

**MINUTES OF THE PROCEEDINGS OF THE
CONSERVATION COMMISSION OF THE CITY OF WORCESTER**

September 12, 2011

WORCESTER CITY HALL – LEVI LINCOLN ROOM

Conservation Commission Members Present:

Stefanie Wood – Chair
Jeremy Theerman
Jordan Berg Powers
Paul Franco
Jack Donahue
Mia McDonald
Joseph Wanat (absent)

Staff Present:

Kathleen Donovan, Department of Inspectional Services
Jonathan P. Gervais, Department of Public Works & Parks
Luba Zhaurova, Division of Planning & Regulatory Services

CALL TO ORDER – 5:34 pm

APPROVAL OF THE MINUTES – The approval of the minutes was held.

OTHER BUSINESS:

1. **The Mullin Rule:** Ms. Zhaurova stated that according to case law, Commissioner McDonald and Donahue cannot vote on 3 Tyson Terrace, 55 Lake Avenue North, and 4-6 Meadow Lane items because they were not present at the first hearing on the matter. Known as “Mullin Rule”, which stems from an Appeals Court decision, Mullin v. Planning Board of Brewster, 17 Mass. App. Ct. 139 (1983), the rule states that when members of a board or agency are acting in a quasi-adjudicatory manner, each member who participates in the decision must have heard all the evidence firsthand. She stated that if the Commission desires, staff can work with the Law Department to develop a proposal to implement a change to the Commission’s Rules & Regulations to enable a Commission member to be able to participate in a hearing even if one was missed, with certain conditions. The Commission indicated that they would like to see a draft amendment.
2. **CSX Transportation, Inc. - Railroad Right-of-Way Milepost 47.2:** Chair Wood felt that CSX adequately documented work that had to be done associated with Tropical Storm Irene damage and asked that a copy of the letter is placed in the file.

List of Exhibits:

Exhibit A: Letter from Samuel Farnsworth, LSP of AMEC Earth & Environmental, Inc. to the Worcester Conservation Commission; re: CSX Transportation, Inc. Railroad Right-of-Way Milepost 47.2, Worcester, Massachusetts; dated 9/12/2011.

REQUESTS FOR CONTINUANCES, EXTENSIONS OF TIME, POSTPONEMENTS, WITHDRAWALS

3. **55 Lake Ave North** - Request for Determination of Applicability to determine jurisdiction (WCC File # 11-33): Mark Armington submitted a letter requesting continuance (Exhibit E) due to the fact that the Commission was not able to conduct a site walk. Upon a motion by Commissioner Theerman and seconded by Commissioner Franco, the Commission voted 6-0 to continue the meeting to October 3, 2011.

List of Exhibits:

Exhibit A: WPA Form 1 – Request for Determination of Applicability for UMASS Medical School, 55 Lake Avenue North with a cover letter dated August 1, 2011; received August 2, 2011.

Exhibit B: Plan of Land for MASS Medical School, 55 Lake Avenue North; prepared by Cullinan Engineering; dated 01/31/2011.

Exhibit C: Memorandum from the Department of Public Works & Parks to the Conservation Commission; re: 55 Lake Avenue North – NOI; dated 8/19/2011.

Exhibit D: Site Photographs distributed by the applicant to the Conservation Commission at the 8/22/2011 meeting.

Exhibit E: Letter (e-mail) from Mark Armington to the Conservation Commission requesting a continuance to September 12, 2011; dated September 9, 2011.

UNFINISHED BUSINESS

Public Hearing

3 Tyson Terrace - Notice of Intent to construct a duplex with associated site work (WCC File # 11-32): Richard Bezdegian, petitioner, submitted revised plans to the Commission showing 30-ft wetland buffer delineation. Chair Wood stated that she did not see any issues on the site walk. Commissioner Donahue concurred.

Upon a motion by Commissioner Theerman and seconded by Commissioner Franco, the Board voted 4-0 (with Commissioners McDonald and Donahue abstaining because they were absent at the previous meeting) to close the Public Hearing.

Upon a motion by Commissioner Theerman and seconded by Commissioner Franco, the Board voted 4-0 (with Commissioners McDonald and Donahue abstaining because they were absent at the previous meeting) to issue an Orders of Conditions.

List of Exhibits:

Exhibit A: WPA Form 3 – Notice of Intent for 3 Tyson Terrace; prepared by Richard Bezdegian; dated 8/2/2011.

