



Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands
WPA Form 5 – Order of Conditions
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

Provided by MassDEP:
85-1060
MassDEP File #
eDEP Transaction #
ACTON
City/Town

A. General Information

1. From: ACTON
Conservation Commission

2. This issuance is for (check one):
a. Order of Conditions b. Amended Order of Conditions

3. To: Applicant:

Kirk Ware
a. First Name b. Last Name
Hawthorn Homes, LLC
c. Organization
530 Great Road
d. Mailing Address
Acton MA 01720
e. City/Town f. State g. Zip Code

4. Property Owner (if different from applicant):

Susan Smith
a. First Name b. Last Name
Blackstone Middlesex Realty Trust
c. Organization
1474 Butterfield Court
d. Mailing Address
Marco Island FL 34145
e. City/Town f. State g. Zip Code

5. Project Location:

101 Nonset Path (vacant land) Acton
a. Street Address b. City/Town
B-4 12 (easement map B-5: 25-7, 25-8, 25-9)
c. Assessors Map/Plat Number d. Parcel/Lot Number

Latitude and Longitude, if known: 42°31'12"N 71°25'35W
d. Latitude e. Longitude



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A. General Information (cont.)

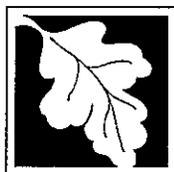
6. Property recorded at the Registry of Deeds for (attach additional information if more than one parcel):
Middlesex South
- | | |
|--------------|--|
| a. County | b. Certificate Number (if registered land) |
| <u>13640</u> | <u>99</u> |
| c. Book | d. Page |
7. Dates: February 16, 2011
- | | | |
|--------------------------------|-------------------------------|---------------------|
| a. Date Notice of Intent Filed | b. Date Public Hearing Closed | c. Date of Issuance |
|--------------------------------|-------------------------------|---------------------|
8. Final Approved Plans and Other Documents (attach additional plan or document references as needed):
See attached Decision (9 pages)
- | | | |
|--------------------------------------|---|--------------------------|
| a. Plan Title | b. Prepared By | c. Signed and Stamped by |
| <u>Stamski & McNary, Inc.</u> | <u>Joseph March, PE 40472 & William F. McNary PLS 30753</u> | <u>McNary PLS 30753</u> |
| d. Final Revision Date | e. Scale | |
| <u>See attached Decision</u> | | |
| f. Additional Plan or Document Title | g. Date | |

B. Findings

1. Findings pursuant to the Massachusetts Wetlands Protection Act:
- Following the review of the above-referenced Notice of Intent and based on the information provided in this application and presented at the public hearing, this Commission finds that the areas in which work is proposed is significant to the following interests of the Wetlands Protection Act (the Act). Check all that apply:
- | | | |
|---|--|---|
| a. <input type="checkbox"/> Public Water Supply | b. <input type="checkbox"/> Land Containing Shellfish | c. <input checked="" type="checkbox"/> Prevention of Pollution |
| d. <input checked="" type="checkbox"/> Private Water Supply | e. <input type="checkbox"/> Fisheries | f. <input checked="" type="checkbox"/> Protection of Wildlife Habitat |
| g. <input checked="" type="checkbox"/> Groundwater Supply | h. <input checked="" type="checkbox"/> Storm Damage Prevention | i. <input checked="" type="checkbox"/> Flood Control |
2. This Commission hereby finds the project, as proposed, is: (check one of the following boxes)

Approved subject to:

- a. the following conditions which are necessary in accordance with the performance standards set forth in the wetlands regulations. This Commission orders that all work shall be performed in accordance with the Notice of Intent referenced above, the following General Conditions, and any other special conditions attached to this Order. To the extent that the following conditions modify or differ from the plans, specifications, or other proposals submitted with the Notice of Intent, these conditions shall control.



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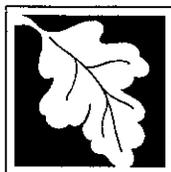
B. Findings (cont.)

DENIED because:

- b. the proposed work cannot be conditioned to meet the performance standards set forth in the wetland regulations. Therefore, work on this project may not go forward unless and until a new Notice of Intent is submitted which provides measures which are adequate to protect the interests of the Act, and a final Order of Conditions is issued. **A description of the performance standards which the proposed work cannot meet is attached to this Order.**
- c. the information submitted by the applicant is not sufficient to describe the site, the work, or the effect of the work on the interests identified in the Wetlands Protection Act. Therefore, work on this project may not go forward unless and until a revised Notice of Intent is submitted which provides sufficient information and includes measures which are adequate to protect the Act's interests, and a final Order of Conditions is issued. **A description of the specific information which is lacking and why it is necessary is attached to this Order as per 310 CMR 10.05(6)(c).**
3. Buffer Zone Impacts: Shortest distance between limit of project disturbance and the wetland resource area specified in 310 CMR 10.02(1)(a) 0
 a. linear feet

Inland Resource Area Impacts: Check all that apply below. (For Approvals Only)

Resource Area	Proposed Alteration	Permitted Alteration	Proposed Replacement	Permitted Replacement
4. <input type="checkbox"/> Bank	a. linear feet	b. linear feet	c. linear feet	d. linear feet
5. <input checked="" type="checkbox"/> Bordering Vegetated Wetland	<u>1,455</u> a. square feet	b. square feet	<u>3,009</u> c. square feet	d. square feet
6. <input type="checkbox"/> Land Under Waterbodies and Waterways	a. square feet e. c/y dredged	b. square feet f. c/y dredged	c. square feet	d. square feet
7. <input type="checkbox"/> Bordering Land Subject to Flooding Cubic Feet Flood Storage	a. square feet e. cubic feet	b. square feet f. cubic feet	c. square feet g. cubic feet	d. square feet h. cubic feet
8. <input type="checkbox"/> Isolated Land Subject to Flooding Cubic Feet Flood Storage	a. square feet c. cubic feet	b. square feet d. cubic feet	e. cubic feet	f. cubic feet
9. <input type="checkbox"/> Riverfront Area	a. total sq. feet	b. total sq. feet		
Sq ft within 100 ft	c. square feet	d. square feet	e. square feet	f. square feet
Sq ft between 100-200 ft	g. square feet	h. square feet	i. square feet	j. square feet



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 MassDEP File #

eDEP Transaction #
 ACTON
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B. Findings (cont.)

