

McGREGOR & ASSOCIATES

ATTORNEYS AT LAW, P.C.

15 COURT SQUARE – SUITE 500
BOSTON, MASSACHUSETTS 02108
(617) 338-6464
FAX (617) 338-0737

GREGOR I. MCGREGOR
E-mail: gimcg@mcgregorlaw.com
(617) 338-6464 ext. 123

VIA HAND DELIVERY

July 18, 2007

Acton Conservation Commission
Natural Resources Department
472 Main Street
Acton, MA 01720

**RE: Spring Hill Road, Lots 2C & 3
Notice of Intent, DEP File No. 085-0971
Our File No. 2453**

Dear Commission Members:

This Firm represents William Sawyer of 15 Spring Hill Road, as well as several of his neighbors, with respect to the two residences (the “Project”) proposed for construction on Lots 2C and 3 on Spring Hill Road in Acton (the “Property”). The Project proponent is Jeanson Homes Inc., who is represented by Acton Survey & Engineering, Inc. (collectively, the “Applicant”). The Property is owned by William and Deanne Angell (the “Angells”). The Applicant has submitted a Notice of Intent (“NOI”) for the Project to the Acton Conservation Commission (the “Commission”).¹

We urge the Commission to deny the Project, which seeks to “shoehorn” two large homes into a small area of upland on a site which has wetland areas. A great deal of documentation in support of claims made by the Applicant is missing. The Applicant has failed to request a waiver for work within 75 feet of wetlands, and has not established how or why it is exempt from the requirements of the Bylaw as a Limited Project. The Project would cause massive alterations to fragile wetlands which are part of an important larger system. The Commission denied a virtually identical proposal by the Angells in 1999, and the reasons for that denial remain valid today. The Project contravenes the plain requirements of the Bylaw and the Act by failing to protect the interests that they protect.

¹ Incidentally, the cover of the NOI indicates its submittal to the Commission under the WPA. We assume it was the Applicant’s intention to file under the Acton Wetlands Protection Bylaw as well. The NOI should be refiled under both the Act and the Bylaw.



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In the spirit of fostering an efficient and thorough review of the Project, we offer several suggestions for the Commission to consider. First, the Commission should hire a consultant to perform a peer review of the Project. Second, the Commission should not be distracted with the question of whether a denial would result in a “taking” of the Property. As discussed in detail below, it is our opinion that a denial would not be a “taking.” Finally, the Commission should not be concerned that a denial will lead to eventual approval at the state level, taking the Project out of the Commission’s hands. Acton’s local Home Rule wetlands bylaw offers an additional layer of protection for the Town’s wetlands beyond the state Wetlands Protection Act (the “Act”), and gives the Commission tighter control over proposed developments. A denial under the local Home Rule wetlands bylaw (the “Bylaw”) must be appealed to Superior Court, for a certiorari review of the Commission’s decision.

THE COMMISSION CAN AND SHOULD HIRE A PEER REVIEW CONSULTANT TO REVIEW THE PROJECT

As an initial matter, we strongly suggest that the Commission hire a peer review consultant to review the NOI. We further suggest that the Commission require that the Applicant provide funds to pay for said consultant. Under G.L. Ch. 40, § 8C, the Commission may establish an account for consultant fees, which may be collected pursuant to G.L. Ch. 44, § 53G. The latter statute permits the Commission to establish “special accounts,” set up by the municipal treasurer, for the deposit of consulting fees. The money will be used to hire a consultant for this Project only, and shall be returned to the Applicant with accrued interest following completion of the Project.

The Acton Wetland Protection Bylaw Rules and Regulations (the “Regulations”), §2.4(4), authorizes that in the course of reviewing an NOI, “the Commission may deem it necessary to obtain expert engineering or other outside consultant services in order to reach a final decision,” and that the decision to hire a consultant may be made “at any point in [the Commission’s] deliberations” The Regulations also make it clear that the applicant is obligated to pay all reasonable costs and expenses associated with that review, referred to as a “consultant fee.” We hope and trust that the Applicant is willing to pay for a peer review of its NOI in order to guarantee a comprehensive review of the Project.

