

West Newbury Conservation Commission Meeting Minutes

Meeting date & place: 6:30 pm, February 20, 2024, Second Floor Town Offices.

Members Present: Chair Molly Hawkins, David Parrott, George Preble, Haley McGraven, and Conservation Agent Michelle Greene.

Not present: Jack Haley

Executive Session: 6:30 PM

1. **Pursuant to G.L. c. 30A, §21(a)(6):** To consider the purchase, exchange, lease or value of real property if the chair declares that an open meeting may have a detrimental effect on the negotiating position of the public body (review of draft Conservation Restriction for property at 114 Ash Street, “Evergreen Farm”, so-called). A vote regarding whether to go into executive session is expected; and votes may occur during the executive session.

Ms. Hawkins moved, Mr. Preble seconded, and the Commission voted unanimously to enter executive session.

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Ms. Hawkins moved, Mr. Preble seconded, and the Commission voted unanimously to exit executive session and commence the open meeting.

Open Session 7:10 PM

1. **Public Meeting: Request for Determination of Applicability (continued):** 16 Donovan Drive, Applicant: Daniel Chiango, Re: Construct a 24’x32’ barn *This matter has been continued to 3/4/2024 by request of the applicant.*
2. **Public Hearing: Notice of Intent (continued):** 125 River Road, Applicant: Michael Fusco, Re: Construction of a roadway, driveways, and associate grading, DEP# 78-07XX *Continued to 3/18/2024*
3. **Public Hearing: Notice of Intent (continued):** 154 Middle Street, Applicant: Joseph & Margo Cooper, Re: Continue work on a single-family home and associated grading and utilities, DEP# 78-0769

Consultant Thorsten Akerly appeared on behalf of the applicant. He said that the applicant received a letter from the state’s Division of Fisheries & Wildlife Natural Heritage & Endangered Species Program (Natural Heritage) saying that the prior letter remains effective with the same conditions for turtle protection applying. Natural Heritage has no issues with the additional stormwater management structures.

Also, the applicant has provided the Commission an operations and maintenance plan for the drainage structures, including ongoing inspection of the swale and similar provisions. These requirements are tied to the property in perpetuity.

Ms. Greene said that with these additional documents, the applicant’s Notice of Intent (NOI) is straightforward.

Ms. Hawkins moved, Mr. Preble seconded, and the Commission voted unanimously to close the public hearing for this matter.

Ms. Hawkins moved, Mr. Preble seconded, and the Commission voted unanimously to issue an Order of Conditions for the proposed work, with special conditions requiring that

1. All work shall conform to the following approved plans and documents, copies of which are included herewith:
 - “Proposed Building Permit Site Plan #154 Middle Street, Subdivision Lot 2, West Newbury” dated August 18, 2023 and revised January 23 2024;
 - “Proposed Interim Drainage Design 154 Middle Street & 2 Kimball Road, West Newbury” dated January 18, 2024;
 - NHESP letter dated February 6, 2024 NHESP File No.: 23-8374 (20-39601);
 - NHESP letter dated September 30, 2020 NHESP File No.: 20-39601;
 - “Operation & Maintenance Plan for the Proposed Interim drainage Design & Building Permit site Plan at 154 Middle Street & 2 Kimball Road West Newbury, Massachusetts”, no date;
 - “Turtle Protection Plan Lots 1-3 Middle St./Kimball Rd.” dated September 9, 2020
2. The turtle protection plan dated September 9, 2020, prepared by Williams & Sparages, attached to and incorporated in this Order, shall be implemented as submitted and approved by the NHESP program.
3. Erosion control shall consist of a trenched, staked, silt fence and a temporary crushed stone berm and shall be installed by the applicant as shown on the above referenced plan and shall be inspected and approved by the WNCC prior to any other work under this Order.
4. The stormwater management system described in the “Proposed Building Permit Site Plan #154 Middle Street, Subdivision Lot 2, West Newbury” dated August 18, 2023 and revised January 23 2024 and “Proposed Interim Drainage Design 154 Middle Street & 2 Kimball Road, West Newbury” dated January 18, 2024 shall be perpetually maintained in functioning order according to the “Operation & Maintenance Plan for the Proposed Interim drainage Design & Building Permit site Plan at 154 Middle Street & 2 Kimball Road West Newbury, Massachusetts” by the current and any future property owners.
5. Special Condition number 4 shall run with the land and shall remain in full force and effect after the issuance of a Certificate of Compliance.

