

**February 18, 2015 Minutes of the Meeting
Delaware and Raritan Canal Commission**

TIME: 10:05 a.m.

DATE: February 18, 2015

PLACE: D&R Canal Commission Office
Stockton, New Jersey

ATTENDING:

COMMISSIONERS: Vice Chairman John Loos, Commissioner Julia Cobb Allen, Commissioner Mary Leck, Commissioner Phil Lubitz, Commissioner Bruce Stout, Commissioner Mark Texel, and Commissioner Ed Trzaska

STAFF: Executive Director Marlene Dooley, Deputy Attorney General Alison Reynolds, Staff Engineer Joseph Ruggeri, and Ms. Colleen Christie Maloney

GUESTS: D&R Canal State Park Superintendent Patricia Kalleser; Mr. Robert Barth, D&R Canal Watch, DRCC Advisory Council; Mr. Robert von Zumbusch, DRCC Advisory Council; Mrs. Smith; Mr. Douglas Chaabrak, Amy S. Greene Environmental.; Mr. Jerry Hurwitz, Princeton Battlefield Society; Mr. Chris Tarr, Stevens and Lee; Ms. Miyuki Kaneko, Stevens and Lee; Mr. Russell Smith, Hopewell Valley Engineering; Mr. Bruce Afran; Ms. Kip Cherry, Princeton Battlefield Society; Mr. Thomas O'Shea, Van Note-Harvey Associates; Mr. Gene Porzio, Altran; Mr. John Ford, Altran; Mr. Greg Olson, PSEG; Mr. David Roth, PSEG; Mr. Darin Johnson, Wildlife Center Friends; Mr. James Rhatican, Wolff and Samson; Mr. Curt Emmich, Forrestal Center; Mr. Christopher DeGrezch, DBR.

Vice Chairman Loos 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. He stated, "In compliance with the Open Public Meetings Act (N.J.S.A. 10:4-6), notice of this meeting was given by way of annual notice filed with The Times, the Star Ledger, the Hunterdon County Democrat; the county clerks of Hunterdon, Mercer, Middlesex, Monmouth, and Somerset Counties; the municipal clerks of those counties; and posted on the NJ DEP Public Participation Calendar, on December 23, 2014. Notice of this meeting was also given on February 10, 2015 by way of notice filed with The Times, the Star Ledger, and the county clerks of Hunterdon, Mercer, Middlesex, Monmouth, and Somerset Counties."

Administrative Items

Vice Chairman Loos confirmed that next month's commission meeting date is March 18, 2015. Commissioner Stout noted he would not be in attendance.

Minutes of the Meeting

Minutes of the January 21, 2015 Meeting

Vice Chairman Loos asked for comments or corrections on the minutes. Hearing none, he asked for a motion on them. Commissioner Trzaska motioned to approve the minutes and Commissioner Leck seconded the motion. Vice Chairman Loos and Commissioners Allen, Leck, Stout, Trzaska, and Texel voted to approve the minutes; Commissioner Lubitz abstained. The minutes were approved.

Motion for Reconsideration: 14-3791B Institute for Advanced Study Faculty

Housing

Commissioner Loos noted that Commissioner Texel had requested that this item be placed on the agenda.

Commissioner Texel made a Motion for Reconsideration on the Institute for Advanced Study project, DRCC # 14-3791B, including the following statement:

I hereby make a motion for reconsideration of proposal 14-3791B the Institute for Advanced Study Faculty Housing presented at our last meeting, January 21, 2015. After reviewing the proposal and hearing testimony from both the applicant and the objector on that day, I was fully prepared to vote in favor of approving this proposal at our January 21, 2015 meeting.

I believed on that day, as I do still today, that the project as presented by the applicant fully complies with our commission's regulations. As you recall, at last month's meeting, I abstained from voting on the motion on the floor at that time to approve the proposal. I did so based on comments by our commissioners prior to the roll call vote that there were already sufficient votes in support of the proposal for it to pass without my vote needed. Therefore, I chose to abstain from voting out of respect to the objector, the Princeton Battlefield Society, who has been a very strong and faithful non-profit partner of the State Park Service.

However, I believe the appropriate outcome is that this project be approved because it does comply with the D&R Canal Commission's regulations. Therefore, today, I respectfully request reconsideration of the proposal so that I may cast my vote in support of it.

