

**Hamilton Conservation Commission
Minutes of Meeting of Sept. 29, 2010
Meeting held at Hamilton Town Hall**

Commissioners present:

Nancy Baker, Virginia Cookson, Robert Cronin, Peter Dana (until 9 p.m.), Richard Luongo (co-chair)

Staff present:

Jim Hankin, Conservation Coordinator

Others present included:

Carol Decker, Ipswich River Wildlife Sanctuary
Kay Scheidler, Hamilton-Wenham Regional School District
Mark Kuzminskas, 408 Bridge St.
John Donovan, 484 Bay Rd.
Denis Curran, Hamilton-Wenham Recreation Board
Paul Furnari, 49 Bridge St.
Ken Whitaker, Hamilton-Wenham Open Land Trust

The Commission is scheduled to meet at 7:30 p.m. on Oct. 6, 2010 at the old Hamilton Library, and Oct. 20, 2010 at Town Hall. Site walks are scheduled for Saturday, Oct. 2, 2010.

Richard Luongo opened the meeting at 7:30 p.m.

Conservation Coordinator Jim Hankin noted that prior to this meeting, commissioners received copies of a number of documents: a 2-page proposal for the 2010-2011 Hamilton-Wenham elementary school environmental education program, in conjunction with Mass Audubon; a portion of a restoration report filed by Hayes Engineering relative to 408 Bridge St.; the 3-page Enforcement Order issued Sept. 20 and sent to Prof. John J. Donovan at 484 Bay Rd., and an accompanying 2-page cover letter; a 1-page appendix to that Enforcement Order; a 7-page Aug. 18 Enforcement Order regarding the same matter; and a 2-page letter sent to Conservation Coordinator Jim Hankin on Sept. 21 by Prof. Donovan.

Presentation of proposal for 2010-2011 Environmental Education Program
Mass Audubon and Hamilton-Wenham Regional School District

Carol Decker of the Mass Audubon Ipswich River Wildlife Sanctuary (IRWS) thanked the Commission for its past financial support of the environmental education the IRWS provides to Hamilton-Wenham students. She introduced the school district's new director of instructional services, Kay Scheidler, with whom she arranged the details for the upcoming year's environmental education, which will target grades K-4. The written proposal detailed programs that would take place at the sanctuary, and at the schools, and the costs.

Nancy Baker asked whether students' families know about the Commission's involvement. Ms. Decker said at the time that parents are asked to pay the student fee charged for each field trip to the IRWS, it is noted that the Commission sponsors the program.

For the first time, the budget includes administrative costs of \$450. Ms. Decker said this was a realistic statement of the cost of staff time for billing, booking events, and arranging transportation. Other costs are roughly \$115 higher than in 2009-2010. The HWRSD requests \$4450.13 from the Commission, toward the total program budget of \$6449.47.

Ms. Decker said the Wenham Conservation Commission is not supporting the program, but a number of Wenham residents are contributing.

Richard Luongo made a motion for the Commission to take this request under advisement, and place the matter on the agenda of the Oct. 6 meeting. Commissioners approved the motion by general consent.

Enforcement Order

408 Bridge Street

Mark Kuzminskas, owner; Hayes Engineering, representative

Consideration of lifting Enforcement Order after final monitoring report and site inspection

Conservation Coordinator Jim Hankin noted that the Aug. 17, 2010 report by wetland scientist Libby Wallis of Hayes Engineering states that an area near a pond at 408 Bridge St. has been successfully restored per the terms of the Commission's Enforcement Order. She said trees and shrubs survived and flourished through July of the second growing season, and she reported 75% coverage of the area, with 15% or less of that cover being purple loosestrife. The report states that she established the extent of purple loosestrife visually.

