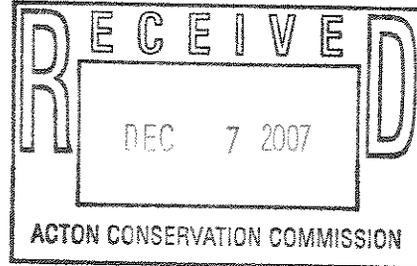


December 5, 2007

Acton Conservation Commission
cc: Tom Tidman

RE: Spring Hill Road



Dear Conservation Commission,

We wanted to personally thank you for your time and for upholding your decision and the Acton Wetland Bylaw. Your efforts are very much appreciated and have renewed our faith in town government! We hope that this matter is now ended but since there is still the possibility of an appeal, we thought you might find these enclosures helpful for both this NOI and future NOIs where an approval is denied.

They are both written by McGregor & Associates and provide information to Conservation Commissions for ensuring that their decisions hold. Luke Legere also stressed the importance to us of making sure that you get your decision written, signed and delivered before the 21 days, which may be difficult around the holiday season. He said that if the decision fails to go out before this deadline, then the DEP SOOC will control and your decision will be null and void which would be a real shame after everyone's hard work on this matter. He also mentioned that procedurally, it is important that all members sign the written decision once it is actually written (rather than attaching a signature page to the decision). We hope you do not mind us providing you with this information. We just really want to make sure that this is the end of this matter!

Thank you again for your time and effort.

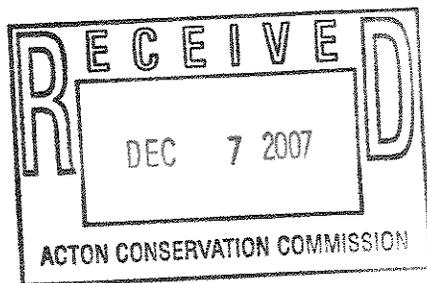
Yours Sincerely

Dara Mitchell and Terry O'Sullivan

McGREGOR & ASSOCIATES

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IDEAS FOR COMMISSIONS TO ISSUE 'DECISIONS THAT STICK'

1. Apply the Wetlands Protection Act, DEP regulations, local bylaw, and Commission regulations literally and consistently to all proposed projects.
2. Improve the bylaw and regulations as necessary to give the Commission more Resource Area jurisdiction and greater disapproval discretion, and to set tougher data submittal requirements, design specifications, and performance standards. Regulate cumulative impacts and restrict project segmentation.
3. Focus any disapprovals on failures to submit complete applications (return them), failures to submit data and plans required in the DEP and Commission regulations, failures to supply further information requested in writing by the Commission, failures to meet the design specs and performance standards set in the DEP and Commission regulations, and failures to avoid unacceptable, adverse impacts on Resource Areas and their values (showing that no conditions can be imposed to reduce those impacts to an insignificant level).
4. Remember that the DEP regulations, 310 CMR 10.05(6), explicitly authorize the Commission to disapprove proposed projects. Specifically, Section 10.05(6)(b) requires that the Order of Conditions "shall impose such conditions as are necessary to meet the performance standards...for the protection of those areas found to be significant to one or more of the interests identified in the Act." Then the same subsection provides, "The Order shall prohibit any work or any portion thereof that cannot be conditioned to meet said standards." Section 10.05(6)(c) further adds, "If the Conservation Commission finds that 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 Act, it may issue an Order prohibiting the work. The Order shall specify the information which is lacking and why it is necessary."
5. When your disapproval is based on insufficient information submitted, remember that 310 CMR 10.05(7)(h) gives the Commission an important right of remand on any appeal to DEP: "When the request for a Superseding Order concerns an Order prohibiting work and issued pursuant to 310 CMR 10.05(6)(c), the Department shall limit its review to the information submitted to the Conservation Commission. If the Department determines that insufficient information was submitted, it shall affirm the denial and instruct the applicant to refile with the Conservation Commission and include the appropriate information...."
6. Build a record of documents, including the application, plans, calculations, correspondence, reports, site visits, photos, videotapes, and audiotapes, to support any disapproval.



