

**Minutes of the October 16, 2013 Delaware and Raritan Canal Commission Meeting  
to be reviewed at the November 20, 2013 Meeting of  
the Delaware and Raritan Canal Commission**

TIME: 10:05 a.m.

DATE: October 16, 2013

PLACE: Delaware and Raritan Canal Commission Office  
Stockton, New Jersey

**ATTENDING:**

**COMMISSIONERS:** Chairman Robert Bostock and Commissioners Mary Alessio Leck, John Loos, Phillip Lubitz, Bruce Stout, and Director Mark Texel

**STAFF:** Ms. Marlene Dooley, Ms. Colleen Christie Maloney, Mr. Vince Mazzei, Deputy Attorney General Lisa Daglis

**GUESTS:** Ms. Patricia Kalleser, D&R Canal State Park; Mr. William Bogosian and Mr. Joe Shepherd, NJ Water Supply Authority (NJWSA); Mr. Robert Barth, D&R Canal Watch; Mr. Herb Spiegel, D&R Canal Commission Advisory Committee; Mr. Robert von Zumbusch, D&R Canal Commission Advisory Committee; Mr. Paul Schneider, Pineville Brunswick Developers; Ms. Jennifer Smith, 426 Royal LLC; Mr. Richard Schummer, Richard Schummer Engineering; Mr. Michael Thomas, T&M Associates; and Mr. Joel Greenberg, Schwiebert Chapter of Trout Unlimited.

The meeting opened at 10:05 a.m. Chairman Bostock announced that this was a regularly scheduled meeting of the D&R Canal Commission and that all provisions of the Open Public Meeting Law of 1976 had been met in the scheduling of the meeting.

Chairman Bostock noted the passing of David Knights and held a moment of silence in his honor.

**Administrative Items**

There were no administrative items for discussion.

**Minutes of the Meeting**

**Minutes of the Meeting of August 21, 2013**

The minutes of the meeting were approved by the members present.

**Minutes of the Meeting of September 18, 2013**

Commissioner Loos abstained from the vote. The minutes of the meeting were approved by the remaining members present.

## Review Zone Projects

### Review Zone A Projects

Chairman Bostock asked Ms. Dooley to provide an overview of the Bakers Basin Road project.

#### 12-2834A Bakers Basin Route 1 Commercial Development (Lawrence)

Ms. Dooley outlined the project including that the project was a 16-acre site on Route 1 and Bakers Basin, most buildings on site would be demolished, there would be five commercial buildings built and a new connector road to replace the existing jug handle; there is a stream corridor on the site, and an existing warehouse will remain. The proposed stream corridor mitigation was outlined.

Chairman Bostock asked for comments from the Commissioners. Commissioner Leck asked about the flooding on the site and surrounding area. Vince Mazzei responded, including that no part of the commercial building will be in the corridor, the existing road is in the floodplain and the examination that is conducted by the DEP's floodplain program.

Chairman Bostock asked for comments from the public. Mr. Bob Barth, D&R Canal Watch, asked for clarification regarding the mitigation and the demolition. He also stated the need for parking at Bakers Basin Road and concerns regarding the project's impact on the canal. Ms. Dooley outlined the 1:1 mitigation on the site, the replanting of the stream corridor, planting behind the warehouse and the painting of the existing warehouse to lessen its visual impact. She also noted that there is an existing parking lot on State property 0.4 miles from Bakers Basin that can be expanded if the building on the site is demolished and that the State could not identify property at Bakers Basin for parking with the amount of mitigation funds available. There was also discussion as to concerns raised by the Office of Resource Development in DEP as to whether a private entity could perform work on State property. Commissioner Loos stated the approval should be conditioned on the applicant demolishing the building or an alternative mitigation if the applicant can not demolish the building. Director Texel asked for clarification regarding the plantings and existing setbacks and the impact to the park view. Robert von Zumbusch, D & R Canal Commission Advisory Committee, asked the type of trees to be planted and noted the importance of the screen being a mix of deciduous and evergreen.

