

**Minutes of the Peterborough Conservation Commission Meeting  
October 21, 2010, Peterborough Town House, 7 p.m.**

Present: Jo Anne Carr, Swift Corwin, Bryn Dumas, John Kerrick, Matt Lundsted, John Patterson, Francie Von Mertens, Robert Wood. Excused: Susan Stanbury  
Guests: Dick Estes, Sharon Monahan

September's minutes were approved.

**Permit by Notification**

Sharon Monahan presented a Permit by Notification to the Wetlands Bureau for a dry hydrant located on Diamond Pond to serve three houses on a private drive at the end of Carley Road (Lot R006-051). The hydrant has been approved and recommended by the Fire Department and a letter from the Fire Chief to that effect is part of the application.

Von Mertens noted that by town ordinance a dry hydrant is a permitted use that requires no town wetlands permitting; and that a Permit by Notification if signed by the ConCom allows work to begin after 10 days. If not signed by the ConCom, and no letter of concern is submitted by the ConCom, the work can begin after 25 days. The ConCom has 21 days to submit a letter of concern.

Von Mertens moved that the PBN be signed (Kerrick second). The motion passed. Kerrick will sign the PBNs being held at the Town Clerk's office.

**Zoning Board of Adjustment / possible request to re-hear case # 1159-A**

Members discussed concerns about ZBA approval of a variance allowing the construction of a carport and driveway within the Wetlands Preservation District on Route 202N, R011-030-000.

Von Mertens said that by state RSA only the Selectboard has clear standing to request a rehearing of a land use board's decision, but that the Selectboard, owing to the wetlands issue, is looking to the ConCom to state grounds for a rehearing. The Selectmen may request that the ConCom represent the town by formal authorization to act as an agent of the Selectboard.

The ZBA chair may be requesting a reconsideration of the decision, presenting his reasons at the November 1 ZBA meeting. Von Mertens asked the ConCom to discuss whether to request a rehearing in the event the ZBA does not itself vote to rehear. The deadline for a rehearing request is November 4, 30 days from the original decision.

By state statute, clarified by various court decisions, all five variance criteria must be met for a variance to be granted. Von Mertens presented the five criteria with brief explanation of them provided by the Local Government Center.

After wide-ranging discussion, the following points were agreed upon. There was general consensus that a rehearing request is merited, and the strong preference for that request to be made by the ZBA and accepted by the ZBA. A rehearing would give the Conservation Commission opportunity to comment on the variance application.

Grounds for a rehearing based on the Conservation Commission's reading of the minutes and ZBA case 1159-A findings are as follow:

1. The Wetlands Protection District, by Peterborough town ordinance, is the jurisdictional entity that is relevant to the application. The District is "all land within fifty (50) feet of said wetland" (town ordinance 245-15-C4). The ZBA minutes and decision (Finding #2) referred to impacts to "jurisdictional wetlands," but that is a distinction that the state makes but Peterborough town code does not.

In review of the application for the carport and driveway as presented to the ZBA, impact to the town's Wetlands Protection District is not materially different under the original July 7 Case 1159 when compared to the October 4 Case 1159-A.

When asked if there is a reduction in the intrusion into the Wetlands Protection District, "Mr. Little [applicant's counsel] said no. . ." (10/4/10 ZBA minutes). This raises the question of whether the two cases are materially different.

2. Town code requires Conservation Commission comment for special exceptions relating to the Wetlands Protection District but not for variances. Nonetheless, in several past variance cases involving Wetland Protection District incursion, the ZBA has requested Conservation Commission comment. The abutting wetland received one of the highest rankings in the 2009 *Town of Peterborough Comparative Wetlands Evaluation*. That ranking suggests the need for Conservation Commission comment on the application. A rehearing would make that comment possible.

3. Acting in behalf of the public interest, specifically for protecting the abutting wetland, the Conservation Commission supported a lot line adjustment in 2006 that gave town land to the property owner at that time so that a licensed septic system could be installed to replace one that had failed. During those negotiations with the town, the Wetlands Protection District on the property was mapped, and the applicant – who was considering purchasing the property at that time – was made fully aware of the property's constraints.

The Conservation Commission questions whether adding another nonconforming use to a parcel that came burdened with nonconforming uses is in the public interest. The town has already acted in good faith to remove a number of nonconforming uses by a boundary adjustment.

Von Mertens said that she would communicate the ConCom's reasons to request a rehearing to the Selectboard. Corwin voiced a concern that the Conservation Commission is not authorized to request a rehearing; only the Selectboard can do that. ConCom members agreed that Commission comment has to be restricted to wetland issues. ConCom co-chairs Von Mertens and Kerrick will communicate that to the Selectboard.

### **Babine, Wheeler and Lowe Conservation Easement draft**

John Paterson distributed town counsel Ratigan's comments on the proposed conservation easement as well as the Monadnock Conservancy's response to those comments.

**1. Groundwater withdrawal.** Attorney Ratigan advises against limiting potential municipal groundwater withdrawal. Jo Anne Carr pointed out that the relevant aquifer is not high transmissivity, and therefore lacks municipal potential. All agreed that access challenges further decrease the odds of the area ever being a groundwater resource.

**2. Forestry.** Attorney Ratigan counseled against restricting commercial forestry. Patterson commented that we neglected to inform him that the easement is "forever wild" regarding forestry, and that choice reflects both an NRI and an assessment of limited timber potential

**3. Extinguishment and Condemnation.** Attorney Ratigan counseled against the boiler plate division of revenue proceeds between grantor and grantee in the event of seizure by eminent domain. The proceeds rightfully belong to the taxpayers (town).

**4. Resolution of Disputes.** Attorney Ratigan saw the recommended procedure of appointing arbitrators as too complicated, and he recommended that a retired judge's name be picked out of a hat. And that each party pay its own legal fees without granting power to the arbitrator to assess fees to one party.

Patterson will speak to Pam Brenner about resolving these issues.

Other business put forward to the November 18 meeting because of the late hour.

/fvm