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7. Write a separate set of factual findings and conclusions of law to justify any disapproval; reference exhibits in the record as support; keep these findings and conclusions with the record.
8. In such factual findings, begin with recitations of the dates of the application, abutter notifications, public hearing notices, public hearing dates, attendance, continuance dates, agreements to continue, titles and dates of plans and technical submittals, numbered or lettered exhibits, site visits, the close of the hearing, dates of meetings, notices of meetings, attendance, motions and votes, and reasons in summary. Then follow with the Commission's detailed factual findings and legal conclusions.
9. Take a tape recording of the public hearings and of the public meeting at which the Commission votes to disapprove; state the reasons (essentially a summary of the factual findings and legal rulings) during that meeting. Keep any tape recording with the record and transcribe it later if there is an appeal. Arrange for a stenographic (verbatim) transcript of the hearings and meeting if you know in advance that the proposed project is likely to be very controversial with an appeal virtually certain.
10. Base any disapprovals on independent analysis, research, and knowledge of the Commission (not just on the Commission disbelieving what the applicant submits); compile and submit in the record the Commission's data, correspondence, or reports from other boards and officials and any expert consultants.
11. Where feasible, make the disapproval "without prejudice" to the applicant submitting a completed application, submitting the required or requested data, meeting design specs, meeting performance standards, or scaling back or redesigning the project to reduce the impacts to an insignificant level. Try to identify in the Commission's factual findings the specific alternatives the Commission would consider and approve.
12. If a disapproval is based on proven violations of the Wetlands Protection Act or local bylaw or both (that is, the application seeks approval of what the DEP regulations or your regulations prohibit explicitly), reference the illegal work in detail and mention any violation notices and enforcement orders which the Commission issued before the application was filed.
13. Remember to adhere to the strict procedural requirements of the Wetlands Protection Act, DEP regulations, local bylaw, and Commission regulations about the public hearings (such as newspaper notices, notification of abutters, continuances of hearings, and decisions within 21 days of the close of the last hearing).
14. Remember to adhere to the strict procedural requirements of the Open Meeting Law about the Commission's meetings (especially posted Town Clerk notices of meetings, presence of quorums, motions duly made and seconded, decisions taken as formal votes, and conducting all meetings as public sessions, not executive sessions).
15. Remember that the Open Meeting Law requires that a record be maintained of your proceedings (minutes) including date, time and place, members present or absent, and action taken. If you fail to do so, a court may order that your decision is null and void for that reason. The Open Meeting Law



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does not require a stenographer or tape recording, but we recommend (obviously) that the record be detailed in order to withstand challenge of any disapproval.

16. Make certain that there is a valid quorum present at the meeting where the final decision is voted by the Commission, and that all persons voting have attended all previous hearings on the application; in other words, make sure that enough members attend every night of public hearing so that at the final meeting all the persons constituting the quorum (and thus voting) have heard the facts (with no missed hearings). It helps to avoid continuing hearings to later nights at which it is doubtful a large quorum can attend. The reason for this recommendation is the subdivision case of Mullin v. Planning Board of Brewster, 17 Mass. App. Ct. 139, 141 (1983) in which the Massachusetts Appeals Court ruled that all members of the board who are to join in the decision must have attended the hearing and any continuance of the hearing.
17. Issue any disapprovals as "denial orders of conditions" and so make sure to delete the standard administrative conditions in the format; make certain that this denial Order of Conditions is under both the Wetlands Protection Act and the local bylaw.
18. In the event that the final decision is an approval under the Wetlands Protection Act but a disapproval under the local bylaw, issue two Orders of Conditions, one an approval under the Act and the other a denial order under the local bylaw.
19. Watch carefully whether there is an appeal to DEP under the Wetlands Protection Act within the ten (business) day deadline with proper notification served on the Commission (insofar as the disapproval is under the Wetlands Protection Act); watch carefully whether there is a separate appeal to Superior Court in the nature of certiorari (review on the document record) within the 60 (calendar) day deadline (insofar as the disapproval is under the local bylaw).
20. Understand that any appeal to DEP is "de novo", meaning that the project application essentially starts over in DEP and that the Commission decision as such is not reviewed. Nevertheless, give your disapproval credibility by supplying to DEP your reasons with written findings and rulings and attend the DEP onsite inspection, thereafter participating fully and challenging any DEP approval at a full adjudicatory hearing. Use exhibits in your record as the basis for your submittals to DEP in this process.
21. Get your Town Counsel involved in the event of an appeal to DEP. Town Counsel should submit your denial decision and record to the DEP Regional Office, include a legal opinion letter that the Commission was correct, argue for a right to a remand if the denial was based on insufficient information submitted, attend the DEP onsite inspection, prepare and file your Request for Adjudicatory Hearing if you wish to challenge the Superseding Order, and represent you aggressively in that adjudicatory proceeding thereafter, including the necessary written specification of issues, prefiled written testimony, any negotiations, and the adjudicatory hearing itself in DEP.
22. Understand that the issue in any appeal to Superior Court is different from that in DEP: the Commission decision is under review in court for whether, on the document record, there appears to have been an error of law resulting in manifest injustice. This is a very tough "standard of review"



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for the plaintiff, provided that you prepare a record, you have your Town Counsel submit it in answer to the court complaint, you vigorously oppose the plaintiff trying to bring to court new expert testimony or burden the Commission with "discovery", and your counsel briefs the court on the legal authority of the Commission.

