John Appelmans
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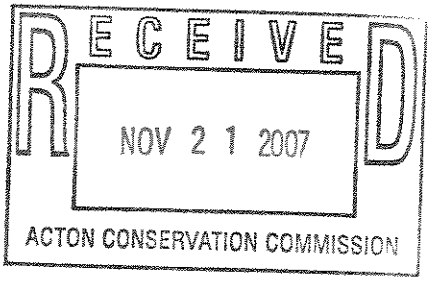

November 13, 2007

Office of Administrative Appeals
Department of Environmental Protection
1 Winter St, 2nd Floor
Boston MA 02108

File #85-971

Dear Sir,

I am an abutter to the site of a proposed property development project that is subject to a MassDEP Superseding Order of Conditions (SOC). This SOC overturns an Acton Conservation Commission denial of a project which would encroach on wetlands and wetland buffer zones for the purposes of residential development. The property is located at 12 Spring Hill Road in the town of Acton.

This letter relates a complaint regarding the recent review and determination by the MassDEP Central Regional Office of an appeal by the applicant under the Wetlands Protection Act and Acton Wetland Bylaw. The appeal was filed by the applicant, Jeanson Homes, on behalf of the land's current owner, William and Deanne Angell.

The applicant sought this appeal in order to obtain permission to construct a driveway within the wetlands buffer zone adjacent to a stream and to cross the stream itself, to locate two houses and their septic systems on a property in the town of Acton, and to excavate and then to build an embankment within the no-disturb buffer zone in order to accomplish the necessary elevation for the houses and septic systems.

[The subject property is over 60% wetland. The neighboring property on the eastern boundary, which was owned by the Angells and has been subdivided, is now owned by Dara Mitchell and Terry O'Sullivan.]

The entire case file for this project, including the project plans, evidence submitted by interested parties, the Town of Acton's Conservation Commission proceedings, and the MassDEP SOC and accompanying letter, are all available online at:

https://doc.acton-ma.gov/dsweb/View/Collection-1779

I have elected not to print and mail all of this material, as my attempt to conserve paper and speed your review.

It has come to our attention that a number of failures appear to have occurred in what we understand is the due process for a MassDEP review of an appeal under the Wetlands Protection Act. These include:

1. No public hearing of the review by MassDEP of the Conservation Commission decision

2. No notification to interested parties (as defined by the Wetlands Protection Act) regarding such a hearing

3. Inadequate notification to interested parties of the MassDEP decision (with only one exception other than the applicant and the Conservation Commission itself)

4. Failure to effectively address the facts and conclusions in the Conservation Commission decision (with only one exception), and explain the reasons for overturning the decision

5. Failure to interpret the law correctly regarding determining the applicant's rights to encroach on wetlands, and to either identify offsetting benefit to the community when such rights are granted, or demonstrate that the applicant has a legal basis for claiming that denial will constitute a legal taking.

6. Failure to correctly determine the admissibility of evidence in an appeal

7. Making errors in interpreting the engineering analysis of the application, and failing to subject the analysis to adequate review to identify and remove them.

This letter addresses these points in order.

1. No Public Hearing on the Conservation Commission Decision by MassDEP

There does not appear to have been a hearing at which the Conservation Commission's decision was reviewed with all the interested parties who have rights of representation in the matter.

I am an abutter to the original property prior to its subdivision, and as such was sent a Notice of Intent by the applicant when he first submitted his proposal. I also participated in all of the public meetings constituting the Conservation Commission hearing, and submitted two documents summarizing the concerns of a number of neighbors and abutters to the subject property. These letters, as well as the Town of Acton's file of the Commission proceedings, are all available online at:

https://doc.acton-ma.gov/dsweb/View/Collection-1779

I believe I was therefore entitled to participate (and still am) in the review of this appeal that was conducted by MassDEP on this matter, and in a hearing to consider the concerns and arguments of the interested parties.

No public hearing on the matter ever appears to have occurred. A site visit took place on September 27, 2007, but no one should mistake that tour for any kind of meeting, since it could not serve as an effective venue for the purposes of the review of documentation,

recording minutes, voting, or, frankly, for implementing any other aspect of Public Meeting law other than gathering information.

2. No Notification to Interested Parties Regarding a Public Hearing

I was not notified of such a hearing, nor did I receive notice of the MassDEP decision on the appeal. In fact, the letter announcing the SOC was dated October 16, 2007, while the SOC itself was mailed on October 22, 2007 (by regular mail). These documents were sent to only two other parties than the applicant: the Conservation Commission, and Dara Mitchell, one of the abutters.

