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Present: Bendrix Bailey, Acting Chairman
Matthew Bache
William Clapp
Mike Gifford

Absent: Kevin Thompson
Bill Milka
Christopher Gerrior

Merilee Kelly, Conservation Agent
Dawn DeMaggio, Board Administrator
Lori Walsh, Recording Secretary

The meeting convened via Zoom video conference ID #840 7072 1679. Acting Chairman Bailey called the meeting to order at 7:03 p.m. and took attendance of Members, staff, applicants, and representatives. He stated the meeting was being recorded.

Public Meetings

DEP SE272-0581 A Request for an Extension of Order of Conditions by Matthew Magalhaes at 443 Neck Road, a Proposed House and Subsurface Sewage Disposal

Mr. Magalhaes of 443 Neck Road was present on Zoom to discuss the project with the Board. Mr. Magalhaes said they purchased the property in 2019 and the Order of Conditions had already been in place. He said that there have been some hiccups along the way to get the house constructed. They are in the process of building it and they have a building permit. Completion date looks like it will be Spring of 2023. They are looking for a six month to a one year extension of the Order of Conditions.

Member Clapp made a motion to grant the extension for two years.

Member Bache seconded the motion.

Motion passes with a roll call vote of 4.

Ratification of Enforcement Order - 89 Box Turtle Drive

Acting Chairman, Bendrix Bailey said that due to both Attorneys present for this meeting he is going to turn it over to the Town Attorney, Blair Bailey.

Atty Blair Bailey was on Zoom for the meeting. He talked about the initial order that was issued for 89 Box Turtle Drive by the Conservation Agent at the time. At the next meeting they asked for the order to be amended and re-issued with some additional information and voted to issue the order. Atty Bailey also said that the letter from Atty Anglely said that the second order wasn't actually ratified by the Commission it was just voted on. The problem with the second order was that it wasn't signed by the Commission, it was only signed by the Conservation Agent. He recommends that the Commission issue a new order requiring a restoration plan and signed by the Commission; he said that it is up to the Commission how much of a time frame they want to give to the Owner. Atty Bailey said that it was said that the Commission didn't give enough time for the orders but this has been going on now for about two months.

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The Owner has known about the enforcement order for a while now so a new order should be signed by the Board and it should request for them to submit a restoration plan.

Timothy Angley, Attorney for 89 Box Turtle Drive spoke on the order. He said that they are having a wetlands specialist do a delineation right now and they have some disagreement as to what the actual wetlands border might be. So, he said unless they can agree on what the orders are to say what needs to be restored and in what area.

Atty Bailey said that it's not hard to say that there is a violation. Atty Angley said that they are not going to agree that there is a violation. Atty Bailey said that it's fine then they can skip to a civil action and it can be solved there. He also said that if the argument is that there isn't a violation, then they have a certain amount of time to prove it. They have known about the violation for two months now. Atty Angley said the alleged violations that the Board didn't properly approve and that is fine, but until the procedures have been followed they can't appeal anything and that's part of the problem. He also said that the Board is deficient in issuing the orders.

Atty Bailey said then they will issue a new enforcement order, and there has been no appeal of the tickets issued under the by-law. Atty Angley said actually there has. Atty Bailey said okay so they have a hearing in front of the district court but as far as the time frame, the position of Atty Angley's client is that there wasn't a violation. Then one would think that they wouldn't need a lot of time to come up with proof since they have already been aware of this for two months now.

Atty Angley said what he is saying is he's not going to agree at this hearing that there is a violation until they have a delineation. Atty Bailey said he doesn't recall asking him if he agrees to it so they are going to issue a new order and he can appeal it, he can appeal the issue to that order with DEP. Atty Bailey said from what he knows about that property and what was done, they can try to appeal it but there was a violation, and the extent of the violation might be an issue, whether there was one or not. He also said he's pretty sure that the clearing was done in the 100' buffer zone, that it's not going to be an issue but they can debate that all they want. He said to Atty Angley that what the Board will do is issue a new order requiring a restoration plan and then he can appeal that as he sees fit. They can file or not file a NOI but to fix what they've alleged in the violations. Atty Angley said that the violation didn't occur because the second order was unratified. Atty Bailey said it just didn't get signed by the Commission, it is in the minutes of the meeting. He also said when they issue the new order they can put an end date that's in the discretion of the Commission, and the new enforcement order will require a restoration plan. Atty Angley obviously disagrees so they can appeal that.

Atty Bailey said that his recommendation is that, given what has been going on with the notices and trespass notices, the Commission notify DEP so that they can come in and participate since obviously the home owner has a problem with this Commission and its authority. So he thinks they should notify DEP and ask the southeast region to come in because that will be easier and faster. He also says that he thinks they should keep issuing tickets under the by-law. Atty Angley said he is not going to offer his advice as to what the Board should do. Member Bailey said that he's not sure they'd be interested in it.

