

**Town of Cape Elizabeth  
Ordinance Committee Minutes**

September 2, 2020

7:00 p.m.

Remote meeting

As a result of the COVID-19 virus, the Ordinance Committee conducted the meeting via remote access as provided by Maine law. The Ordinance Committee used Zoom meeting to conduct the meeting and allowed the public to remotely attend and participate. Zoom allowed all Ordinance Committee members and members of the public to hear all discussion and hear votes, which were taken by roll call, as required by law. A meeting link was provided to access the meeting by video/audio.

Present: Penny Jordan, Chair  
Jamie Garvin  
Chris Straw

Presenters: Aram Calhoun, Jess Jansujwicz, Jeff Rodriguez, Nancy Lightbody

Staff: Maureen O'Meara, Town Planner

Councilor Penny Jordan called the meeting to order. The minutes of the August 11, meeting were approved 3-0.

Public Comment

No members of the public were in attendance.

Vernal Pools

Chair Jordan thanked the speakers for the supporting information provided.

Before the presentation began, Councilor Straw identified his question of whether the state regulatory structure incorporated a variable for drier years? Should there be testing over a longer time frame or bar testing in dry years? Have we seen folks taking advantage of dry years to perform their testing? Is this a loophole or not a widespread incident?

Aram Calhoun, Professor of Wetland Ecology, Department of Wildlife, Fisheries and Conservation Biology, University of Maine at Orono, said it would not be easy to factor in dry seasons. Dry years tend to be identified in the late summer and vernal pool identification is done in the spring. The state law includes intentional loopholes and a locally run program is best for meaningful vernal pool protection.

Chair Jordan asked Ms. Calhoun to identify the intentional loopholes. Ms. Calhoun will try to identify some as she makes her presentation, which is the creation of a vernal pool Special Area Management Plan (SAMP). You can visit the "Of pools and people" web page for more information.

Vernal pools are defined based on the type of breeders found. Vernal pools are ephemeral and may disappear by the end of the summer. They are less than 4,300 sq. ft in size and have no permanent inlet or outlet, and no bull frogs (which eat amphibians). Maine defines vernal pools based on the presence of the wood frog, spotted salamander or fairy shrimp.

Her organization researches what happens to juveniles when they leave the vernal pool. That can travel miles to other vernal pools to mix genes, and need a number of habitats. Radio transmitters were used to track how they move through neighborhoods, specifically a neighborhood in Mount Hope in 2017. They measured maximum travel distances by adults. The study included 817 salamanders, 1165 fairy shrimp, and 3018 wood frogs. The study demonstrates that the area upland of the vernal pool is critical habitat.

Under federal rules, an area 750' from the vernal pool is considered an "area of concern," but it is NOT a no-touch zone. They may not regulate the activity at all. Under state rules, 20% of vernal pools are protected by regulations, and subject to a 250' upland buffer. If the buffer area includes multiple property owners, the development potential is divided up among the property owners. No state permit has been denied because of a vernal pool. Animals go beyond, 250 and if the upland is compromised, the vernal pool function is compromised. For example, in Massachusetts, they have certified vernal pools and a 50' buffer, but there are no animals in the vernal pool.

The Army Corps of Engineers has a SAMP tool and this has just been approved for use in Maine to protect vernal pools. SAMPs have been used in other states, such as Texas, and Rhode Island to protect sensitive natural areas factoring in ecological and societal considerations.

The Maine SAMP was developed with input from the Army Corps, EPA, USFWS, 5 state agencies, 2 towns, and others. The development process took 7 years, included 100 meetings, and was a stakeholder driven process. SAMP improves on the current regulatory framework because the current system was not consistent for developers, did not protect the ecological system, and does not add responsibilities to state regulators, who already have too much work. Vanessa Lavesque did her dissertation on the process used to create the Orono SAMP.

SAMP incorporates the following:

1. Voluntary to set up program
2. Alternative Regulatory Mitigation Tool
3. Existing regulatory rules
4. Adopted programs in Topsham and Orono; pending in Bangor, Kittery, Brunswick.

Why adopt a SAMP? The state and federal rules focus on the vernal pool footprint. When you protect the footprint but lose the surrounding habitat, the

vernal pool becomes simply an urban wetland. One-size regulations don't meet the need of municipalities and property owners. To establish a SAMP, start with the Army Corps, then the Maine DEP, then municipal adoption of an enabling local ordinance and create an overlay zone. The state will need to delegate review authority to the town, but it can be partial delegation limited to vernal pools. The "Of pools and people" website includes template documents such as third party agreements and easements, and model ordinances. The Town will need to map vernal pools in the rural zones and can use aerial photography to do that.

How does the SAMP work once put in place? When development in a growth zone is proposed that impacts a vernal pool, a fee is paid and the impact is allowed. The fee is then used to purchase/protect 2 vernal pools in the rural zone. The fee is based on the value of the lot without a vernal pool. The fee is paid to a third party (it can't be held by the town). For every vernal pool fee paid, 2 vernal pools are protected.