Nancy Baker said the report does not state that there is 75% coverage of wetland vegetation. She noted in particular that a significant percentage of facultative upland species are present in one of three areas defined in the restoration planting plan, "Area C," and said that area may not be adequately restored. She noted that photos of the site presented at the last meeting document that the area is very grassy. She suggested testing for hydric soils to make sure the land in that area could support wetland species. She said the area is not satisfactory as a wetland replication area at this time. She suggested the Commission request an additional monitoring report in 2011, and reinspect the site in spring of 2011 before lifting the Enforcement Order.

Owner Mark Kuzminskas said Area C is small. He said also that shrubs planted further back than that area are hidden by tall grass. He said he planted 15 blueberry bushes, several pussywillows, silky dogwoods, 15 winterberry bushes, and red maple trees, with the maples spread along the area to create a natural effect. He said when the shrubs and trees mature; the area should be "in good shape." He said he planted several more silky dogwoods than the restoration plan required.

Ms. Baker said it would take years to get the property back to the condition it was in prior to unpermitted cutting around the pond.

Richard Luongo asked how the wetland scientist could report 75% coverage, if Ms. Baker's statements are correct. Virginia Cookson and Mr. Hankin replied that the monitoring requirements stated "vegetative cover", not specifying that it must be wetland vegetation. Mr. Luongo asked whether the Commission stipulated that plantings had to be specific categories of vegetation; Ms. Baker said this was the case. Mr. Hankin made copies of the June 17, 2009 monitoring section of the Enforcement Order and distributed them to commissioners.

Mr. Kuzminskas said the Enforcement Order says "75% coverage" without reference to wetland plants.

Ms. Baker made a motion for the Commission to defer a decision to release the project until commissioners have had an opportunity to revisit the parcel, that visit to take place no later than June 30, 2011. She said it would be helpful to have a follow-up data sheet from the landowner's consultant so the Commission could compare the 2011 data with that reported in August 2010. Ms. Cookson seconded the motion. VOTE: Unanimous.

Mr. Hankin and Ms. Baker said the owner could bring the area into compliance without much additional work.

Enforcement Order

484 Bay Road

John H. Donovan, owner

Placement of fill (asphalt material) on access-way to property in buffer zones and resource areas

John Donovan addressed the Commission and outlined two concerns about issuance of an Enforcement Order (EO) relative to an access road on his property.

First, he said the EO is in error. He said after flooding damaged the access road, the Federal Emergency Management Agency (FEMA) "came in" and paid for rehab work. He said his property is a farm, and access road maintenance on farms is exempt from regulations pursuant to the Wetland Protection Act; he referred to page 22 of the a manual entitled "Farming in Wetland Resource Areas" which he filed with the Commission.

Second, he objected to the way the EO was served. He said a police officer went into a barn on his property and delivered the Order to a 22-year-old employee, which he said was inappropriate. He read aloud a letter he drafted, which he proposed Conservation Commissioner Jim Hankin should sign and return to him. As drafted, it would apologize for the manner in which the EO was served, express gratefulness for Mr. Donovan's generosity to the Town, state that Mr. Hankin should have telephoned Mr. Donovan instead of issuing the EO by mail, and pledge to determine the facts of a case in the future prior to issuing an EO. Mr. Donovan said he lives in town and is accessible, and a phone call to him could have resolved the situation. He said he sometimes works long hours, and noted that on the day of this meeting he was at work at 7, and planned to return to work following this meeting, until 11 p.m. He left his business card, with multiple contact numbers.

Mr. Donovan said he allows public use of several properties he owns in Hamilton, including trails through his Bay Rd. property, and fields off Sagamore St. used for youth sports. He introduced Denis Curran of the Hamilton-Wenham Recreation Board, who said that board appreciates what Mr. Donovan has done in offering use of his property for soccer, baseball, lacrosse, and a Saturday afternoon "challenger league." Mr. Curran said approximately 2200 children and youths use the Sagamore St. fields each year.

Mr. Donovan stated that recently he was repairing a wall on his land when a woman screamed at him that he could not do that work because it was taking place in wetlands, and also that Town law bars work on walls. He said the woman was walking her dog on his property at the time. He

said he called Peter Britton, and Mr. Britton said Mr. Donovan has permission to repair a wall anywhere in Hamilton.

