

## GROTON CONSERVATION COMMISSION

### Minutes

March 31, 2011

Chairman Bruce Easom called the meeting to order at 7:00 p.m. in the lunch room at Town Hall. Members Craig Auman, Marshall Giguere, Peter Morrison, and David Pitkin were present. Nadia Madden arrived at 7:25 p.m. Bill Neacy was absent. Conservation Administrator Barbara Ganem was also present.

#### 213 Whiley Road Request for Determination of Applicability (Request for Determination of Applicability) continuation

B. Ganem summarized the discussion which the Commission has had with applicants Jeff and Lauren Aubuchon on the two outstanding Orders of Conditions which they intended to address with the filing of an RDA. The applicant has presented an as-built plan showing existing conditions at the site on which it is clear a retaining wall and filled-in area extends into Lost Lake/Knops Pond. The applicant has presented several ideas for mitigation, including a donation to improve Sargisson Beach and the planting of blueberry bushes. P. Morrison suggested that procedurally it may be best to get a motion on the table. C. Auman made a motion, seconded by M. Giguere to issue a positive #3 and #5 Determination specifically requiring the applicant to remove the retaining wall and filled-in area.

In the ensuing discussion, D. Pitkin clarified that approximately 150 SF has been filled. M. Giguere noted this motion would require the filing of a Notice of Intent, but issuing an Enforcement Order could short circuit the process. Members questioned whether the discussion should proceed without N. Madden present. P. Morrison pointed out a quorum of the Commission was present, so the members who could vote under the Mullin rule would vote, while the remaining members abstained. B. Easom explained that only the members who had missed zero or only one meeting on the matter could technically vote under the Mullin rule. M. Giguere mentioned there is still the matter of the outstanding request for a Certificate of Compliance for the retaining wall Order of Conditions.

Applicant Jeff Aubuchon said he has improved the site by taking out a cesspool on the hill and installing a septic system for a one bedroom home and a deep well. He felt there was a net gain in environmental protection. Water comes down the hill and filters through the filled in area. He commented he is a good member of the community who made a mistake. He added that taking out the retaining wall is a very big deal and will create a situation in which the hill does not have integrity, and there could be damage to the lake. Mr. Aubuchon mentioned there are many others on the lake who continue to have cesspools and collapsing retaining walls. He questioned whether the Commission would consider the installation of a catch basin on the hill to infiltrate runoff, as well as the addition of stone-filled channels to capture stormwater for mitigation. This strategy was recommended by attorney Ray Lyons. J. Aubuchon said he was open to other suggestions from the Commission. He said he knew that what they had done was not right and that it was a mistake. He stressed this would not set a precedent as they were now proposing

additional improvements to the site. It would be much more difficult to remove the retaining wall because all of the materials would have to go up the hill rather than down.

Lauren Aubuchon stated they feel they have exhausted their options, and the removal would not improve the environment. She distributed plans showing the location of proposed infiltration trenches and blueberry bushes which would catch water before it heads to the lake. Their offer to donate funds to stabilize the shore line at Sargisson Beach remains on the table.

M. Giguere worried that the issue of mitigation has resulted in a waste of Commission time, as well as that of the applicants, and there will be a delay in getting anything done due to the time of year. He was of the opinion the Commission would be better off now if a decision had been made during the initial meeting. P. Morrison felt there would be more damage done to have them now return the shoreline to its original condition. It involves a lot of work and will probably require heavy equipment, with the result being more detrimental than good. He did agree the Commission does not want to set a precedent as it will encourage people to continue with this type of activity. The Commission can also consider fines. Mr. Morrison pointed out the applicants have offered something additional, and this could be an incremental benefit with what was on the table before.

The infiltration trenches would be between 8 in. and 1 ft. in depth and would be good for the property because of its steepness. Members pointed out it is compensatory flood storage which is the issue, and there is no place to do it. Mr. Aubuchon said there is erosion occurring on neighboring properties. Members said the Aubuchons have been good to work with and have made an honest mistake, but there is nothing that says it's okay to fill a resource area. How do we say it is okay when someone else comes forward with similar plans?

(N. Madden arrived at 7:25 p.m.) Commissioners summarized the previous discussion, and Lauren Aubuchon added the determination is whether moving the retaining wall is more detrimental to the environment than leaving it in place. She mentioned they are still willing to help improve Sargisson Beach. J. Aubuchon stated the stone-filled trenches will help capture runoff and noted they would plant blueberry bushes on the remaining shore line to help control erosion. The net improvements are a positive for the property, and the Aubuchons are asking the Commission's consideration in taking a negative and making it a positive. The outstanding issues are mitigation, floodplain storage, and precedent setting.

P. Morrison commented the attitude of the general lake community about not filing and midnight septic system installations should be taken into consideration. He pointed out this is definitely a balancing act. M. Giguere said we are somewhat limited procedurally to require the filing of a Notice of Intent. C. Auman added we would be allowing the filling of a resource it is our job to protect. N. Madden stated the mitigation measures offered do not affect compensatory flood storage. The flood storage has been quantified, but the mitigation is to improve water quality. P. Morrison said we could look at the net benefit of what is there now through the new construction.

