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AUG 07 2020  
TOWN OF AYER  
TOWN CLERK

## **Town of Ayer Conservation Commission**

Town Hall \* One Main Street \* Ayer, MA 01432 \* 978-772-8249

Minutes for 5/14/2020

Location: Remote Meeting via Zoom, accessible to public, due to Pandemic State of Emergency

Present: Jon Schmalenberger (JS, Chair), Mark Phillips (MP, Vice-Chair), George Bacon (GB, Member), Jennifer Amaya (JA, Member), Jessica Gugino (JG, Member/Clerk), Jo-Anne Crystoff, (CA, Conservation Administrator)

Not Present: Scott Murray (SM, Associate Member)

### **Broadcast and Recorded by APAC**

- **7:00 PM – Open Meeting**

- Throughout the meeting, JS periodically asked for input (questions or comments) from members of the public viewing the meeting remotely (via Zoom or live broadcast).
- CA informed the Commission of procedures (“best practices”) that would be followed by APAC and IT Director Cindy Knox if there were any disruptive incidents of “Zoom bombing,” as recently experienced during an on-line Planning Board meeting.

- **Confirmation of Agenda**

- GB moved to confirm the agenda as posted; MP 2<sup>nd</sup>.
  - Motion approved unanimously.

- **Approval of Meeting Minutes**

- GB moved to accept the minutes for 4/23/2020 as written; MP 2<sup>nd</sup>.
  - Motion approved unanimously by Roll Call Vote 5-0.

- **Discussion: Authorization of Conservation Agent to sign signature page of permits during State of Emergency**

- In the wake of the Governor’s Executive Order 17 declaring the COVID-19 State of Emergency and his “Municipal Relief Act,” MassDEP and the Registry of Deeds have now issued more guidance that affects how conservation commissions can proceed with their discretionary authority to issue recordable permits while meeting remotely via Zoom.
- CA prepared a draft “Certificate of Vote” that authorizes CA to “physically sign” permits “on behalf of the Commission so directed by vote of the Commission.”
  - Since Orders of Conditions must be recorded at the Registry of Deeds, and the Registry requires original ink signatures, this allows CA to provide an original signature on behalf of the Commission.
  - GB received clarification that CA can only sign on behalf of the Commission so long as the Commission has previously voted to approve a permit application.
  - MP received clarification that this authorization to sign on behalf of Commission members ends when the State of Emergency is lifted.
- GB moved to approve the Certificate of Vote as described above; MP 2<sup>nd</sup>.
  - Motion approved unanimously by Roll Call Vote 5-0.



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- CA said she must now send this to Town Clerk Susan Copeland, then it goes to Town Counsel, and from there, to the Registry of Deeds where the Certificate of Vote itself must be recorded and assigned a Book and Page reference before it goes into effect.
- CA also noted a secondary issue that has not been resolved by the State.
- MassDEP has a 10-day appeal period during which it can question a commission's issuance of an OOC.
  - The clock on the 10-day appeal period (for DEP or abutters or applicants) starts on the day that CA issues/mails the signed OOC to the applicant and DEP.
    - With the Municipal Relief Act, this appeal period for DEP is technically extended to 45 days after the end of the State of Emergency.
  - How does this work if ConCom issues an OOC for a project to move forward, but DEP's appeal period extends this far?
  - With ConCom being advised by Town Counsel to use its discretionary authority to *not* move forward on potentially controversial applications during the State of Emergency, CA suggested one approach would be for her to contact our DEP Circuit Rider to see if a particular application would or would not be likely to trigger a DEP appeal.
    - Hopefully, this too will receive further clarification as MassDEP continues to grapple with procedures to employ during the pandemic.
- **Public Hearing (cont'd.): Notice of Intent (NOI) – Spectacle Pond PFAS Treatment Plant, Ayer Department of Public Works (DPW), MassDEP # 100-0443**
  - Assessor's Map 17, Parcel 7
  - Previously, ConCom continued this Public Hearing because it cannot issue an Order of Conditions (OOC) until Natural Heritage & Endangered Species Program (NHESP) has reviewed and issued its own permit or made comments.
    - Those comments had not been received by ConCom.
    - In addition, any special conditions imposed by NHESP are also incorporated into the OOC issued by ConCom.
  - CA contacted DPW Superintendent Mark Wetzel to ask about the status of the application regarding the receipt of comments from NHESP.
    - He forwarded her query to Maggie Lofstedt, the civil engineer consultant from CDM Smith, Inc.
    - Ms. Lofstedt contacted CA directly to say that, yes, NHESP had responded back on March 20 with a comment requiring a turtle protection plan, and that Oxbow Associates was hired to create that plan.
      - ConCom had not previously been notified of this.
    - In addition, Ms. Lofstedt said that she had heard verbally from NHESP that they were going to accept the turtle protection plan.
  - CA will contact NHESP directly to follow up and confirm, as well as to see what NHESP conditions must be put into ConCom's OOC.