4. **Enforcement Order Update: 154 Middle Street, FKA 14 Kimball Road Lot 2, DEP# 78-721, Re: Continuing discharge of material into wetlands**
5. **Enforcement Order Update: 2 Kimball Road, FKA 156 Middle Street, FKA 14 Kimball Road, Lot 3 Re: Continuing runoff issues contributing to discharge of material into wetlands**

Ms. Greene noted that the Commission now has received a wetlands restoration plan as well as the operations and maintenance plan. Thus, it can determine whether to amend the outstanding enforcement orders for the two properties. Mr. Akerly said that restoration work to remove materials from the wetland could start in mid-April and would take perhaps 6 weeks to complete. Mr. Akerly and the Commission members agreed that it would be good to finish this work before the growing season. Mr. Akerly suggested a May 1 deadline for completion of restoration work. He said that if the work encountered a delay, the property owners will notify the Commission and seek an extension.

Ms. Hawkins moved, Mr. Preble seconded, and the Commission voted unanimously to amend the enforcement order issued to 154 Middle Street, FKA 14 Kimball Road Lot 2, DEP# 78-721 to approve the restoration plan with a cleanup deadline of May 1, 2024.

Ms. Hawkins moved, Mr. Preble seconded, and the Commission voted unanimously to amend the enforcement order issued to 2 Kimball Road, FKA 156 Middle Street, FKA 14 Kimball Road, Lot 3 to approve the restoration plan with a cleanup deadline of May 1, 2024.

6. Public Hearing: Notice of Intent: 24-26 Bridge Street, Applicant: Myfanwy Collins, Re: After-the-fact permitting for an under driveway culvert replacement, DEP# 78-7XX

Ms. Greene reported that the NOI has been received along with photos.

Ms. Hawkins said that this situation is tricky because no engineered plans are provided. Homeowners Myfanwy Collins and Linda MacDonald said that they have spoken with Millenium Engineering, which will be working with them on this. Ms. Greene and Ms. Hawkins explained that if the culvert does not meet engineering standards, it will need to be replaced. With the intense storms, many culverts are being blown out and the concern is that if that occurs, there would be a need for more restoration work.

The homeowners reported that the replacement culvert has been working well and Ms. Greene said that the photos indicate that the culvert is conveying water but there may be an issue with some water going outside the sides of the culvert, potentially creating a scouring situation that could damage the driveway and affect wetlands. This also makes it advisable for an engineer to look at it, she said. The engineer will need to show that the culvert meets the Wetlands Protection Act standards for a stream crossing.

Ms. Greene said that she would welcome a call from Millenium so that she can explain what is needed for the NOI. *The Commission determined that a full wetlands delineation is not needed in this case, but a hydrologic and hydraulic (H&H) study is needed to ensure that the culvert is properly sized.* Mr. Preble added that Millenium should also be able to determine how to ensure that the water is directed into the culvert.

Because a DEP number has not yet been assigned, *the matter was continued to March 4, 2024.*

7. Enforcement Order Update: 0 Baileys Lane, Parcel R13-82A, Long Hill Orchards, Re: Filled wetlands

Ms. Greene reported that she had heard back from the contractor Conner Lincoln and the property owners that they intend to comply with the restoration deadline. Thus Ms. Greene will drop this item from the agenda until there are further updates. Mr. Parrott asked about the metrics for monitoring progress in removing materials from the wetlands. Ms. Greene said that monthly reports of restoration activities and truckloads of materials hauled off site was a condition of the restoration plan and evaluation of progress would occur through observations of the site.

8. Enforcement Order Update: 22-24 Main Street - PRSD, Re: Continuing sedimentation into intermittent stream, DEP# 078-0701

No update

9. Enforcement Order Update: 0 Middle Street, Lower Artichoke Spillway, Re: Siltation into Artichoke River, DEP# 78-749

Ms. Greene reported that Newburyport successfully finished with work at spillway portion of the Artichoke dam. Phase 2 will involve tree removal on the earthen dam. The Enforcement Order can't be lifted yet as Natural Heritage has required a site visit in the spring to determine if a cleanup is needed downstream of the site for any sediment deposits. This will be taken off the agenda for now until there is an update.