Richard Luongo asked whether there was an attempt to serve the Enforcement Order at the front door of Mr. Donovan's house. Mr. Hankin said he and Hamilton Police Officer Karen Wallace went to the house, but no one answered at the door. Officer Wallace suggested someone might be in the barn. She and Mr. Hankin drove to the barn in their separate cars. He arrived first, saw an employee working, and introduced himself to her and identified himself as an employee of the Conservation Commission. Mr. Hankin said he asked her if she would accept the Enforcement Order and see that the landowner got it, and she agreed to do so. He said he told her that the police officer was present so there would be someone to see that the delivery of the EO took place. He said he then left in his car, and does not know what Officer Wallace did after he departed. Mr. Hankin said he requested that a public safety officer accompany him for two reasons. First, he did not want to violate the landowner's rights, and trespass. Second, he wanted someone to see him serve the EO, so there would be no question that it had taken place.

Mr. Luongo told Mr. Donovan that prior to this event, the EO had been sent by certified mail to Mr. Donovan, and it was returned by the post office to the Commission office. He said it is not part of the Commission's procedure to contact landowners by telephone prior to issuing and sending an EO. He said the Commission cannot walk on a landowner's property without the landowner's clear consent; the Commission's visual inspection of the access road took place from public property, Cutler Rd. He asked Mr. Donovan, "Short of standing on the street and throwing it at the door, what would you wish us to do?"

Mr. Donovan replied that the Commission should change its procedure, and call landowners. Mr. Luongo replied that the procedure is stipulated in a Town by law. Mr. Donovan repeated, "Change it." Mr. Luongo said the Commission proceeded with Mr. Donovan's case just as it has with all other such cases. Mr. Donovan repeated that the Commission should change its procedures. Mr. Luongo said to have telephoned Mr. Donovan in this case would have constituted special treatment, which the Commission cannot provide.

At Peter Dana's request, Mr. Hankin provided further details about the steps that led to the delivery of the EO to Mr. Donovan's employee. Mr. Hankin said the Planning Board coordinator told him an acquaintance, whom she did not name, told her that she had observed that crushed asphalt had been spread on the access road off Cutler Rd. into the rear of Mr. Donovan's property. Mr. Hankin said he observed the access way from Cutler Rd. on Aug. 14 or 15, and visually corroborated that report. He said the site is close to wetlands, and clearly within Commission jurisdiction. He said further that he knew such work requires Commission review and approval, but that this had not taken place. He issued and signed an EO, and sent it to Mr. Donovan by certified mail. He said the envelope was returned unopened, after the post office attempted delivery 3 times. At the Commission's Sept. 15 meeting, he proposed serving the EO by hand, and asked whether the Commission would authorize a police escort. The Commission voted to do so. On Tuesday Sept. 21, he served the EO with Officer Wallace.

Mr. Luongo told Mr. Donovan that if he had accepted the mailed EO and explained the situation to the Commission, the later situation would not have occurred. Mr. Donovan said he never got the mailed EO. Mr. Luongo said he got the last one, which was delivered in the only way the Commission could make sure that Mr. Donovan received it. He said the first EO could have been "thrown out the window" if someone had accepted delivery, and Mr. Donovan had attended a Commission meeting to discuss it, as the EO directed him to do.

Mr. Donovan said he did not commit a violation. He said he does not need Commission approval to repair his access road.

Mr. Dana said if a property is a farm, the owner is entitled to certain exemptions. He said FEMA should inform local conservation commissions of wetland-related cases in which it is involved.

Mr. Donovan expressed concern that such situations could happen repeatedly. He said he would try to change the process and procedure.

Virginia Cookson said the work on the access road was not just a repair, and said she was sure FEMA did not require Mr. Donovan to upgrade the dirt road.