B. Ganem read from the WPA regulations, 310 CMR 10.57 (4)(a) 1 outlining the performance standards for work in Bordering Land Subject to Flooding: "Compensatory storage shall be

provided for all flood storage volume that will be lost as the result of a proposed project within Bordering Land Subject to Flooding, when in the judgment of the issuing authority said loss will cause an increase or will contribute incrementally to an increase in the horizontal extent and level of flood waters during peak flows.” Chairman Easom said we only have to look at the level of flow over the Pepperell dam to see the effect of filling floodplain. He asked if there was any other discussion on the motion. P. Morrison said we have three options: 1) to issue a positive Determination requiring the filing of a Notice of Intent, 2) issue a negative Determination in which the applicant is allowed to leave the retaining wall in, and 3) an Enforcement Order to make them take it out.

The motion failed with C. Auman and N. Madden voting in favor, P. Morrison and M. Giguere voting in the negative, and B. Easom and D. Pitkin abstaining. P. Morrison questioned whether this project could qualify as a minor change, but members indicated this was an expired Order of Conditions. In any case, it could not be amended to allow more impacts to the resource area. The Commission could consider issuing an Enforcement Order requiring they follow through with a Notice of Intent. A fine could also be issued for this. M. Giguere and D. Pitkin saw the more immediate problem as what to do with the Request for Determination of Applicability where the response is either a negative finding in which the retaining wall is allowed to remain or a positive finding in which the filing of a Notice of Intent is required for the removal. They questioned whether the applicants wished to withdraw the Request for Determination of Applicability. The Commission could then issue an Enforcement Order requiring mitigation to specifically address the retaining wall. B. Easom asked Commissioners how they would vote on the issue of withdrawing.

The applicant has offered \$2000 for erosion control at Sargisson Beach; this fails to address the performance standards in the WPA regulations. D. Pitkin thought the Commission just has to see it through. B. Easom suggested the materials could be loaded on a barge during the summer and then hauled to the boat launch for removal. The process may be long, but it could be done without impacts. Chairman Easom asked if anyone wished to make another motion, and C. Auman made a motion to issue a positive #3 and #5 and an Enforcement Order to remove the wall. There was no second as any positive Determination requires a follow-up Notice of Intent. D. Pitkin pointed out the applicants proposed no work in the Request for Determination of Applicability, and it was the Commission’s mistake to let it go on. M. Giguere said he was leery about taking the retaining wall out as there is a chance they could do more damage. B. Easom suggested the site should be considered in terms of implications down the road. If the resources are damaged in this area, another location in the lake could be protected. The Commission needs to examine what the future holds for us. P. Morrison expressed concern that that would include incidents where proposals are not brought before the Commission before an activity takes place. He said this proposal would allow the applicant to keep their expanded land area while making improvements at Sargisson Beach. DEP does not set standards for the local Commission but they have the authority to impose fines under the state law. In the Mavilia case they issued a fine that amounted to \$6000 worth of work on 400 feet of Sargisson Beach and allowed him to keep his retaining wall. This could be considered punitive and encourage people not to fill the lake. C. Auman said this could be accomplished with a voluntary donation to the Conservation Fund.

J. Aubuchon asserted the infiltration trenches were sufficient mitigation. He did not feel \$6000 was a fair number. N. Madden said our job is to protect the resources, and she feels that this is what we are bound to do. P. Morrison maintained it was discretionary, and the Commission should not act as a police department. D. Pitkin believed it was true incremental changes could impact the floodplain and could be significant to the natural resources. Questions were raised about whether there would be a measurable difference. C. Auman protested that this would result in everyone building out similarly sized extensions and asked if they would then have the right?

Mr. Aubuchon indicated he would like to reach a reasonable resolution. While there are six Commissioners present only four can vote, and we are effectively at gridlock. P. Morrison questioned whether the Commission was willing to take as part of mitigation everything that was previously proposed and \$6000. N. Madden thought this sufficient to deter future applicants. C. Auman said no. M. Giguere noted it sends a message 'if you do this, it is going to be painful.' There are two amounts of pain: 1) financial and 2) process. This could take the form of a donation to the Conservation Fund. C. Auman asked what the next applicant is going to say. M. Giguere said the Request for Determination of Applicability could be withdrawn and the applicant return and then have the full Commission act on the new one.

J. Aubuchon said he was more comfortable with \$4000. B. Easom said the terms would be laid out similarly to those required in a house transfer, i.e., 1) Withdraw Request for Determination of Applicability, 2) write check, and 3) vote on Certificate of Compliance. D. Pitkin said he would be uncomfortable signing off on the Certificate of Compliance. It was suggested a straw vote be taken of the plan mentioned above with a check in the amount of \$4000. Only P. Morrison was in favor. With the amount at \$6000, M. Giguere and P. Morrison were in favor. P. Morrison made a motion to continue the meeting, seconded by N. Madden, and it was

VOTED: to continue the meeting.

The motion failed to pass with N. Madden, C. Auman, B. Easom, D. Pitkin, and M. Giguere voting in the negative, and P. Morrison voting in favor. Mr. Aubuchon indicated he wished to bring in legal counsel.

C. Auman offered a motion, seconded by N. Madden, and it was

VOTED: to issue a positive Determination #3 under the Wetlands Protection Act and #5 under the Groton Wetlands Protection Bylaw requiring the filing of a Notice of Intent for the removal of the retaining wall and return of the site to the original extent of shore line.

The motion passed with N. Madden, C. Auman, and M. Giguere voting in favor, while P. Morrison voted against, and B. Easom and D. Pitkin abstained. Members informed Mr. Aubuchon that it is the Commission's decision to close the meeting on the Determination and issue a finding. The applicant has a say in continuing meetings, but the Commission determines when it is time to close.

Owner James Reilley (54 Hill Road) has filed a Notice of Intent which will be heard on April 12. He has asked to have the Commission sign off on his Building Permit Application now so that he