Chairman Bostock asked for final comment, and hearing none, he entertained a motion. Commissioner Loos moved to approve the project with the proposed mitigation and that in the event that the applicant cannot demolish the building off the site, the applicant will return to the Commission for approval of an alternative, appropriate, mitigation. Director Texel asked for clarification regarding the limitations on the demolition and there was discussion with Ms. Dooley and Superintendent Kalleser of what the potential problems related to liability and State contracting might be based on other previous projects. Director Texel and Commissioner Loos discussed ensuring there was alternative mitigation should the private entity not be able to conduct the demolition on State

property; Director Texel suggested amending the motion to state that the applicant either demolish the building off site or pay for the demolition so that the applicant does not have to return to the Commission. Commissioner Loos stated the Commission could direct staff to determine appropriate alternative mitigation and report back. Chairman Bostock asked for a second on the original motion. Commissioner Lubitz seconded the motion. Commissioner Stout asked Commissioner Loos to restate the motion. The motion was restated. Commissioner Loos amended the motion to state that the project be approved but in the event that the applicant cannot demolish the building on park property off the site, or pay for the demolition, that staff will work with the applicant to identify an appropriate equivalent mitigation. Commissioner Lubitz seconded the motion. Chairman Bostock called the vote. The motion was approved unanimously.

#### Review Zone B Projects

Chairman Bostock stated that the Heritage Shopping Center and Gateway projects would be moved to the end and discussed individually. Chairman Bostock stated that the remaining seven Zone B projects would be considered as a group. Chairman Bostock asked the Commissioners if they wanted to identify a Zone B project for individual discussion. No project was identified. Chairman Bostock asked for a motion. Commissioner Lubitz moved the seven Zone B projects; Commissioner Loos seconded. Chairman Bostock asked Ms. Dooley to give a brief overview of the seven Zone B projects other than Heritage Shopping Center and Gateway.

#### 13-4482 Morven Museum and Garden (Princeton)

Ms. Dooley outlined the project including that it was a historic site in Princeton, that the applicant is proposing an addition, parking lot and widening the entrance for an interpretive center; there is not a stream corridor, the project meets stormwater standards and is recommended for approval.

#### 13-3125A Institute for Islamic Studies (W. Windsor)

Ms. Dooley outlined the project including that the project is a seven-acre lot that is presently a farm field, there is no stream corridor, and it meets stormwater standards and is recommended for approval.

#### 13-4442 Westerly Road Church Subdivision (Princeton)

Ms. Dooley outlined the project including that it is a four-acre site in Princeton that presently has a church, large parking lot and four homes; the applicant seeks to demolish the church and parking lot and keep the three homes and build four additional homes; there is not a stream corridor, it meets stormwater and is recommended for approval.

#### 13-4458 Kiddie Academy (No. Brunswick)

Ms. Dooley outlined the project including that it is a 1.36-acre site and the applicant seeks to build a daycare facility, there is not a stream corridor, and it meets stormwater and is recommended for approval.

#### 13-4365 PNC Bank (W. Windsor)

Ms. Dooley outlined the project including that it is an area adjacent to Mercer Mall that is

presently not developed. The applicant would build a bank and parking area and it is recommended for approval.

13-3725A Bittel Patio (Lambertville)

Ms. Dooley outlined the project including that it is a single-family home within a large development which was previously approved by the Commission. Since the development was a major project, any changes to individual homes require approval. The applicant is making a minor change; the site has a recorded easement, the work is outside the easement area, the stormwater impact is de minimus and the project is recommended for approval.

13-2657B Stonebridge at Montgomery

Ms. Dooley outlined the project including that it is a 40-acre site with an existing continuing care facility that was originally approved by the Commission; this project is a small expansion, there is no stream corridor on the site, the project meets stormwater and is recommended for approval.