Mr. Dana expressed appreciation for work that Mr. Donovan has done for the town of Hamilton. He said the Commission is "all for" suggestions about bettering what it does.

Mr. Donovan said he would speak to the selectmen, townspeople, the Town Manager, and perhaps to state officials if it is necessary to pass a state law to change what he called "not a nice procedure and process for a town like this."

Mr. Luongo said Mr. Hankin followed the procedures the Commission has been following for years. He told Mr. Donovan a phone call is not a legal document, so a landowner is not going to be informed of an EO by phone. Mr. Donovan said he did not do anything wrong; Mr. Luongo said the Commission and staff did not, either. Mr. Donovan said "the gentlemanly thing" would have been to make a call.

Mr. Donovan left the meeting room.

Mr. Hankin said Mr. Donovan is apparently claiming an agricultural exemption, which Mr. Hankin said he did in another case years earlier related to the same property. He said he does not recall the Commission ever finding formally that the property qualifies for an agricultural exemption.

Nancy Baker read a passage from state wetland regulations concerning the agricultural exemption, specifically a section in "improvement of land in agricultural use", which states that before beginning work, a person claiming an agricultural exemption must first file a conservation plan for Commission review at a public meeting; the Commission then has 21 days to provide the person claiming the exemption with comments in writing detailing any issues with that conservation plan. She said that until the Commission sees a conservation plan, it does not know that this is an agricultural use.

Commissioners agreed to send a copy of this regulation to Mr. Donovan.

Ms. Baker raised the issue of the need for erosion control, as the EO called for. Mr. Luongo said Mr. Donovan claims to be exempt from regulations that would require this, because FEMA did the project. Mr. Hankin said Mr. Donovan may have obtained funds from FEMA, but FEMA does not send crews to perform work.

Mr. Hankin said that even after a property owner files a conservation plan (which he said he does not recall Mr. Donovan doing), the owner still must meet the definition of land in agricultural use. The owner has to convince the Commission that a property is being used for commercial agriculture.

Commissioners agreed to place Mr. Donovan's draft of a letter of apology in the case file.

Mr. Hankin said it is the Massachusetts Attorney General's opinion that agricultural exemptions under the Wetland Protection Act "trump" local regulations and therefore apply uniformly throughout the Commonwealth, but some legal observers disagree.

Ms. Cookson said Mr. Donovan's property at 484 Bay Rd. does not meet the definition of a farm. Mr. Hankin said there certainly has been no finding to that effect.

The minutes secretary joined the meeting at 8:35 p.m., at which time tape recording of the meeting ceased.

Request for Determination of Applicability

49 Bridge Street

Paul Furnari, applicant and owner

Construct 2 decks and 1 addition on sonotubes, in riverfront area but outside no-build zone

Paul Furnari described changes he proposes to an existing house at 49 Bridge St., near the Miles River, and pointed out the features on a site plan. He proposes adding a "farmer's porch" to the side of the house facing the road; an addition containing a room and an adjacent roofed and screened porch at the back of the house; and a deck. All would be constructed on sonotubes, for which excavation would be done by hand. The farmer's porch at the front of the house would have an apron of 1/2" thick Dura-Rock cement board, which would be nailed to the framing and would extend to the ground, but which would not require any foundation work. The only proposed change to the existing footprint would be to square off a 4' X 7' area where the existing building "jogs" at one corner. Mr. Furnari also proposes adding a full second floor. Mr. Furnari said it is impractical to convert the existing basement to living space, because it has flooded in the past.

Nancy Baker asked about floodplain boundaries. After examining documents, she concluded that all work would take place in the 500-year flood zone.

During this discussion, John Donovan reentered the meeting room and suggested to commissioners that they use e-mail to contact him; he stated that it is "a legal venue." He handed them his written e-mail address. He then departed again.

Mr. Furnari said the work area is now lawn, with a flagstone patio area near an existing bulkhead; none is currently bare ground.