10. Discussion: Continuing drainage issues at 335 Main Street

Anne (appearing in person) and Manuel (appearing via Zoom) Sanchez-Felix were present to discuss drainage issues at the home at 335 Main Street, which experienced significant flooding and failure of a culvert under their driveway in the serious storms that occurred in August 2023.

Ms. Greene explained that the culvert under the driveway (which undergrounds an intermittent stream running from a large wetland located on property owned by 331 Main Street) failed, collapsing part of the driveway. The culverted stream under the driveway connects to a Massachusetts Department of Transportation (DOT) culvert that runs under Main Street, which is a state highway. Ms. Greene said that there had been conversations about a request for an emergency certificate with Selectboard Chair Wendy Reed and Ms. Greene, but the Commission cannot make such a determination itself without a determination from a state or local agency finding a threat to public safety—and no such determination has been presented to the Commission. It is the position of the Town agencies that there is no public safety threat and thus no emergency. Additionally, MA DOT had indicated that while they support the culver work being done quickly, they would not be ordering it as an emergency. MA DEP has confirmed that without a town or state official ordering that the work is an emergency, the Commission is correct to not issue an emergency certificate under the state regulations.

Mr. and Ms. Sanchez-Felix expressed great frustration with the situation. Ms. Sanchez-Felix said that they could not even find consultants until December. They have been trying to do the right thing but have encountered continuous obstacles and are reaching the exhaustion point. The Sanchez-Felixes do believe there is an emergency and with heavy spring flows followed by freezing, persons using Main Street will encounter a safety hazard.

Mr. Sanchez-Felix said that where the stream goes back undergrounded near his garage the culvert is 16", but the connecting DOT culvert is only 12"—and notwithstanding a meeting with state Senator Tarr, DOT says it does not want to change anything. The Sanchez-Felixes said that DOT had to do excavation at the end of the driveway and discovered that the 16" under-driveway culvert was not even connected to the DOT system that ran across Main Street. DOT changed it so now two channels of water join together at the end of the driveway, increasing volume and velocity of flows.

Ms. Hawkins said that given the Town's position that this is not an emergency, an emergency declaration will need to come from a different agency. The homeowners could seek a declaration from the police, the DOT, or some other agency. Findings by consultants hired by the homeowner themselves involve a conflict of interest when it comes to determining an emergency.

Mr. Sanchez-Felix said that the old clay culvert under the driveway collapsed and all they want to do is replace it. He asked several times why such a replacement would require an NOI and supporting consultant work. Ms. Greene said that even though it is culverted the stream is a protected resource area under the Wetlands

Protection Act and compliance with the requirements cannot be waived. She noted that a few years before when the Sanchez-Felixes undertook work to pave and expand the driveway, the Conservation Agent at the time sent them an email saying that a filing for that work which was in the 100' buffer zone of the bank of the stream where it is above ground was required—but a filing was not done. She said it would be hard to say that the unpermitted work to construct the garage, and the conversation of the driveway from gravel to pavement and widening of the driveway that is evident on GIS mapping has not contributed to the current issues.

Mr. Sanchez-Felix expressed doubt that water in a culvert could constitute a wetland. Mr. Parrott replied that water in the culvert is within the definition of a wetland. It is a stream. Doing work to install stones, to replace the culvert is all work in a wetland. Ms. Greene said that with an NOI, the applicant has the burden of showing that the work will not adversely impact a wetland resource.

The Sanchez-Felixes said that perhaps they could do nothing and wait for an emergency to occur that is finally agreed upon to be an emergency. Perhaps, they said, they could let the stream flow above ground. Ms. Greene said that the homeowners do not have to do anything under the Wetlands Protection Act and restated that the Commission cannot make the determination that there is an emergency. Mr. Sanchez-Felix said that their hands are tied because the water is coming in from the property above theirs over which they have no control and running out into the undersized DOT culvert over which they have no control.

Ms. Greene said that if the Sanchez-Felixes want to do something about the failed culvert making a hole in their driveway, they need to file an NOI with the Commission. She noted that in acting on an NOI, the Commission may order restoration work addressing unpermitted work such as the driveway paving. In response to Mr. Sanchez-Felix' observation that this makes no sense and there are always degrees of flexibility in such matters, Ms. Greene and Commission members stressed that the Commission is acting under state law tying its hands in terms of compliance requirements.