Jess Jansujwicz, University of Maine at Orono, explained that setting up a program includes not just the target species, but also working with the town, real estate interests, and rural landowners. Lessons learned in Orono include identifying willing rural landowners. Many already have their land in conservation programs, such as Tree Growth. It was important to make the vernal pool easements more appealing and explaining the SAMP program. Programs can be tailored, such as allowing collecting firewood and limited tree harvesting. The best messenger to communicate with landowners are hosted events like bean suppers.

Councilor Straw observed that the SAMP mechanism may allow development where current regulations may not allow it. There is still the issue to identify where the vernal pool is and that is a labor intensive process.

Ms. Calhoun said that for vernal pools in growth zones, you don't need to wait until spring to map it because you can develop it and mitigate impact by paying the fee. Now, the fee goes to the state. With a SAMP, the fees stays in the town for 3 years. She is willing to help towns with mapping, and has already committed to 5 towns.

Councilor Straw said he does not want to lower the bar for development but rather create a bright line rule, and is ok with no construction.

Ms. Calhoun, as an ecologist, is happy every vernal pool in a growth zone triggers this. Now, only 20% of vernal pools trigger state and federal rules, so we only get mitigation for 20%. Wildlife habitat depends on a vernal pool linked with unfragmented forest.

Councilor Straw is concerned with the preservation and protection of open space. He does not want to create an incentive to wipe out open space in growth areas. Land will be protected in areas that wouldn't be developed anyway, or not for a long time.

Ms. Calhoun said preserved land must be at risk and not already conserved. Rural land may be the most at risk. Ms. Jansujwicz observed that current land owners may commit to preservation, but when they die there is no in perpetuity protection in place. Ms. Calhoun stated that one vernal pool surrounded by development is no longer functional.

Councilor Jordan summarized that you sacrifice the vernal pool for mitigation fees to spend on protecting a vernal pool with the wooded habitat. Ms. Calhoun followed up that in the growth zone the vernal pool is already sacrificed because the vernal pool ecosystem needs connection to the forest. Without that, you get an urban wetland with bullfrogs.

Councilor Straw stated that we have development zones abutting preserved open space. Ms. Calhoun asked if you could organize your development area so it is not adjacent to the open space?

Chair Jordan said that Cape has limited development now with plans to keep it rural. Open space is part of every development so how do we reconcile that with the wooded areas needed for vernal pools?

Ms. Calhoun referenced Orono and Topsham, where stakeholders reviewed maps on growth areas. In response to a question, Ms. O'Meara described the growth and rural areas in the 2019 comprehensive plan.

Councilor Straw said that growth areas run along roads and wrap open space areas. He might support a system where all land north of the Town Center was growth area and all land south of the Town Center is rural area. He would tailor this program to apply to the town center only and not use it in the northern section of town. Ms. Calhoun offered to help review maps.

Chair Jordan thanked the presenters and asked that the referenced templates be sent as soon as possible.

### Pesticides

Chair Jordan welcomed Nancy Lightbody, Chair of the Falmouth Conservation Commission, to present on Falmouth's work with a pesticide ordinance.

Nancy Lightbody began that her presentation is from the conservation commission point of view and that the town's ordinance committee was very helpful. The Town Council 2016-2017 workplan included pesticides. There was concern with human exposure to pesticides, the water quality status of Highland Lake, other streams and Mussel Cove. Water quality testing shows that pesticides migrate off lawns and into stormwater and Casco Bay, harming crustaceans. She noted that South Portland has an ordinance. Is Cape starting, contemplating or adopting an ordinance?

Chair Jordan responded that the town is doing research, has heard from Ali Clift, Cumberland County Soil and Water Conservation District (CCSWCD), and Falmouth is the first town we are hearing from.

Ms. Lightbody said that Falmouth had help from CCSWCD, Friends of Casco Bay, State Board of Pesticide Control, local scientists, the Portland Water District and Portland and South Portland. Thirty other Maine jurisdictions have adopted some kind of pesticide control. In 2017-2018, Falmouth met with stakeholders including residents, industry representatives from pest control and landscaping, nurseries, and school department (athletic fields). A collaborative approach will be more effective long term. They supported an education program, "lawns and lobsters," at the Portland Country Club, and learned from Bruce Taylor, University of Maine Professor about the impact of pesticides on humans/infants. CCSWCD hosted an event, "Where does the water go."

After 1.5 years and 6 ordinance drafts, the purpose of the ordinance concerns human health and also environmental impacts. They started with just pesticides but added in fertilizers, and included exemptions for products used to protect human health, utility lines, the Maine Turnpike Authority(MTA), invasives, insect treatments where the pest exceeds control measures that are practical. For fertilizers, they want to collect and analyze soil samples and then add soil amendments only needed based on the soil samples. The fertilizer should be 50% slow release and done in spring or late fall. No fertilizing should be done in summer or dry conditions.

