

TOWN OF ESSEX
Inland Wetlands and Watercourses Commission
29 West Avenue
Essex, CT 06426
essexct.gov

MINUTES

Regular Meeting - January 10, 2012

Call to Order and Seating of Members

The regularly scheduled meeting of the Essex IWWC was conducted on January 10, 2012 in Room A of the Essex Town Hall at 7:30 p.m. Those members in attendance were Chair, Daniel Lapman, Chuck Corson, Claire Tiernan, Barbara Zernike, Larry Shipman and Fred Szufnarowski who was seated for Nancy Arnold. Ms. Arnold arrived at 7:35pm. Also in attendance were Stella Beaudoin, Recording Secretary and Joe Budrow, Wetlands Enforcement Agent and Zoning Enforcement Agent.

Mr. Lapman called the meeting to order at 7:30 p.m.

New Business

- **Consideration of Application 12-1 for property located at 1 Foxboro Road, Essex, CT, Assessor's Map 16 Lot 12. The property is owned by Ellen Croft Craft and Roberta Croft Ellis. The applicant is Frank J. Sciame, Jr.**

This is an application to allow a 7-lot subdivision on an existing 11.04 acre parcel. There are no inland wetlands present on the property other than the fringe of the tidal wetlands that is present along the shore of the North Cove. Each parcel involved in the proposed subdivision will have a 100' upland review area for North Cove. All of the proposed lots are frontage lots so no new roads or common driveways are proposed. Installation of a driveway and an underground utility relocation for the adjacent windmill house property is proposed.

A petition with 28 certified signatures was submitted to the Essex Land Use Office on January 3, 2012.

Attorney Terrance Lomme presented on behalf of the applicant Fred Sciame. Mr. Lomme stated that there is currently a house on the property which is part of the 7 lot subdivision. Mr. Lomme indicated that there will be no construction within 150 feet of North Cove and there is no construction on the subdivision at this time. Mr. Budrow had suggested that a separate application be filed for the relocation of the utilities of the windmill and Mr. Lomme indicated that his client is happy to comply. Mr. Lomme stated that there will be no construction within the 100 foot setback of North Cove. Mr. Lomme commented on the petition which was submitted in conjunction with this application and noted that per the CT General State Statutes a public hearing must now be conducted on this application.

Mr. Lomme confirmed for the record that the application was received on January 3, 2012. Mr. Lomme stated that the CT General Statute requires that the petition must be filed within 14 days of the application and the petition is also dated January 3, 2012, which is in compliance.

Mr. Lomme indicated that there is a driveway which crosses the main piece of the property. There will be power coming in underground to the property. The house is part of the 7-lot subdivision and will remain on a separate and distinct lot of the subdivision.

Mr. Lomme introduced Mr. Joe Wrenn, P.E. who is on hand to answer any questions. Mr. Wrenn stated that there are no inland wetlands on the site; there are only tidal wetlands and there is no proposed activity within a wetland. Mr. Wrenn noted that the wetlands within the fringe of the CT River are tidal only.

Ms. Arnold questioned if there is any underground piping on the property.

Mr. Wrenn stated that there is a water service that bisects the property from the intersection of Foxboro Road all the way down to the windmill house. Richard Snarski, soil scientist evaluated the property on December 5, 2011 and at that time Mr. Snarski flagged all of the tidal wetlands. Mr. Snarski did not find any inland wetlands on the property. Mr. Wrenn noted that the majority of the area in and around the bank is sandy with no evidence of high water. An inquiry was made to the DEEP for species of concern or those species that might be endangered that habitat this property. Dawn McCay, Environmental Analyst III for the DEEP responded with a letter determining that the proposed activities will not impact any endangered species. The waterline that crosses the property will be abandoned and left in place and possibly utilized for lot #2.

Mr. Wrenn presented an updated map to Mr. Budrow which was submitted for the record. Mr. Wrenn referenced the map and noted that the entire shaded green area will be a conservation easement. The only future potential on the property shaded in green is for private docks.