23. Town Counsel should aggressively defend the Commission by reviewing your record organizing it if necessary, and filing it quickly in court within the deadline for answering. Town Counsel should in addition file a formal answer to the complaint denying the allegations and adding what are called affirmative defenses, such as failure to file the complaint within the statutory deadline (statute of limitations), failure to state a cause of action in the complaint, lack of standing to bring a court action, failure to file in the correct court, failure to properly serve the complaint, failure to properly name the Town as a defendant, failure to have "clean hands" (example, past violations), and several other important defenses that may be available. Affirmative defenses are especially critical if the complaint includes claims beyond just the incorrectness of the Commission decision (such as unconstitutional "taking without compensation," violation of civil rights, illegal trespass and others) or seeks relief beyond just invalidating the Commission decision (such as money damages).
24. Essentially the Superior Court should uphold the decision of the Commission where it is determined by the Court to have been supported by "substantial evidence." This is commonly understood to require that the findings of the local board must rest on such evidence as a reasonable mind might accept as adequate to support a conclusion. This review entails scrutiny of the whole record to determine whether "substantial evidence" exists.
25. In the event of a serious appeal of a serious denial, hire Special Counsel to defend the Commission.



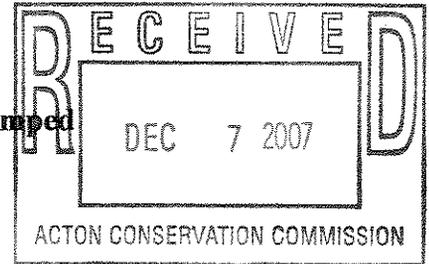
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**If Not Issued Within 21 Days, Local Order Can Be Trumped
By DEP's Superseding Order**
by Nathaniel Stevens, Esq.
McGregor & Associates, Boston, MA
Chair, Arlington Conservation Commission



The state's highest court recently ruled that the failure of a Conservation Commission to issue its decision under a local bylaw within 21-days of closing the public hearing meant that DEP's approval superseding order of condition controls instead. In Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich, the Supreme Judicial Court ("SJC") said that a Commission forfeits its right to impose the more stringent requirements on a project by failing to issue its decision within 21 days of the close of the public hearing, as required by the Wetlands Protection Act ("WPA"). As a consequence, any Superseding Order issued by DEP would govern the project (in this case, an approval).

Importantly, in its October 23, 2007 decision, the SJC specifically rejected the developer's argument that failure of a Commission to act within 21 days meant "constructive approval" of a project under municipal wetlands law. The Court noted that while constructive approval is part of many zoning or subdivision permitting laws, it is not provided in the WPA. Instead, the WPA's remedy is an appeal to DEP.

Essentially, the SJC imposed additional limits on what aspects of the WPA can be made stricter by a local wetlands bylaw or ordinance and Commission wetland regulations. The SJC said that while municipalities are free to adopt more stringent wetlands protection standards, they cannot expand or ignore the timing provisions of the WPA, such as the 21-day period to issue a decision on a Notice of Intent.

The facts of this case were disputed. The case illustrates what Commissions should and should not do. On July 5, 2003, Oyster Creek Preservation, Inc. ("OCP") filed a Notice of Intent to dredge Allen's Harbor Inlet on Cape Cod to improve navigation. The Harwich Commission opened the public hearing on July 15, 2003, and, with the applicant's consent (good practice), continued the hearing to August 5, to August 19, and then closing the hearing on September 16, 2003. However, on September 29, 2003, the Commission received a letter from an attorney representing abutters which raised concerns about the effect of the project on abutting properties. Rather than explain to the abutters that the hearing had closed, or ask the Applicant if it could re-open the hearing and properly notice the re-opened hearing (a needed step), the Harwich Commission, at its next scheduled meeting on September 30, 2003, unilaterally voted to re-open the hearing to accept the abutter's letter into the record (not good without Applicant's consent and public notice). The Commission then voted to close the hearing and proceeded to vote to deny the project.

The dispute as to when exactly the Harwich Commission issued its denial order was settled by the SJC by looking at the postmark date on the envelope, as provided by the DEP wetlands regulations (see 310 CMR 10.04). The SJC counted the days from the

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first time the Commission closed the public hearing, September 16, 2003, not from the second time.

By the SJC's count, the Harwich Commission issued its denial twenty-two days after the Commission first closed the public hearing.

While Commissions should realize and be relieved that the SJC rejected the applicant's claim of constructive approval, they should be sure that their decisions are postmarked within 21 days of closing the public hearing. If they fail to do so, any Superseding Order issued by DEP will govern.