Therefore, I do not believe proper notification of the interested parties has been effected. As a result, I do not believe my rights in this matter have been served, nor have those of the other parties who are entitled to participate as stipulated by the Wetlands Protection Act and the MassDEP regulations.

In addition, many of those who participated in the Conservation Commission hearing were neither invited to, nor present on the site visit, including (to mention only five) William Sawyer, Joan Gardner, William Sisler, Stuart Harvey, and myself, all of whom are documented abutters, as recorded by the NOI's that had been sent to us by the applicant at the initiation of the application. In addition, a group of more than ten residents (neighbors and those in the near neighborhood) formed, and they are also entitled to representation in the appeal process.

Several of the abutters who did hear about the site visit from a third party (this is not proper notification, of course) and came to attend it were told by Ms Mary Ann DiPinto that they would not all be able to participate in the site visit, and therefore were barred from presenting their concerns at the site visit. I did not attend the site visit, since I expected to be invited to a hearing on the matter.

Nor was there any announcement of a hearing in the future, nor any indication that the site visit might be considered a hearing de facto. Therefore, as Mary Ann DiPinto apparently indicated to those present (as I learned later), I anticipated that we would hear directly from MassDEP as interested parties about any hearing, and about any determination in time to file an appeal if that were necessary.

3. Inadequate Notification to Interested Parties of the MassDEP Decision

The second failure is that most of the interested parties were not notified of MassDEP's decision. None of the abutters were notified, nor were any participants in the original Conservation Commission hearings, other than the applicant, and Dara and Terry O'Sullivan, who own one of the five properties which abuts the subject property.

Also, none of us was informed of the decision or our right of appeal, nor of the process to do so, until we were told about the SOC. I learned about the SOC today.

In the absence of such a hearing announcement and the receipt of the determination itself, I am claiming that I was not offered the necessary opportunity to appeal to which I am entitled, and that I was not given sufficient time to effect such an appeal. I am asking to be allowed to exercise that right through this letter.

4. Failure to Effectively Address the Facts and Conclusions in the Conservation Commission Decision

Mr. Philip Nadeau, of MassDEP's Central Regional Office, does not address the facts and conclusions in the Conservation Commission decision (with only one exception), and explain the reasons for overturning the decision. He acknowledges in his letter that there are a number of concerns in the Conservation Commission's denial of the project because "it could not be conditioned to meet the Performance Standards under the Wetlands Protection Act or under the Acton Wetland Bylaw, and because the information submitted was insufficient to describe the activity and its impact on the wetlands."

The Conservation Commission came to these conclusions because:

a) There are significant ecological impacts as a result of clearing, filling and crossing the wetlands, which the applicant has not effectively assessed in a qualified scientific manner, and

b) The applicant failed to satisfy the burden of proof in a number of areas including (but not limited to) assessing the presence of estimated wildlife habitat, particularly for Species of Special Concern.

Here are several (not an exhaustive list) of the significant faults in the application, which the SOC does not address:

1. The applicant has never performed a Species of Special Concern environmental review, **even when directed to do so by the Conservation Commission**. This failure was cited by the Commission in its decision.

   In an earlier application (also denied), a biologist hired by an abutter determined that the subject property contained estimated habitat for two such listed species. One of these species was a turtle. In addition, the applicant's engineer subsequently reported suspected beaver activity. Even though such species are not listed, **their habitats are granted special protection under the revisions to the Wetlands Protection Act of March, 2005, requiring a formal review for such habitat.**

   The applicant knows this. This applicant has simply flouted the process and the law by failing to satisfy the burden of proof in this area, among others, as the Conservation Commission concluded (and wrote).

   Mr. Nadeau's SOC and letter **completely fail to address this lack of proof**, even after **the letter acknowledges it**. He must know that the law requires the

applicant to satisfy it. Yet, **there is no supporting argument in the letter or the SOC why such lack of proof should be overlooked, the Conservation Commission's decision overturned, and permission granted to infringe on the wetlands and the buffer zones.**

2. The project involves three types of encroachment on the wetlands: the driveway, an embankment and a retaining wall to raise the home sites to the necessary elevation, and installation of drainage and recharge systems. All are located within the wetlands or the no-build buffer zones.