Motion made by Claire Tiernan to conduct a site walk on Saturday, January 14, 2012 at 9:00 a.m. on behalf of **Application 12-1 for property located at 1 Foxboro Road, Essex, CT, Assessor's Map 16 Lot 12. The property is owned by Ellen Croft Craft and Roberta Croft Ellis. The applicant is Frank J. Sciame, Jr.** On the day of the site walk, IWWC members may park at the home of the property owner located at 1 Foxboro Road, Essex, CT.

Motion seconded by Chuck Corson and passed unanimously 7/0/0.

New Business

- Cease and Desist property located at 141 Saybrook Road, Essex, CT re installation of a 15" wall at the shoreline without approval and extension of drainage pipe to south Cove without approval.

This matter is continued from the special meeting of the Essex IWWC which was conducted on December 29, 2011. The applicant, Michael Picard through his attorney, John Bennet is on record stating that the IWWC does not have jurisdiction.

Campbell Hudson, legal counsel to the IWWC presented. Mr. Hudson indicated that he and Attorney Bennet have had a discussion regarding the legality and the jurisdiction of this Inland Wetlands and Watercourses Commission. Mr. Hudson stated that the actions taken by Joe Budrow, Essex WEO/ZEO with regard to the Cease and Desist order was handled correctly.

Attorney John Bennet presented on behalf of Michael Picard. Mr. Bennet stated that he is here this evening to address the cease and desist that was previously issued. Mr. Bennet stated that part of the reason we are here this evening is that similar structures had been constructed on the adjacent

property with no permitting involved. Mr. Bennet noted that someone was led to believe that the wall structure was permissible and that IW Permitting would not be necessary as the adjacent property circumstances did not require an IW Permit.

Mr. Bennet stated that the wall structure is accepted as a landscape item and Mr. Bennet stated that he does not think the IWWC has jurisdiction. Mr. Bennet stated that the cease and desist does not comply with the law.

Mr. Bennet proposed that the cease and desist remain in place without prejudice. He went on to say that his client, Michael Picard will apply for an IW Permit for the wall structure only. Mr. Bennet indicated that Mr. Picard does not have any responsibility for the discharge of the water and Mr. Picard will be happy to pull all of the pipes out as soon as the water is no longer running onto his property. Mr. Bennet noted that it was his understanding that permitting is not necessary for drainage. Mr. Bennet stated that he will move to have the drainage pipe removed. Mr. Bennet noted that this does not however answer the jurisdictional questions, but perhaps those questions do not need to be addressed at this time.

Attorney Hudson indicated that it might be helpful at some point in a more generalized concept to discuss jurisdiction with respect to the land that is in 100 feet of the CT River. Mr. Hudson stated that the issue as to whether or not the IWWC has the authority based on the idea that the jurisdiction does not apply as these are tidal waters. Mr. Hudson stated that he does not agree with that conclusion although the law is not 100 percent clear on that.

Mr. Hudson noted that with respect to this matter, if the IWWC is to proceed as recommended by Mr. Bennet and if the client does apply, Attorney Bennet would not be giving up his rights to object on this issue and Attorney Hudson stated that he has not problem with that. Mr. Hudson went on to say that the IWWC has followed a pragmatic approach over the years. There is the question of this other violation and that is the pipe. Mr. Hudson stated that the argument is that all of the water that is draining through that pipe is generated form the neighboring property to the north and from the Town to the north. Mr. Hudson noted that they do not believe that they need this drainage facility and would just as soon not have it. The applicant stated that he is willing to get rid of that structure.

Mr. Corson stated that the IWWC conducted a site walk to review the drainage conditions. It was agreed that this situation involved multiple properties including the town and all parties were looking into how to proceed. The IWWC has requested to be kept apprised and that has not occurred. Mr. Corson reiterated that the IWWC wishes to be kept in the loop and apprised of any additional information.

Mr. Bennet stated that he intends to see that the discharge is removed from his client's property. In the interim, the property owner, Michael Picard does not want the property washing into South Cove, so he armored the end of the pipe. Mr. Bennet stated that he is prepared to take everything out and stop the drainage with an injunction. The pipe obstructs an easement that belongs to Mr. McDonald who occupies property behind Mr. Picard.

