

## Conservation Commission Minutes, 02/16/2017

### Lenox Conservation Commission Landuse Meeting Room February 16, 2017 Minutes

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

The meeting was opened at 7:30 PM.

**Notice of Intent 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 Scenic Mountain Act 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 1st and continued for another update on October 15th. No one was present, nor was Commission contacted for the Oct. 15 meeting. Continued to November 5, 2015 and at that meeting this was continued again to December 3rd. The Lenox CC attended a meeting of the Richmond CC on November 10, 2015 at 7:00 PM. On December 3rd, the NOI was continued to Jan. 21, 2016. On Jan. 21, this was again continued to February 4th. At the Feb. 4th meeting this was continued to February 18th. On February 18th, 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 and again continued to October 6, 2016. The latter meeting was canceled and continued to November 3, 2016 as per Stantec who stated that they needed information from John Burns, the peer review consultant, and correspondence from the Pittsfield City Solicitor regarding the language of the airport's legal easement which will need to be reviewed by Town Counsel. Continued again to December 8, 2016, but prior to that, Stantec, stating that they had verbal agreements with all parties, request further continuation to have time to draft the document for final approval. Continued to January 5, 2017 and at that time continued to January 19, 2017. A PMA representative was not available at that time. It was agreed to continued again to Feb. 2, 2017 and that by January 27th, outstanding questions of the Conservation Commission will be prepared by TF and JS and submitted to Stantec. Continued to Feb. 16, 2017.

Present were: Randy Christensen, Jim McLaughlin and Dave Nadeau of Stantec; Chris Pedersen of the Pittsfield Municipal Airport; and Becky Cushing of Mass Audubon.

Mr. McLaughlin reviewed the items that were included in the most recent packet of information, copies of which were provided to all Commissioners on February 12, 2017. The packet contained 14 documents that were provided in response to a request made by Commissioners JS and TF. (Refer to the minutes of February 2, 2017.) He noted that in item #14, the last of the documents in the packet, mistakenly had 7 additional copies of one of the photos. There was one photo which showed pre-construction conditions of the existing trail. Using a map, Mr. Christensen indicated where the photos were taken. The photo which shows the excavator is taken from one of the trails which leads into the disturbed site. Mr. Christensen said that according to Cody Miller, the photos were taken from the Lenox side of the site.

Mr. McLaughlin referred to the January 3, 2017 restoration plan saying that even though the Commission has not yet approved, it is completely supported by Audubon. Since they did not have approval 3 weeks ago they have not been able to order the plants, and the fear is that they may miss the planting schedule for May and will therefore have to wait until the fall.

Mr. McLaughlin introduced Dave Nadeau who works with stormwater calculations and does a lot of work with Mass DEP. He said that both Mr. Christensen and Mr. Nadeau had come as had been requested by the Commission as they would be able to answer stormwater and restoration questions so that Stantec may be able to move forward as soon as possible.

JS asked who authorized the road. Mr. McLaughlin said that he didn't think that anyone did, and believes that the contractor took it on himself. Mr. Christensen said that there had been discussions between the previous airport manager and Rene Laubach, the former Sanctuary Director at Mass Audubon about using trails for access as long as they were restored. Ms. Cushing said that Mr. Laubach did not authorize the road and that she could get documentation from him and provide that to the Commission.