Commissioner Stout seconded the motion.

Vice Chairman Loos then stated that the motion was subject to comment and opened the floor to comment from the commissioners and then the public.

Commissioner Lubitz asked the Deputy Attorney General if he could vote on the project. DAG Reynolds said he can vote if he was prepared. Commissioner Lubitz noted that he had listened to the recording of the last meeting, reviewed the exhibits, read the minutes and that he was prepared.

Bruce Afran, attorney for Princeton Battlefield Society, spoke and noted his clients opposed the project for previously discussed reasons. He noted the former motion to

approve the project with conditions and the vote. Mr. Afran made extensive comments opposing the motion including that there was no provision within commission rules allowing for a Motion for Reconsideration, discussion of the commission rules regarding post-decision review, a hearing body's ability to seek reconsideration, and final agency action. Mr. Afran further commented on and questioned Mr. Texel's statement in support of the motion. Mr. Afran discussed a case regarding abstention as a negative vote, that there is no provision for a member of a body to ask to change his vote and precedent.

Chris Tarr, attorney for the applicant, provided comment in support of the motion including a discussion of case law regarding administrative reconsideration being interpreted broadly and favoring reconsideration and noted the four instances where it is not allowed. Mr. Tarr stated the standards were met in this case and asked for support of the project. Mr. Tarr noted the history of the matter and the former motion and conditions.

Robert Barth asked the commission for the Deputy Attorney General's finding on the matter. DAG Reynolds stated that the case law holds that administrative bodies have inherent authority to reconsider their final decisions subject to certain exceptions that do not apply here and therefore found Commissioner Texel's motion for reconsideration legally defensible.

Kip Cherry, First Vice President of the Princeton Battlefield Society, noted that there is an appeal process that is laid out for the Institute to follow and this is not that process and asked for the Commission to consider future decisions.

Mr. Afran responded to Mr. Tarr's comments including referencing the Rules of Court and believed none of the traditional grounds for reconsideration are present.

Mr. Tarr stated that there are cases regarding motions for reconsideration on the volition of the administrative agency itself, fairness, and Robert's Rules addressing motions for reconsideration by administrative entities.

Jerry Hurwitz, President of the Princeton Battlefield Society, spoke opposing the motion stating that having a "change of heart" or changing one's mind is not a valid basis for overturning a project after a full hearing. He noted the need for finality. He further stated the Princeton Battlefield Society will appeal.

Vice Chairman Loos asked for additional comment. Hearing none, he asked the commissioners for any final comment.

Commissioner Trzaska stated that he heard from the DAG Reynolds and trusts her judgment.

Commissioner Texel stated he took exception to Mr. Afran's statement that he was opposed to the application and discussed his statements in January and noted for the record that nothing that he previously stated showed concerns with the application. He noted that personal feelings are irrelevant and that major concerns from the first proposal where he voted "no" were addressed.

Commissioner Stout stated that he voted against the original application when the project intruded into the stream corridor, the commission is vested with the authority to protect the corridor, and noted the commission asked the applicant to remove the project from the corridor and they did. Commissioner Stout discussed the commission's legal charge and noted that the commission cannot create a buffer to a stream corridor. He believes he does not have authority to reject the project based on the rules. Regarding the Motion for Reconsideration, he relies on the advice of the Deputy Attorney General that it is an appropriate matter.

Vice Chairman Loos called the question on Commissioner Texel's Motion to Reconsider the Institute for Advanced Study Faculty Housing project. He noted that if the motion passes, the original motion will be read into the record, then it will be opened to questions by the commission and public, and then there will be a vote on the original motion.

Commissioner Allen stated she listened to all the legal comments and is not comfortable with a positive vote and voted "no."

Vice Chairman Loos, and Commissioners Leck, Lubitz, Stout, Texel and Trzaska voted in favor. The motion passed 6 to 1.

Vice Chairman Loos read the original motion into the record, which was a motion to approve DRCC#14-3791B Institute for Advanced Study Faculty Housing with the following conditions:

1. There shall be no disturbance of the stream corridor buffer;
 2. The applicant shall construct a temporary chain link/snow/silt fence prior to the beginning of construction to keep all work out of the corridor;
 3. The applicant shall give notice to the commission that the fence is in place and commission staff shall inspect the fence and approve its location;
 4. The commission shall advise Princeton of the purpose and importance of the fence;
- and
5. A commission engineer shall review and give final approval of the plans to review the drains.