Member Bache made a motion to have the Board sign the enforcement order with the changes made here tonight.

Member Gifford seconded the motion.

Motion passes with a roll call vote of 4.

Member Bailey said to Atty Bailey that he has an enforcement order with two dates on it that he can change and it has everything they need on it and they have Board Members here, not a quorum but they could have three signatures on it tonight. Atty Bailey said that he prefers that a new order be typed up and the Members go into the office and sign it so that it can be served. Member Bailey said he will mark

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up the copy that he has based upon their discussion now. The first date he'll change is the issuance of the enforcement order and he asked Atty Bailey if the enforcement date is today's date or the date that the Board signs it. Atty Bailey said that the effective date would be the date that the Commission goes into the office to sign it. Member Bailey said that the enforcement order that he has says that the enforcement order was issued by the Conservation Agent and it has a date but it doesn't say effective date. Atty Bailey said that can be the date of the vote. The date will be July 19, 2022. He said originally they gave the property owner two weeks to respond to this enforcement order. We can do that again. The Board agreed to give them two weeks on the new enforcement order. Atty Bailey said he will modify that date which is item C, to August 2, 2022, their next meeting. The enforcement order just needs to be signed by the Board Members.

He stated that under C, Order, there is a box to check to see the attached NOI shall be filed with the Conservation Commission on or before. Member Bailey read the enforcement order. He feels that they have to file a NOI that they are going to do the following which includes a restoration plan that is due on August 2nd. Member Bailey said that they are not going to check off the box for a NOI. Atty Bailey asked Atty Anglely if they can have a constable deliver the violations or will he accept service.

Atty Anglely said that having the fines issued by a constable is fine. Atty Bailey said they should have a vote to contact DEP. Member Bailey asked Atty Bailey if the Board agrees with the order then they can sign it or does it have to be at a meeting. Atty Bailey said that he would prefer it if those who signed it had participated in the vote.

Member Bailey said that under C, the two things that have to be done are to complete the attached notice of intent and file with the Commission on or before August 2nd with the restoration of the 25 foot no disturb zone and surrounding areas of the buffer zone to BVW, and the property owner shall take the following actions immediately: erosion and sedimentation controls to be installed to prevent further actions. Atty Bailey said that he would say that the order should say that the owner is required to file a restoration plan within the two weeks and eliminate the NOI. Atty Bailey said a restoration plan is filed to restore things the way they were and a NOI implies that there is some mechanism by whatever they did is approvable by the Commission. It's up to the Board how to do it but they can issue an enforcement order that requires a restoration plan. It's up to the owner if they want to file a NOI if they think that it's things that can be done under the Wetlands Protection Act. Conservation Agent Kelly said if they file a NOI they can put conditions on it, but if they file a restoration plan by itself, they might not have that kind of leeway.

Member Bailey said the way he reads it is that they have to complete a NOI that they are going to do the following which is to supply the Commission with a restoration plan which has to be done by August 2, 2022 and in the meantime, they shall put in the erosion controls. He said there is no way to fill this form out without checking that box for a NOI. Atty Bailey said if you look at C you're already checking the box that says you filed a restoration plan on or before and then there is a date there. There is nothing that says you have to check the box.

Atty Bailey said that you don't have to order both things, a restoration plan and a NOI. Member Bailey said that the box is checked for a restoration plan and to put the sedimentation controls in immediately, and they are not going to check off the NOI. Atty Bailey said it's not going to preclude a need for a NOI. It is a question of what you require in the enforcement order. They are free to file a NOI for their activity and as their Council said, they are disputing the wetlands line which may or may not address the extent of the violations or whether there was one. He feels that the restoration plan is the way to go. So, we would have the signatures of all the Commissioners that voted to issue the order tonight; have the Members go to the Annex Building to sign the order.

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Member Bache made a motion to issue the new enforcement order as written here tonight and the Board members to sign the enforcement order at the Annex building.

Member Clapp seconded the motion.

Motion passes with a roll call vote of 4.

Atty Angley said he can accept service of the new enforcement order. He also asks if the May 9th is now rescinded or supplanted by this new order. Atty Bailey said yes because of the lack of the signatures on the second order and he will have them delivered to his address. Atty Bailey said they should have a vote to contact DEP. Mr. Bailey asked Atty Bailey if the Board agrees with the order then they can sign it or does it have to be at a meeting. Atty Bailey said he would prefer it if they participated in the vote. Member Bailey asked Atty Bailey if they should have a motion to start issuing fines if things are not completed by the date. Atty Bailey said that the fines can only be issued on the violation of the by-laws. The fines are not wetlands fines. There are two separate issues and one is the violation of the Wetlands Protection Act or alleged violation, and there is no fine in the Wetlands Protection Act. The tickets that are being issued are for the local Rochester wetlands by-law so those should continue. He is also recommending Merilee get a hold of the southeast region of DEP and ask if they would help out with this and go out there. Atty Angley asked what they are filing the fines for. Atty Bailey said it is under the Town of Rochester wetlands by-law. Atty Angley asked what they are violating under the Rochester wetlands by-law. Atty Bailey said they cleared wetlands without a permit. Atty Angley said but they are disputing that. Atty Bailey said that they didn't have to agree with Atty Angley to issue a ticket. Atty Bailey said until they hear that there was no violation they are still going to issue tickets. He asked Atty Angley if he wants them serving the ticket with a constable. Atty Angley said yes. Atty Bailey said that they also need to vote to contact DEP.