NC questioned if the contractor knew about the Scenic Mountain Act. Mr. McLaughlin responded that he should have and added that Cody Miller of Stantec was a part time inspector for the project. NC said that the plans to do the work for the original right of way did not conform to the RDA which had been approved to only cut down 10 trees which were six inches in diameter or bigger yet the plans called for clearing a 20 foot wide area. Mr. McLaughlin responded that at the first meeting regarding the violation, Stantec acknowledged that mistakes outside of the permit were made, but that they agreed to correct them, and have been attempting to do so. NC said that he had no problem with the planting plan and that the Commission has received almost all of what they have asked for in this "after the fact" project, but didn't understand why it has taken so long. TF asked Mr. McLaughlin if he had understood Mr. McLaughlin to say that Stantec had not authorized the clearing and installation of the road. Mr. McLaughlin concurred and said that Mr. Miller left the site prior to when the contractor put in the road. He agreed that Stantec should have had better control. TF said that he recalled reading in the documents that Stantec did authorize 1.75 or 1.8 acres of cutting, depending on which document one read. Mr. McLaughlin said that represented the area of the right of way. DL commented that on the bid form the intent was to clear the right of way. He questioned if the revised plan, approved by Audubon and John Burns, who did offer some suggestions, was sufficient. TF said that those details could be discussed after the hearing was closed. RFC felt that the Commission had been provided with enough information to clearly know what had happened at the site and should now move forward for restoration. NC asked the Commission if they felt comfortable with the plan to restore. TF said that the Commission should close the public hearing and then agree on the findings i.e., agree on what parts of the submissions are a matter of fact, and what parts are a matter of opinion. After that, he said, the Commission could consider the question. NC said that he didn't want to close the hearing without Stantec knowing. TF argued that that was not the way the process worked. JS agreed that the hearing should close so that the Commissioners could confer.

Mr. McLaughlin told the Commissioners that there was no intention by the airport or Stantec to “pull the wool over anyone’s eyes” or violate the permit. He said that this was the most disturbing project in trying to get approval in his career and that he would not have carelessly authorized a contractor to do this.

JS said that a hiker discovered the road and reported it to Audubon in early August of 2015 and asked Mr. McLaughlin when Stantec became aware. Mr. McLaughlin responded that the road was “pretty much” done before they knew.

Mr. McLaughlin apologized on behalf of the Pittsfield Municipal Airport Commission, the contractor and Stantec and said that he has tried to explain what happened. He said that they have no more information to offer and would like to move forward on the restoration that has been approved by Audubon. He asked that the hearing be closed.

JS reminded Mr. McLaughlin that the Commission is responsible with enforcing the SMA and has nothing to do with the agreement between the applicant and property owners. Mr. McLaughlin said that he understood, but reminded the Commission that they have provided the Commission with a monitoring plan, and that if the indices that the Commission has required are not met, they will adjust the period. He also said that he has offered to provide to the Commission and Audubon GPS coordinates all along the trail.

NC asked the Commissioners if they had specific questions for Mr. Christensen or Mr. Nadeau. TF said that if Mr. McLaughlin has said the Commissioners have all the maps and calculations to evaluate then he (TF) has no more questions. TF added that the same applies for the ecological questions and restoration plans. He said that one of the things the Commission had asked for is what Stantec might have been using as scientific references to guides in crafting the plan and then asked Mr. Christensen if he had anything to add. Mr. McLaughlin responded that they were going with scientific knowledge that has been developed over the span of a 30 year career and the scientific knowledge of Audubon scientists and comments from Mr. Burns, the consultant. TF clarified that there is not a protocol that is being followed, but that Stantec is depending on the experience of Mr. Christensen and others. Mr. Christensen said that it is a successional species idea which is a known quantity. He added that the papers he has reviewed are not a good match for the scale of the project because they are written for much larger plots whereas this is miniature by comparison so he would not want to submit any of what he has reviewed as a good match to their plan.

Before closing the public hearing, those representing the applicant said that they had nothing more to add. RFC made a motion to close the hearing so that the Commission could craft the Order of Conditions with the expertise of JS and TF. VA seconded the motion.

There was discussion regarding the possibility of being able to get plants for the spring versus a fall planting. Mr. McLaughlin and Mr. Christensen were not optimistic. They said that the work would have to be done in stages and would be working from the top to the bottom. Ms. Cushing said that Audubon had approved all of the bench marks and said that if the planting had to wait until the fall they should adjust the time lines for monitoring. Mr. McLaughlin said that the time lines would be adjusted from the point of restoration.

Ms. Cushing agreed to submit documentation from Mr. Laubach’s comments that were mentioned earlier and Mr. McLaughlin agreed to send a “shape file” with the coordinates and footprint of the disturbance area.