Ms. Lightbody emphasized the importance of education, as the carrot, and the ordinance, as the stick. Property owners should comply as much as licensed applicators. Falmouth hired a marketing professional and designed an education campaign, but plans changed due to the pandemic. The plan include a logo, signing a pledge of voluntary compliance, website information, condominium association and golf course awareness, speakers and workshops. She noted that Maine is one of 7 states that do not preempt towns to regulate pesticides.

Implementation will take time, but the ordinance took from the end of 2016-March, 2020. The ordinance committee wanted more information so the conservation committee revised the ordinance to regulate applicators.

Chair Jordan asked if the applicator registration was considered a duplication of the registration required by the state bureau?

Ms. Lightbody responded that the Bureau of Pesticide Control registers every year, but the application totals are not broken down by town. Falmouth wants to see if the ordinance meets the goals of less use and water quality improvements. The town ordinance is not duplication but rather receiving data the applicators already have. In response to the potential burden on MTA if all towns adopt the regulation, they were assigned a \$50 fee. The final ordinance references a sole proprietor or business, but will need to be changed to "applicator."

Industry representatives wanted base line data collected before an ordinance was in place. Water quality testing is expensive, about \$1,000 per sample to test for chemicals, less for fertilizers. Testing is not funded right now.

The Falmouth Ordinance Committee supported registering now and if less is applied, that still supports goals. The mission has to balance improving the environment and still supporting local business. All business are supposed to be registered, but not all are at this time. We are focusing on education for private property owners, and hope that they are asking for environmentally responsible treatments when hiring landscapers.

Chair Jordan said that it is easy to work with professional businesses to get them registered, but the challenge is private property owners applying treatments without professional knowledge.

Ms. Lightbody noted that they are asking businesses to display their Bureau of Pesticide Control (BPC) license number. There is a challenge balancing eradicating invasives and limiting chemicals. We exempt pesticide use to treat invasives. If we are funded to do baseline data, we would prioritize Casco Bay, our borders. Do we do multiple years v. multiple places?

We will reporting in January and evaluating the ordinance. It remains important to work with applicators. Most are ok with registering and will help with collating data.

Chair Jordan asked about the number of applicators? Ms. Lightbody said Falmouth has 19 registrations so far. There are many companies and individuals and some companies have not registered, so we will start with a low key reminder to register.

Chair Jordan asked about the Portland, South Portland direction? Ms. Lightbody said Falmouth learned a lot from them, borrowed from towns, noted that South Portland has the timed implementation of private owners and gold courses.

The committee likes this approach. We should copy Falmouth and collect data. The committee voted 3-0 to recommend a full discussion with the Town Council on the Falmouth approach of tracking commercial applicators before adopting restriction. The town can then review the volume and consider next steps. Application season ends soon and we can vote adoption soon after.

Councilor Garvin asked Ms. Lightbody about measures of effectiveness that property owners are more aware, etc. They are not yet measuring that. Councilor Garvin referenced his experience on the Recycling Committee where education reaches a point of diminishing returns.

### Vernal Pools

The committee returned to its discussion of vernal pool regulations.

Chair Jordan noted the SAMP option is not a cookie cutter approach. Should the committee look more at it?

Councilor Garvin agreed the information was great. Do we have a pervasive issue to address or is this a 1 person/project issue?

Councilor Straw agreed and noted that this streamlines the development process. Growth zones wrap around Robinson Woods. This approach would have streamlined the development in the Town Center that triggered this review.

Chair Jordan noted that in other areas of town, such as Cross Hill, development happens in wooded areas and is the design of our town.

Councilor Straw speculated that if we could put all our development in the Town Center, perhaps we could support a bus line.

Chair Jordan concluded that there is not much development going on for this to be an issue. Is the Resource Protection Chart in the Zoning Ordinance fine as it is?

Councilor Straw doesn't like the current ordinance, but this solution is a bigger problem. There should be a state solution.

Councilor Garvin asked if this is a solution looking for a problem that doesn't match ours? It depends on which version of the facts you believe to determine if anything was circumvented.

Councilor Straw noted that with multiple tests, on any year there could be a change. The vernal pool test may have showed a transition to noncritical. He recommends that the Town Council consider this option the next time it revises the growth areas, and otherwise do nothing for now.

Chair Jordan is compensating for her bias, which is not to do anything. Vernal pools don't exist in perpetuity with climate change, etc. She supports Councilor Straw's motion.

Councilor Straw thinks this is a problem, but too big for the town to close the loophole. We are not very protective of the travel/web of life around vernal pools. We are doing a lot of development in town. We should focus our energies on protecting open space and this solution does not fit that.

The committee voted 3-0 to recommend to the Town Council not to take action at this time and revisit at a future date to the extent that comprehensive plan growth areas are changed or amended.

#### Next meeting

The next meeting will be held on Monday, October 5th at 7:00 p.m. The agenda will include review of fences. The meeting adjourned at 9:21 p.m.