Chairman Bostock asked for comment from the Commissioners. Director Texel asked for background regarding the Westerly Road project and Mr. Mazzei noted the history of the project at DEP and the agreement between all parties to rezone the neighborhood, move the church, and create homes to allow for a contiguous neighborhood. Chairman Bostock asked for comment from the public. Hearing none, Chairman Bostock called the vote. The motion to approve the seven Zone B projects was approved unanimously.

13-4441 Gateway at Monroe

Chairman Bostock stated that the next project would be the Gateway project. He stated that the Commission received a letter requesting that the project be held but that the Commission does not have a process to hold the application. Chairman Bostock stated that the Commission can deny without prejudice so that the applicant can address any issues and choose to come back before the Commission at a later date. Commissioner Stout moved to deny the application without prejudice. Commissioner Loos seconded. Chairman Bostock asked for comment from the Commission and public. Hearing none, he called the vote. The motion was approved unanimously.

Commission enters Executive Session

Chairman Bostock stated that the next project was the Heritage Shopping Center Phase II. He noted that objections were received last week. Chairman Bostock stated that he would like to go into Executive Session to discuss with counsel proceeding on the application. Chairman Bostock read the Open Public Meetings Act statement regarding entering Executive Sessions into the record. Chairman Bostock asked for a motion. Commissioner Lubitz made a motion to enter executive session. Commissioner Stout seconded. The motion passed unanimously.

Executive Session began at 10:35 a.m.  
The public session resumed at 11 a.m.

13-2445B Heritage Shopping Center Phase II (So. Brunswick)

Chairman Bostock called the meeting back to order and requested that Ms. Dooley outline the Heritage Shopping Center Phase II Project.

Ms. Dooley outlined the project including that it was a 45-acre site on Route 1 in South Brunswick, that the Commission issued approvals for the site in 2001 and 2006, that this project is a second phase for a shopping center for parking and a building and that an easement for the site was established in 2002. Staff issued a deficiency report on September 15 and received several items, including a check, a CD with stormwater calculations, and conservation and maintenance easements on October 9 which made the application complete.

Chairman Bostock acknowledged that there were representatives for the objector and applicant present. Paul Schneider, Giordanno Haleran and Cisela, introduced himself and Michael Thomas, engineer, T & M Associates for the applicant. Jennifer Smith, Gibbons, introduced herself and Richard Schummer, Richard Schummer Engineering, for the objector. Chairman Bostock recognized Ms. Smith.

Ms. Smith stated that the objector was 426 Royal, LLC, a neighboring commercial property owner located approximately six-tenths of a mile from the applicant's property on Route 1. In response to a question from Commissioner Loos, Ms. Smith provided additional information regarding the stores on the site. Mr. von Zumbusch requested that the site plan be displayed and a site plan was posted.

Ms. Smith noted that substantial written objects were submitted on October 10, 2013, when she became aware that the project would be heard by the Commission. Ms. Smith stated she would only highlight a few of the objections at the meeting. Ms. Smith noted that her client objects to the location of the basin and the retaining wall within the stream corridor. She outlined her position including that the project should be reviewed under the current regulations which do not allow basins and retaining walls within the stream corridor, that the project is a different project than the one approved in 2002, and that the current regulations govern and not a private document entered between Pineville and the Commission. Ms. Smith further stated that the applicant did not provide nonstructural stormwater facilities to the maximum extent feasible but took credit for the 33 acres in the stream corridor; that the initial application to the South Brunswick Planning Board showed that recharge was occurring but that as the application progressed, the applicant amended the application and calculations to say there was no recharge; concerns related to water quality due to the comingling of water on the site before discharging to a stream; and that existing basin #2 is being retrofitted from a basin to constructed wetlands without a showing of consent of those holding a cross easement. Commissioner Loos asked for clarification regarding ownership of the basin and Ms. Smith clarified that the applicant owns and operates the basin. Ms. Smith also noted factual inconsistencies within the staff report including the number of trees on site and to be removed and the inclusion of basin #4 when basin #4 has been eliminated.