Exhibit B: Memorandum from the Department of Public Works & Parks to the Conservation Commission; re: 3 Tyson Terrace – NOI; dated 8/19/2011.

Public Meeting

4. **4-6 Meadow Lane:** Request for Determination of Applicability (WCC File # 11-34): Attn. Morris A. Bergman, representative for Brian O'Connell & Dorothy Hargrove, provided additional information to the Board (Exhibit F). He disagreed with the Law Department's recommendation to grant a negative Determination of Applicability (Exhibit E) and disagreed with the finding that the snow would melt toward the brook given the pitch of the sidewalk. He stated that this finding should have been substantiated by the Department of Public Works and pointed to the pictures in his submittal (Exhibit F) which showed a different pitch of the sidewalk. He stated that he believed that shoveling of the snow from the sidewalks would negatively impact the brook.

Chair Wood quoted from the City of Worcester's Wetlands Protection Ordinance and Wetlands Protection Regulations, in the Definitions section, that:

"alter" - shall include, without limitation, the following activities when undertaken to, upon, within or affecting resource areas protected by this chapter:...

...(8) changing water temperature, biochemical oxygen demand, or other physical or chemical characteristics of water; but specifically excluding the use of de-icing materials and chemicals for roadway maintenance during the winter months..."

Mr. Bergman stated that this definition does not include "sand" in its definition and that the Legal Opinion did not refer to this section. He stated that the State regulations did not seem to have similar exemption for de-icing materials and that the City Ordinance cannot be less strict than the State's laws and regulations.

Mr. O'Connell stated that the traffic warms the road, which in turn warms the water runoff which negatively affects the brook. He stated that the consideration should be "about values, and not word-smithing".

Councilor William Eddy stated that 6 Councilors filed a moratorium on the Snow Ordinance, which since then expired. He stated that this case is an unintended consequence of the snow ordinance, and encouraged the Commission to vote for a positive Determination of Applicability.

Councilor Frederick Rushton stated that the Tatnuck Brooks runs into Coes Pond and already has silting problems.

Dorothy Hargrove, petitioner, disagreed with the Legal Opinion and stated that cars are not idling on Pleasant Street and that the Opinion did not answer the question asked.

Miriam Elany, friend of the petitioner, stated that certain facts in the Legal Opinion are in dispute.

Jo Hart encouraged the City to have "a Snow Plan".

Mr. Bergman stated that he found it strange that the definition of "alteration" is different for the local ordinance as compared to the state regulations. He stated that the burden is on the applicant to prove that the proposal is *not* harmful to the wetland resource area, but that the applicant did not provide such evidence.

Commissioner Franco did not believe the sidewalk was frequently used by the pedestrians.

Councilor Kathleen Toomey stated that the City Council has been working on a solution to the snow ordinance disputes. She stated her support for “clean environment” and the petition.

Commissioner Berg Powers expressed frustration with the fact that the Commission has to consider the petition, when, in his opinion, it is a City Council’s matter. He stated that if the Determination of Applicability was positive, the petitioner would need to come back to the Commission with the Notice of Intent and would probably end up having to remove the snow to a different location.

Commissioner McDonald concurred with Commissioner Berg Powers. While she felt that the snow should not go to the brook, the safety of pedestrians on the sidewalks was paramount to her.

Commissioner Donahue felt that the Commission should grant negative Determination of Applicability, if reading the law as it is written.

Chair Wood stated that she believed the area affected was jurisdictional, but that the pitch of the land and sidewalk is not as important. She stated that the catch basins in the area probably drain to the brook anyways. She stated that based on the local ordinance, she would vote for a negative Determination of Applicability.

Commissioner Theerman stated that local ordinance clearly states that de-icing of roads is exempt, and that if the Commission grants a positive Determination of Applicability, it would apply to many properties next to brooks in the City.

Commissioner Franco was concerned with what he called a “local ordinance’s departure from the intent of the state ordinance”. He stated that the local ordinance can be more restrictive, but not less restrictive and wondered if the law was proper. He stated that the balance should be struck between safety and environmental concerns, but he stated that the sidewalk was not continuous. He was not concerned with setting a precedent, as he felt the Commission can decide these issues on a case-by-case basis.

Commissioners McDonald and Donahue were abstaining from the vote because of the Mullin Rule.

Ms. Donovan stated that the Commission can make separate votes under the state and local laws.