THE PROJECT FAILS TO SATISFY THE STANDARDS OF THE BYLAW OR THE ACT

The stated purpose of the Bylaw is “to protect the wetlands, vernal pools, adjoining buffer zones [and other resource areas] of the Town of Acton by controlling activities deemed to have a significant impact upon wetland interests.”² In order to achieve this stated purpose, “no person shall remove, dredge, fill or alter any resource area ... without first filing a ... written Notice of

² Those wetland interests include, groundwater, flood control, erosion control, storm damage prevention, water pollution prevention, fisheries, protection of endangered or threatened species, and wildlife habitat.



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Intent” Furthermore, under the Regulations §3.2(3), and the Bylaw §8.3(3), construction of a driveway within of 75 feet of a wetland is prohibited. Natural vegetation must remain undisturbed within 50 feet of a wetland pursuant to the Regulations §3.2(2), and the Bylaw §8.3(2). Under the Regulations §1.5, and the Bylaw §4.6, a waiver is required for construction of a driveway within of 75 feet of a wetland and disturbance of natural vegetation with 50 feet of a wetland. An applicant must apply for waivers at the time of filing. No such waiver requests were filed. A waiver will be granted only where the Commission determines that “such action is in the public interest, and is consistent with the intent and purpose of the Bylaw.”

The Project proposes to cross wetlands to reach a relatively small portion of upland at the rear of the site, which necessarily involves construction of a driveway within 75 feet of a wetland and disturbance of natural vegetation within 50 feet of a wetland. The Applicant should be required to apply for waivers from these requirement. As discussed in greater detail below, the mere fact that the Applicant claims to be a Limited Project does not make it so. That determination is left to the discretion of the Commission. In the event that the Commission finds that the Project is not a Limited Project (as was the case in 1999), the Applicant will need waivers from §8.3(2&3) of the Bylaw. We urge the Commission not to grant such waivers.

The Property consists of 5.19 acres (2.56 acres of BVW and 2.62 acres of upland), of which 2.31 acres lie within Buffer Zone. The Property is not suited for development, and the Project would alter far too much of the Property’s resource areas to be permissible. The Project would alter 928 square feet of BVW and 961 square feet of replication. This is a massive alteration within an important wetland system. The Acton Wetland Protection Bylaw Rules and Regulations (the “Regulations”), §4, sets forth the Town’s requirements for wetland replication. A peer review consultant is needed to ensure that the Project will satisfy those replication requirements. The Project would also alter a total of 24,425 square feet of Buffer Zone, which equals 25% of total Buffer Zone on the Property. As you know, the Bylaw considers Buffer Zone a Resource Area.

It appears also that the Applicant has failed to provide any data or supporting documentation to support many of the statements and claims made in its letters (many of these claims, incidentally, are not made in any specific regulatory context). For instance, no reports or narrative descriptions of the wetlands on the Property or replication methods have been submitted. There is no description of how the project meets the performance standards for BVW. No details on the crossing structure or erosion controls have been provided, either.

It is unclear whether the Applicant has had a qualified and experienced professional demarcate Vernal Pool boundaries or determine whether the Property contains vernal pools. Anecdotal statements about children catching fish is not considered ‘documented evidence’ that an area is not a vernal pool. While the documented presence of fish populations may preclude the ‘certification’ of the vernal pool, the Bylaw protects vernal pools regardless of whether or not



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they are certified. It is possible for an area to function as a vernal pool despite the presence of fish. If the fire pond is functioning as a vernal pool, it is protected as such under the by-law.

