

## Conservation Commission Minutes, 09/01/2016

### Lenox Conservation Commission Landuse Meeting Room September 1, 2016 Minutes

**Members present:** Chair Neal Carpenter, (NC); Vince Ammendola, (VA); Tim Flanagan, (TF); Joe Strauch, (JS); Dick Ferren, (DF)  
**Absent with notification:** David Lane, (DL); Rose Fitzgerald Casey, (RFC)  
**Staff present:** Peggy Ammendola, Land Use Clerk (PA) and Gwen Miller, Land Use Director/Town Planner (GM)

**Notice of Intent (NOI) Scenic Mountain Act (SMA), Pittsfield Municipal Airport (PMA), 0 West Mountain Rd., Map 27 Parcel 24.** On May 15, 2014, the Conservation Commission issued a Negative Determination subsequent to PMA filing a Request for Determination for the re-clearing of an existing easement and the replacement of the existing beacon and beacon pole which had fallen into disrepair at property located at West Mountain Rd. Subsequent construction activities have resulted in additional impact within the areas subject to the SMA and the need for site restoration of construction access within and adjacent to the easement on land of Mass Audubon. *Informal on August 20, 2015 and the first hearing was held on September 17, 2015. Update on October 1<sup>st</sup> and continued for another update on October 15<sup>th</sup>. No one was present, nor was Commission contacted for the Oct. 15<sup>th</sup> meeting. Continued to November 5, 2015 and at that meeting this was continued again to December 3<sup>rd</sup>. The Lenox Conservation Commission (CC) attended a meeting of the Richmond CC on November 10, 2015 at 7:00 PM. On December 3<sup>rd</sup>, the NOI was continued to Jan. 21, 2016. On Jan. 21, this was again continued to February 4<sup>th</sup>. At the Feb. 4<sup>th</sup> meeting this was continued to February 18<sup>th</sup>. On February 18<sup>th</sup>, the seeding and grading phase was approved and the hearing was continued to July 21, 2016. On July 21, 2016 continued to Sept. 1, 2016.*

- Construction Access Road Restoration Final Plan provided by Stantec and dated August 16, 2016 was received electronically on August 17<sup>th</sup> and hard copies were received August 18<sup>th</sup>. These copies were provided to the members at their meeting on August 18<sup>th</sup>.

Present were John McLaughlin and Cody Miller of Stantec; Becky Cushing, Kate Buttolph and Evan Marshall of Mass Audubon; John Burns of Burns Environmental Consulting Services of Cummington; Doug Bruce of Berkshire Natural Resource Council (BNRC); Chair Chris Pedersen and Vice Chair David Keator of Pittsfield Airport Commission (PAC)

Jim McLaughlin of Stantec provided the Commission a consolidated plan and an overview of existing conditions. He said that the easement was purchased by the PAC in 1950 and it was cleared in 1950 or 1955 and that he is sure that no clearing has been done prior to the RDA since he has worked with the PAC in the last 30 years. There are two existing condition plots in the easement, which indicates what the mature forest looks like when regenerated on its own. Audubon wants the area replanted with the cover type that is in these plots. The proposal is to plant 2,200 seedlings by hand, a robust amount, but taking into account that many will not survive the first year. They would order the plants for the 2017 spring planting. There is a five year monitoring plan and success standards are to be met at the end of the 5 year period. If deficiencies exist as documented in the final report, remedial measures will be developed and implemented the following growing season and an additional monitoring year will be added and repeated until the approved success standards have been addressed. Monitoring will include checking of erosion and inappropriate use of the trail.

Regarding the easement, Mr. McLaughlin said that the PAC has the only rights to the easement and doubts that there will be any reason to go up to the beacon with the heavy equipment as was done previously which led to the need for restoration. Maintenance, replacing lights, etc., can be done with a smaller ATV. Stantec doesn't condone the use of Audubon property by others.

Mr. McLaughlin conceded that there had been a breakdown in communication and that they are paying dearly for it. Stantec and the PMA want to make it right and are hoping that the Commission will approve tonight. Even so, he feels confident that from a distance, no one could tell that this construction had taken place. TF disagreed, saying that he can see the road every day from his office, and added that the focus needs to be the best course of action to correct the damage that has been done. He believes that significant progress has been made. He has a lot of questions on detail.