Upon a motion by Commissioner Franco and seconded by Commissioner Theerman, the Commission 4-0 that the area depicted on the plan reference in the application is an *area* subject to jurisdiction of the Wetlands Protection Act.

Upon a motion by Commissioner Theerman and seconded by Commissioner Wood, the Commission voted 2-2 (with Commissioners Theerman and Wood voting yes, and Commissioners Franco and Berg Powers voting no) to grant a negative Determination of Applicability with respect to the Wetlands Protection Act and local Wetlands Protection Ordinance as relating to the *work* referenced in the application (removal of the snow onto the bank of the West Tatnuck Brook). The motion did not carry and the negative Determination of Applicability was not granted.

Upon a motion by Commissioner Berg Power and seconded by Commissioner Franco, the Commission voted 2-2 (with Commissioners Franco and Berg Powers voting yes, and Commissioners Theerman and Wood voting no) to grant a positive Determination of Applicability with respect to the Wetlands Protection Act as relating to the *work* referenced in

the application (removal of the snow onto the bank of the West Tatnuck Brook). The motion did not carry and the positive Determination of Applicability was not granted.

The Commission asked Mr. Bergman if the petitioners were willing to continue the meeting in order to allow the Commission to review the evidence further, to inquire about the Mullin Rule. Mr. Bergman stated yes.

Ms. Donovan stated that it was practice of the Commission in the past to allow Commissioners vote on the meeting after missing a previous meeting if all evidence has been reviewed by the Commissioners. Mr. Bergman was in favor of that and stated that he would like to resolve questions stemming from the Legal Opinion. He was amenable to continuing the meeting.

Upon a motion by Commissioner Berg Powers and seconded by Commissioner Theerman, the Commission voted 4-0 to continue the meeting to October 3, 2011.

List of Exhibits:

Exhibit A: WPA Form 1 – Request for Determination of Applicability for 4-6 Meadow Lane; prepared by Brian O’Connell and Dorothy Hargrove; dated August 2, 2011.

Exhibit B: Letter from Philip Nadeau, Wetlands Program Chief, Department of Environmental Protection, to Dorothy Hargrove; re: Snow Removal – Wetlands; dated February 1, 2011.

Exhibit C: Memorandum from the Department of Public Works & Parks to the Conservation Commission; re: Pleasant Street (4 & 6 Meadow Lane); dated 8/19/2011.

Exhibit D: Exhibit packet submitted by Attn. Bergman to the Conservation Commission at the August 22, 2011 meeting that includes:

1. Tatnuck Brook Watershed information
2. Picture of West Tatnuck Brook Watershed Sign in Locale
3. Picture of Embankment of Applicant(s) in Winter
4. Copy of City of Worcester Snow Removal Ordinance
5. Copy of City of Worcester “Position” re: “Buffer”
6. Copy of Mass DEP “Snow Disposal Guidance”
7. Copy of MGL Chapter 85 Section 7A (Storage of Snow/Ice Removal Agents)
8. Copy of MGL Chapter 85 Section 7B (Disposal of Snow on a State Highway)
9. Copy of Burden of Proof Standard re: Wetland Protection Act (City of Worcester Ordinance)

Exhibit E: Memorandum from the Law Department to Division of Planning & Regulatory Services; re: 4-6 Meadow Lane: Request for Determination of Applicability; dated September 7, 2011.

Exhibit F: Exhibit packet submitted by Attn. Bergman to the Conservation Commission at the September 12, 2011 meeting that includes:

1. Law Department Opinion
2. Photographs – street views of sidewalk adjacent to West Tatnuck Brook

3. Level “checks” on sidewalk
4. Code of Massachusetts Regulations definitions of “alter”

NEW BUSINESS

Public Hearing

Commissioner Theerman left the meeting.

5. **Worcester Regional Airport (375 Airport Drive) - Notice of Intent (CC-2011-037):** James Stolecki, representative for Massport, the applicant, stated that the airport is seeking approval for its 5-year vegetation management plan (VMP). Also present was Dwight R. Dunk, principal scientist with Camp Dresser & McKee Inc. and Andy Davis, the Director of the Worcester Airport.