Member Bache made a motion to have the Conservation Agent contact DEP to get involved.

Member Gifford seconded the motion.

Motion passes with a roll call vote of 4.

Member Bailey said that as a member of a Town Board we have tried to be helpful in this regard. He said that if there are any other members of the Town that have watched this and wonder why we're doing an enforcement order, this is an exceedingly unwise course of action shown on the part of the homeowner. They approached us to ask if they needed to file paperwork. We told them they did, they went ahead and did the work anyway. We invited them in to help them to discuss how to take care of this properly and they refused. It's not the habit of any board in Rochester to make life difficult for residents. The Boards exist to help residents understand how to solve problems and remain within the rules and regulations. In this case we have someone who has refused every overture and opportunity to work with us.

Commission Business

Minutes –

Member Bache made a motion to approve the minutes for June 7th and June 21, 2022.

Member Gifford seconded the seconded the motion.

Motion passes with a roll call vote of 4.

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Voucher(s) -

MACC, Seminar Unit 104/105- Dawn & Bill, Invoice #200010566/67/69, \$165.00

W.B. Mason, Office Supplies, Invoice #230832404, \$11.19

MACC, Annual Membership Dues, Invoice#FY230250, \$563.00

Fileguard, Monthly Storage Fee, Invoice#81032, \$18.00

Member Bache made a motion to approve the vouchers.

Member Gifford seconded the motion.

Motion passes with a roll call vote of 4.

Conservation Agent Update

45 Kings Highway - MBTA Mitigation Memo documenting work performed as required

Conservation Agent Kelly said that they have to do a check list of the stormwater prevention plan weekly. Any time they've had a problem they have fixed it. Mitigation plan goes back to things that they were doing when they were getting their order of conditions. That was allowed for field verification and seasonal high groundwater within the area of the storm water where basin number two will be located. Two test pits were completed after removal of the pile, coupled with a permeability test of the soils and it is worth noting that removal of the pile was not feasible at the time that the order of conditions was issued. What they found after they moved the pile and performed the test pits was a seasonal groundwater which is consistent with that found in all the other test pits that were previously performed and provided. Permeability tests confirm the soils to be coarse grain sandy gravels which exhibit the highest level of soils permeability.

After they did the test pits it was found that the area is consistent with all the other test pits. It is a field change. Construction of the wetland replication area 1 and Wetland replication area 2. The work has already been done without permission from the Board. Atty Bailey asked if they were asking the Board to modify the plan. Agent Kelly said yes. Member Bailey asked Agent Kelly how she feels about it and she said she would approve it. He also said that he saw the pictures and he didn't see a request for a change he just saw a change made.

Agent Kelly said that she believes that they are just informing the Board that those changes were made. She also said that it looks like they did a good job with the stream replication area. Member Bailey said that the pictures looked good to him and his only confusion is was this something that required approval ahead of time. Member Bailey asked what it is exactly and where are we because it looks like it's already been done. Agent Kelly said it does and she believes it is done. This document of Mitigation that this work was performed. So, it's already been done without advance permission.


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Member Baily asked if they are asking the Board for a field change because he doesn't see a request for approval. Agent Kelly said she feels that they think it's enough to talk about it and change it in the as-builts. Member Bailey said that they don't let people make field changes on their plans, they need to get permission first. He said that they informed her after the fact. Agent Kelly said yes. Member Bailey said the work looks good and he doesn't object to it and he asked the Board Members if any of them object. Member Gifford asked if it was appropriate to reach out to them and ask if they made the changes. They need to ask the Board before they make changes. Agent Kelly asked if it was sufficient enough to give them a call or does the Board want them to come to a meeting. Member Gifford said no, a phone call is good. Member Bailey said that they need to be aware that when they make changes ahead of time, they're at risk. They are required to get approval of field changes. Member Bailey said he thinks that they should forget about a phone call and a letter might be more sufficient.

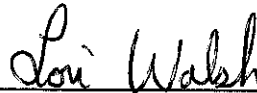
Adjournment

Member Bache made a motion to adjourn at 7:43 p.m.
Member Gifford seconded the motion.

Date: 16 AUG 2022



Chairman, Christopher Gerrior



Lori Walsh, Recording Secretary