“The Commission may deny a permit for failure to meet the requirements of [the Bylaw]; for failure to submit necessary information and plans ... or where the Commission deems that no conditions are adequate to protect” the wetland values protected by the Bylaw. The Bylaw, §8.1, places the burden of proof on the Applicant to prove “that the work proposed in the application will not harm the interests protected by [the Bylaw].” The Applicant has not yet begun to present evidence sufficient to meet this burden. The Project fails to meet the requirements of the Bylaw. Important information has not been submitted. It is difficult to imagine that the Commission could create a set of conditions for this Project that would be capable of protecting the values protected by the Bylaw.

THE REASONS SUPPORTING THE COMMISSION'S 1999 DENIAL OF AN IDENTICAL PROPOSAL REMAIN VALID

Significantly, the Commission denied a virtually identical proposal by the Angells in 1999. In its 1999 Denial Order of Conditions, the Commission found that “the proposed work is an example of an applicant wedging two big houses into a small piece of marginally developable land.” Removal of existing trees and vegetation would significantly alter habitat for local wildlife, and the Commission determined that “the proposed work could not be effectively conditioned to avoid all harm” to wildlife habitat. The Commission also determined that the Project would “increase the amount of impervious surface on site adjacent to the wetland resource areas and in the Buffer Zone,” thus increasing runoff to the wetlands. Furthermore, “treated sewage effluent, carrying elevated levels of nutrients, may also affect a wetland already apparently stressed by an upstream nutrient source.”

Ultimately, the Commission determined that “the site is significant to many of the interests and values of the Act and the Bylaw,” that the Property was “a sensitive forested wetland with high wildlife habitat,” and that “the proposed work is an inappropriate development within a marginal upland portion of the applicant’s property that is surrounded by significant wetland resource areas.” In conclusion, the Commission stated that “the project cannot be conditioned to meet the performance standards to protect the interests of the Act and the Bylaw,” and that “work in the buffer zone will irrevocably impact the buffer zone and the functions and values of the wetland resource area, especially its wildlife habitat, a key interest protected by the Bylaw and the Act.”

These reasons were proper to support denial in 1999, and remain to support denial of the Project today. Conditions on the Property have not changed, and the Project proposes massive alterations in violation of the standards set forth in the Bylaw. The Commission should not now change the position that it correctly took the last time work was proposed on this delicate site.



DECISION OF WHETHER TO ALLOW WETLAND CROSSING IS
LEFT TO THE DISCRETION OF THE COMMISSION

In a letter dated July 13, 2007, the Commission asked why the Applicant believes it has a right to access the Property in the manner proposed. The Applicant responded that the Act allows access to upland areas and that the Bylaw does not prohibit wetland crossings. Even if so, the decision of whether to allow a wetland crossing is left to the discretion of the Commission. 310 CMR 10.53(3) provides that:

In the exercise of this discretion, the issuing authority shall consider the magnitude of the alteration and the significance of the project site to the interests identified in M.G.L. c. 131, § 40, ... the extent to which adverse impacts are minimized, and the extent to which mitigation measures, including replication or restoration, are provided to contribute to the protection of the interests identified in M.G.L. c. 131, § 40.

As noted above, construction of a driveway within of 75 feet of a wetland and disturbance of natural vegetation within 50 feet of a wetland are prohibited by the Bylaw and would require waivers. An applicant must apply for waivers at the time of filing, which the Applicant did not do. A waiver will be granted only where the Commission determines that "such action is in the public interest, and is consistent with the intent and purpose of the Bylaw."

The Applicant proposes to build a driveway that will cross BVW on the Property, yet has not filed for any waivers, presumably due to its hope that the Commission has already concluded that the Project is a "Limited Project" under the Act, 310 CMR 10.53(3), and the Bylaw, §4.5. The Applicant states that the shared driveway meets the requirements of 310 CMR 10.53 (3) (e), but fails to demonstrate why or how the Project is reviewable under this section. As noted above, the 'Limited Projects' section of the Act's Regulations highlights the Commission's use of discretion in considering potential approval. Therefore, it is not really possible to "meet the requirements" of this section. Furthermore, any alterations not associated with construction of the roadway would not covered by the "Limited Project" provisions in the Act and Bylaw.