Mr. Dunk distributed the missing page 2A quantifying the wetland areas. He showed on the plan the area that the FAA identified as airspace space, extending out from the runways, that has to be free of obstructions, including vegetative ones. Mr. Dunk stated that the trees within 5-ft of the this plane, which is ~20-30 ft above the ground, would need to be removed (cut) and branches chopped up. Folio-spraying with herbicides wouldn't occur within 100-ft of the wetland areas. He stated that all of the VMAs (Vegetation Management Areas) clearing will be conducted in year 1 of the 5-yr plan and that follow-up methods will be used to maintain the vegetation below the plane during the remaining 4 years. He stated that primary removal would be mowing, cut-and-chop, and drop-and-lop methods, with long-term maintenance consisting of mowing around the runways with some mechanical clearing (with weed-wackers and chain-saws). He stated that there would be about 1.8 acres clearing and maintenance area in Worcester. No work will be conducted within 200-ft of the riverfront areas. He stated that 20-acres of the buffer zone was identified. He stated that the wetlands were identified using MassGIS data layer with field verification where necessary. Mr. Dunk stated that most of the Vegetation Management Area is located in Leicester because of the topography of the site.

Commissioner McDonald asked if the stumps will remain. Mr. Dunk said yes and that no stump grinding will take place. He stated that the trees will be cut with equipment, while chainsaws would be used in sensitive areas, such as wetlands. Commissioner Berg Powers asked specifically about work in or near the wetland. Mr. Dunk stated that the wetlands will be maintained as shrub-scrub or herbaceous wetland, depending on the elevation. He stated that no change to the area of the wetlands is proposed (no dredging or filling), but that there might be a change to the type of the wetland. He said that no re-seeding is proposed, but that after the cutting, the shrubs and herbaceous species should re-sprout from the existing seed bank.

Mr. Berg Powers asked if the footprint of the work will be kept light. Mr. Dunk stated that the contractor will limit vegetation areas clearing to the ones specified in the plan.

Commissioner asked what the long-term plan is for preventing the spread of invasive species. Mr. Dunk stated that this was not a specific topic covered by the plan, but that the area is planned to be maintained as grassland. Mr. Stolecki stated that this issue will be addressed as needed.

Chair Wood stated that 5-year plan is unusual. Mr. Dunk stated that 310 CMR provision allows for 5-year long-term Order of Conditions.

Upon a motion by Mr. Donahue and seconded by Commissioner Franco, the Commission voted 5-0 to close the Public Hearing.

Upon a motion by Mr. Donahue and seconded by Commissioner Franco, the Commission voted 5-0 to issue an Order of Conditions for 5 years.

List of Exhibits:

- Exhibit A: WPA Form 3 – Notice of Intent for 375 Airport Drive; prepared by Massachusetts Port Authority; received 8/24/2011.
- Exhibit B: Massachusetts Port Authority Vegetation Management Plan for Worcester Regional Airport; prepared by CDM; dated July 2011.
- Exhibit C: Memorandum from the Department of Public Works & Parks to the Conservation Commission; re: 375 Airport Drive – NOI; dated 9/9/2011.
- Exhibit D: Table 1: Summary of Vegetation Maintenance in Wetland Areas, page 2(a); submitted by the petitioner to the Conservation Commission at the 9/12/2011 meeting

6. **222 June Street - Notice of Intent (CC-2011-039)**: Paul J. McManus of EcoTec, Inc., representative for 222 June Street, LLC, the applicant, stated that the proposed use is located within 100-ft of a catch basin, thus triggering a review under the local ordinance. He stated that the site has type A soils that drain well. Commissioner Donahue asked if the temporary stockpile equipment area will be used for soils too. Mr. McManus stated that it would be used for sand, stone, and soil for the pipe-work.

Upon a motion by Mr. Franco and seconded by Commissioner McDonald, the Commission voted 5-0 to close the Public Hearing.

Upon a motion by Mr. Franco and seconded by Commissioner McDonald, the Commission voted 5-0 to issue an Order of Conditions.

List of Exhibits:

- Exhibit A: Worcester Conservation Commission – Notice of Intent for 222 June Street LLC; prepared by 222 June Street, LLC; received 8/26/2011.
- Exhibit B: Plan of Land for 222 June Street; prepared by Finlay Engineering Services; dated 5/9/2011.
- Exhibit C: Hydraulic / Hydrologic Calculations for 222 June Street LLC; prepared by Finlay Engineering Services; dated 7/2011; received 8/26/2011.
- Exhibit D: N.P.D.E.S. Construction Stormwater Pollution Prevention Plan (“SWPPP”) for 222 June Street LLC; prepared by Scott Jordan, CPESC, EcoTec, Inc.; dated 8/17/2011; received 9/9/2011.
- Exhibit E: Memorandum from the Department of Public Works & Parks to the Conservation Commission; re: 222 June Street – NOI; dated 9/9/2011.