Virginia Cookson said most work would take place between 100' and 150' from wetlands, so a Request for Determination of Applicability (RDA) should be adequate. Ms. Baker said the state Wetland Protection Act (WPA) calls for a Notice of Intent (NOI) in this case. She said the WPA allows conservation commissions to issue RDAs for "minor activities" within the riverfront resource area. She questioned whether all features of the proposal constitute "minor activities." Conservation Commissioner Jim Hankin said that state regulations view as a "minor activity" a new deck proposed on existing lawn 50' or more from the mean high water line or bordering vegetated wetland (BVW), whichever is closer, but he questioned whether the additions Mr. Furnari proposes constitute "minor activity," even if they are constructed on sonotubes. Ms. Baker said it is relevant that the proposed addition would expand the living space. She said

building a second floor would not require an NOI, because it would not change the footprint of the existing structure, but that in order to move forward with the proposed addition Mr. Furnari would need to do an official alternatives analysis, and offer compensation for loss of riverfront area. Mr. Hankin said the WPA gives the Commission authority to make a finding that proposed work that exceeds the state definition of a "minor activity" would have no impact in the interests of the WPA, but it is very rare for this Commission to make such a finding.

Mr. Furnari told commissioners that he would eliminate the heated 12' X 12' addition and roofed screened porch from the plan, and instead build a 12' X 24' deck; he amended the site plan to reflect this change. Commissioners told him the following work on the house, plus repairs he proposes to the existing free-standing garage, would be authorized by an RDA: the proposed second story, farmer's porch, 4' X 7' infill, and deck, plus residing and reroofing the garage.

Ms. Cookson made a motion for the Commission to issue a negative determination noting the site plan changes accepted by the Commission. Ms. Baker seconded the motion. VOTE: Unanimous.

Commissioners signed the determination.

Peter Dana left the meeting at 9 p.m.

Discussion

Phragmites infiltration on Hamilton Wenham Open Land Trust pond

Ken Whitaker told commissioners that officials of the Hamilton Wenham Open Land Trust (HWOLT) have discovered a stand of phragmites, approximately 75' X 20', in wetlands on the upland side of a trail on HWOLT property off Farrington Lane just west of the Miles River., which the trail bridges several times. HWOLT members are concerned that the invasive plant could spread into the area between the trail and the river. He said HWOLT would like to eliminate the phragmites; he asked for input about how to do so without violating wetland regulations. He noted that he is a member of the Wenham Conservation Commission.

Nancy Baker said that state wetland regulations allow limited exemptions in restoration projects if the proposed work would improve the natural resource area; she said this gives some leeway for work in wetlands. She said burning is considered the most effective way to eliminate phragmites, and herbicide plus hand-pulling is the next most effective. Richard Luongo said the Lynn Fire Department periodically conducts controlled burns in wetlands to reduce vegetation, and fire risk.

Mr. Whitaker said HWOLT would formulate a proposal to request a limited exemption for removal of the phragmites.

Commissioners returned to discussion of the Enforcement Order regarding 484 Bay Rd. Ms. Baker said that until the landowner demonstrates agricultural use to the Commission's satisfaction, the Commission has no choice but to continue its enforcement action. Commissioners decided to send the landowner copies of the regulations regarding filing for an agricultural exemption, and if no such filing takes place within 30 days, to again contact the landowner.

Ms. Baker left the meeting at 9:15 p.m. This eliminated the quorum, and brought the meeting to a close.

Conservation Coordinator Jim Hankin said he would place the remaining item on this meeting's agenda, a Certificate of Compliance filing for 34 Black Brook Rd., on the agenda for the meeting of Oct. 6; he said the applicant is in no hurry. He distributed documents related to the Oct. 2 site walk to inspect an area of Bradley Palmer State Park in which the state proposes bridge work and updated commissioners about the time and place to assemble for that site inspection.

Minutes submitted Oct. 4, 2010 by Ann Sierks Smith