Mr. Sanchez-Felix again expressed his anger and frustration, noting that even his consultant John Morin of the Morin Cameron Group was confused about this situation. Ms. Greene said that Mr. Morin had never spoken with her about this work. She said he was welcome to phone her tomorrow. She would be happy to walk him through the NOI process and explain how he will have the burden of showing compliance with stream crossing standards. She said that as with the matter concerning a culvert replacement that was just discussed prior to this agenda item, a wetlands delineation would not be required but an H&H assessment would be needed. Mr. Sanchez-Felix said that they do not want to pay for such an assessment. Ms. Hawkins said that the assessment would bolster the homeowners' position with DOT. Ms. McCraven and other Commissioners said that they could not responsibly act on the NOI without knowing what an H&H assessment would say. Ms. Hawkins added that not having this information puts the homeowners in peril.

The Sanchez-Felixes restated their dismay at dealing with so many governmental entities with no flexibility, the upstream and downstream matters over which they have no control, and the problems created with climate change.

11. Discussion: Wetlands Protection Bylaw

Ms. Greene reported that changes have been incorporated into the bylaw and work is progressing on the regulations.

12. Approval of Minutes: December 6, 2023

Deferred

13. Approval of Minutes: December 11, 2023

Deferred

14. Approval of Minutes: January 8, 2024

Deferred

15. Approval of Minutes: February 5, 2024

Deferred

16. Approval of Minutes: February 12, 2024

Deferred

17. Land Agent: Update on CPC funding request for Sawmill Brook crossings

Ms. Greene said that she met with the Town Manager and the Chair of the Selectboard/Community Preservation Committee (CPC). They are considering \$50K CPC application for design, engineering, permitting, and construction for a footbridge to cross a perennial stream to provide access to trails on the newly-acquired Sawmill Brook open space property. This is slated for the CPC's agenda this Thursday. If the Commission supports the proposal, Ms. Greene will provide the CPC a letter of support. Unrelated to the footbridge, ultimately, the hope is to connect to trails in the Deer Run development, but certain locations would require very costly construction projects. It was thought that Essex County Trails Association might take on some of this, since some of their trails are involved.

The Commission unanimously agreed to support the bridge proposal.

18. Conservation Agent:

Ms. Greene asked for and received Commission interest in participating in the March 20 Selectboard meeting with the Finance Committee that will discuss the wetlands bylaw and the Commission budget.

A Select Board meeting is scheduled for February 26 at 5:30 pm in executive session to discuss the Evergreen Farm conservation restriction proposal and the question of MassWildlife assertions of ownership of certain land near Ash Street.

19. Commission Representative to Open Space:

Mr. Parrott reported that the Open Space Committee would be meeting tomorrow in person.

20. Commission Representative to Community Preservation Committee:

No update

21. Other Business:

Ms. Greene said that two Requests for Determination of Applicability have come in. One, concerning construction at 37 Coffin Street, warrants a site visit and the other at 137 River Road concerning tree removal might be best seen on a drive-by basis since parking is difficult at that site. Also suited for a drive-by look is 24-26 Bridge Street.

Ms. Greene said that for the Municipal Vulnerability Preparedness grant concerning flooding at River Road and its environs, 5 citizen science signs will be placed along River Road. One is proposed to be located on the trail approaching the Indian River Bridge at the last location that can be reached during high tide flooding. Ms. Grammer, who chairs the Town Climate Change Resiliency Committee, said that the signs would not be very big and would generally be placed on telephone poles or other existing signs. The one near the poles River Bridge would be held up with a small metal stake that would be driven into the ground with a post driver.

Ms. Hawkins moved, Mr. Preble seconded, and the Commission unanimously approved driving a post on the trail approaching the Indian River Bridge for the climate change signs.

22. Informal Discussion:

Ms. Grammer said that to meet the state's 2050 decarbonization goals, electric utilities are planning tremendous electric grid buildout projects that will involve a number of construction projects, many of which will require approvals from Conservation Commissions throughout the state.

23. Upcoming Meetings: March 4, 2024 - Regular business public hearings & meetings

Adjournment 9:09 pm

Meeting Documents

Presentations and records associated with each matter identified, as included in the Conservation Agent's files.

Respectfully submitted