Campbell Hudson stated that Mr. Bennet will take private action against the neighbor and possibly with the town and Mr. Bennet will further take action to stop that drainage from dumping onto his client's property. Mr. Hudson noted that the IW Commission might wish to consider taking no further action at this time so as to allow the applicant to resolve the issue, which is a private matter.

Mr. Bennet commented on the selective enforcement with respect to similar structures and consequences. Mr. Bennet stated that he has made a demand that the drainage be reconfigured to its preexisting condition so that it does not drain onto Mr. Picard's property.

Ms. Zernike asked Mr. Bennet if he plans to simply remove the pipe that is draining onto Mr. Picard's property.

Mr. Bennet noted that someone is going to remove that pipe on Mr. Picard's property and the trespass of water will stop. Mr. Bennet stated that this situation did not exist in 2004 and he stated that he intends to stop it.

Mr. Hudson stated that one does not have an automatic right to deposit water on someone else's property unless you have an easement for the same. Mr. Hudson noted that if someone takes a pipe and dumps water onto someone else's property the court can issue an order to make that stop. Similarly there may be other areas where actions were taken that caused water to flow over the ground and that too could be a trespass.

Mr. Corson noted that in the mid 1990's the pipe was extended and this action was brought before the IWWC and it was approved. At the time no one looked down slope to see where it went as it had been in place for some time.

Mr. Hudson stated that as long as the drainage can get to an acceptable condition then the IWWC will be fine with it. Mr. Hudson stated that the Wetlands Enforcement Officer has given the applicant a cease and desist order and the applicant is asking to hold tight on this for a period of time and see if this issue, which was not their problem to begin with can be remedied.

Ms. Arnold questioned Mr. Bennet's definition of holding tight.

Mr. Bennet stated that the cease and desist is status quo until the private matter is settled. Water will continue to be discharged until a way is found to stop it. Mr. Bennet noted that it is not our street, it is not our pipe and the water will continue to flow. To have an order to say that we are in violation because we are discharging is unfair. It was noted that the water falls over some rocks and into the cove.

Mr. Corson stated that for the time being it appears that what is there is stable. Mr. Corson noted that this issue needs to be resolved.

Mr. Hudson stated that the IW Commission requests to have periodic updates as to the status of the progress on the removal of the pipe. These updates can come in the form of a letter or in the form of an email.

Ms. Arnold asked if Tom Metcalf, P.E. is familiar with the status on this issue and requested that Mr. Budrow communicate with Mr. Metcalf.

Mr. Hudson stated that the resolution could involve litigation. While it is the hope that the matter is resolved before it goes into litigation, if it does go to the court, it could take some time for resolution.

Mr. Szufnarowski stated that the IW Commission has been provided with the legal aspects of the situation, i.e., lawsuit, trespassing. The Commission talked about the technical components of this issue and the runoff which at this time appears to be stable. The other question is that of the jurisdiction of the IWWC. This issue surrounds an area in close proximity to the CT River and Mr. Bennet has stated that the IWWC does not have jurisdiction.

Campbell Hudson stated that the questions that have been raised are, does the upland review area jurisdiction which is 100 feet, apply to that distance measured from a potentially tidal watercourse. South Cove is tidal at that particular point, not under the way the IWWC regulations are currently

written, i.e., definition of watercourse as a river, but excluding from that the tidal wetland laws which are under the exclusive jurisdiction of the DEEP. Mr. Hudson stated that the better interpretation and argument is that exclusion of a watercourse specifically refers to the sections that are tidal wetlands. Those sections only deal with tidal wetlands. They do not deal with tidal watercourses. The inland wetland statute specifically deals with wetlands and watercourses, and tidal deals only with wetlands. The interpretation is that what is precluded from the IW jurisdiction which is only tidal wetlands and not tidal waters. Mr. Hudson noted that one could say the definition in question is why is that language is even necessary if the earlier section pertains to wetlands.

Mr. Corson stated that the IWWC has jurisdiction over the watercourse and the abutting land, however the IWWC does not have jurisdiction over a tidal water.