Coastal Resource Area Impacts: Check all that apply below. (For Approvals Only)

	Proposed Alteration	Permitted Alteration	Proposed Replacement	Permitted Replacement
10. <input type="checkbox"/> Designated Port Areas	Indicate size under Land Under the Ocean, below			
11. <input type="checkbox"/> Land Under the Ocean	_____	_____		
	a. square feet	b. square feet		
	_____	_____		
	c. c/y dredged	d. c/y dredged		
12. <input type="checkbox"/> Barrier Beaches	Indicate size under Coastal Beaches and/or Coastal Dunes below			
13. <input type="checkbox"/> Coastal Beaches	_____	_____	_____ cu yd	_____ cu yd
	a. square feet	b. square feet	c. nourishment	d. nourishment
14. <input type="checkbox"/> Coastal Dunes	_____	_____	_____ cu yd	_____ cu yd
	a. square feet	b. square feet	c. nourishment	d. nourishment
15. <input type="checkbox"/> Coastal Banks	_____	_____		
	a. linear feet	b. linear feet		
16. <input type="checkbox"/> Rocky Intertidal Shores	_____	_____		
	a. square feet	b. square feet		
17. <input type="checkbox"/> Salt Marshes	_____	_____	_____	_____
	a. square feet	b. square feet	c. square feet	d. square feet
18. <input type="checkbox"/> Land Under Salt Ponds	_____	_____		
	a. square feet	b. square feet		
	_____	_____		
	c. c/y dredged	d. c/y dredged		
19. <input type="checkbox"/> Land Containing Shellfish	_____	_____	_____	_____
	a. square feet	b. square feet	c. square feet	d. square feet
20. <input type="checkbox"/> Fish Runs	Indicate size under Coastal Banks, Inland Bank, Land Under the Ocean, and/or inland Land Under Waterbodies and Waterways, above			
	_____	_____		
	a. c/y dredged	b. c/y dredged		
21. <input type="checkbox"/> Land Subject to Coastal Storm Flowage	_____	_____		
	a. square feet	b. square feet		



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 City/Town

B. Findings (cont.)

* #22. If the project is for the purpose of restoring or enhancing a wetland resource area in addition to the square footage that has been entered in Section B.5.c (BVW) or B.17.c (Salt Marsh) above, please enter the additional amount here.

22. Restoration/Enhancement *:

a. square feet of BVW

b. square feet of salt marsh

23. Stream Crossing(s):

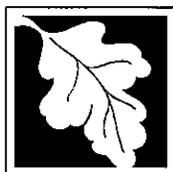
a. number of new stream crossings

b. number of replacement stream crossings

C. General Conditions Under Massachusetts Wetlands Protection Act

The following conditions are only applicable to Approved projects.

1. Failure to comply with all conditions stated herein, and with all related statutes and other regulatory measures, shall be deemed cause to revoke or modify this Order.
2. The Order does not grant any property rights or any exclusive privileges; it does not authorize any injury to private property or invasion of private rights.
3. This Order does not relieve the permittee or any other person of the necessity of complying with all other applicable federal, state, or local statutes, ordinances, bylaws, or regulations.
4. The work authorized hereunder shall be completed within three years from the date of this Order unless either of the following apply:
 - a. the work is a maintenance dredging project as provided for in the Act; or
 - b. the time for completion has been extended to a specified date more than three years, but less than five years, from the date of issuance. If this Order is intended to be valid for more than three years, the extension date and the special circumstances warranting the extended time period are set forth as a special condition in this Order.
5. This Order may be extended by the issuing authority for one or more periods of up to three years each upon application to the issuing authority at least 30 days prior to the expiration date of the Order.
6. If this Order constitutes an Amended Order of Conditions, this Amended Order of Conditions does not extend the issuance date of the original Final Order of Conditions and the Order will expire on _____ unless extended in writing by the Department.
7. Any fill used in connection with this project shall be clean fill. Any fill shall contain no trash, refuse, rubbish, or debris, including but not limited to lumber, bricks, plaster, wire, lath, paper, cardboard, pipe, tires, ashes, refrigerators, motor vehicles, or parts of any of the foregoing.
8. This Order is not final until all administrative appeal periods from this Order have elapsed, or if such an appeal has been taken, until all proceedings before the Department have been completed.



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85-1060
MassDEP File #

eDEP Transaction #
ACTON
City/Town

C. General Conditions Under Massachusetts Wetlands Protection Act (cont.)

9. No work shall be undertaken until the Order has become final and then has been recorded in the Registry of Deeds or the Land Court for the district in which the land is located, within the chain of title of the affected property. In the case of recorded land, the Final Order shall also be noted in the Registry's Grantor Index under the name of the owner of the land upon which the proposed work is to be done. In the case of the registered land, the Final Order shall also be noted on the Land Court Certificate of Title of the owner of the land upon which the proposed work is done. The recording information shall be submitted to the Conservation Commission on the form at the end of this Order, which form must be stamped by the Registry of Deeds, prior to the commencement of work.
10. A sign shall be displayed at the site not less than two square feet or more than three square feet in size bearing the words,

