

FINAL MINUTES
HB 1579 COMMISSION TO STUDY LAND DEVELOPMENT
REGULATIONS AND THE EFFECTS OF LAND DEVELOPMENT
WITHIN UPLAND AREAS THAT MAY AFFECT WETLANDS AND
SURFACE WATERS OF THE STATE

January 20, 2009 * 9:00 AM
NH Legislative Office Building, Room 305, Concord, NH

Commissioners Present:

Chairperson Representative Sue Gottling, NH House of Representatives, member of the
Resources, Recreation and Development Committee
Vice-chairperson Erin Darrow, representing American Council of Engineering Companies of NH
Senator Harold Janeway, NH Senate
Representative Chris Christensen, NH House of Representatives
Cheryl Killam, representing NH Municipal Association
Peter Stanley, representing NH Association of Regional Planning Commissions
Jennifer Czysz, representing NH Office of Energy and Planning
Pat Corso, representing Business and Industry Association
Peter Walker, representing NH Association of Natural Resource Scientists
Charles Miner Jr., representing NH Fish and Game Department
Paul Morin, representing Home Builders and Remodelers Association of NH
Laura Deming, representing NH Audubon Association
Jasen Stock, representing NH Timberland Owners Association
John Doran, representing NH Association of Realtors
Johanna Lyons, representing NH Department of Resources and Economic Development
James Gove, representing Associated General Contractors of NH

Other Attendees:

Jillian McCarthy, NH Department of Environmental Services
Bruce Berke, Mount Washington Resort/Sheehan Phinney
Charlie Hood, NH Department of Transportation
Nicholas Alexander, NH Department of Transportation
David Shulock, Brown, Olson & Gould, P.C. Biomass Group
Gina Rotondi, Rath, Young and Pignatelli
Michael Licata, Business and Industry Association
Susan Olsen, NH Municipal Association
Paul Currier, NH Department of Environmental Services
Carl Paulsen, NH Rivers Council
Joel Maiola, Granite Edge Consulting

Commission Staff:

Dari Sassan, NH Office of Energy and Planning

I. ROLL CALL AND INTRODUCTIONS

Chairperson Gottling called the meeting to order at 9:04 AM. Commissioners introduced themselves by name and representation. Agendas and draft minutes from the November 18, 2008 meeting were distributed to commissioners. Chairperson Gottling thanked Commissioners for their attendance and for the presentations that many had given.

II. APPROVAL OF MINUTES FROM NOVEMBER 18, 2008 MEETING

Ms. Killam requested that the spelling of her name be corrected on page 2 of the minutes. Mr. Walker requested that on page 3, it be clarified that his firm works for the owner of the Fall's Way subdivision though it was not involved in any of the permitting or the court case.

Ms. Killam moved to accept the minutes of the November 18, 2008 meeting. Mr. Stanley seconded. The minutes were accepted unanimously.

III. PRESENTATIONS

Mr. Alexander, a Program Specialist with the NH Department of Transportation (DOT) Bureau of Planning and Community Assistance said that in 2006, the NH Charitable Foundation assembled a Community Advisory Committee. The Committee, which included broad representation, sought to create a long-range plan that looked at transportation within the broader context. Mr. Alexander distributed the executive summary of the Committee's findings. He said that the bottom line of the report was that transportation impacts everything and everyone has a role to play in transportation decision-making.

Mr. Alexander acknowledged that in NH, municipalities exhibit greater control over land-use decisions than in other states. He said that regional planning commissions (RPCs) have a role to play in bringing their communities together and to serve as a conduit between the state and towns. Mr. Alexander said that RPCs also offer a forum for the Ten-Year Transportation Plan, where regional priorities are established. Mr. Alexander said that each region has a Transportation Advisory Committee Commission. He said that, currently, the 2011-20 Ten-Year Plan is under development. Building upon the regional work, Mr. Alexander said in addition to its ten-year plan, DOT also produces a Statewide Transportation Improvement Plan (STIP) every four years, as required by the federal government.