Vice Chairman Loos stated that the motion was on the floor and subject to debate.

Commissioner Lubitz reiterated that he listened to a recording of the meeting, reviewed the exhibits and read the minutes and is prepared to participate.

Commissioner Trzaska stated that he originally brought the motion and that he is still comfortable with it. He spoke to the commission's jurisdiction for the stream corridor and stormwater and that the project is not physically within the stream corridor.

Vice Chairman Loos opened the discussion to the public. He reminded everyone that prior comments from last month's meeting are part of the record and asked people to speak once and not repeat earlier statements that are on the record.

Mr. Afran stated and discussed a jurisdictional objection based on the agenda.

Vice Chairman Loos stated that when a Motion to Reconsider is voted on and passed, the next step is to consider the project and he ruled there was adequate notice.

Mr. Afran discussed the stream corridor rules, waiver provisions, and the Alfieri project in opposition to the motion.

Director Dooley discussed the stream corridor impact rules including the conditional uses and the commission process for reviewing a stream corridor. She discussed the Alfieri project.

Vice Chairman Loos discussed the staff report form, and stream corridor regulations including conditional uses and language regarding impacts in the corridor. There was a discussion of the check boxes on the front of the staff report form and the commission's review process. Vice Chairman Loos noted the lengthy discussion of the stream corridor in the Institute matter. Mr. Afran discussed jurisdiction, the conditional use provision, completeness as it related to the Institute application, and impacts to the stream corridor from actions outside the corridor.

Ms. Cherry discussed encroachment, fill on the project site and the impact on stormwater and the stream.

Mr. Tarr stated that the Open Public Meeting Act governs and provides three types of notice. He stated the commission only needs to do one but did all three. Mr. Tarr commented further including the Stream Corridor Scope of Review provision and that one only looks at impact if the project includes a portion of the stream corridor.

Vice Chairman Loos asked for any further comment. Hearing none he asked for a roll call vote.

Commissioner Allen voted "no." Commissioner Allen stated that the commission is charged with voting with respect to the impact to the stream corridor in mind, she recognizes the project is not physically within the corridor, but water is integral to a stream corridor, and the amount of water diverted is troubling and will have an impact on the corridor.

Commissioner Texel, Commissioner Trzaska, and Vice Chairman Loos voted "yes."

Commissioner Leck reaffirmed her comments from the last meeting and voted "no." Commissioner Leck expressed her concerns regarding erosion including that water coming off the site will lead to erosion and have an impact on the stream corridor. She noted that she has visited the site and observed impacts on the site.

Commissioner Lubitz reiterated that he listened to the recording of the last meeting, reviewed the exhibits, read the minutes and listened to the today's presentation. Commissioner Lubitz stated that the application satisfies the commission's regulatory requirements and voted "yes."

Commissioner Stout voted “yes.”

Vice Chairman Loos noted that the application carries 5 to 2.

Review Zone A Projects

No projects

Review Zone B Projects

14-3688A Modification to Cranbury Station Park (Cranbury)

Director Dooley described the project, a modification to a 2014 approval which includes construction of warehouses and associated improvements. No work is proposed in the stream corridor; however, the applicant has offered to provide a stream corridor easement. Vice Chairman Loos asked for comment from the commission and the public. Hearing none, he asked for a motion on the project. Commissioner Trzaska moved to approve the project and Commissioner Lubitz seconded the motion. The project was approved unanimously.

14-3688B Roadway Improvements to Route 130 and Station Road (Cranbury)

Director Dooley described the project, which involves roadway improvements related to 14-3688A. The project will result in 0.62 acres of new impervious surface and stormwater will be managed by facilities at Cranbury Station Park. Vice Chairman Loos asked for comment from the commission and the public. Hearing none, he asked for a motion on the project. Commissioner Stout moved to approve the project and Commissioner Lubitz seconded the motion. The project was approved unanimously.