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- While there was concern that ConCom not itself hold up this public services project, it will still take at least until the next meeting before the Certificate of Vote (see above discussion) is itself recorded at the Registry and goes into effect.
  - An OOC cannot be recorded at the Registry until the Certificate of Vote has itself been recorded.
    - That being the case, and there being no public comments, GB moved to continue the Public Hearing to 5/28/2020; MP 2<sup>nd</sup>.
      - Motion approved unanimously by Roll Call Vote 5-0.
- **Public Hearing (cont'd.): NOI -- 0 Washington Street, "Ayer Solar II LLC," Rohit Garg, MassDEP # 100-0444**
  - Assessor's Maps 13, 12 & 4, Parcels 13-1, 13-2, 12-1, 4-49
  - Town Manager Robert Pontbriand has signed the third-party consultant contract with EcoTec.
  - CA has set up accounts with Accounting, one to receive the funds from the applicant to pay for the consultant, and a second to be used to disburse those funds in payment.
    - Goldsmith, Prest & Ringwall (GPR) has been asked to contact the applicant and have them send a check for the contract amount of \$10,680, for deposit into the special account.
  - EcoTec has said they will get right onto this review.
  - GB moved to continue the Public Hearing to 5/28/2020; MP 2<sup>nd</sup>.
    - Motion approved unanimously by Roll Call Vote 5-0.
- **Public Hearing (cont'd.): Notice of Intent (NOI) – Off Shaker Road – "Shaker Mill Pond," Open Space Residential Development, Aho Development Corp., MassDEP # 100-0437**
  - Assessor's Map 36, Parcel 18, and Map 43, Parcel 3
  - Because the Certificate of Vote will not go into effect until at least the next meeting, GB moved to continue the Public Hearing to 5/28/2020; MP 2<sup>nd</sup>.
    - Motion approved unanimously by Roll Call Vote 5-0.
- **Public Hearing (cont'd.): NOI – 270 Woodland Way, David Grubb, MassDEP # 100-0442**
  - Assessor's Map 36, Parcel 181
  - Because the Certificate of Vote will not go into effect until at least the next meeting, GB moved to continue the Public Hearing to 5/28/2020; MP 2<sup>nd</sup>.
    - Motion approved unanimously by Roll Call Vote 5-0.
- **Discussion: 2020 Weed Treatment of Ayer Ponds**
  - The 2020 weed contract with SOLitude Lake Management was reviewed.
  - CA noted that only very small amounts of invasive Fanwort were observed in Flannagan Pond, and questioned whether this should be included in this year's treatment.
    - Not using Sonar to treat for Fanwort in Flannagan Pond would reduce the contract amount by around \$8000, from roughly \$33,000 to \$25,000.



