



CITY OF DOVER

## CONSERVATION COMMISSION MINUTES

Meeting Type: Regular Meeting  
Meeting Location: Council Conference Room – 288 Central Ave, Dover, NH  
Meeting Date: **Monday, January 5, 2009**  
Meeting Time: **5:30 pm**

Commission members present: Tom Fargo, Chair; Bill McCann, Vice Chair; Alban Lobdell; Marcia Colbath; Chris Hunt.

Commission member absent: Britt Schuman (death in the family)

Also present: Dean Peschel, City Staff Liaison & Environmental Program Director

1. Approval of minutes from November 3, 2008 meeting. Chairman Fargo noted that the November 3<sup>rd</sup> meeting minutes remain incomplete pending a summary of the River Street pump station item to be provided by Dean Peschel.
2. Approval of minutes from December 1, 2008 meeting: Chairman Fargo reviewed the contents of the minutes noting that he had developed a new format. The format contains a new section entitled “Findings of the Commission” that he drafted. In an effort to avoid an appearance of conducting a meeting over the internet, he waited to distribute the draft minutes at the meeting. Vice Chair Bill McCann suggested that the “Findings” be identified as draft until approved. Chris Hunt noted that he did not attend the site review meeting at the Eisler property on December 5, 2008. Bill McCann made a motion to approve the minutes with the noted changes, seconded by Marcia Colbath. The motion passed with unanimous approval.
3. RE: Tax Map G, Lot 13; Further consideration of an application by David and Susan Eisler, 344 Washington Street, Dover, for an **after-the-fact** City of Dover Conditional Use permit to construct a one-foot high, 50 ft ± long temporary dry stone curb along their property line, perpendicular to the bank of an unnamed tributary stream to the Cochecho River to prevent seasonal flooding of their home.

***Chairman’s note: The Commission’s review of this application started at its December 1, 2008 meeting, continued with a site review on December 5, 200, and continues as outlined below.***

### Summary of Application:

The Eislers were requested by the Planning Department to submit an application to the Conservation Commission for a review in accordance with Dover’s Conservation District Zoning Regulation 170-27 which requires a Conditional Use Permit from the Planning Board for: “altering the surface configuration of the land” (170-27 C (2)) in “those areas within a minimum of fifty (50) feet of the mean high water of any stream, brook, or other freshwater body” (170-27 B (2)). The Commission is responsible for providing the Planning Board with: “a written review of the environmental effects of the proposed use upon the area in question” (170-27 C (2) (c)).

### Testimony Received: January 5, 2009

Chairman Fargo reminded the Commission that the review of this application at the previous meetings (the December 1st regular meeting and the site review on Saturday, December 6th) was officially suspended by motions approved by the attending members. He asked for a



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motion to reconvene. Bill McCann made the motion, seconded by Al Lobdell, and it was approved unanimously.

Chairman Fargo reviewed the then draft findings of the Commission, outlined below. He asked the Commission members to indicate their concurrence that these findings are accurate. The members so indicated.

Chairman Fargo recognized Mr. Penaskovic to provide testimony. Mr. Penaskovic provided photographs that were reviewed by Commission members. Using the photos and a description of the chronology of construction activities on his property, Mr. Penaskovic stated that the driveway construction and maintenance he completed was done with proper approvals. He also stated that the Eislers had violated instructions from the Planning Director to not construct their stone wall without a City permit. Mr. Penaskovic then read portions of the City's zoning regulations and pointed out areas where he felt the Eisler's application is deficient in meeting the requirements of the regulations, including several state requirements.

Ms. Dewyngaert then presented a summary of issues related to the Goodspeed dam and flooding issues associated with the dam and storm events. Ms. Dewyngaert stated that the Eisler's stone wall was placed without a permit and that negligent actions by the Eislers and previous owners of their property threaten to erode her property. She asked the Commission require to the Eislers to retain engineering professionals to assure that their plan will work.

Mr. Penaskovic stated that his previous and current neighbors have completed many construction projects without appropriate permits. These un-permitted projects have focused attention on flooding problems that he did not create, yet he is being blamed for his neighbor's water issues. He is unable to resolve these problems through his own legal action and he requested the action of the Commission, and other City and State officials to help him resolve these issues.

Susan Eisler stated that they constructed the wall to do what they could to secure some relief from the threat of future flooding. She stated that once the City and State forces Mr. Penaskovic and Ms. Dewyngaert to bring their property into compliance, and that in so doing the treat of flooding would abate, then she (they) would remove the wall.

Bill McCann asked Mr. Penaskovic to clarify why he objected to the Eisler's wall. He replied that he appreciated what they were trying to do, but he objected to how it was being done. His objection was that the wall is improperly engineered for its intended purpose and would result in damage to his property.



**CITY OF DOVER**

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Marcia Colbath stated that the stones would be less effective than sandbags in diverting the floodwater, and she asked Chairman Fargo why sandbags (a truly temporary flooding mitigation measure) could not be used. Fargo replied that sandbags were provided by the Dover Fire Department during the last flood event as an emergency-response measure. Fargo stated that he was not sure whether permits would be needed for sandbags. Susan Eisler responded that they were not happy that the sandbags ripped and spilled sand. They are seeking a more durable temporary water diversion structure.