Mr. Burns said that he was hired by the Conservation Commission to look at Stantec's plan, which was finalized last week; to see what he thinks would be a logical approach, identify problems and come up with some creative solutions. He asked that someone brief him on the original proposal and what the Commission is expecting in the final outcome. He understands the six foot access that is needed.

JS interrupted to read an excerpt from the September 17, 2015 letter written by Attorney Kathleen Connolly of Louison, Costello, Condon & Pfaff, LLP, legal counsel for Mass Audubon. It reads:

"Mass Audubon requests that any references to the illegal access ways having been 'improved' be deleted from the restoration plans. These are illegal impacts to the natural environment on Mass Audubon lands, not an improvement in any sense of that word from the perspective of the impacted landowner." He added that Audubon wants the path completely closed and does not want vehicles up there. Mr. Burns asked if this was a letter early on in this process, and JS agreed, stating that since then there has been nothing new. Mr. McLaughlin responded that there have been discussions, correspondence, meetings and site visits with Ms. Cushing and Tom Lautzenheiser and insists that the PAC has had the undeniable right to go across this property for 66 years. TF said the Commission has a copy of the easement and has read it, but that the Commission has heard different interpretations. One interpretation of the easement is that the PAC originally had the right to perambulate all the properties and pick a route and once the route was established it became the premises of the easement. The PAC continued to have the right to access and service the line, in whatever form, below or above ground, along that established route. TF said that is different from Mr. McLaughlin's interpretation which seems to preserve the right to access properties from any place. This, TF said, is a dilemma for the Commission to figure out whether or not any plan for restoration, which would include long term monitoring, would remain open and available for access. "If it is, we can establish and monitor a plan and agree on that. If not, if any land owner says you can't go on the path, not talking about the power line easement, the path, if an owner

says that it is closed to you now then our option under the SMA would appear to be that the Commission could order an entire restoration of everything including the path.”

Ms. Cushing said that Mass Audubon’s up to date position is that they understand that the PAC needs access for emergency beacon maintenance. Mass Audubon understands that the PAC would still need to be permitted under the SMA to establish any permitted access path. No new legal documents have been presented assuring access along the path in perpetuity.

Mr. McLaughlin said that the path is a part of the NOI for the SMA and any approval would include the path.

Mr. Burns said that after reading the report several times, in general he finds that Stantec has done a terrific job given their experience and resources they have. He says that he is familiar with their work. He has walked the property and has found that the initial grass seeding has taken well. He questioned stormwater analysis and said he would like a more detailed erosion control plan. Mr. McLaughlin responded that there had been great concern in the beginning when the land was disturbed, but even before the first seeding was done, there was virtually no detectable erosion. He added that there is no excessive stormwater runoff. Calculations have been made by using standard scientific engineering data which is accepted by virtually every agency in the United States that shows there isn’t an increase of flow off of site. He said that temporary erosion control went in the fall which included water bars to help to get through the winter and they were backed up this spring with a more elaborate placement of water bars to prevent concentrated flow. Most of the flows should be following in its normal path. He said that they are not changing, in any significant nor detectable manner, the direction of the flow off the mountain. Mr. Burns disagreed with Mr. McLaughlin and stated that the work that was done to the site significantly altered the rate of water flow as it has gone from forested to no canopy cover.

Mr. Burns asked about the downed tree trunks all along the edge, especially the downhill edge. Mr. McLaughlin said that their plan is to take most of them and cut into small pieces, to help define the path, but would skew them as they do not want it to look like a park trail. Mr. Burns suggested using them in a combination, e.g. woody debris, and to partially bury the logs and angle them. With these materials and rocks, a rough surface is created and slows down runoff. It will not be attractive, but it is very functional. Woody debris in the trail is also good as it slows down the flow. He noticed some cobble stone which created a dry well. He encourages them to think of and continue to have collection spots such as this.