14-4604 Cranbury Half Acre Park (Cranbury)

Director Dooley described the project, which includes developing a 204-acre parcel with warehouses and associated improvements, resulting in 141 acres of new impervious surface. There is a stream corridor on site and conditional uses within the corridor include a sewage pipe and a rip-rap apron related to the stormwater treatment of a roadway. Vice Chairman Loos asked for comment from the commission and the public. Hearing none, he asked for a motion on the project. Commissioner Trzaska moved to approve the project and Commissioner Lubitz seconded the motion. The project was approved unanimously.

14-3012B Ridge Road Substation (So. Brunswick)

Director Dooley described the project, which is a new PSEG substation near Ridge Road and Route 1 on a portion of the former Princeton Nursery Site. Vice Chairman Loos asked for questions from the commission and then the applicant. Mr. Rhatican, a representative for the applicant, discussed the project including that the project is part of a region-wide upgrade, the other approvals received, the outreach done, that the stream corridor was previously preserved by the land owner and the project area is not within that corridor, and that the project manager was available to present or answer questions regarding the stormwater.

Mr. Afran noted he was appearing for Mark and Catherine Smith whose property adjoins the project site. Mr. Afran made comment including that their engineer’s comments are

extensive, their engineer did not have adequate time to review the latest submission, and he would need a second day to present his final comments.

Vice Chairman Loos asked Director Dooley to respond. Director Dooley outlined the original submission of the application, staff recommendation of approval, an OPRA request and meeting with Mr. Russ Smith, PSEG's latest submission in response to the objector's comments, and the document submission to the objectors.

Commissioner Trzaska asked whether the project could be carried to the next meeting under commission regulations. The DAG stated that, based on the project being found complete on January 12, 2015, the 45-day review period would run after the next commission meeting. Mr. Rhatican noted that the entire report is not new, prior versions were reviewed over time and some changes were made. Vice Chairman Loos stated it raised concerns regarding the ability to review the matter. Mr. Rhatican stated that the changes were made to improve the condition and the project is urgent and mandated by Federal Energy Regulatory Commission. DAG Reynolds, Mr. Afran and Mr. Rhatican discussed further including the reason for upgrades, and the issue of deadlines and penalties.

Vice Chairman Loos called for a motion to go into executive session for the purpose of discussing attorney client privileged matters. Commissioner Lubitz motioned to enter into executive session and Commissioner Trzaska seconded the motion. It was approved unanimously. At 11:55, the commission entered into executive session.

At 12:10 pm, Vice Chairman Loos asked for a motion to enter open session. Commissioner Stout motioned to do so, and Commissioner Leck seconded the motion. It was approved unanimously.

Vice Chairman Loos noted that there was concern that there was adequate time to review the latest documents and called for a motion. Commissioner Stout motioned to table consideration of this application until the March meeting to give the objector ample opportunity to review the documents. Commissioner Trzaska seconded the motion. The motion was approved unanimously. Mr. Rhatican asked for his client to present the project. Vice Chairman Loos stated that the matter was tabled.

Executive Director's Report

Director Dooley referred the commissioners to the monthly work tally. She provided and outlined a budget report and there was discussion.

D&R Canal State Park Superintendent's Report

Superintendent Kalleser noted her staff was busy with snow and ice removal, the park received a dump truck with snowplow, the Calhoun Street Canal House suffered water damage, the park was involved in two more acquisitions, and park staff had met with Delaware River Mill Society staff to discuss the sink hole at the Prallsville Mills site.

There was discussion of a notice from Princeton University regarding the Carnegie Lake Dam repair project. Mr. von Zumbusch noted a 7:30 meeting on March 3. Director Dooley noted that she attended a pre-application meeting on the project with the

applicant and that the project may be eligible for a General Permit but the applicant offered to present to the commission.

Commissioner Leck asked if there had been a closing on the the Csapo property, Bordentown Township. Superintendent Kalleser noted it had not yet come through.

Vice Chairman Loos asked the superintendent about the pothole repairs at the Prallsville Mills complex and there was discussion regarding the need.

New Jersey Water Supply Authority (NJWSA)

There was no report.

Old/New Business

There was no old or new business.

Public Comment

There was no public comment.

Executive Session

There was no executive session.

Adjournment

Vice Chairman Loos noted he would entertain a motion to adjourn the meeting. Commissioner Stout motioned to adjourn and Commissioner Lubitz seconded the motion. The motion was approved unanimously. The meeting adjourned at 12:40 p.m.

Respectfully submitted,



Marlene Dooley
Secretary