3. The applicant has failed to supply a Wetlands Replacement Project Plan that satisfies the stipulations of the guidelines promulgated by MassDEP. For example, there is no construction schedule, and the applicant has made no effort to address the additional impacts of constructing the replacement area itself, which can only be **accomplished by crossing the wetland zone itself.**

   In the MassDEP guidelines for Wetlands Replacement projects, **use of heavy machinery is heavily restricted** in such circumstances, and construction is directed to be undertaken **when the ground is frozen** to minimize impact. The applicant has adopted none of these provisions in their plan, which is almost completely boilerplate. In view of the many other failings in the proposed project, no detailed review of the Wetlands Replacement Project Plan was undertaken at all – it was considered to be a waste of time to do so.

4. The applicant makes no provision for storage of supplies, equipment and debris in the site plan. In fact, there is no suitable location for such items on the subject property; the entire upland is construction site, and the remainder is wetlands or driveway or both.

5. There is no public benefit to the project, nor is there a constitutional taking involved in the denial. Therefore, there is no constitutional basis obligating the Conservation Commission or MassDEP to permit this project's encroachment on the wetlands, and there are significant interests that will be jeopardized if it is allowed to proceed.

   It must be remembered that the authority of a municipal Conservation Commission to grant such permission is **discretionary, not obligatory, under such circumstances, as described in the Wetlands Protection Act itself, and as stated by a Commission member to the applicant when they made the mistake of declaring that they were entitled to this permission.**

However, none of these concerns are addressed by the letter or the SOC, except for water quality. Mr. Nadeau indicates that *"Since the land including all of the remaining wetland area is being set aside in a conservation restriction, a 401 Water Quality Certificate will not be required by MassDEP. The MassDEP therefore has determined that the proposed work can be conditioned to adequately protect the interests of the Act."* In other words, since the applicant is willing to declare the rest of the wetlands unbuildable (which it

already is), he is willing to overlook the wildlife habitat, flooding, wind-related tree-damage, potential contamination of downstream wells from driveway runoff, and other potential impacts.

Mr. Nadeau also appears to overlook the legal basis required for overturning the Conservation Commission decision. For that to occur in a legal appeals process, he must find that the original decision must be flawed, based on the information presented at the time to the Commission, and in particular, that there must be a legal basis for granting this permission to violate the Wetlands Protection Act.

In fact, there is no indication in Mr. Nadeau's letter of any error in the Conservation Commission's decision, nor any refutation of their arguments. With the exception of choosing which style of driveway to use (as if the alternative to deny the project did not exist), he simply contradicts their conclusions, and overturns their decision, by issuing an SOC. **There is no rational logic to this approach** that I can see.

5. Failure to Interpret the Law Correctly Regarding Determination of the Applicant's Rights

Furthermore, it has been established that there is **no community benefit** to this project, there is **no case of a taking**, and **no other reason for this project to be approved** other than the applicant's clients' wish to enrich themselves at the expense of the environment. That is explained in the prior Conservation Commission decisions. In fact, if the proposal to convert the wetlands to conservation land is allowed, the town will likely **lose** tax revenue.

Therefore, **there should have been no review of the application at all beyond this legal point**; the technical content of the application is moot unless the applicant establishes that they are entitled to permission for the project to proceed, which they clearly failed to do.

We should also add that this is the **second application** by the applicant's clients for the same project; the first was **also denied** by the Conservation Commission, and went unappealed by them.

[It's also been established that the applicant has filed no application for any waiver of exemption from the Wetlands Protection Act, and has stated that he believes adequate provision already exists without such a waiver for him to be allowed to proceed. He failed to demonstrate that to the Conservation Commission's satisfaction, and Mr. Nadeau has not indicated under what provisions the Commission's decision should be overruled.]

6. Failure to Correctly Determine the Admissibility of Evidence in an Appeal

Mr. Nadeau seems to have made an error in a point of the law: the admissibility of documentation in a regulatory appeal. Specifically, the plot plan showing the Alternative

Route Using Cart Path was submitted by mail **after** the hearing was closed. Therefore, the plan should never have been reviewed under appeal; only documentation submitted prior to the closure of the hearing is admissible in an appeal.

7. Errors in Interpreting the Engineering Analysis

Mr. Nadeau appears to have made at least one error in the engineering analysis of the application. The applicant proposes a single driveway to serve the two new sites. This driveway will be located across an abutter's property, adjacent to their existing driveway, with a small separating median strip between them, until the new driveway forks west and crosses the wetlands. All of this portion of the driveway will be located within the wetlands buffer zone or the wetlands itself.

Two alternative proposals for a driveway were discussed, although no site plans were submitted during the hearing. The first proposal involves a common driveway which would overlap the current O'Sullivans' driveway for approximately the first quarter of its length, and then fork to the west and resume the **original design's path** from the point of the original planned wetland crossing. I refer to this driveway proposal as the "Common Driveway Over Planned Crossing" proposal.