"Massachusetts Department of Environmental Protection" [or, "MassDEP"]
"File Number 85-1060 "
11. Where the Department of Environmental Protection is requested to issue a Superseding Order, the Conservation Commission shall be a party to all agency proceedings and hearings before MassDEP.
12. Upon completion of the work described herein, the applicant shall submit a Request for Certificate of Compliance (WPA Form 8A) to the Conservation Commission.
13. The work shall conform to the plans and special conditions referenced in this order.
14. Any change to the plans identified in Condition #13 above shall require the applicant to inquire of the Conservation Commission in writing whether the change is significant enough to require the filing of a new Notice of Intent.
15. The Agent or members of the Conservation Commission and the Department of Environmental Protection shall have the right to enter and inspect the area subject to this Order at reasonable hours to evaluate compliance with the conditions stated in this Order, and may require the submittal of any data deemed necessary by the Conservation Commission or Department for that evaluation.
16. This Order of Conditions shall apply to any successor in interest or successor in control of the property subject to this Order and to any contractor or other person performing work conditioned by this Order.
17. Prior to the start of work, and if the project involves work adjacent to a Bordering Vegetated Wetland, the boundary of the wetland in the vicinity of the proposed work area shall be marked by wooden stakes or flagging. Once in place, the wetland boundary markers shall be maintained until a Certificate of Compliance has been issued by the Conservation Commission.



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Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

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eDEP Transaction #
ACTON
City/Town

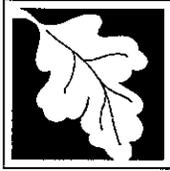
C. General Conditions Under Massachusetts Wetlands Protection Act (cont.)

18. All sedimentation barriers shall be maintained in good repair until all disturbed areas have been fully stabilized with vegetation or other means. At no time shall sediments be deposited in a wetland or water body. During construction, the applicant or his/her designee shall inspect the erosion controls on a daily basis and shall remove accumulated sediments as needed. The applicant shall immediately control any erosion problems that occur at the site and shall also immediately notify the Conservation Commission, which reserves the right to require additional erosion and/or damage prevention controls it may deem necessary. Sedimentation barriers shall serve as the limit of work unless another limit of work line has been approved by this Order.

NOTICE OF STORMWATER CONTROL AND MAINTENANCE REQUIREMENTS

19. **The work associated with this Order (the “Project”) is (1) is not (2) subject to the Massachusetts Stormwater Standards. If the work is subject to the Stormwater Standards, then the project is subject to the following conditions:**

- a) All work, including site preparation, land disturbance, construction and redevelopment, shall be implemented in accordance with the construction period pollution prevention and erosion and sedimentation control plan and, if applicable, the Stormwater Pollution Prevention Plan required by the National Pollution Discharge Elimination System Construction General Permit as required by Stormwater Condition 8. Construction period erosion, sedimentation and pollution control measures and best management practices (BMPs) shall remain in place until the site is fully stabilized.
- b) No stormwater runoff may be discharged to the post-construction stormwater BMPs unless and until a Registered Professional Engineer provides a Certification that:
- i.* all construction period BMPs have been removed or will be removed by a date certain specified in the Certification. For any construction period BMPs intended to be converted to post construction operation for stormwater attenuation, recharge, and/or treatment, the conversion is allowed by the MassDEP Stormwater Handbook BMP specifications and that the BMP has been properly cleaned or prepared for post construction operation, including removal of all construction period sediment trapped in inlet and outlet control structures;
 - ii.* as-built final construction BMP plans are included, signed and stamped by a Registered Professional Engineer, certifying the site is fully stabilized;
 - iii.* any illicit discharges to the stormwater management system have been removed, as per the requirements of Stormwater Standard 10;
 - iv.* all post-construction stormwater BMPs are installed in accordance with the plans (including all planting plans) approved by the issuing authority, and have been inspected to ensure that they are not damaged and that they are in proper working condition;
 - v.* any vegetation associated with post-construction BMPs is suitably established to withstand erosion.



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C. General Conditions Under Massachusetts Wetlands Protection Act (cont.)

- c) The landowner is responsible for BMP maintenance until the issuing authority is notified that another party has legally assumed responsibility for BMP maintenance. Prior to requesting a Certificate of Compliance, or Partial Certificate of Compliance, the responsible party (defined in General Condition 18(e)) shall execute and submit to the issuing authority an Operation and Maintenance Compliance Statement ("O&M Statement") for the Stormwater BMPs identifying the party responsible for implementing the stormwater BMP Operation and Maintenance Plan ("O&M Plan") and certifying the following: *i.*) the O&M Plan is complete and will be implemented upon receipt of the Certificate of Compliance, and *ii.*) the future responsible parties shall be notified in writing of their ongoing legal responsibility to operate and maintain the stormwater management BMPs and implement the Stormwater Pollution Prevention Plan.
- d) Post-construction pollution prevention and source control shall be implemented in accordance with the long-term pollution prevention plan section of the approved Stormwater Report and, if applicable, the Stormwater Pollution Prevention Plan required by the National Pollution Discharge Elimination System Multi-Sector General Permit.
- e) Unless and until another party accepts responsibility, the landowner, or owner of any drainage easement, assumes responsibility for maintaining each BMP. To overcome this presumption, the landowner of the property must submit to the issuing authority a legally binding agreement of record, acceptable to the issuing authority, evidencing that another entity has accepted responsibility for maintaining the BMP, and that the proposed responsible party shall be treated as a permittee for purposes of implementing the requirements of Conditions 18(f) through 18(k) with respect to that BMP. Any failure of the proposed responsible party to implement the requirements of Conditions 18(f) through 18(k) with respect to that BMP shall be a violation of the Order of Conditions or Certificate of Compliance. In the case of stormwater BMPs that are serving more than one lot, the legally binding agreement shall also identify the lots that will be serviced by the stormwater BMPs. A plan and easement deed that grants the responsible party access to perform the required operation and maintenance must be submitted along with the legally binding agreement.
- f) The responsible party shall operate and maintain all stormwater BMPs in accordance with the design plans, the O&M Plan, and the requirements of the Massachusetts Stormwater Handbook.



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Bureau of Resource Protection - Wetlands
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85-1060
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C. General Conditions Under Massachusetts Wetlands Protection Act (cont.)

