



CITY OF NEWBURYPORT
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Jim McCauley, Community Services Chair
City of Newburyport
60 Pleasant St.
Newburyport, MA 01950

August 30, 2023

Dear Councilor McCauley,

I'd like to take this opportunity to provide a synopsis of the rigorous permitting that this project has gone through. It may be helpful to understand what regulatory agencies with jurisdictional oversight have approved this project, what their approvals related to, and a timeline.

Parks Commission (PC):

- The PC has been discussing options for cleaning Frog Pond for over a decade and has been the driving force for the project. The Parks Commission has jurisdictional oversight over any change to a park, per the City ordinance.
- Approved the most recent plan in September of 2021 and applied for CPA funding.

Community Preservation Committee:

- Request for \$2.574M bond plus \$216,000 in design funding approved on April 27, 2022.

City Council:

- Approval of bond on May 31, 2022, 11 yes.
- Condition of approval: final approval of the plan by City Council prior to bond being released.

US Army Corps of Engineers (USACE):

- Jurisdictional determination by USACE received by the City on May 25, 2023 states that Frog Pond does not meet the definition of Waters of the United States and therefore is not within the jurisdiction of USACE under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act.

Massachusetts Environmental Policy Act (MEPA):

- Working session on Jan 4, 2023
- Since the proposed alteration exceeds the MEPA threshold of ½ acre of wetland, MEPA review would have been triggered if one of the following occurred: a) Section 401 WQC was triggered, or b) there was an appeal of the Conservation Commission (ConCom)-issued Order of Conditions. A Section 401 Water Quality Certification (WQC) from the Massachusetts Department of Environmental Protection (MassDEP) is required as a prerequisite to the issuance of a Department of the Army Permit by the USACE pursuant to the provisions of the Clean Water Act, including GP23 for Massachusetts. If the Pond were deemed jurisdictional by USACE pursuant to the provisions of the Clean Water Act, the proposed activities would be subject to

permit authorization from the USACE and the issuance of a WQC from the MassDEP. However, the USACE determined the project was not within the jurisdiction of Section 404 AND there was no appeal, by MassDEP nor anyone else, of the ConCom-issued Order of Conditions during the 10-day appeal period. Therefore, further review by MEPA was not required. They were, however, provided with all documentation and engaged in a working session and were continuously updated with communication about the project as it developed.

MassDEP:

- Working session on Jan 4, 2023
- The project is subject to the MassDEP Wetlands Protection Act (WPA; MGL Ch. 131 s. 40) and Regulations (310 CMR 10.00). The project requires activities in the following WPA Resource and Regulated Areas: Bank, Land under Water Bodies and Waterways, and the 100-foot Buffer Zone. The design team submitted a Notice of Intent to MassDEP and ConCom to present the proposal and detail how the project met each of the Performance Standards for the Resource Areas. MassDEP reviewed the project and did not appeal the decision of the ConCom, who ultimately had jurisdictional authority to approve the project.

ConCom:

- Public hearings held on May 2, May 16, June 6, June 20, and July 21, 2023.
- Notice of Intent was approved on July 21, 2023, 5-0 vote.
- The project is subject to the City of Newburyport Code of Ordinances (Chapter 6.5: Environment, Article II: Wetlands Protection Ordinance). Approval is required from the ConCom to alter the three Resource Areas pertinent to this project site: Bank, Land under Water, and 100-foot Buffer Zone. Section 6.5-27, Jurisdiction & Regulated Activities, specifies that the ConCom can permit alteration of the Bank, Land under Water, and the outer 75 feet of the 100-foot Buffer Zone, which they did. The project also impacts the No-Disturbance Zone (25' buffer), and the City requested a variance from the ordinance by the ConCom "when an overriding public interest is demonstrated or when it is necessary to avoid restricting the use of the property as to constitute an unconstitutional taking without compensation pursuant to Federal and State laws", which was granted. It was deemed by MassDEP and ConCom that the restoration work would not result in a loss of Resource Areas.
- Special Conditions of approval: a) bedrock groundwater well testing data shall be provided, b) construction staging and sequencing plan shall be provided, c) coordination with the Newburyport Department of Public Services to remove accumulated sediment from catch basins prior to any discharge of treated effluent, d) all efforts shall be made to avoid injury or adverse impact to existing wildlife on site during construction, e) written Operations and Maintenance Plan and/or Instruction Manual shall be submitted, f) grading and planting shall comply with the approved plan, and g) site plantings shall be monitored for 2 years to ensure at least 75% survival and shall be replaced as necessary.

Planning Board:

- Public hearings held on July 19, August 2, and August 16, 2023.
- Special Permit was approved on August 16, 2023, 7-0 vote, 1 absent.
- Because the Bartlet Mall lies within the Downtown Overlay District (DOD), any new structure requires approval from the Planning Board, with an advisory review by the Historical Commission. The project was presented to the Historical Commission on June 22, 2023 and a letter was submitted to the Planning Board. The Planning Board reviewed the project in terms of how it meets the Secretary of the Interiors standards for treatment of Historic Places. Specifically, that a) any new additions, exterior alterations, or related new construction will not destroy historic materials, features, and spatial relationships that characterize the property, b) the new work will be differentiated from the old and will be compatible with the historic materials, features, size, scale and proportion, and massing to protect the integrity of the property and its environment, and c) new additions and adjacent or relocated new construction

will be undertaken in such a manner that, if removed in the future, the essential form and integrity of the historic property and its environment would be unimpaired.

- Conditions of approval: a) exterior design of pump house shall be consistent with the approved plans, b) materials shall be real stone (brick and slate) or a request for a minor modification shall be submitted for approval, c) location of the pump house may be subject to change to reduce the visual impact, and d) effective decibel level adjacent to the pump house shall be no higher than 45 decibels (dBA).

Newburyport Commission on Disabilities (NCOD):

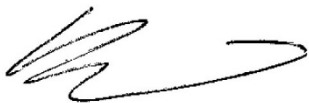
- Public hearing was held on June 8, 2023.
- The NCOD had previously reviewed the project as it pertained to the universally-accessible playground. They were also consulted on the decision to remove the two short flights of granite stairs off Auburn St to the south of the playground and replace with a Flexipave ramp. Because this ramp cannot meet the Americans with Disabilities Act (ADA) requirements for slope, and would require a variance from the Massachusetts Architectural Accessibility Board (MAAB), it was important to have the NCOD review the proposal and provide any feedback prior to the variance request. The NCOD determined that a ramp is far more accessible than stairs and, even though the slope would not comply with ADA standards for grading, someone utilizing a wheeled device would be able to navigate the access route, thereby providing an increased opportunity for inclusion and access at the Park.

MAAB:

- Approval of a variance request was received on July 24, 2023.
- A variance request was submitted to the MAAB to allow a ramp to be constructed at the northwest corner of the park that exceeds 5% grade required to meet ADA standards. Because the pond sits 12-13' below the elevation of the street, it is challenging to create a walkway that meets 1:12 grade without the need for lengthy and costly switchbacks, which would also impact the historic character of the park. The ramp would replace two sets of granite stairs off Auburn St.
- Condition of approval: a) installation of one handicap parking space along the street closest to the new universally-accessible playground.

We look forward to continuing this conversation with the Council at the next Community Services Committee meeting on September 5. In the meantime, please do not hesitate to contact me with any additional questions or concerns.

Sincerely,



Kim Turner, Manager of Special Projects