Mr. Hood who serves as Administrator for DOT's Bureau of Environment said that DOT assigns a lead project manager to every approved project. This manager, continued Mr. Hood, follows the project from its initial approval all the way up to groundbreaking. Mr. Hood said that, within the Bureau of the Environment, a lead manager is also assigned, regardless of the project's size. He said that the manager monitors all impact statements, assessments and studies. Sometimes, said Mr. Hood, a private consultant is also contracted (e.g. delineation, mitigation). Mr. Hood said that regardless of the funding source, all project investigations are conducted to meet all federal and state requirements. By doing so, DOT does not

have to go back and do more studies if new funding sources are incorporated at a later time.

Mr. Hood said that DOT conducts monthly natural resource meetings (3rd Wednesday of each month) with parties including NH Fish and Game, US Fish and Wildlife, the Army Corp of Engineers, NH Department of Environmental Services, and the Department of Resources and Economic Development. He added that on the first and second Thursdays of every month, cultural resources meetings are conducted. Mr. Hood said that these meetings are held for the purpose of soliciting early input.

Mr. Hood said that based upon the input received, design engineers develop alternatives which will protect resources that have been flagged. Then, said Mr. Hood, additional public forums are held and letters are sent out. He added that, typically, DOT does not receive as much feedback as it would like. Mr. Hood said that his bureau issues a draft environmental document which explains the project, identifies resources to protect, and lays out the alternatives that were not adopted. Mr. Hood said that after the draft is circulated, another public hearing is conducted, followed by a final environmental document, which is distributed for informational purposes. Next, said Mr. Hood, DOT applies for permits, at which point the goal is to have all potential roadblocks previously worked through.

Mr. Hood distributed minutes from some of the meetings he had described. Ms. Darrow asked how a project becomes a project. Mr. Alexander responded that the idea for a project may come from different origins, including towns, RPCs, the state or from a federal entity. Mr. Hood added that the concept of “purpose and need” is one that governs the decision of whether or not to go forward with a proposed project. He said that purpose and need must exist to justify a project and that early efforts are made to measure general consensus regarding this criterion.

Mr. Gove said that the Land Use Commission has discussed “secondary impacts” on several occasions. He asked Mr. Alexander or Mr. Hood to provide a thumbnail sketch of the secondary impacts issues that DOT considers. Mr. Hood said that habitat fragmentation is a secondary impact that often comes to DOT’s attention. He referred to an example in which a project’s original proposal would have divided a habitat range, cutting off 100 acres and potentially disrupting normal migration patterns.

Another type of secondary impact Mr. Hood recognized was that when DOT constructs a new road, it may also be creating opportunities to develop land that was previously not suited for development due to accessibility constraints. He said that it is the policy of the Federal Highway Administration to identify these potentials but not to mitigate for them. Mr. Hood said that the Administration takes the stance that it is the eventual developer of the land who should bear the responsibility of mitigation.

Mr. Gove asked if consideration of other secondary impacts commonly arises. He mentioned vernal pools as an example. Mr. Hood recalled that DOT was taken to court for not recognizing vernal pools. Mr. Hood also referred to a project where a consultant was asked to look at habitat fragmentation. He said that the \$300,000-\$500,000 that it would have cost to alleviate the situation was instead put toward mitigation through the purchase of conservation land. Mr. Hood also noted that oversized culverts may sometimes serve to connect sections of habitat. He again emphasized the importance of early input to recognize issues and implement solutions.

Mr. Alexander said that calculating the amount of development a DOT project will bring has proven difficult, if not impossible. He said that a "Delphi process" was initiated to predict the growth that the I-93 expansion would have. That process, continued Mr. Alexander, has thus far proven inaccurate.

Mr. Doran referred back to Mr. Hood's mention of mitigation through the purchase of conservation land, asking whether project funds were put toward the land acquisition. Mr. Hood said that project funds were used, adding that while the land was not directly within the project corridor, it was within the impacted wildlife community.

Mr. Doran asked how new legislation regarding indirect impacts might influence DOT's work. Mr. Hood said that some of the secondary impacts that currently only require identification might eventually require additional research. In such an event, he continued, the balance of mitigation responsibility between DOT and other developers would have to be reexamined to address the issue of duplicate mitigation.