Chairman Bostock next recognized Mr. Schneider. Mr. Schneider raised several issues

including that the Commission has historically defined the extent of the line for development and stormwater management, that the easement is recorded and in the chain of title, that no one is disputing that the stormwater facilities in the present project are in the hatched area as depicted in Exhibit A, and that while the development being proposed is not identical to the one originally approved, the stormwater impacts are no greater and the encroachment into the area stays within the crosshatched area that the Commission agreed was permitted for future stormwater detention facilities required to serve the future development of the future Lot 15.02.<sup>1</sup> Mr. Schneider also stated that permits are effective for five years and the permit would still be in effect due to the Permit Extension Act (PEA), however, Mr. Schneider stated that he does not believe that the permit being in effect is controlling; he stated that present stream corridor rules allow for measures to protect and control development in the future in stream corridors. Lastly he noted that an agency can not change its long standing practice without rulemaking and the longstanding practice of this Commission has been that when it defines a stream corridor line and when it enters into an easement agreement that controls going forward. Mr. Schneider provided a January 8, 2007 letter from Ernest Hahn, then Executive Director. Mr. Schneider also discussed stormwater issues including noting that the applicant submitted lengthy reports with technical calculations that met the rules and Best Management Practices Manuals and were accepted by Commission staff, outlined the geotechnical data submitted for recharge, and that the constructed wetlands proposed achieve 90% reduction and 80% is required. He agreed that there were some errors in the staff report and there is no basin #4.

There was substantial discussion regarding the trees on site and to be removed by the project. Ms. Smith stated there will be 350 to 460 trees removed from the site and only about 60 trees replanted. Commissioner Loos asked if this issue was raised to the planning board and Ms. Smith answered including that the planning board may count the trees and require future payment for the impact. Ms. Smith noted that the Commission's stream corridor regulations state that trees cannot be removed from the corridor. Commissioner Loos asked the applicant how many trees were being removed and whether they were being removed from where the basin is being located. Mr. Thomas stated that the number being removed on the entire site is 481 and the number being replaced is 198 in addition to 562 shrubs and numerous grasses, bulbs and perennials. Commissioner Loos asked the number of trees being removed from the stream corridor; Mr. Thomas could not state the number. Commissioner Loos quoted from the stream corridor regulations that state that the removal of native vegetation or action resulting in the death of native vegetation is not allowed. Mr. Schneider stated that the Commission permitted the construction of the basin in the stream corridor area and noted that the rules do not allow removal of vegetation "unless permitted." Commissioner Lubitz noted that

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<sup>1</sup> Any uses approved by the Commission as part of this Approval and those uses as shown in the cross hatched area at Exhibit A which include that portion of the Stouts Lane access road, the culvert, retaining walls, related appurtenances and the future stormwater detention facilities required to serve the future stormwater detention facilities required to serve the future development of the remainder of 15.02 all of which will lie within the DRCC Conservation Easement are hereinafter collectively referred to as permitted uses

the regulations still require the permitting of the basin in the stream corridor and referenced the January 8, 2007 Director Hahn letter and that this supports the request for this information. Chairman Bostock directed the applicant to provide the number of trees being removed in the stream corridor. Mr. Thomas noted that the site was developed to limit disturbance to the maximum extent practicable and explained that some trees were removed for flood storage as required by DEP. Commissioner Loos stated that the applicant should submit the number of trees removed in the corridor, the number replanted within the corridor, and, for any that can not be replanted, how many trees are being replanted off the site and if that replanting off the site is being done 2 to 1. Commissioner Loos also asked if the applicant is removing large caliper trees in the corridor. Mr. Thomas said some trees in the corridor are over 16 inches and, of the 198 being planted, the minimum size is 7 foot tall. Within five years, they will double to 15-20 feet. Commissioner Leck asked if all the plantings were native species and Mr. Thomas stated that they were.

