is decided to close the public hearing.

Mr. Fellini wanted to clarify that if the NOI is approved then a permanent roadway on the property would be the result.

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Mr. Clarke asked if there were agricultural exemptions for the raising of horses and that in the past there were barrel races on the property. Mr. Zimmer advised that the land would need to be used for that purpose in the last five years, so it is a moot point.

Mr. Fellini asked if a cutting plan approved by DCR would allow for a permanent roadway. Mr. Zimmer replied that DCR would not approve of any type of permanent crossing. They might approve a temporary crossing using timber mats or a corduroy road. This would require an RDA under the act requiring restoration of the BVW temporary crossing at the end of activities on the property. Further discussion regarding how a cutting plan would operate under the provisions and exemptions under the act continued.

Mr. Fellini asked about the restoration plan and Mr. Zimmer's recommendation to restore the entire 100-foot BVW instead of the 25 feet. The proposal is to restore the area 25 feet east and west of the road leaving a path for access to the rear of the property. Since no RDA or NOI was filed and no approvals sought then the entire 100-foot buffer zone should be restored. Not restoring the area completely would hinder the wetland's ability to function. The entire 100-foot area in question is under the commission's jurisdiction.

The discussion about the restoration plan continued and centered on issues related to soils to be used to replace and repair the disturbance, the location and evidence of any water in the area disturbed such as a stream and any vernal pools, and the well to be removed.

Attorney Brodsky responded countering the assertion that the commission has the legal authority to require the restoration of the entire buffer zone which is not a wetland resource area under either the state act or local by-law.

Attorney Brodsky also rebutted Mr. Zimmer's assertion that the exemptions sought by Mr. Spath do not apply. He reviewed the points made and respectfully disagrees with both Mr. Zimmer and Town Counsel and that the land has been under a forestry management plan. For the forestry activity to qualify for the exemption the land must be devoted to continued production of forest products and evidence of such commercial use would include for example, a 10-year forest management plan and there have been forest management plans associated with the property since 1985. Lack of a formal cutting plan does not mean that the land is not devoted to continued production of forest so there is no five-year window, and the forest management plan is evidence of that land being in agriculture use. There is also a neighbor who will provide you with eyewitness testimony of the fact that there was an access road for forest activities.

Mrs. Pelletier asked why the commission does not get advance notice of activities to be performed under a forestry management plan or cutting plan approved by DCR.

Town Counsel Amy Kwesell addressed the commission stating that she attended the most recent site walk and observed very clearly the resource areas and that the delineation was flagged and apparent. The delineation is not in question and what is before the commission is work performed in the resource areas and buffer zones that was not properly permitted under an NOI and how to restore the disturbed areas. The restoration plan put before the commission has evolved and has been approved by Mr. Zimmer except for the question of the extent of the restoration be 25 feet. The entire 100-foot buffer zone is in the commission's jurisdiction.

Mr. Clarke asserted that the area in question beyond 25 feet may be better left to naturally occurring restoration. Mr. Zimmer responded that letting a disturbance naturally restore in this case is not preferred because of the amount of fill and asphalt brought in to construct the road and that a full restoration of the

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buffer zone would be to remove all the construction debris then loam and seed with a conservation seed mix and perform an invasive species management plan.

Mrs. Pelletier asked about amphibious creatures and the effect on them because of the disturbance. Mr. Zimmer explained that there should be no adverse effect as these creatures will seek out wet areas and disperse to the upland areas after the babies mature.

Attorney Brodsky asked where the Commission stood as per the restoration plan. Mr. Fellini responded how about you go to the 100 feet, remove all the construction debris then loam and seed it. There was a discussion about the extent of the construction fill. Town Counsel Kwesell clarified that only the construction fill within the 100-foot buffer would be removed and then restored with Mr. Holmes and Mr. Zimmer conferring on the restoration. Her recommendation is a vote to approve the current restoration plan with the caveat that any construction fill within the 100-foot buffer zone be removed and replaced with loam and conservation seed mix. Mrs. Pelletier also asked to include replacing the American elms with a disease resistant species.