Ms. Dewyngaert asserted that flooding is not unusual occurrence for the Eislers property. The previous owner told her that “her basement flooded all the time”. She stated that the water has always flooded and “it’s not going to go away”. Mr. Penaskovic stated that the previous owner was “happy to see their driveway installed” because it helped prevent flooding of the basement.

Chris Hunt asked those Commission members who were at the site review whether they felt the wall would significantly alter the flow of floodwaters. Chairman Fargo reiterated finding #4 previously approved by the Commission (see below). Chris stated that he was not so much interested in the Commission’s assessment of the efficacy of the wall but rather whether it would alter the water flow in a way that would cause negative impacts. The consensus was that negative impacts would be minor to negligible.

Al Lobdell pointed out that the recent flooding was due to 100-year level events. He asserted that in smaller magnitude events, the wall should not create a problem. Al recognized that there are clearly larger-scale engineering problems that need to be addressed on all four properties.

David Eisler reiterated the temporary nature of the wall that is intended to divert even a small amount of water from flooding their basement. He encouraged the Commission to view the stone wall as the functional equivalent of temporary sandbags that would not need a permit in an emergency situation. Chairman Fargo countered that the recommendations of the Commission do carry some weight with the Planning Board and that he had difficulty with recommending a solution with only limited efficacy. He expressed his further concern that the Commission’s potential endorsement of an ineffective solution would make the Commission a party to what could become a contentious legal dispute.

Susan Eisler disputed the Penaskovic/ Dewyngaert assertion that their driveway altered the course of floodwaters away from her basement. She stated that previous owner told her that their basement never flooded. Susan again asserted that Mr. Penaskovic’s continued grading of the driveway has caused flooding that didn’t happen before the driveway construction and



**CITY OF DOVER**

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associated land surface alterations. Mrs. Eisler appealed again for Commission approval of the partial relief from flooding that that the wall will provide.

Dean Peschel advised that the efficacy of the stone wall to accomplish its purpose should not be a consideration. He suggested the Commission focus on the potential negative effects of the construction to the Conservation District. Chris Hunt agreed. Marcia stated that the wall is intended to divert floodwaters and that is why the Commission was asked to review its environmental effects.

Bill McCann revisited the issue of the temporary nature of the wall as being similar to sandbags that were placed by the Fire Department. Chairman Fargo pointed out that the Eislers were directed to obtain a permit that includes a requirement that the Commission “provide a written review of the environmental effects of the proposed use”. Likewise, Mr. Penaskovic was directed by the Building Inspector to submit an application for a similar permit after-the-fact.

Chairman Fargo requested the Commission to consider that its actions should “do no harm”. He again suggested that by endorsing the application, the Commission could become a party to a contentious legal dispute. Fargo stated that the NHDES is pursuing resolutions to the watershed-scale problems and urged the Commission to allow that process to proceed. Both Susan and David Eisler expressed frustration with the uncertainty and slow pace of the NHDES’s efforts to correct problems that are impacting their quality of life.

Bill McCann reiterated his observation regarding the temporary nature of the wall, that being similar to sandbags, and stated his feeling that the Commission should not be asked to make a judgment because that purview belongs with the Codes Enforcement.

Al Lobdell stated that he felt that the application did not contain the appropriate engineering analysis of the causes of the flooding and the effects of the wall, for him to say one way or the other. Mr. Penaskovic made a statement that he also felt that the application contained insufficient engineering for the Commission to make a determination.

### Findings of the Commission:

The findings, listed below, were drafted after the December 6<sup>th</sup> site review and approved by the Commission on January 5, 2009. The Commission concludes, based on the evidence presented and observations made at the site, that:

1. The flooding of the stream is strongly influenced by the capacity of a 200+ foot long culvert that acts as the outlet to a pond upstream of both the Eisler’s and Penaskovic/Dewyngaert’s properties. The NHDES is working on an administrative solution to this problem. This watershed-scale issue is outside the purview of the Commission.



**CITY OF DOVER**

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2. The hydraulic capacity of the culverts under the Penaskovic/ Dewyngaert's driveway is inadequate to contain the volume of water flowing during periods of high runoff. The present slope of the driveway diverts much of the overflow toward the Eisler's basement.
3. There have been alterations to the surface configuration of the land owned by Mr. Penaskovic and Ms. Dewyngaert in the vicinity of the stream. The owners has been requested by the City of Dover to "*restore the property to its original condition or petition the Planning Board for an after the fact Conditional Use Permit.*" (see attached letter dated September 25, 2008, response October 17, 2008, and follow-up dated November 18, 2008)
4. The "temporary dry stone curb" that has been built on the Eisler's property is unlikely to provide protection from future flooding since it has many gaps and opening through which water may pass.

### Recommendations of the Commission:

Chairman Fargo made a motion for the Commission to not endorse the application for the Conditional Use Permit and stated that in so doing the Commission recognizes that the applicants may be compelled by the City to remove the rocks.