Public Meeting

7. **395 Bridle Path – Request for Determination of Applicability (CC-2011-036):** Robyn Ryan, petitioner, stated that she is seeking to construct an addition above an existing concrete pad of the existing dwelling at 395 Bridle Path. She stated that the addition would be on the 2nd floor. Chair Wood stated that as a rule, the Commission likes to conduct a site walk on the properties that propose alteration closer than 30-ft from a jurisdictional wetland resource. The Commission concurred.

Upon a motion by Mr. Berg Powers and seconded by Commissioner Franco, the Commission voted 5-0 to continue the meeting to October 3, 2011 to allow the Commission time to conduct a site walk.

List of Exhibits:

Exhibit A: WPA Form 1 – Request for Determination of Applicability for 395 Bridle Path; prepared by Robin C. Ryan; received August 19, 2011.

Exhibit B: Certified Plot of Land for 395 Bridle Path; prepared by HS&T Group, LLC; dated 4/6/11; revised by the applicant on 9/23/2011.

Exhibit C: Memorandum from the Department of Public Works & Parks to the Conservation Commission; re: 395 Bridle Path – RDA; dated 9/9/2011.

8. **940 West Boylston Street – Request for Determination of Applicability (CC-2011-038):** Allary Braitsch of VHB, Inc., representative for Stop & Shop Supermarket Company, the applicant, stated that Stop & Shop is seeking to maintain the existing paved lots through the replacement, by grinding down and repaving, of existing deteriorated pavement, with no change to the footprint of the parking lot. She stated that the work will be done over a period of 6-8 weeks and that the existing footprint will remain. She said that a small portion of the parking lot is within the 30-ft wetland buffer. The resource area would be protection during the construction phase. Commissioner Berg Powers asked if the drainage in the rear flows toward the pond or toward the wetland. Taylor Dowdy stated that erosion controls are shown on the downhill slopes along the Burncoat Drive entrance. He said that the parking area drains to the interior catch basins. He stated that some of the area will have grind-and-overlay, and other – full-depth reconstruction. He stated that silt-fences and silt-sacks will be installed to prevent erosion. No landscaping changes are proposed.

Commissioner McDonald left the meeting.

Upon a motion by Commissioner Franco and seconded by Commissioner Berg Powers, the Commission voted 4-0 to grant a negative Determination of Applicability.

Commissioner McDonald joined the meeting.

List of Exhibits:

Exhibit A: WPA Form 1 – Request for Determination of Applicability for 940 West Boylston Street; prepared by Stop & Shop Supermarket Property; received August 25, 2011.

Exhibit B: Wetland Impacts and Pavement Treatment Options Plan for Stop & Shop Store #0085; prepared by VHB, Inc; dated June 30, 2011.

Exhibit C: Memorandum from the Department of Public Works & Parks to the Conservation Commission; re: 940 West Boylston Street – RDA; dated 9/9/2011.

Exhibit D: Photographs of the site submitted by VHB to the Conservation Commission at the 9/12/2011 meeting.

Public Hearing

9. **585 Lincoln Street - Notice of Intent (CC-2011-035):** The petitioner was not present. The Commission voted 6-0 to postpone the meeting to October 3, 2011 and asked staff to contact the petitioner.

OTHER BUSINESS

10. **1119-1121 Grafton Street (WCC-2006-088):** Kevin Quinn of Quinn Engineering, representative for the petitioner, was not present. Chair Wood stated that the building was operational but that the substandard catch basin has been in stalled. She suggested the Commission approved an Enforcement Order requiring the petitioner to install the originally-approved unit. Commissioner Berg Powers concurred, stating that the petitioner has had sufficient time to rectify the situation, but did not do it. Commissioner Franco suggested giving a 30-day time limit to finish the work.

Upon a motion by Commissioner Berg Powers and seconded by Commissioner McDonald, the Commission voted 5-0 to approve an Enforcement Order to require the petitioner to install the specified water quality unit within 30 days of issuance of such order.

ADJOURNMENT

Upon a motion by Commissioner Berg Powers and seconded by Commissioner Franco, the Commission voted 5-0 to adjourn the meeting at 7:55 pm.