In its 1999 denial, the Commission determined that "the project does not meet the thresholds for a Limited Project." Specifically, the Commission noted that the Property's "developable upland area is small compared to the extent of wetlands on site," and that "the site has other special attributes, especially for wildlife habitat, because of its history of protection and connection to adjacent Conservation land." These reasons remain valid today. Therefore, the Commission should require the Applicant to submit waiver requests for its proposal to construct a driveway within of 75 feet of a wetland.



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A RECENT DECISION OF THE STATE'S HIGH COURT SHOWS THAT DENIAL OF THIS PROJECT WOULD NOT RESULT IN A TAKING

Based on our review of the record to date, it appears that there is some degree of concern on the part of the Commission that if it denied the Project, it would be faced with a takings lawsuit.

In a recent decision stemming from a case with facts remarkably similar to this matter, the Massachusetts Supreme Judicial Court ruled that the Ashland Conservation Commission's denial of an Order of Conditions was not a "taking." *Giovanella v. Conservation Commission of Ashland*, 447 Mass. 720 (2006). In that case, Mr. Giovanella bought two contiguous lots, one containing a house and the second constituted predominantly of wetlands. On the "wetland lot" he sought to build a new house. The Ashland Conservation Commission disapproved his application to build near wetlands under a local Home Rule wetlands bylaw, which contained a 25-foot "no-build" area around all wetlands.

The Court introduced the following rule for determining how the "relevant parcel" will be defined in "taking" lawsuits under the Constitution, that is, how to delineate the unit of property on which the impact is to be measured:

We conclude that the extent of contiguous commonly-owned property gives rise to a rebuttable presumption to finding the relevant parcel. Common sense suggests that a person owns neighboring parcels of land in order to treat them as one unit of property.

Giovanella, 447 Mass. at 729. This rule allows for comparing the value of that property before and after the alleged unconstitutional taking. This comparison is the heart of both the so-called *Penn Central* test (for a multi-factor trial to determine whether a taking occurred)³ and *Lucas* test (for a per se taking).⁴

In *Giovanella*, the property owner had two contiguous lots presumed to be one unit of property for purposes of the "takings" analysis. The lots were purchased at the same time, for a lump sum, as part of one transaction, with no evidence of separate financing. Their separate addresses, tax treatment, and lot lines, said the Court, were of minimal significance. The lots

³ In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123-124 (1978), the U.S. Supreme Court provided three factors which serve as the principle guidelines for regulatory takings claims: the extent to which the regulation interferes with the owner's distinct investment-backed expectations; the economic impact of the regulation; and the character of the government action.

⁴ In *Lucas v. South Carolina Coastal Council*, 503 U.S. 1003, 1019 (1992) the U.S. Supreme Court established that in the "extraordinary circumstance when no productive or economically beneficial use of land is permitted" (emphasis in original), a regulation that causes an owner to lose all economically beneficial use of a piece of property is a taking per se.



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were not separated by a road; both were intended for single-family residential use; and, the Mr. Giovanella did not treat them as separate economic units.

On the merits of the takings claim, the Court first noted that there was no “per se” taking under *Lucas v. South Carolina Coastal Council*, 503 U.S. 1003 (1992) because the land was not “rendered economically valueless.” Indeed, Mr. Giovanella bought both lots for \$130,000 and sold one of them for \$319,900. Moving to the *Penn Central* (multi-factor) analysis, the Court considered each of the three key factors and ruled for the Town. First, the wetlands bylaw did not interfere with Giovanella’s “reasonable investment-backed expectations” because he failed to show any substantial personal financial investment in the development of the wetland lot. Secondly, the “economic impact” of the bylaw did not rise to the level of a taking.⁵ Thirdly, the “character of the government action” did not support that the bylaw as applied was a taking.⁶

The facts in *Giovanella* were so clear, the SJC ruled, that it upheld the Superior Court decision in favor of the Ashland Conservation Commission.