By a vote of 7-0, the Commission voted to agree to close the public hearing.

Mr. Pedersen asked if the Commission if he would be advised when the Commission would be scheduled for deliberation. He understood that it would have to be done by 21 days and asked if it would be on the agenda for the next meeting as he wanted to be present. TF said that it could be a special meeting in advance of that. He was advised to leave contact information with PA so that he could be contacted.

#### **Approve Minutes-**

February 2, 2017-DF made a motion to approve the minutes as written. RFC seconded the motion and the Commission voted to approve 7-0.

#### **Other Business-**

**Ed Merritt Ed Merritt, 139-2 Lime Kiln Road, Map 27 Parcel 18-2**-Rob Akroyd of Greylock Design Associates came in to discuss his plans to file an NOI for this property. He had filed an NOI last year with the first hearing on October 6, 2016. After a series of hearings, the NOI was withdrawn without prejudice on November 17, 2016. At that time it was noted that Natural Heritage had stated that there were a number of matters to be resolved relative to a Conservation Restriction (CR). At tonight’s informal meeting, Mr. Akroyd had plans and was reviewing the changes that he would be proposing with a new NOI. TF advised Mr. Akroyd that without a formal filing, the Commission should not discuss with him details regarding his proposal as there wasn’t proper notice and abutters had not been notified. Mr. Akroyd acknowledged, but disagreed, however he will return with an NOI. NC asked Mr. Akroyd to have the issues resolved regarding the CR before a formal hearing to avoid continuances. Mr. Akroyd reminded the Commissioners that back in 2007 with this project, Natural Heritage and the Executive Office of Environmental Affairs recognized that the process and duration for establishing a CR is a ridiculously long process therefore Misty Anne Marold granted him a six month extension for the opportunity to work with the Commission and embark on the project to get the application in and get Mass Audubon on board. He has recently spoken to Ms. Marold who has said that she would grant an extension again and will put that in writing so that the Commission would know that it is in process.

**Kennedy Park-Belvedere**-Mr. Akroyd said that he has been in touch with the Kennedy Park Committee who wants to clear trees that are obscuring the view and asked the Commission if he should file an RDA or an NOI under the Scenic Mountain Act. The Commission concurred that an NOI should be filed.

**Dimitri Shoutov- Lenox Woods at Kennedy Park**-Follow up to February 1, 2017 letter. (See minutes of February 2, 2017.) NC did meet with Matt Ward at the site where Dr. Shoutov had concerns that he described as construction and environmental problems. It was not construction debris, but instead cabinets that appear to have been dumped by someone other than the developer. Mr. Ward said that he would clean it up even though he was not responsible. NC provided pictures. These matters do not fall under the jurisdiction of the Conservation Commission.

**Mass Highway, RDA for MA for Routes 7 & 20 at Housatonic St.**- The project is to extend the length of the turning lanes just as had been done last year at the intersection of Walker St. NC advised the Commissioners to go on their own to become familiar with the site.

**Notice of Intent SMA, Pittsfield Municipal Airport (PMA), 0 West Mountain Rd., Map 27 Parcel 24.** The Commissioners discussed how they would proceed with regards to issuing Orders of Condition.

The Commissioners discussed the best way to proceed in developing an Order of Conditions. TF said that his first argument is the original RDA and the language, “You shall revoke it.” And the second one is the court decision on The Belvedere. The latter was in regards to the fact that the filing for that document was also “after the fact”. He said that hearings were held and an

Order of Conditions was issued but a citizens' group took the Town to court on the grounds that the Town had violated the SMA. TF said that the judge in the superior court case did not find fault with the Commission's actual order to bring the project back into compliance but did find fault with the process. Part of judge's decision stated the Town asserted that a post construction approval process is routine in the land use context, but that it was troubling because the Town did not seek the Commission's approval prior to the construction of the monument when it appeared that the clear purpose of the SMA is to assure public participation in the decision making about such a structure on land that is subject to the SMA. Subsequently this matter was dismissed for failure to appeal.