Mr. Walker asked about the adequacy of existing local, state and federal regulations. Additionally, he asked if gaps exist, if overlap exists and whether resources are being expended in a disproportionate level to their resultant environmental protection. Mr. Hood said that there is always room for improvement. As an example, he said that, in the past, he had written documents for projects that had already been constructed. Mr. Hood said that procedures within DOT are evolving in a positive direction. He said that engineering personnel now operate with a greater consideration for environmental protection. Mr. Hood added that, sometimes, great measures are taken to protect a resource that is later compromised by development within another sector. He said that with the current regulations that local boards enforce, it is impossible to block all harmful development.

Mr. Alexander said that the ability of municipal and regional boards and commissions to respond to proposed development varies throughout the state. He said that the Community Technical Assistance Program (CTAP) is an excellent program through which DOT provided communities with money to study and plan for secondary impacts. Mr. Alexander said that CTAP money enabled RPCs in the

southern I-93 corridor to look at the patchwork of community regulations in the region. He indicated that many areas for improvement were identified at a relatively low cost.

Representative Christensen noted that when considering proposals to develop the land surrounding I-93 exit 20, the local planning board listened to traffic engineers. He said that the engineers made errors, which eventually resulted in the need for DOT to construct substantial improvements. Representative Christensen asked if it might be possible for the state to become involved in the local planning process. Mr. Alexander said that corridor studies provide an opportunity for DOT to work with RPCs and, hopefully, municipalities. Mr. Alexander said that such research could lead to regulation changes and recognition of transportation improvement needs. He said that the driveway permit process gives DOT very limited opportunity to participate in the planning process and that it is currently very difficult for the state to get involved with land-use decision making.

Mr. Walker asked if the divergence between local approvals and the impact that such approvals might have on DOT might qualify as one such “gap” he had asked about previously. Mr. Alexander said that it is and repeated the contention that the driveway permit does not provide a sufficient gateway for DOT involvement.

Mr. Stanley asked how the processes that Mr. Hood and Mr. Alexander had described mesh with the “context sensitive solutions” process that DOT practices. Mr. Hood said that, as DOT has evolved, context sensitive solutions have become increasingly inherent in the work the agency does and have done so at earlier stages in project planning.

Chairperson Gottling asked if the capacity exists to learn whether mitigation measures actually result in mitigation. Mr. Hood said that DOT does do some research to learn the effectiveness of certain mitigation measures. Chairperson Gottling asked if the lessons learned would be applied to redevelopment in the North Country. Mr. Hood said that DOT has addressed the projects that are in the ten-year plan and expressed DOT’s desire not to ignore any part of the state.

Ms. Darrow asked what percentage of total project cost is directed toward environmental planning. Mr. Hood said that he could provide the Commission with such information. Mr. Alexander added that, while there does exist an average percentage, notable exceptions certainly occur where above-average resources are dedicated toward environmental matters. Mr. Doran asked for clarification between permitting costs and bureau operating costs. Mr. Hood said that he could provide cost and percentage information. He added that HB 76 (2008, *an act creating an environmental policy for New Hampshire*) contained some fiscal data. Mr. Hood said he would pass the information along to the Commission.

Senator Janeway asked if a method exists for defining the “corridor” to which corridor studies are applied. Mr. Alexander said that no set protocol exists for

defining corridors. He acknowledged that, sometimes, a town is not included that perhaps should have been.

Mr. Corso asked if Mr. Hood could provide documentation regarding successful wetlands mitigation. Mr. Hood said that he would submit some monitoring reports containing such documentation to the Commission.

Chairperson Gottling thanked Mr. Hood and Mr. Alexander for their appearances before the Commission. She congratulated them and their agency for having brought about a measure of cultural change as revealed during their testimony.

IV. DISCUSSION OF FUTURE MEETING TOPICS AND DATES

Chairperson Gottling said that a proposed one-year extension of the Commission had been attached to an omnibus bill.