Mr. Hudson stated that the IWWC has jurisdiction over a tidal watercourse. The upland area above the tidal watercourse where the IW does have jurisdiction does not make sense. There is no logical reason why an IW Commission would have jurisdiction. Mr. Hudson stated that the intent is that you still have to show some connection to the protected watercourse. The IW Commission does not have the right to regulate what goes on in the upland areas. The tidal waters can in fact flow over wetland areas and when tides and storms come in, at times the tidal wetlands are under the river. Mr. Hudson noted that the town of Old Saybrook will not accept an application for anything on tidal waters. Mr. Hudson went on to say that no one can say with absolute certainty that in the Deep River case, when the state came in and claimed sole authority over the wetlands, they were asked to prove that and it was conceded that neither one would budge. The IWWC may have jurisdiction only if the DEEP does not exercise their authority. Mr. Hudson noted that if the IWWC claims to exercise jurisdiction over the upland, it is logical that it tie in with the river.

Mr. Bennet stated that the IWWC does not have jurisdiction. Mr. Bennet indicated that there is a definition in the IWWC regulations that accepts something in coverage. Mr. Bennet stated that per the CGS, the word tidal wetland is described as a water body. Mr. Bennet noted that what the IWWC regulation has done is it has taken that out of coverage. Mr. Bennet indicated that the regulations are defined in a way that does not include certain things and when the regulations speak to the setback of 100 feet, the IWWC does not have jurisdiction.

Mr. Hudson stated that how the regulations are written is not important as the exclusion language is right out of the CGS. Mr. Hudson noted that going forward the IWWC might wish to further discuss the language and look more closely at the regulations.

Mr. Corson suggested that this issue be brought to the DEEP and ask how they wish to proceed.

Mr. Bennet asked for a determination to be made this evening to continue these proceedings and Mr. Bennet will try to get back to the IWWC on a decision relating to the wall by the date of the February 2012 meeting. If the wall is satisfactory, the cease and desist on the drainage will be ended. Mr. Bennet stated that it is his intention is to come back before the IWWC with permit request for the wall without prejudice, based and Priscilla Bailey's report which will be part of that application. Mr. Bennet stated that he expects to finish this process with a permit for the wall and without the cease and desist continuing. Mr. Bennet indicated that the owner took action to stabilize his property and prevent further erosion; and an expert submitted a report saying the measures implemented by the property owner are an improvement to the situation.

Motion made by Chuck Corson regarding the Cease and Desist Order for property located at 141 Saybrook Road, Essex, CT for the installation of a 15" wall at the shoreline without approval, and the extension of a drainage pipe to South Cove without approval. The Motion is: the IWWC will accept the offer made by Attorney John Bennet on behalf of the property owner subject to the Cease and

Desist, who will apply for an Inland Wetlands Permit for the construction of the 15" wall. The IWWC will pursue no further action, for the time being, surrounding the issue of the drainage pipe to South Cove.

Motion seconded by Nancy Arnold and passed unanimously 7/0/0.

Mr. Corson noted that it was the intent of the IWWC to include in the regulations the 100-foot from any wet area. Mr. Corson suggested that the IWWC might wish to revisit that issue/regulation.

Jeff Lovelace, member of the Essex Conservation Commission stated that he would like to seek permission from the IWWC to join the site inspection on the property that is subject to a 7-lot subdivision, 1 Foxboro Road, Essex.

Mr. Lapman noted that the Conservation Commission members are welcome to attend the site inspection. Mr. Lapman stated that while it is not a requirement, the applicant should as a courtesy, present before the Conservation Commission to discuss the proposed easement on this property. Mr. Lapman noted that the Conservation Commission does however have jurisdiction once the easement is in place and filed on the Essex land records.

Ms. Arnold noted that when there is a proposed conservation easement referenced on an IW application, the IWWC always asks the applicant if they have had a discussion with the Conservation Commission.

Ms. Tiernan noted that the Essex Planning Commission is meeting on Thursday, January 12, 2012 and this subdivision is on their agenda for consideration.

Mr. Lovelace noted that the Conservation Commission receives from the CT DEEP, copies of applications and approval by the DEEP for docks, etc. Mr. Lovelace questioned if this is the jurisdiction of the IWWC.