Chairman Fargo presented the following reasons for his motion: 1) He was concerned about the Commission endorsing a solution that it recognized as only marginally effective for the intended purpose; and 2) The Commission shouldn't endorse another encroachment into the Conservation District that would only serve to make more complex the ultimate solution to the flooding problems. Marcia Colbath seconded the motion and stated her agreement with the reasons to not endorse the application.

Vice Chairman Bill McCann stated his support for the motion to not endorse the application, but for a different reason, to be incorporated as a friendly amendment to the motion. He stated that the he felt the application for a permit was unnecessary because the "alteration of the surface configuration of the land" or "erecting a structure", as requested, is to be temporary. Therefore, "it would be a bad precedent for the Commission to approve a permit for something for which a permit is not needed". Al Lobdell stated his agreement with Vice Chairman McCann to not endorse the application for the same reason. Marcia and Tom did not agree with the temporary structure exemption from requiring the Conditional Use Permit.

The vote was four in favor of the motion to not endorse the application (Tom, Marcia, Bill & Al), one opposed (Chris). The motion carried.

Chris Hunt stated his vote in opposition to the motion was because he felt that the impact of the structure on the Conservation District was only minor, not significantly impacting the land nor capable of causing substantial diversion of flood runoff.



**CITY OF DOVER**

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Meeting Time: **5:30 pm**

4. RE: Tax Map L, Lot 43; Considering an application by Greg Porciello, 157 Wednesday Hill Road, Lee, NH, for a State of New Hampshire Minor Impact Dredge and Fill permit and a City of Dover Conditional Use permit to reconstruct a non-conforming, single-family home located at 163 Spur Road, Dover. The home is located partially within the City of Dover Conservation District associated with the tidal Bellamy River. The proposal also includes the in-kind replacement of the existing boathouse and dock requiring a State of NH Dredge and Fill Permit.

### Summary of Application:

Mr. Porciello (agent: Sherrie Trefry of NH Soils Consultants) requested a review of his proposed development by the Conservation Commission in accordance with Dover's Conservation District Zoning Regulation 170-27 which requires a Conditional Use Permit from the Planning Board for: "*altering the surface configuration of the land*" (170-27 C (2)) in "*those areas within a minimum of one hundred (100) feet of the mean high water of any water body, river, stream, swamp, or marsh subject to tidal action*" (170-27 B (1)). The Commission is responsible for providing the Planning Board with: "*a written review of the environmental effects of the proposed use upon the area in question*" (170-27 C (2) (c)). In addition, pursuant to RSA 482-A:3 and RSA 482-A:11, III, the Conservation Commission is obligated to provide input on applications for the NH Department of Environmental Services, Wetland Bureau on applications for Dredge and Fill Permits.

### Testimony Received:

Sherrie Trefry of NH Soils Consultants (agent) and Mr. Porciello were present at the Meeting. Ms. Trefry gave an overview of the proposed site redevelopment. In addition to the permits noted above, Ms. Trefry indicated that the project also requires a permit under the State's Comprehensive Shoreland Protection Act (CPSA, RSA 483-B). The re-development plan was to tear down and rebuild portions of the building that are not up to building code standards. Upon deconstruction, extensive rot and foundation problems were found necessitating the reconstruction of most of the entire structure. The plan is to make the structure more conforming than original, moving away from side setbacks and decreasing the extensions into the shoreland area.

Chairman Fargo asked about the dock and boathouse. Ms. Trefry stated that the boathouse is actually a storage shed that will be left as-is, the proposal is to just reinforce the structure. Fargo noted that City restrictions on structures over water may be somewhat different than State requirements.

Marcia Colbath stated that she wanted to see the site. Chairman Fargo suggested that in the interim the applicant should finalize the State Dredge and Fill Permit application and clarify both City and State permit requirements for the combined dock and storage shed structures.

Chairman Fargo noted that the plan shows a reduction in the amount of impervious cover. Ms. Trefry replied that, as presented, the total impervious cover would decrease 15% from



**CITY OF DOVER**

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the amount that was present on the site, accomplished primarily by removing an existing shed to the north of the house. The applicant proposes additional plantings in the area of this shed to better reflect the requirements of the CSPA.

Chairman Fargo asked the applicant to be more specific about the landscaping plan and to try to follow the guidance in the book: “*Landscaping at the Water’s Edge*”, recently published by the UNH Cooperative Extension. Consistent with other applicants for re-development projects on Spur Road, the Commission has recommended that more non-lawn elements should be including in the landscaping plan.

Mr.Porciello noted that he has made arrangements to service the house with the private Spur Road sewer. This removes the potential negative impacts of a septic system that he could have built.

Chairman Fargo made a motion to table the application pending a site review scheduled for Saturday, January 10<sup>th</sup> at 10:00 AM. Seconded by Marcia, the motion passed 4-0 (Al had left the meeting).

### 5. Other Business:

- Open forum for concerns of the Commission  
No additional issues were presented.

### 6. Adjournment:

The meeting was adjourned at 7:14 PM