- g) The responsible party shall:
 - 1. Maintain an operation and maintenance log for the last three (3) consecutive calendar years of inspections, repairs, maintenance and/or replacement of the stormwater management system or any part thereof, and disposal (for disposal the log shall indicate the type of material and the disposal location);
 - 2. Make the maintenance log available to MassDEP and the Conservation Commission ("Commission") upon request; and
 - 3. Allow members and agents of the MassDEP and the Commission to enter and inspect the site to evaluate and ensure that the responsible party is in compliance with the requirements for each BMP established in the O&M Plan approved by the issuing authority.
- h) All sediment or other contaminants removed from stormwater BMPs shall be disposed of in accordance with all applicable federal, state, and local laws and regulations.
- i) Illicit discharges to the stormwater management system as defined in 310 CMR 10.04 are prohibited.
- j) The stormwater management system approved in the Order of Conditions shall not be changed without the prior written approval of the issuing authority.
- k) Areas designated as qualifying pervious areas for the purpose of the Low Impact Site Design Credit (as defined in the MassDEP Stormwater Handbook, Volume 3, Chapter 1, Low Impact Development Site Design Credits) shall not be altered without the prior written approval of the issuing authority.
- l) Access for maintenance, repair, and/or replacement of BMPs shall not be withheld. Any fencing constructed around stormwater BMPs shall include access gates and shall be at least six inches above grade to allow for wildlife passage.

Special Conditions (if you need more space for additional conditions, please attach a text document):

SEE ATTACHED DECISION FOR DENIAL (9 pages).



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D. Findings Under Municipal Wetlands Bylaw or Ordinance

1. Is a municipal wetlands bylaw or ordinance applicable? Yes No
2. The ACTON Conservation Commission hereby finds (check one that applies):

- a. that the proposed work cannot be conditioned to meet the standards set forth in a municipal ordinance or bylaw, specifically:
ACTON WETLAND PROTECTION BYLAW CHAPTER F
 1. Municipal Ordinance or Bylaw 2. Citation

Therefore, work on this project may not go forward unless and until a revised Notice of Intent is submitted which provides measures which are adequate to meet these standards, and a final Order of Conditions is issued.

- b. that the following additional conditions are necessary to comply with a municipal ordinance or bylaw:
 1. Municipal Ordinance or Bylaw 2. Citation

3. The Commission orders that all work shall be performed in accordance with the following conditions and with the Notice of Intent referenced above. To the extent that the following conditions modify or differ from the plans, specifications, or other proposals submitted with the Notice of Intent, the conditions shall control.
 The special conditions relating to municipal ordinance or bylaw are as follows (if you need more space for additional conditions, attach a text document):

SEE ATTACHED DECISION FOR DENIAL (9 pages).



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 Bureau of Resource Protection - Wetlands
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E. Signatures

This Order is valid for three years, unless otherwise specified as a special condition pursuant to General Conditions #4, from the date of issuance.

8.31.2011
 1. Date of Issuance
- Six -
 2. Number of Signers

Please indicate the number of members who will sign this form.

This Order must be signed by a majority of the Conservation Commission.

The Order must be mailed by certified mail (return receipt requested) or hand delivered to the applicant. A copy also must be mailed or hand delivered at the same time to the appropriate Department of Environmental Protection Regional Office, if not filing electronically, and the property owner, if different from applicant.

Signatures:

Thomas B. Arnold Don J. [Signature]
[Signature] [Signature]
Terence Mantlo [Signature]

by hand delivery on _____

by certified mail, return receipt requested, on _____

Date

Date 9/2/2011

F. Appeals

The applicant, the owner, any person aggrieved by this Order, any owner of land abutting the land subject to this Order, or any ten residents of the city or town in which such land is located, are hereby notified of their right to request the appropriate MassDEP Regional Office to issue a Superseding Order of Conditions. The request must be made by certified mail or hand delivery to the Department, with the appropriate filing fee and a completed Request of Departmental Action Fee Transmittal Form, as provided in 310 CMR 10.03(7) within ten business days from the date of issuance of this Order. A copy of the request shall at the same time be sent by certified mail or hand delivery to the Conservation Commission and to the applicant, if he/she is not the appellants.

Any appellants seeking to appeal the Department's Superseding Order associated with this appeal will be required to demonstrate prior participation in the review of this project. Previous participation in the permit proceeding means the submission of written information to the Conservation Commission prior to the close of the public hearing, requesting a Superseding Order, or providing written information to the Department prior to issuance of a Superseding Order.

The request shall state clearly and concisely the objections to the Order which is being appealed and how the Order does not contribute to the protection of the interests identified in the Massachusetts Wetlands Protection Act (M.G.L. c. 131, § 40), and is inconsistent with the wetlands regulations (310 CMR 10.00). To the extent that the Order is based on a municipal ordinance or bylaw, and not on the Massachusetts Wetlands Protection Act or regulations, the Department has no appellate jurisdiction.



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G. Recording Information

Prior to commencement of work, this Order of Conditions must be recorded in the Registry of Deeds or the Land Court for the district in which the land is located, within the chain of title of the affected property. In the case of recorded land, the Final Order shall also be noted in the Registry's Grantor Index under the name of the owner of the land subject to the Order. In the case of registered land, this Order shall also be noted on the Land Court Certificate of Title of the owner of the land subject to the Order of Conditions. The recording information on this page shall be submitted to the Conservation Commission listed below.

ACTON
 Conservation Commission

Detach on dotted line, have stamped by the Registry of Deeds and submit to the Conservation Commission.