Mr. Burns advised to keep an eye on where the flows are going. He liked that the plan called for hydrogel and the species list, but he would like more detail on the planting pattern. He recommended specific species in addition to the trees and to be cautious about some nursery stock. Some of the plants that can be found at the top would be good planted below and he suggested collecting specimens from the area. He felt that the plant list was good. Mr. McLaughlin said that at the last meeting there was strong opposition to transplanting, which is why they are planning for nursery stock. JS said that he felt that transplanting would create more disturbances. Collecting seed, from some plants, e.g., grass was encouraged, cutting from the plants, and shaking the seed loose.

As far as maintaining, Mr. Burns suggested back pack sprayers, and water collection cisterns and to involve volunteers perhaps from Mass Audubon and the PMA.

Mr. Burns likes the monitoring plan as it makes lots of sense, but suggested to monitor in June and September rather than once a year.

With regards to invasive plants, Mr. Burns recommends that when they are seen, to get rid of right away. Bittersweet should be treated early in the season and he advised that Mass Audubon should keep an eye out for it.

Limiting ATVs has proven to not be effective. Mr. Burns said that he has seen gates torched or hacksawed, trees cut and rocks moved to gain access on other sites. He has observed a trail that is more than 6 to 8 to 10 feet wide going up to the tower. Off to the west there is a dirt road to the other tower which comes off one of the developments.

TF asked Mr. Burns to comment on the duration of monitoring. Mr. Burns feels that five years is reasonable with a pattern being set by the 4<sup>th</sup> or 5<sup>th</sup> year. Mr. McLaughlin asked Mr. Burns if he has seen other agencies monitoring programs for periods longer than five years and Mr. Burns said that he hadn’t. Mr. McLaughlin said that if by year three, they saw nothing happening, they would take corrective action.

Ms. Cushing clarified that there are two separate issues. The first issue is to permit the restoration and the second issue is permitting permanent access. She is pleased to hear of the coarse woody debris and logs being positioned along the trail edges. She asked what kind of equipment would be used. Mr. McLaughlin said that they might use a small ATV and chain saws and that he hopes that it will all be done by hand. This would be done at the time of the plantings and this would start in the spring of 2017.

Mr. McLaughlin confirmed that the survey, which is actually a recovery of the property boundary line, has been completed. It is not a boundary survey. Foresight Land Services did the work on it. Ms. Cushing would like to have a copy of the work. Mr. McLaughlin will ask Foresight for this. She also feels that a monitoring plan isn’t sufficient. Since planting is to be done in the spring of 2017, she feels that the first year of monitoring would begin 2018. Ms. Cushing asked if there was a process for checking on this project with the Commission or landowners and TF told her that it would depend on how the conditions were written. Mr. McLaughlin said that they would be giving reports to the Commission.

Regarding the separate permitting for the establishment of the path, Ms. Cushing said that she noticed that the wording is for “six foot wide minimum”. She thought that it would be “six foot wide maximum”. Mr. Pedersen said that the vehicle they will be using is 5 feet 8 inches wide. So it must be a minimum of 6 feet but in some places it may need to be wider. He said that if they were held to exactly to six feet wide someone could be killed. The area would determine the necessary width. Ms. Cushing requested a detailed plan to show the widths. She feels that a boundary needs to be established to be sure over time it doesn’t get wider. She wants to avoid vague language. Mr. Pedersen said that that could be done, but pointed out that if a tree were to come down across the path, some deviation would have to take place. TF confirmed that Ms. Cushing was requesting that there be stipulation as to what would be allowed under routine maintenance. Ms. Cushing said that if a permitted access path needs permanent monitoring, it should be built into the permit. Mr. McLaughlin said that if they do an annual maintenance, they would make a report to Audubon and to the Commission, such as an email that would inform the parties and notify Audubon if they see indications of trespassers. He pointed out that Audubon would be responsible for taking action, not the PAC. Ms. Cushing said that one way Mass Audubon deals with motorized vehicles is to block with trees. She would like to do that, but if the road is permitted, she can’t do that. JS said that at this point it hasn’t been established that it will be a permitted. NC thought that this was a part of this NOI. Some of the Commissioners felt that there would have to be a separate Notice. GM recommended that all parties needed to know about the easement. It was agreed that the City Solicitor of Pittsfield and Audubon’s attorney give their opinion on the easement language and then GM will have Town Counsel review. NC and GM thought that access was going to be allowed, but were waiting for a plan from Stantec. NC said that the path is already in existence. TF responded that if there was a path there, it was not being used legally and the work that the Commission is concerned with was new unpermitted work and whether there was a path there or not it was irrelevant. NC said that Ms. Cushing has continued to say that if emergency access were needed, and there was no other

alternative, and it is permitted under the SMA, then Mass Audubon could not stand in the way. Ms. Cushing said that she would get a formal statement from their legal counsel.