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- MP stressed that Sandy Pond should be kept in as good shape as possible, given the town beach and public use.
- With the economic fallout from the pandemic, all agreed that this year would be a good year to skip the Fanwort treatment in Flannagan, as well as to see what the impact of skipping a year would have.
- MP asked that a few corrections be made in the existing contract – updating the treatment guarantee to apply to the year 2020 rather than 2018, and discarding the use of Andover as an example.
- GB moved to approve the 2020 weed treatment contract with Solitude, minus the Sonar treatment in Flannagan, and with the corrections suggested by MP; MP 2<sup>nd</sup>.
  - Motion approved unanimously by Roll Call Vote 5-0.
- CA will have SOLitude provide a revised contract for Town Manager Pontbriand to sign.
- **Enforcement Orders Update (EOs): 0 Central Avenue, John Hillier**
  - Assessor's Map 26, Parcel 281
  - Mr. Hillier was present to participate remotely via Zoom.
  - Under discussion were the March 4 and the March 21 Ratified EOs.
  - March 4, 2020 EO
    - This EO was for the placement of blacktop paving material without a ConCom permit and within the buffer zone to an intermittent stream.
      - In addition, this paving was done on the thin sliver of property owned by Ruth Maxant Schultz, which Mr. Hillier has been crossing to access his property from Central Avenue.
      - ConCom specified the material needs to be removed, disposed of legally, with written proof of Ms. Schultz's permission provided to CA along with notification prior to work commencing.
    - CA said she just learned Mr. Hillier had spoken to Town Manager Pontbriand on Tuesday (5/12) about the need to remove the material by hand.
      - Meanwhile, CA had received an email from Denise Child, MassDEP Wetlands Section Chief, on May 4, suggesting that the requirement to remove the paving material by hand, rather than by machine, might not be necessary if the area affected was just the buffer zone and not reasonably likely to alter the resource area itself.
      - ConCom members were therefore in agreement to dispense with the requirement that the material be removed by hand.
    - JS asked to hear from Mr. Hillier directly.
      - Mr. Hillier said he was in favor of making things right with Ms. Schultz and ConCom on the paving, agreeing that paving had been placed on Ms. Schultz's property that shouldn't have been.
    - CA noted that the EO for this violation, issued March 4 but not ratified until April 23 (due to the pandemic), had called for a restoration plan to be delivered to ConCom by today's date but there was no such plan.



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- Mr. Hillier claimed that he had not received the EO until the day before, May 13.
- Mr. Hillier thought the pavement removal could be done with a simple scored cut by a machine, and that he would then take it to a recycling center for legal disposal.
  - CA said ConCom would want to see the receipt from the recycling center.
  - JG said ConCom had also asked that Mr. Hillier provide confirmation in writing from Ms. Schultz that he had her permission to do this restoration work on her property.
    - Mr. Hillier agreed this was a good idea, and would have his lawyer work on this.
- MP spoke to the importance of getting resolution on this issue and asked that this work be completed by ConCom's next meeting on May 28.
  - All agreed that this was a good deadline, but that it was of course contingent on Mr. Hillier's receiving Ms. Schultz's permission first.
- MP asked what was the status of Mr. Hillier continuing to traverse property owned by Ms. Schultz to reach the rough parking area on his property, noting that a previous conversation with Ms. Schultz to ConCom (see March 12 meeting) had indicated she was no longer happy with his use of her property.
  - Mr. Hillier said it sounded like the Commission was expressing concern with an issue that was not really its business.
  - MP noted that the area in question is buffer zone regardless, and that ConCom's concern was that everybody was on the same page so that things can progress forward to resolve the violation.
- Mr. Hillier also asked what he should do once the paving material was removed, since a considerable edge would be left – should he refill that area with gravel or push material from elsewhere on site to fill in the gap?
  - CA said that this decision had to be with the agreement of Ms. Schultz since it is her property.
  - GB said ConCom's concern here was that there be no increase in erosion.
  - Mr. Hillier is to come to an agreement with Ms. Schultz as to what can be done to re-fill the area after the pavement's removal, AND that their solution be reviewed by CA first to make sure there are no objections on the part of ConCom.
- March 21, 2020 EO
  - This EO was for continuing to do work (excavation, stump removal, grading) on a parcel with an existing EO/Cease & Desist (February 2019), still without a permit or engineered plan.
    - The EO, discussed and ratified at the 4/23/2020 remote meeting, requires that a restoration plan and Notice of Intent be submitted to ConCom by June 15.