To:

ACTON
 Conservation Commission

Please be advised that the Order of Conditions for the Project at:

101 NONSET PATH (VACANT LAND) 85-1060
 Project Location MassDEP File Number

Has been recorded at the Registry of Deeds of:

MIDDLESEX SOUTH _____
 County Book Page

for: _____
 Property Owner

and has been noted in the chain of title of the affected property in:

_____ _____
 Book Page

In accordance with the Order of Conditions issued on:

_____ Date

If recorded land, the instrument number identifying this transaction is:

_____ Instrument Number

If registered land, the document number identifying this transaction is:

_____ Document Number

_____ Signature of Applicant

DECISION
TOWN OF ACTON CONSERVATION COMMISSION

Notice of Intent Filing
Under the Massachusetts Wetlands Protection Act
and the Town of Acton Wetland Protection Bylaw
for 101 Nonset Path, Acton, Massachusetts
DEP File No. 85-1060

Applicant: Kirk Ware, Hawthorne Homes, LLC

Representative: Richard J. Harrington, Stamski and McNary, Inc.

Date Filed: January 26, 2011

Hearing Closed: August 17, 2011

DECISION

On August 17, 2011 the Town of Acton Conservation Commission (the Commission) voted to deny this Notice of Intent under the Massachusetts Wetlands Protection Act (M.G.L. Ch. 131 S40) (hereinafter "the Act") and the Town of Acton Wetland Protection Bylaw, Chapter F: Environmental Protection (hereinafter "the Bylaw"). The Commission presents the following **Findings of Fact and Reasons for Denial.**

Findings of Fact

- **FF-1.** The project site is located at 101 Nonset Path in Acton, Massachusetts and, as described in the Notice of Intent ("NOI") for the project, encompasses approximately 7.2 acres of vacant land. In the NOI filed with the Commission on or around January 26, 2011 the project site is identified as Assessors Reference Map B-4, Parcel 12 with easements on Map B-5, Parcels 25-7, 25-8, and 25-9.
- **FF-2.** Wetland resource areas on and/or adjacent to this site as defined by the Act and/or by the Bylaw consist of "Bordering Vegetated Wetland," and "Stream." Bank and or Land Under Water may also be present. Several vernal pools may be located within the Bordering Vegetated Wetlands of the site.
- **FF-3.** The NOI for the project is dated January 26, 2011 and is titled "Nonset Path, Map B4, Parcel 12, Including Easement Area Only on Map B5, Parcels 25-7, 25-8, & 25-9, Acton,

MA 01720" ("the January 26, 2011 NOI"). The January 26, 2011 NOI submittal includes (1) WPA Form 3, (2) the NOI Wetland Fee Transmittal Form, (3) a Certified Abutter List, Affidavit, and Notice to Abutters, (4) a Project Narrative, (5) a USGS locus map, (6) a copy of that portion of the Massachusetts Natural Heritage Atlas, 13th Edition encompassing the project site, (7) a copy of that portion of the FEMA Flood Insurance Map encompassing the project site, (8) copies of various deeds and record plans for the project site, and (9) site plans prepared by Stamski and McNary, Inc. entitled "Grading, Drainage & Utilities Plan" Sheets 1 of 2, dated January 26, 2011, "Details," Sheet 2 of 2, dated January 26, 2011, "Nonset Path Pre-Development Drainage Map," Sheet 1 of 1, dated December 30, 2010, and "Nonset Path Post-Development Drainage Map," Sheet 1 of 1 dated December 30, 2010. Also submitted with the NOI was a report prepared by Stamski and McNary, Inc. titled "Stormwater Management Report for Nonset Path, Acton, MA," dated January 11, 2011.

- **FF-4.** A public hearing under the Act and the Bylaw on the project was held by the Commission on March 2, 2011 and March 16, 2011, and continued at the request of the applicant or its representative to June 15, 2011. The Commission conducted multiple site visits in the company of the applicant and/or the applicant's representative during the course of the hearing process.
- **FF-5.** The project as described in the January 26, 2011 NOI and reviewed and discussed at the hearing of March 2 and 16, 2011 would include the extension onto the project site of an existing private driveway and sewer line currently serving three single family residences on adjacent properties. The work would entail construction of the new driveway extension through BVW and associated buffer zones located on the project site. The work would also entail the widening of the existing driveway and the construction of a "Constructed Stormwater Wetland" and associated outlet structure, two sediment forebays, an approximately 120-foot long basin retaining wall, and an approximately 1,827 square foot wetland replication area within the buffer zone of the site BVW. Direct impacts to BVW were quantified at 1,759 square feet; buffer zone impacts were not quantified. As described at the public hearing, the roadway, sewer and drainage structures would serve 15 residential duplex structures (30 residential units) and associated driveways and roadways located in the upland area of the project site.
- **FF-6.** At the public hearing of June 15, 2011 the applicant's representative presented "progress prints" for a revised project for the site designed to serve 12 single family residences. As with the earlier project, work would include the construction of a private driveway and sewer line within site BVW and associated buffer zones, and the widening of the existing driveway and the construction of a "Constructed Stormwater Wetland" and associated outlet structure, two sediment forebays, an approximately 120-foot long retaining wall, and an approximately 3,009 square foot wetland replication area within the buffer zone of the site BVW. Direct impacts to BVW were quantified at 1,455 square feet; buffer zone impacts were not quantified. Following discussion of the revised project the public hearing was continued to July 6, 2011.
- **FF-7.** Subsequent to the June 15, 2011 public hearing and prior to the July 6, 2011 public hearing the applicant and/or applicant's representative submitted revised plans and reports

for the project, including “Grading, Drainage & Utilities Plan” Sheet 1 of 3, January 26, 2011, revised June 28, 2011, “Details,” Sheet 2 of 3, January 26, 2011, revised June 28, 2011 and “Details,” Sheet 3 of 3¹, January 26, 2011, revised June 28, 2011, “Nonset Path Pre-Development Drainage Map,” Sheet 1 of 1, December 30, 2011, updated June 9, 2011, updated June 28, 2011, “Nonset Path Post-Development Drainage Map,” Sheet 1 of 1, December 30, 2011, updated June 9, 2011, updated June 28, 2011, and “Revised Stormwater Management Report for Nonset Path, Acton, MA,” January 11, 2011, revised June 28, 2011. New plans prepared and submitted by Stamski and McNary, Inc. included “Nonset Path Alternatives Analysis Sketch,” June 9, 2011 updated June 28, 2011, two undated reports entitled “Wetland Replication Schedule” and “Wetlands Descriptions – Alternative Access,” a letter report from B&C Associates, Inc. “RE Potential Vernal Pools” dated June 24, 2011 and a letter report from Stamski and McNary Inc. “RE 101 Nonset Path” dated June 30, 2011.