There was a motion to approve the most recent restoration plan with two caveats being that all construction debris within the 100-foot buffer zone be removed and all disturbed areas in the buffer zone shall be restored with loam and conservation seed mix additionally, the American elms listed on the plan should be replaced with disease resistant elms. The motion was moved by Mr. Clarke and seconded by Mr. Fellini. Motion passed unanimously.

Amy Kwesell turned to the Notice of Intent that was before the commission. The NOI is for a permanent roadway on the property.

Mr. Spath asked to speak before the commission. He reviewed the history of his ownership of the property, his dealings with the various offices in town hall including the assessors, his forest management plan, and reasons for the roadway in relation to his forestry plan. He explained his understanding of land under chapter 61 agricultural use and believes that the work he performed was exempt from the act. He also reviewed his dealings with the Zoning Enforcement Officer and the timeline of events leading to the cease-and-desist order issued. He also spoke about the administrative warrant sought by the Conservation Commission and his state approved forestry management plan on file in the assessor's office. Mr. Spath mentioned his discussions with town officials that he says were secretly tape recorded without his consent and that he asked town counsel to have the recordings expunged from the records and the request was not acknowledged. He also mentioned that a Conservation Commission member flew a drone over his property and posted the footage on Facebook. He spoke about the rumors and accusations made against him, his records request, and the various interactions with town officials. Mr. Spath reviewed the ownership history of the property and the forestry plans dating back to 1985. He said he has been fighting to keep the land in open space, has gone to great expense to do so and if he cannot operate a tree farm he will need to sell the property. The Chair responded and said the Town Manager advised him against using his drone on the property and that he did not publish any footage of the property.

Attorney Brodsky re-iterated what was before the commission: we are proposing to alter less than 5,000 square feet of bordering vegetated wetland and proposing to replicate that consistent with state wetlands protection act regulations, we met our burden of proof and the performance standard for the alteration of those wetlands for the gravel road and we are asking the commission to close the public hearing and issue an order of conditions approving the project.

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Mr. Fellini asked Mr. Zimmer for his comments. Mr. Zimmer referred to his February letter which identified several areas where additional information was needed in respect to the overall square footage of restoration. The NOI takes credit for the historic access road as permanent restoration and includes the grates. Additional information was not provided, and it does not meet the performance standards without those issues being addressed. He also believes that the plan does not adequately comply with DEP stormwater standards. The commission cannot make an educated determination without his comments in the letter being addressed. If the gravel road had been included under a DCR approved cutting plan then it would be exempt.

Attorney Brodsky said the NOI was to extend the historic access through the wetlands to get to the rear of the site to facilitate the property to be forested in the future. There is testimony that it was historically forested with a road through wetlands. If it was a pristine wetlands site, you can do that under a forestry cutting plan with an access road. The NOI is to restore the wetlands, build a bridge over the wetlands and replicate removed wetlands. The cutting plan is not relevant.

Mr. Spath said he does not intend to develop the property and wants to have a tree farm and keep it in forestry.

Town counsel Kwesell reminded the commission that since Attorney Brodsky asked for the hearing to be closed that the commission must close the public hearing and a decision must be made and issued within 21 days.

The Chair asked for public comment. John Meade, 104 Barker Street spoke to his knowledge of the property and how it has been used over the years, the access ways, and his other concerns about overdevelopment in town.

Mr. Campbell made a motion to close the public hearing and issue a decision within 21 calendar days. Mr. Fellini seconded, and the motion passed unanimously.

Town Counsel advised that a meeting be set up within the 21 days to issue a denial or an order of conditions. The meeting was set for March 14 at 7 PM.

The applicant for 345 Washington Street was not in attendance so the public hearing was not opened and was rescheduled for April 4 at 7:05PM.

Mr. Fellini made a motion to adjourn the meeting, seconded by Mr. Campbell. Motion passed unanimously.

The meeting adjourned at 8:51 PM.

Materials and Exhibits

ECR- Brad Holmes, Additional Information, Wetland Restoration Submittal dated February 28, 2024
Adam J. Brodsky letter to Chair, Art Egerton response to SRE review dated February 29, 2024
SRE-John Zimmer dated March 7, 2024, response to DTM letter of February 29, 2024
KP Law Amy Kwesell March 7, 2024 response to DTM letter of February 29, 2024

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