Ms. Czysz said that she had been in contact with Steve Whitman regarding a presentation about instances outside the US where regulations had been modified to allow for a comprehensive planning process. Mr. Whitman said that he was not certain he would be the ideal presenter because his work rarely places him in direct involvement with regulatory processes. Still, Commissioners expressed a desire to host a presentation from Mr. Whitman.

Chairperson Gottling asked if Commissioners would like to also host a presentation from Mark Kern of the US Environmental Protection Agency. Commissioners replied affirmatively. Mr. Gove said that he would invite Mr. Kern. Mr. Walker recommended inviting Matt Schweisberg as well, to which Commissioners agreed. Senator Janeway proposed that the Commission should provide these presenters with specifics regarding requested subject matter.

Mr. Walker said that a hearing would be taking place on January 27, 2009 at 1:00 PM regarding HB 222 (2009 *an act relative to fill and dredge permits in wetlands*). Mr. Stock asked if such a bill might be premature given the fact that the Commission was formed to vet out the issue of secondary impacts. He asked if the Commission would give input or voice non-support for the bill. Mr. Morin said that his constituency feels that indirect impacts are not well defined in the bill. He added that, in his estimation, it would be appropriate for the Commission to oppose HB 222.

Senator Janeway said that the intent of the bill was to address the Supreme Court decision regarding the Fall's Way development. The bill, he continued, does not attempt to redefine indirect impacts, but to clarify the legislative intent that wetlands impacts should not be looked at so narrowly. Mr. Morin said that the court ruling found that there existed a jurisdictional limit and restated his feeling that this bill would be premature. Mr. Doran acknowledged Senator Janeway's

good intentions in sponsoring the bill, but said that he also would view HB 222 as premature.

Chairperson Gottling said that the Commission would not take a stance on the bill at the present time. She encouraged individual Commissioners to attend the hearing and represent their own views. Mr. Morin requested that further discussion of the bill be placed on the next meeting's agenda.

Ms. Darrow said that she sees some potential for unintended consequences to arise from the bill. She added that the American Council of Engineering Companies of NH sees HB 222 as premature. She also suggested that the Commission's discussion of the bill indicated a need for a legislative subcommittee.

Regarding subcommittees, Chairperson Gottling proposed that the Commission develop two subcommittees. Ms. Czysz said that the first subcommittee could focus on land use management practices in other states. She referred to a handout, available on line at:

http://www.nh.gov/oep/legislation/2008/hb1579/2009/documents/new_england_state_level_planning_programs.pdf

The handout provides an overview of some of the measures taken in other New England states. She said that programs that seem especially applicable to the Commission's work can be examined further and the program directors could be contacted and perhaps brought before the Commission.

Chairperson Gottling also proposed the development of a legislative subcommittee and said she would take volunteers to join either committee. Ms. Czysz volunteered to chair the legislative subcommittee. Mr. Gove asked if the formation of subcommittees might generate some conflict in that a Commissioner could be placed in the position of representing her subcommittee *and* the entity for which she serves as a Commissioner. Potentially, the stance of the subcommittee might be in dissonance with the stance of the Commissioner's constituency. Chairperson Gottling encouraged Commissioners to represent their constituencies when the work of subcommittees is brought before the full Commission.

Mr. Morin and Mr. Stanley both expressed willingness to serve the legislative subcommittee in an information-gathering capacity. Chairperson Gottling requested that Mr. Morin and Mr. Stanley work together to establish the subcommittee.

Chairperson Gottling announced that the Commission would to change its meeting time due to the legislative schedule. The Commission agreed to meet again on February 23, 1:00 PM at the Department of Resources and Economic Development. Beginning in March, the Commission agreed to meet on the third Monday of each month at 1:00 PM in room 305 of the NH Legislative Office Building, Concord.

V. OTHER BUSINESS

Ms. Czysz requested a decision as to whether Mr. Whitman should present at the same meeting as Mr. Kern and Mr. Schweisberg. Chairperson Gottling proposed having Mr. Whitman present at the March meeting and focusing the February meeting on the EPA presentation and discussion of the indirect impacts bill. Commissioners expressed agreement.

VI. ADJOURNMENT

At 11:05 AM Chairperson Gottling adjourned the meeting.