Mr. Schneider noted that the applicant was a commercial competitor and other related litigation. Commissioner Loos stated that the objector raised questions and the Commission approves or rejects projects based on facts and regulations

Commissioner Leck stated she had visited the site and asked questions regarding the constructed wetlands, drains from the basin to the creek and retention. Mr. Thomas stated that all basins must hold the 100-year storm and can accommodate the two, 10 and 100-year storms; basins 2 and 3 can hold approximately 10 feet and that an Operation and Maintenance manual was submitted.

Commissioner Loos asked about recharge on the site and Mr. Thomas outlined the testing of 15 test pits on the site. Mr. Mazzei clarified that the DEP manual requires recharge for soils group A-C, that the Soil Surveys showed initially that it was C, however the soil borings showed that the soil is D; he noted that does not mean that recharge does not occur.

Chairman Bostock asked if the Commissioners had any additional questions. Commissioner Loos reread the permitted use language regarding the basin from the 2002 stream corridor easement (see footnote) and asked Ms. Smith why she felt that the provision was not still applicable. Ms. Smith responded including that the easement was entered in 2001/2002 and a waiver to modify the regulatory definition of permitted use was incorporated into the easement; the regulations were modified in 2009 and detention basins and retaining walls became uses that were not permitted. It is her position that the Commission cannot exempt a developer in perpetuity from complying with ever changing regulations; they have to comply with regulations in effect today. The applicant had an approval in 2002 and they could have built the basin at that time. She also noted that in 2002, permits had a 3-year duration, therefore the permit expired in 2005 and therefore would not be extended by the PEA. Chairman Bostock asked if it was Ms. Smith's position that even though the easement was recorded with the ability to construct stormwater systems, the regulations supersede the easement and render it void. Ms. Smith stated that the Commission could create a conservation area but the Commission

cannot have the exception go on forever when there are regulations adopted subsequently and that are effective statewide. One cannot have a perpetual exception to rules created individually when the permit only lives on for 5 years. Commissioner Loos asked Mr. Schneider for his response. Mr. Schneider stated that there is a doctrine called "failure of consideration" and that if the Commission does not live up to its obligation then the permittee does not have to live up to its side; there is no easement. Ms. Smith noted that the Commission could obtain a new easement for the project. Commissioner Loos asked Ms. Smith if an easement was a contract. Ms. Smith stated that there was a question as to whether a state agency can enter a contract that changes the individualized regulation in perpetuity.

Commissioner Lubitz asked for clarification regarding the PEA and for Ms. Smith to clarify her position on the January 2007 letter from Director Hahn. Ms. Smith responded including that the 2007 letter was just an opinion by the Executive Director not an approval and that it did not serve to extend the 2002 approval, that the regulations changed in 2009 and that the PEA did not extend the 2002 approval because it expired in 2005 and the PEA only applies to permits in effect as of 2007.

Commissioner Loos asked if the applicant provided mitigation for the intrusion into the corridor at the time the easement was entered and Mr. Schneider stated that he did not know. Commissioner Loos stated that he felt it was relevant as to whether it was an exception to the easement area or was there an expansion in exchange for the intrusion. Mr. Schneider noted that if the claim is that the Commission lacked the authority to enter an agreement in 2001 to specifically allow the future small detention facility, the time to challenge that appeal expired.

Chairman Bostock thanked Ms. Smith and Mr. Schneider for their comments. Chairman Bostock stated that since the application was not complete until October 9, he believed the Commission had until November 24 to act, therefore the matter could be heard at the November meeting. Chairman Bostock requested that the applicant and objector and any others who would like to comment, submit information by November 1 so that staff and counsel for the Commission can review before the November meeting. Chairman Bostock asked that the applicant and objector provide answers for questions asked during the meeting such as those related to the number and location of trees and clarity regarding mitigation for the easement. Commissioner Loos asked the parties to exchange information with each other when they submit to the Commission and the parties agreed. Chairman Bostock asked if Commissioners had additional questions and then asked staff, counsel, and the public. There was no further comment.