The facts before the Commission are substantially the same as those considered by the SJC in *Giovanella*. The Angells purchased the Property as part of a larger parcel, which included 8 Spring Hill Road, for \$345,000 in December 1993. They sold 8 Spring Hill Road in November 2006 for \$620,000. The listing for 8 Spring Hill Road offered the option of purchasing Lots 2C and 3 to potential buyers, evidencing that the three parcels were not treated as separate economic units. The three parcels are not separated by a road and are all intended for single-family residential use. Thus, 8 Spring Hill Road and Lots 2C and 3 would be considered one unit of property for a takings analysis.

Due to the sale of 8 Spring Hill Road, the Property has not been rendered economically valueless, so there would be no “per se” taking. Under a *Penn Central* analysis, the wetlands bylaw would not interfere with the Angells’ “reasonable investment-backed expectations,” because the Property was subject to conservation restriction at the time of purchase. Secondly, the “economic impact” of the bylaw would not rise to the level of a taking.⁷ Thirdly, the “character of the government action” would not support that the bylaw as applied was a taking.⁸

Therefore, on the facts presented by this matter, a denial of the Application by the Commission would not result in a “taking” of the Property. In its 1999 decision, the Commission appeared to recognize this, noting that it did “not believe that an economic hardship exists on the

⁵ Making assumptions in favor of the landowner that the pre-denial value of both lots was \$452,700, and that the value of the wetland lot was reduced to \$0 after the denial, then the value of the entire property was reduced to \$319,900, a decrease of 29%, not significant enough to rise to the level of a taking.

⁶ The limitations imposed were not like a physical invasion and the bylaw did not unfairly single out Mr. Giovanella.

⁷ Even assuming that the value of the wetland lot would be reduced to \$0 after a denial, then the value of the entire property would be reduced to \$620,000, far too much value to rise to the level of a taking.

⁸ The limitations imposed are not a physical invasion and the bylaw does not unfairly single out the Angells.



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site because a residence has already been constructed on the lot,” and “when the property was bought, a conservation restriction was in effect limiting development”

DENIAL UNDER ACTON'S LOCAL HOME RULE WETLANDS BYLAW WILL BE
REVIEWED IN SUPERIOR COURT, NOT AT THE DEP

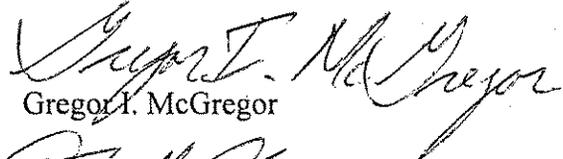
The *Giovanella* case also illustrates another important point. The denial of a project under the state Wetlands Protection Act can be appealed to the Massachusetts Department of Environmental Protection. However, a denial of a project under the Bylaw must be appealed to Superior Court, where the court's review of the Commission's decision is in the nature of certiorari. The function of certiorari review is to correct errors of law committed by a tribunal not otherwise subject to review, where the errors are apparent on record and adversely affect material rights. Certiorari is a traditional type of judicial review of “adjudicatory” decisions.

In other words, the Commission need not fear that its denial of the Project would ultimately result in approval at the state level, effectively causing the Commission to lose its control over the conditions that it would like to see imposed on the Project. The Acton Wetland Protection Bylaw provides the Town with a stricter standards for work proposed in or near resource areas. Regardless whether DEP were to determine that the Project satisfies state standards, a court would be limited in its review of the Commission's decision under the local bylaw.

For the foregoing reasons, the Project should be denied.

We thank you for your consideration in this matter.

Sincerely,



Gregor I. McGregor



Luke H. Legere