NC said that with the Belvedere project, no one knew to file under the Act, but the PMA did know because they did file the RDA.

TF, reading from the judge's ruling, said the Town and Commission should avoid post hoc decisions under the SMA, but that in this matter the Commission was being asked to do so.

RFC asked if the erection of the new beacon had been federally mandated and if they didn't comply would they lose the airport. TF said that in order to receive the grant for the project, the PMA had to comply with the requirements e.g., have to be done a certain way, e.g. brightness of light, etc. DL said that if the PMA wanted to reach a certain level of classification then the PMA would have to make the improvements. TF pointed out that the federal process does not supersede the state or local regulations.

DL asked if it were sufficient to determine an Order of Conditions based on the conditions of the Determination of Applicability and the judge's decision. TF added that the Commission should also discuss what damage was done and what would have to be done to bring the site back into compliance. TF stated that the judge said that the Commission is to order compliance. DL doesn't know that is possible. TF agreed that there may be permanent harm and the Commission may have to accept that, but the question is what should the order say in order to get closer to the original site conditions. TF feels that the first item which should be remedied is the soil compaction.

TF said that the third issue is to look at the existing disturbed conditions as it is clear that none of it complies with the SMA. In particular he said that the watershed resources aren't in compliance, the stormwater standards are not met and none of the maps that Stantec submitted comply in any way. DL asked if TF felt that this was needed for the Order of Conditions. TF didn't think so, but he thinks that the best case scenario for a restoration may be different from what any of the other Commissioners would think. He said that the Commission needs to determine what is meant by restoration. For him restoration means making the form and function of the forest as close as one can come and as quick as possible. TF also said that for him that would include woody vegetation, but he believes that the presence of a road would impede that. TF referred to the slope stability maps that were done for the whole state and said that this is the worst possible place to put a road. He doesn't believe an 8 foot wide road is a proper solution or that slopes along the length of the road with the water bars are a solution.

TF recalled that Mr. McLaughlin had said that the Mass Audubon regional ecologist was happy with their plan, but TF said that he had shared the document he and JS had created with the regional ecologist who told TF that this is exactly what Audubon wanted to see.

The Commissioners discussed the conditions of the disturbance area where the soil was compacted and in some areas scraped down to the bedrock and how restoration would have to be done a section at a time. The meadow area at the top was destroyed and has little soil. The restoration guidelines are good, and in the absence of anything any better the Commission could use the federal guidelines. TF said that the Commission doesn't have the legal option to approve the proposal that Stantec has provided. DL feels that the Order of Conditions should be based on the original conditions for the RDA and the Superior Court Civil Action No. 2012-01876, Sonya Bykofsky & 19 others, Plaintiffs, vs. Town of Lenox & another which the action arose from the construction of a monument in Kennedy Park (Belvedere). The part of this seven page document which was of particular importance in this matter is at the bottom of page 4.

TF said that if as a Commission it tries to agree on what Stantec is proposing he would be very unhappy especially with the watershed proposal. Stantec gave 25 foot contours and the regulations say they have to be 2 feet or less and the stormwater regulations suggest smaller values where needed. He said that there are many other problems, but he feels that a cleaner approach is simply to say that under the SMA, the Commission's only option is that since they did work without a permit they have to restore. If at some point someone wants to come back and say they want a road, they should submit the proposed work for that, hold a public hearing and give proper alternatives. One alternative that was suggested was to bring in the beacon and etc. by helicopter. TF said that in the minutes of a Pittsfield Municipal Airport Commission meeting they discussed alternatives such as solar. He stated that the Commission did not have the opportunity to talk about alternatives. There are three other locations that would make more sense than the route that was taken. TF concluded that this was the worst possible location for the environment and that Stantec should be told to restore.

At 9:33 PM, RFC made a motion to adjourn. DL seconded the motion and the Commissioners voted to agree 7-0.

Respectfully submitted,  
Peggy Ammendola