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- CA referenced two emails sent to Mr. Hillier by MassDEP's Ms. Child, and copied to ConCom.
  - The first, on May 4, noted Ms. Child's attempt to contact Mr. Hillier by phone (cell and then business line) and then email, asking him to contact her.
  - The second, May 14, noted Mr. Hillier has not yet replied to Ms. Child, nor had other attempts to contact him by phone been successful.
    - Ms. Child then strongly recommended that Mr. Hillier attend tonight's ConCom meeting to discuss the EOs.
      - She warned that if MassDEP has to become directly involved, it can impose civil administrative penalties for these violations – so far better if Mr. Hillier resolved these matters "locally, and immediately."
- To ConCom, Mr. Hillier said the question of filing an NOI is "being taken under advisement" – meaning that he is seeking expert legal advice.
  - He reiterated his position that there is no intermittent stream crossing his property, just a drainage ditch.
    - "My position has been that it is a drainage ditch, my position remains that it is a drainage ditch."
  - JG repeated GB's suggestion from the previous meeting that Mr. Hillier could resolve this by filing something like an ANRAD (Abbreviated Notice of Resource Area Delineation – the wetlands were flagged last year by GPR for Mr. Hillier).
    - He could then appeal ConCom's position that it is an intermittent stream to MassDEP and get a final resolution.
  - Mr. Hillier said his intention at tonight's meeting was to express his willingness to correct the violation on Ms. Schultz's property.
  - CA reiterated that it would be a good idea if he were to respond to Ms. Child at MassDEP.
- JS asked Mr. Hillier directly what he planned to do regarding the intermittent stream vs. drainage ditch disagreement.
  - Mr. Hillier again said he was seeking legal advice and added that ConCom had provided no documentation that it was an intermittent stream.
    - JG began to reference the Sept. 18, 1947 Public Spirit article on the 'unnamed brook of the week' that flows down the hill from Washington Street as part of a wetland system, crossing Mr. Hillier's property and draining in Balch Pond, but was cut off by Mr. Hillier who repeated "no documentation."
      - (See minutes for 9/26/2019, which notes that a copy of this article was given to Mr. Burchard, of GPR, with Mr. Hillier present.)



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- Regardless, JG said the land itself contains the proof of it being an intermittent stream, but Mr. Hillier again said he wanted someone with more experience than him to determine this.
  - Mr. Hillier reiterated his view that there was no documentation, and JS responded that the Commission was not agreeing with him at all on this matter.
  - CA noted that the banks of an intermittent stream were delineated and flagged last year.
  - MP and CA brought up the EO's language that, if Mr. Hillier does not submit an NOI by June 15, ConCom could begin to issue fines of up to \$300/day until an NOI has been received.
    - Compliance with the submission of an NOI, as required by the EO, appears to hinge on whether Mr. Hillier agrees there is a jurisdictional intermittent stream crossing his property.
  - CA ended the discussion for tonight by saying that if Mr. Hillier commits to May 28 for removal of the pavement from Ms. Schultz's property, and restoration of the gap by whatever Ms. Schultz is comfortable with (and with CA's notification), that that is as far as the Commission can get with Mr. Hillier tonight.
    - JS asked Mr. Hillier to begin that process with Ms. Schultz, and CA will reach out to Ms. Schultz as well next week.
- **Enforcement Order: 0 Taft Street, Brian Anderson**
  - Assessor's Map 19, Parcel 119
  - Kevin Conover, of David E. Ross Associates, was present online on behalf of Brian Anderson, now the current owner.
    - (Note: EO issued to Abigail Anderson, then the landowner of record, now Brian Anderson.)
  - After a neighbor complaint, an EO was issued to Mr. Anderson on May 4.
    - Excavation, earth disturbance, and some vegetation removal was done in the bordering vegetated wetland (BVW) adjacent to an intermittent stream as well as within the wetland resource area of the intermittent stream itself.
    - In addition, two piles of crushed stone and a pile of loam were dumped on the property, and wetland soil had been removed.
      - Per CA's request, the piles of dumped stone were removed by the contractor, except for the final layer on the ground as removing this would have created more disturbance.
        - The pile of loam was allowed to remain if covered by a tarp.
      - The EO required a restoration plan be submitted by June 15.
    - Mr. Conover said Mr. Anderson was attempting to clean up the lot, which is across the street from his residence, and was not aware there were wetlands on the property.
      - Mr. Conover cited a 2011 Request for Determination of Applicability (see minutes, 3/10/2011), where the Commission voted to issue a Negative



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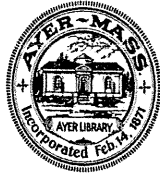
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Determination of Applicability, ruling there was a drainage ditch crossing the property, not an intermittent stream.