- **FF-8.** At the hearing of July 6, 2011 the Commission requested additional information concerning the new and revised and/or updated plans and reports referenced in FF-6 and FF-7. Information requested included, but was not limited to (1) an assessment of alternative stormwater management system designs that would reduce or eliminate the need for the stormwater basins to be located entirely within the buffer zone, (2) an assessment of alternative stormwater management system designs that would eliminate the stormwater basin berm and retaining wall structures from the buffer zone and the 75-foot no structures zone of the Bylaw, (3) review of which stormwater standards are not being met and why, (4) a discussion of the hydraulic connection between the stormwater basins, the replication area and the remaining fragmented wetland area, (5) an engineering plan demonstrating how the roadway retaining/support walls would be constructed through the site BVW without additional temporary or permanent wetland impacts beyond the footprint of the roadway, (6) an erosion control plan for the construction of the proposed roadway retaining/support walls, (7) a plan for wildlife features for the proposed wetland replication area, (8) an operations and maintenance plan, long term pollution prevention plan and an illicit discharge compliance statement for the site stormwater management system, and (9) backup data and/or new data documenting the findings of the B&C Associates, Inc. relative to potential vernal pool species composition. Following these requests the hearing was continued to August 17, 2011.
- **FF-9.** At the public hearing of August 17, 2011 the applicant’s representative indicated no further information would be forthcoming. The hearing was then closed.
- **FF-10.** The project entails the crossing and filling of BVW for the purpose of constructing a driveway to an upland portion of the site, and significant work within the buffer zone of the BVW for the purpose of constructing stormwater management basins and structures to serve that portion of the roadway within the BVW and the stormwater runoff from project development in the uplands portion of the site. The applicant has submitted the application as a “Limited Project Driveway Crossing.” The Wetlands Protection Act regulations for limited projects at 310 CMR 10.53(e) grant the Commission the right to waive certain

¹ Note: The January 26, 2011 NOI submittal included only one detail sheet (see FF-3).

requirements for *“the construction and maintenance of a new roadway or driveway of minimum legal and practical width acceptable to the planning board, where reasonable alternative means of access from a public way to an upland area of the same owner is unavailable.”* The limited project provisions of the Act are adopted by the Bylaw at Section F4.5.

- **FF-11.** The proposed roadway width is 18 feet. The applicant has indicated that 18 feet is the minimum width acceptable to the Town of Acton Fire Chief for a development of twelve residential units². Meanwhile, in a written memorandum submitted to the Conservation Commission on August 12, 2011 the Town of Acton Zoning Enforcement Officer / Assistant Town Planner has presented a preliminary discussion of site zoning that would suggest that use of the existing driveway easement would allow only one residential unit on this site.³ The applicant’s representative opined at the hearing of August 17, 2011 that a single residential unit would likely require a 10 foot wide driveway.
- **FF-12.** The applicant has presented several alternative access options to the site, all of which would entail greater impacts to BVW. However, in the written memorandum referenced in FF-11, the Town of Acton Zoning Enforcement Officer / Assistant Town Planner presented a preliminary discussion of site zoning that would suggest that the project site may not have legal frontage for any development. The applicant did not present an alternatives assessment that included alternative development scenarios (i.e. less than 12 residential units) that might have resulted in a lesser “minimum legal and practical width” for the roadway crossing as referenced in the Act’s regulations for limited projects.
- **FF-13.** The BVW of the site borders an intermittent stream that flows easterly to an extensive wetland system that includes Will’s Hole, a quaking bog. A stream identified as perennial on the USGS topographic map supplied with the NOI discharges from Will’s Hole and represents a headwater stream of the Nashoba Brook watershed. Will’s Hole is located within the 90-acre Town of Acton Will’s Hole/Town Forest Conservation Land which, in turn, creates an important natural and undisturbed link between the vegetated riparian corridors associated with Nonset Brook and Vine Brook to the north and Nagog Brook to the south. This includes linkage to a large area identified by the Massachusetts Natural Heritage and Endangered Species Program as “Priority Habitat of Rare Species” and “Estimated Habitat of Rare Wildlife” (see Attachment C of the January 26th 2011 NOI).

² In an email submitted to the applicant’s representative and the Town of Acton Natural Resource Director, dated August 10, 2011, the Town of Acton Fire Chief Robert Craig wrote: “I did meet with yourself and the other parties noted above on July 26, 2011. The purpose of the meeting was to review a revised plan for 101 Nonset Path which is now proposed to have twelve single family dwellings. In regard to my concerns and specifically for the Conservation Commission I would note that after discussion I did indicate and it was agreed that the minimum acceptable clear paved width of the proposed access drive would be eighteen feet. The exception to that would be as noted that at the Lot 17 buffer zone area the clear paved width would be 26 feet wide to better accommodate emergency vehicles on the curve.”

³ Scott A. Mutch, Zoning Enforcement Officer & Assistant Town Planner to Terry Maitland, Chairman Conservation Commission, August 12, 2011, “Zoning Guidance & Information - Notice of Intent of Hawthorne Homes, LLC - 101 Nonset Path, Acton, MA.”