A second proposal ("Alternative Route Using Cart Path") would have involved laying a driveway extension that used the entire O'Sullivan driveway up to their house, and then completely detoured three-quarters of the way **around** the existing O'Sullivan home to the east, in order to exploit a previous (now overgrown) path that crossed the wetlands further upstream. Because of its length and the imposition it poses on the O'Sullivan's, this proposal is, to put it charitably, impractical; its only merit is that it can discredit the idea of a common driveway if someone believes it to be the only common driveway option, as Mr. Nadeau concluded (erroneously), and whose only benefit accrues to the applicant, for that sole purpose.

In the review, Mr. Nadeau considered documentation that was submitted by the applicant's engineer, Acton Survey and Engineering, Inc, regarding the second approach (Alternative Route Using Cart Path). When describing the impact of the common driveway approach, AS&E completed its calculations using the full width of a common driveway, as if there were natural vegetation there now. This was clearly done to maximize the **apparent** impact of a common driveway. This analysis ignores the facts that:

1) One single driveway already exists, and that the common driveway would simply replace it, occupying only an incrementally larger footprint, for the portion that is shared

2) The environmental impact of the existing driveway has already been sustained, and should not be considered as part of the impact of the common driveway for the shared portion; only the incremental impact should be considered.

Although both alternative proposals involve a common driveway concept, the two proposals are NOT the same. Mr. Nadeau seems to have overlooked the first alternative completely, even though it was discussed **several times** in the application documents. He apparently dismisses the entire Common Driveway concept based on the misunderstanding that the entire impact of the Alternative Route Using Cart Path would necessarily have to be incurred.

This is not the case. For the Common Driveway Over Planned Crossing approach, in the location where the existing O'Sullivan driveway would be reused, **there is already fill, roadbed, and asphalt, and the natural vegetation has already been removed.** Therefore, the impact of expanding the width of this portion of the driveway to a common driveway is only **incremental, instead of fundamentally the same as the entire new driveway contained in the proposal**. The applicant deliberately invites an unfair comparison between only 2 of the 3 available options, in order to avoid the complexities of a common driveway, and Mr. Nadeau apparently obliges.

He **should** have considered the **incremental** increase in width of the common driveway (about 6 feet) in the Common Driveway Over Planned Crossing, not the total width of a completely new common driveway (about 18 feet). Adding a completely new driveway within the buffer zone represents an encroachment of **approximately 16 feet**. The proposed project therefore results in **10 feet more encroachment than the better of the two common driveway alternatives.**

This arithmetic error had already been **pointed out in the documentation submitted by the abutters**, which is one of the reasons we believe Mr. Nadeau did not effectively review the documentation of the case.

Therefore, **even if the appeal had been properly reviewed, *and* all of the Conservation Commission's concerns had been addressed by the SOC** (neither of which I believe to be the case), **and the project were then to be approved by MassDEP, a *correct* SOC should specify a *common driveway* to the point of the current planned crossing to minimize the environmental impact, not a completely separate driveway as the current project proposes.**

Conclusion

We believe the Acton Town Conservation Commission has acted competently and responsibly in enforcing the Wetlands Protection Act and the Acton Wetland Bylaw, and in exercising its **discretion** regarding awarding permission to encroach on wetlands.

I am seriously concerned that the decision by MassDEP, as evidenced in the SOC and accompanying letter, and its failure to address the legal points of the case comprehensively and effectively, both **undermines the effectiveness and morale of municipal Conservation Commissions**, and **sets a precedent for developers to encroach on wetlands** purely for the purpose of capitalizing on the development of tiny tracts of restricted-access uplands surrounded by wetlands.

Although the official period for lodging an appeal has expired if taken as starting from the publication date of Mr. Nadeau's letter, since **I believe due process was not served as a result of failing to notify interested parties and failing to hold a hearing,** I wish to open an adjudicatory appeal to review MassDEP's decision regarding granting this SOC. It is my hope and expectation that the oversights I have indicated can be addressed, that my interests and legal rights in this matter can be protected, and that Conservation Commissions in Massachusetts will be given the support they deserve from MassDEP in upholding the law.

Please reply to me at the above address notifying me of your decision, and of any additional hearings which MassDEP determines are warranted in this matter.

Regards,
John Appelmans
Enclosure

cc: Conservation Commission
Dara Mitchell
William Sawyer
Stuart Harvey
Robert Callahan
William Sisler
David Mitchell-Hart

RECEIVED
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ACTON CONSERVATION COMMISSION