### **Other**

#### **Next Month Meeting Date**

Chairman Bostock sought confirmation that the next meeting date should be moved to November 20, 2013. The change of the meeting date to November 20, 2013 was confirmed by all attending Commissioners.



### **Executive Director's Report**

Ms. Dooley reported on the staff's workload and fees for the preceding month and distributed a report (see attached report). Ms. Dooley also noted the following issues.

#### **Carvallo Park**

Ms. Dooley noted issues related to Carvallo Park, a tot park adjacent to the canal park and leased by the City Lambertville from the State in Review Zone A. She discussed the intent to expand the park which would come before the Commission and recent sampling at the park related to investigation as part of a Green Acres grant.

#### **Personnel**

Ms. Dooley provided a status report including that the positions approved by the Commission in June are not filled.

#### **Mid-Block Crosswalks**

Ms. Dooley noted the increased public questions and concerns about areas where the path crosses busy roads and the interest in mid-block crosswalks. Bridge Street in Lambertville, Canal Road in Franklin near Weston Causeway, Amwell Road at historic Millstone, the area near Port Mercer in Lawrence and Princeton, Bakers Basin Road and Alexander Road have all been the subject of discussion. There was a brief discussion of the history, Commission requirements and present requirements with DOT and local authorities.

### **D and R Canal State Park Superintendent's Report**

Superintendent Kalleser stated that she attended a pre-bid meeting for the rebuilding of the DeMott Lane Bridge; bids are due October 31, 2013; the expected completion date is 2014. Two buildings considered attractive nuisances within Six Mile run were demolished. The Griggstown Bridge Tenders House is near completion. There was a meeting with the Office of Leases to discuss a licensing agreement with the Millstone Valley Preservation Coalition to resolve issues raised at the last Commission meeting regarding use of the building. Ms. Kalleser noted that there was a site visit regarding the complaint of Mr. Fulmer regarding the spillway near South Bound Brook. Canal Fest is Saturday, October 19 in Franklin.

Superintendent Kalleser noted the retirement of Mr. Bogosian. He was thanked for his service by all present.

### **NJ Water Supply Authority (NJWSA) Report**

Mr. Shepherd stated that the contractor is on site at the Swan Creek aqueduct.

Commissioner Loos asked when the dredging in the eastern Franklin would come before the Commission. Mr. Shepherd stated that the NJWSA would not be before the Commission this year since the date had been pushed back.

### **Old Business**

There was no old business.

There was no old business.

**New Business**

There was no new business.

**Public Forum**

Chairman Bostock opened the floor to public comment.

Mr. von Zumbusch, D & R Canal Commission Advisory Commission, wanted to recognize and note the great contributions of former D&R Canal Commissioner David Knights including his efforts with the Mapleton Preserve which is part of the preservation of the context of the canal, great efforts to save the Commission itself, and as the president of Preservation New Jersey. His passing is a great loss. Commissioner Loos seconded these thoughts and noted Mr. Knights' work on the Commission, his larger impact through projects in New Jersey, and that he was an honorable person.

Captain McKelvey, Canal Society of NJ and D & R Canal Coalition, noted he has reject copies of Warren Lee's book on the Belvidere Delaware Railroad, which is a great resource. He would provide those to any Commissioner who would like a copy. Chairman Bostock asked if the Commission could accept and the DAG stated they could be accepted since it is a resource and of nominal value.

**Adjournment**

Chairman Bostock entertained a motion to adjourn. Commissioner Lubitz made a motion to adjourn the meeting; Director Texel seconded; the motion was approved unanimously and the meeting adjourned at 12:15 p.m.

Respectfully submitted,



Marlene Dooley  
Secretary