- **FF-14.** The Commission observed five hydrologically isolated pools of standing water within the Bordering Vegetated Wetlands as delineated by the applicant's representative which exhibited the physical characteristic of vernal pools. Several of these physical characteristics, including the ephemeral nature of the pools, were documented in the above referenced report by B&C Associates, Inc. No systematic investigation of these pools was undertaken by the applicant or the applicant's representative, despite such requests by the Commission.
- **FF-15.** Section F1 of the Town of Acton Wetland Protection Bylaw states that its purpose is *"to protect the wetlands, vernal pools, adjoining buffer zones, banks, lands subject to flooding and riverfront areas (collectively, "the resource areas") of the Town of Acton by controlling activities deemed to have a significant impact upon wetland interests. Said wetland interests include (but are not limited to) the following: public or private water supply, groundwater, flood control, erosion control, storm damage prevention, water pollution prevention, fisheries, protection of endangered or threatened species, and wildlife habitat (collectively, the interests protected by this Bylaw.)."*
- **FF-16.** The Wetlands Protection Act regulations at 310 CMR 10.55(1) presume BVW *"are likely to be significant to public water supply, to groundwater supply, to flood control, to storm damage prevention, to prevention of pollution, to the protection of fisheries and to wildlife habitat."* The regulations at 310 CMR 10.55(1) further state: *"Bordering vegetated wetlands are probably the Commonwealth's most important inland habitat for wildlife. The hydrologic regime, plant community composition and structure, soil composition and structure, topography, and water chemistry of bordering vegetated wetlands provide important food, shelter, migratory and over wintering area and breeding areas for many birds, mammals, amphibians and reptiles."*
- **FF-17.** The performance standards at 310 CMR 10.55 (4)(a) for protection of BVW is that activities proposed *"shall not destroy or otherwise impair any portion of" the BVW.* The importance of the buffer zone (or setback) in preventing damage to BVW is acknowledged in the regulations of the Act, including the General Provisions at 310 CMR 10.53(1) which state *"For work in the buffer zone subject to review under 310 CMR 10.02(2)(b)3., the issuing authority shall impose conditions to protect the interests of the Act identified for the adjacent resource area. The potential for adverse impacts to resource areas from work in the buffer zone may increase with the extent of the work and the proximity to the resource area. ... Conditions may include limitations on the scope and location of work in the buffer zone as necessary to avoid alteration of resource areas. The issuing authority may require erosion and sedimentation controls during construction, a clear limit of work, and the preservation of natural vegetation adjacent to the resource area and/or other measures commensurate with the scope and location of the work within the buffer zone to protect the interests of the Act."* The regulations of the Act at Section 310 CMR 10.03(1) state that *"any person who files a Notice of Intent to perform any work ... within the Buffer Zone has the burden" to demonstrate "that proposed work within the buffer zone will contribute to the protection of the interests" of the Act.*

- **FF-18.** Although the Act and its Regulations do not include the Bordering Vegetated Wetland buffer zone as a resource area, as does the local Bylaw and its Regulations, the Act is administered in a way that acknowledges its vital importance. In the Matter of Priors Crossing, Inc., Docket 92-156 (Final Decision, May 16, 1996), the DEP held that, “[m]ost important for this discussion, the regulations recognize that activity in the buffer zone to a BVW is likely to harm the BVW.” In that decision, the DEP determined that conditioning of activities within a Bordering Vegetated Wetland buffer zone should be evaluated under the same performance standard in which direct Bordering Vegetated Wetland alteration is evaluated.
- **FF-19.** The Commission finds that work in the BVW associated with the onsite stream has the potential to impact the ability of these resource areas to protect groundwater quality and surface water quality, to provide flood control and prevent storm damage, to protect wildlife, to provide a natural corridor for wildlife movement, and to provide wildlife habitat.
- **FF-20.** The Commission finds that the 100-foot buffer zone of the BVW associated with the onsite stream represents a significant riparian zone that has value (1) as a wildlife corridor and habitat connecting natural riparian areas downstream of the site, (2) for the protection of groundwater supply by providing recharge area, (3) for flood control and storm damage prevention by providing flood water storage and dissipation area, and (4) for prevention of pollution by “pre-treating” flows before they enter the BVW. The Commission finds that work in the buffer zone of the site BVW has the potential to impact these values and interests.
- **FF-21.** The Town of Acton Wetland Protection Bylaw identifies the 100-foot buffer zone as in the same category of protection as a “wetland” or a “vernal pool.” Specifically, Section F1 of the Bylaw states that the Bylaw’s purpose is *“to protect the wetlands, vernal pools and adjoining buffer zones of the Town of Acton.”* This concept is further supported in Section F3.18 where the term “resource area” is defined to *“mean any area subject to protection under this bylaw and include bank, wetland, vernal pool, buffer zone, lands subject to flooding or riverfront area.”*
- **FF-22.** Section F8.1 of the Bylaw states that the applicant shall bear the burden of proving that the work proposed in the application will not harm the interests protected by this Bylaw.
- **FF-23.** The Bylaw and Regulations establishes specific minimum (emphasis added) setback distances for activities from the edges of wetlands and vernal pools. These minimum setbacks include a *“50-foot buffer of undisturbed natural vegetation,”* and a *“75-foot setback to the edge of driveways, roadways and structures,”* and a *“100-foot setback from the mean high water line of vernal pools.”* The Bylaw, at Section F 8.3, expressly states: *“No activity shall be allowed within these setbacks except as provided below. These setbacks are the minimum and may be extended further if deemed necessary for the protection of the interests of the Bylaw by the Commission.”*
- **FF-24.** While a driveway may be required to access the uplands of the project site, the footprint of the proposed driveway may be greater than the *“minimum legal and practical*

width acceptable to the planning board” described at 310 CMR 10.53(3)(e), particularly in light of the preliminary opinion of the Town of Acton Zoning Enforcement Officer that zoning may only allow one residential structure on this site (see FF-11). Should the Zoning Enforcement Officer’s opinion eventually be upheld, the roadway will, in part, not meet the provisions of a *“limited project”* and hence not be in compliance with the setbacks of the Bylaw.