- There are BVW, however, and CA stated her opinion that the “ditch” is an intermittent stream.
  - In addition, she reminded Mr. Conover and the Commission that MassDEP holds that previous determinations ‘stay in the past’ and are not binding on future reviews of a commission.
- Mr. Conover said his client’s intent was to clean up the lot and create a nice informal area for the neighborhood to use for dog walking.
  - It will not be fenced.
  - Looking at the property from Taft Street, the area to the left of the stream would be restored to its original condition while the area to the right of the stream would be turned into a grassy area for dogs.
- Since Mr. Anderson has an intent to develop and improve the site in some manner, the EO will be revised to require an NOI submission, with a plan, rather than a restoration plan.
  - Per Mr. Conover’s request, the deadline was changed so that the NOI would be ready for review at ConCom’s July 9 meeting.
- GB moved to ratify the Enforcement Order as amended (NOI, deadline July 9); MP 2<sup>nd</sup>.
  - Motion approved unanimously by Roll Call Vote 5-0.
- **Discussion: Discretionary criteria for accepting applications and scheduling meetings during pandemic State of Emergency**
  - As previously discussed under the Certificate of Vote discussion above, the regulatory landscape is slowly evolving under the conditions of the State of Emergency.
    - CA has been on a number of conference calls discussing this.
  - Given the Municipal Relief Act, it is up to the *sole discretion* of conservation commissions whether they open Public Hearings on applications during this state.
    - At the same time, commissions will not want to be buried under a deluge of application reviews when the State of Emergency is lifted.
  - Various town counsels, including Ayer’s (KP Law), have advised that commissions refrain from opening public hearings on projects that could be controversial and draw public interest.
    - This is due to the potential difficulties some may have in participating or contributing input via remote connection, either Zoom or phoning in during a live broadcast.
  - Criteria suggested for determining if a project application might be deemed ‘controversial’ include:
    - volume of public interest;
    - scope of a project (i.e. subdivision vs. single resident project);
    - whether other permits must be in hand;
    - urgency of a project (i.e. emergency vs. landscaping);
    - order of receipt.





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- The public interest would be better served if projects that were likely to draw public interest were reviewable in an in-person meeting rather than via remote viewing.
  - As examples of public interest, CA noted that she had received 4 different inquiries from residents about Mr. Anderson's work on his Taft Street property (see EO discussion above).
    - Two calls have also already been received about a different project on Shaker Road for which CA recently received an NOI application.
  - For ConCom's next meeting, MP asked CA to put together a chronological list (in order of receipt) of projects/applications received for Commission review.
    - ConCom could then consider moving forward on projects that were likely to be uncomplicated.
  - From online, resident Ken Diskin, who also serves on the Planning Board where these issues are also relevant, asked how public interest could be determined.
    - GB mentioned how government projects hold an "open comment" period, and perhaps something like that could be employed.
    - Mr. Diskin also noted that another challenge was how to keep the public involved, something that gets more difficult when hearings are continued, risking that members of the public lose interest.
      - It's important that applicants don't take advantage of that in light of the difficulties faced by municipal boards meeting remotely under the conditions of the State of Emergency.
    - GB wondered how easily controversial projects could or would be appealed if their public presentation was solely via Zoom/live broadcast.
  - JS asked how well the means of public participation have been explained to people.
    - During live broadcasts on local cable (Ch. 8), a phone number is displayed at the bottom of the screen for people to call in directly with questions or comments during an ongoing meeting.
    - Posted agendas also contain information for joining a meeting via Zoom.
  - JA said she was mindful of the importance of maintaining public access, but was also hesitant about the Commission postponing too much work indefinitely given no one knows how long the current pandemic situation will last.
- **8:45 PM – Adjourn Meeting**
    - MP moved to adjourn; GB 2<sup>nd</sup>.
      - Motion approved unanimously.

**Minutes Recorded and Submitted by Jessica G. Gugino, Clerk**

**Date Minutes Approved by Conservation Commission:** \_\_\_\_\_

5/28/2020

**Signature Indicating Approval:** \_\_\_\_\_

*Jessica G. Gugino*