Ms. Arnold noted that there are differences between various coastal towns as to how the installation and improvements of docks are handled. It comes down to statutory and regulatory interpretations. Ms. Arnold noted that we try to be at peace with the DEEP and she noted that they notice us of the dock approvals.

Approval of Minutes

- Regular Meeting, December 13, 2011
- Special Meeting, December 29, 2011

- Amendments to the December 13, 2011 meeting Minutes as noted in italics:

Page 6, 4th line from the top: "By the Paul foundation to drop a line and dredge". Mr. Budrow noted that this is what was said at the meeting. Members asked to have the language changed to "drop a *drag line*"

Page 2, 3rd paragraph: "each one of these proposals" and "Mr. Budrow recanted that he did walk the site and spent an hour". Members asked to have the language changed to "Mr. Budrow *recounted*".

Page 6: Mr. Szufnarowski commented on an email sent by Mr. Budrow which was made part of the record. "...the easement that the drainage swale looks fantastic." Mr. Szufnarowski questioned the

use of superlatives. It was noted that this is a direct quote and as such cannot be amended in the Minutes. Mr. Szufnarowski briefly discussed his objection to the use of superlatives when describing a property.

Motion made by Dan Lapman to approve the Minutes from the December 13, 2011 regular meeting as amended.

Motion seconded by Nancy Arnold and passed unanimously 7/0/0.

- Amendments to the December 29, 2011 special meeting as noted in italics.

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Last line on page 4: "Mallard Point Road".

Motion made by Dan Lapman to approve the Minutes from the December 29, 2011 special meeting as amended.

Motion seconded by Barbara Zernike and passed unanimously 7/0/0.

Correspondence and Invoices: No correspondence and no invoices.

Reports:

a. Wetlands agent

- Mr. Budrow reported that the Essex Park and Recreation Commission will come in with an application to clear the bank in the area of the fishing hole at the northern pond in Viney Hill Brook Park. Mr. Budrow noted that this is an exempt activity.
- Mr. Budrow reported that he received a call to look at a property on Main Street in Ivoryton where there are wetlands that lead to Falls River. There is an above ground oil tank with a pinhole leak that was releasing oil onto the ground. The wetlands are situated 80 feet back. Mr. Budrow noted that the area was 50 x 80 of back fill. The fire marshal was called when the oil leak was first spotted by the son of the property owner. There was 150 gallons of oil leaked and DEEP came out and brought out an environmental crew to clean up.
- Mr. Szufnarowski referenced the cease and desist which was the discussion at this evening's meeting and requested clarification on the notation that a previous administrative permit had been issued.

Mr. Budrow clarified that a landscaping wall with a fence at the top was installed along the cove on the adjacent property owned by Robert Kolp. Although the work was almost complete, Mr. Budrow reviewed the site and he issued an IW administrative permit to Mr. Kolp.

- Mr. Budrow stated that he will send an email on Friday follow this meeting with a copy to the IW Commissioners surround the issue on the property adjacent to the Centerbrook Post Office.

b. Chairperson: No report.

c. Planning Commission Representative Claire Tiernan reported that the Planning Commission will conduct a public meeting on Thursday, January 12, 2012.

- d. **Conservation Commission Representative:** No report.
- e. **Zoning Commission Representative Larry Shipman** reported that the Gateway Commission presented at the December 2012 zoning meeting. Gateway hopes that the Town of Essex would join that Commission. Mr. Shipman indicated that most of the commentary is that the town does not need to adopt the new Gateway regulations. They have made some accommodations to lessen the burden on this town as there are a large number of residences that would be affected. Mr. Shipman stated that no final decisions have been made yet.

Motion made by Dan Lapman to adjourn.

Motion seconded by Claire Tiernan and passed unanimously 7/0/0.

The regularly scheduled meeting of the Essex IWWC adjourned at 9:00pm

Respectfully submitted,

Stella C. Beaudoin
Recording Secretary

The next regularly scheduled meeting of the Essex Inland Wetlands and Watercourses Commission will be conducted on February 14, 2012.