- **FF-25.** The Bylaw at Section F8.3 allows for *“0-foot setbacks for water-dependent structures (drains, outfalls, weirs, etc.)”*. The Commission does not, and has not, deemed detention and retention basins to be water-dependent structures as they can readily be located in upland areas between the developed portion of the site and the wetland resource area, with discharge to the resource area via a drain or outfall. Specifically, the Commission finds, and has previously found, the down-gradient berm of a detention basin or retention basin to be a non-water-dependent structure subject to the setback provisions of Section F8.3.
- **FF-26.** The project proposes both a “Stormwater Wetland Basin” and an approximately 120-foot long retaining wall associated with the project’s stormwater management system within the Bylaw *“75-foot setback to the edge of ...structures.”* The Commission finds the down-gradient berm of the “Stormwater Wetland Basin” and the 120-foot retaining wall to be non-water-dependent structures and therefore not allowed as proposed in this NOI.
- **FF-27.** The applicant is providing erosion control during construction. However, the project as proposed meet only the bare minimum setbacks identified in Section F8.3 of the Bylaw (*“50-foot buffer of undisturbed natural vegetation”* and *“75-foot setback to the edge of ... structures”*). Section F8.3 of the Bylaw states that these “setbacks are the minimum and may be extended further if deemed necessary for the protection of the interests of the Bylaw.” The Commission has found that proposals where the vast majority of disturbance would be within the buffer zone (herein “Buffer Zone Projects”) must be held to higher performance standards than the bare minimum to protect the interests of the Act and Bylaw. Projects with significant alterations within the buffer zone do not have any margin of error during and after construction. Under these circumstances, incremental encroachment of activities into wetlands is likely. Impacts associated with such activities – increased runoff, encroachment, stormwater damage, increased flooding, impact to groundwater and surface water quality, loss of wildlife habitat, etc. - threaten the interests of the Act and the Bylaw.
- **FF-28.** From a larger perspective, the project may degrade the value of local conservation land by destroying the riparian corridors between these lands, and other neighboring undeveloped lands. In addition, the proposed structures will alter or impair wildlife habitat by destroying habitat in the buffer zone and upland area by creating a barrier to movement of wildlife species and by reducing the connectivity of adjacent wetlands and upland habitats.

REASONS FOR DENIAL

- **D-1.** The Notice of Intent filed for this project does not meet the minimum requirements for the submittal of information under the Act and the Bylaw and is thereby incomplete. Several of the site’s wetland resource areas, including stream and (potential) vernal pools, are not

identified in written submittals and/or on site plans. No meaningful information is provided as to the character and function of site wetland resources, including buffer zones, or as to how site activities may affect the function and viability of those resources or protect the interest of the Act and the Bylaw. Hence, the Conservation Commission was not able to fully determine the impact of the project impacts on the site wetlands and the interests of the Act and Bylaw.

- **D-2.** The Conservation Commission requested, and did not receive, information necessary to evaluate the impacts of project activities on site resource areas. This information included, but was not limited to, (1) an assessment of alternative stormwater management system designs that would reduce or eliminate the need for the stormwater basins to be located entirely within the buffer zone, (2) an assessment of alternative stormwater management system designs that would eliminate the stormwater basin berm and retaining wall structures from the buffer zone and the 75-foot no structures zone of the Bylaw, (3) review of which stormwater standards are not being met and why, (4) a discussion of the hydraulic connection between the stormwater basins, the replication area and the remaining fragmented wetland area, (5) an engineering plan demonstrating how the roadway retaining/support walls would be constructed through the site BVW without additional temporary or permanent wetland impacts beyond the footprint of the roadway, (6) an erosion control plan for the construction of the proposed roadway retaining/support walls, (7) a plan for wildlife features for the proposed wetland replication area, (8) an operations and maintenance plan, long term pollution prevention plan and an illicit discharge compliance statement for the site stormwater management system, and (9) back-up data and/or new data documenting the findings of the B&C Associates, Inc. relative to potential vernal pool species composition. Hence, the Conservation Commission was not able to fully assess the impacts of the project on wetland resources or the project's ability to minimize or prevent any such impacts.
- **D-3.** The project proposes significant encroachment into the buffer zone of the site BVW so as to manage stormwater associated with the development of the upland portion of the site. This work includes stormwater detention /retention basins that could be located in the upland between most, if not all, of the upland development and the resource area. Furthermore, this work includes non-water-dependent structures located within the "75-foot setback to the edge of ... structures" as defined at Section F8.3 of the Bylaw. As such, the Commission has found that the project does not meet the minimum setback standards for the protection of wetlands as required in the Bylaw.
- **D-4.** The work proposed in the buffer zone will impact adjacent BVW, and hence does not meet the standards for the protection of Bordering Vegetated Wetlands as required under the regulations of the Act at 310 CMR 10.55(4)(a) and 310 CMR 10.03(1).
- **D-5.** The Wetlands Protection Act regulations for limited projects at 310 CMR 10.53(3) requires the Commission to consider the availability of reasonable alternatives to the proposed activity. Section 310 CMR 10.53(3)(e) requires the applicant to design the roadway or driveway according to the minimum length and width acceptable to the Planning Board. In this case the minimum width which would be acceptable to the Planning Board is 10 feet. Therefore, the plan, as proposed, fails to meet this standard by failing to present a

driveway of 10 feet in width. The limited project provisions of the Act are adopted by the Bylaw at Section F4.5. Therefore, the proposed roadway fails to comply with the Bylaw.

- **D-6.** In making this decision as in making all decisions, the Commission has recognized and assessed each aspect of its obligations under general administrative law (e.g., the Administrative Procedures Act). It is the Commission's opinion that this decision is within its delegated authority; has been made as a result of a public process and in accordance with the regulations outlined within the Act and the Bylaw; and is based upon "substantial evidence" to support the Commission's decision. The basis of this evidence includes information submitted by the applicant, information presented during hearings pertaining to the project, an extensive review of the project by the Commission, scientific evidence, related DEP policy and the Commission's policy set through previous decisions.

<end>