TF said that if the Commission were to receive a new application from Mr. McLaughlin and he was asking for a new curving trail to get up to the beacon instead of the power line the Commission would need to know from Mass Audubon's legal team if the easement holder would have automatic permission and right to do that or if new easement language needed to be required to alter the existing location.

Ms. Cushing said that it seems that there is another possible discussion. Maybe there isn't a right, but maybe a negotiation. She stated that what she is hearing about intent and responsibility makes her think that it isn't a reality.

VA responded that if in fact the easement gives the PAC the right to use the access in whatever form it takes, emergencies, preventative maintenance, etc., the Commission would have to look at one way, but if Mass Audubon's legal team says that Stantec does not have the right of passage, then there would be restoration and there would be no path. SMA approval would not be necessary because access would not be allowed. NC questioned if it could be taken by eminent domain as access would be necessary for the beacon. Mr. McLaughlin once again said that the airport commission believes that they have that right to access. VA said that the extent of restoration is based on the supposition that the airport has the ability to go on the path whenever they need to. If the airport doesn't have the ability, then the restoration is something else than what is presented. There may be another way to get over the land that hasn't been investigated which would make this superfluous. Mass Audubon could then block off their property and the airport no longer has custodial problems. NC said that this access is the easiest way.

Mr. Bruce commented on the straw wattles that are wrapped in plastic netting. He encouraged that they be removed as soon as possible for the safety of the wildlife.

TF expressed that he felt that they were making progress although there were still some questions that needed answering. He said that with Mr. Burns' help, conditions supporting the plan could be included in the Order of Conditions.

Action points:

- Ms. Cushing will get a written opinion of the easement language from Mass Audubon's legal counsel.
- The PAC will get a written opinion of the easement language from the City of Pittsfield's City Solicitor.
- Lenox's Town Counsel will review the opinions and the Commission will rely on her opinion.
- Mr. Burns will send his comments and/or recommendation.
- Mr. McLaughlin will ask Foresight Land Services to provide a copy of their work on the survey to Ms. Cushing.

A detailed plan of the path will be made showing the width at various points.

Mr. Burns recommended that the plantings should be installed as soon as possible. Mr. McLaughlin said that they would order once they have approval from the Commission.

VA made a motion to continue the hearing to October 6, 2016 at 7:30 PM. DF seconded the motion and the Commission voted to agree 5-0.

#### **Approve Minutes-**

August 18, 2016-DF made a motion to approve the minutes as amended. JS seconded the motion and the Commission voted to agree 5-0.

#### **Other Business:**

- RDA from Mass DOT-work where there is a washout on the west side of Rt. 7 & 20.
- Stone Ledge, Map 45 Parcel 54-There will be a request for a partial Certificate of Compliance. There is a Conservation Restriction, but it must be presented to the Commission and then to the state to complete the process.
- NOI for Ed Merritt, 139 Lime Kiln Road, Map 27 Parcel 18-2. This had been submitted since the last meeting, but there were inconsistencies and errors in the NOI fees so Rob Akroyd of Greylock Design was asked to pick up and refile. Mr. Merritt wanted to begin work of the studio, but NC advised that that Order had run out a year ago. They will be requesting a partial Certificate of Compliance.
- Eli and Carolyn Newberger-132 Lime Kiln Road, Map 27 Parcel 34-They want to commence with a previously approved project and do additional work. They will be filing another RDA to put in a mudroom and remove dead trees.
- Site Visit for the trail-Joe Toole, 439 Pittsfield Rd., Map 33 Parcel 1. September 17, 2016 at 10:00 AM.

VA made a motion to adjourn and DF seconded the motion. The Commission voted to adjourn 5-0 at 10:00 PM.

Respectfully submitted,  
Peggy Ammendola