

DEP File No. 85-971 / TOA 75-280
Applicant Jeanson Homes, Inc.



DENIAL
Wetlands Protection Bylaw
Chapter F

From the ACTON CONSERVATION COMMISSION Issuing Authority

To Jeanson Homes, Inc., Mike Jeanson William & Deanne Angell
(Name of person making request) (Name of property owner)

Address 12 Kennedy Lane, Acton MA 01720 Address 643 Pleasant Hill, Acton MA 01718

This Order is issued and delivered as follows:

- by hand delivery to person making request on _____ (date)
- by certified mail, return receipt requested on 12/26/2007 (date)

This project is located at West of 8 Spring Hill Road (#12), Plate E-6, Parcel 6-1

The property is recorded at the Registry of Middlesex South

Book 24106 Page 522

Certificate (if registered) _____

The Notice of Intent for this project was filed on May 17, 2007 (date)

The public hearing was closed on December 5, 2007 (date)

Findings

The ACTON CONSERVATION COMMISSION has reviewed the above-references Notice of Intent and plans and has held a public hearing on the project. Based on the information available to the ACTON CONSERVATION COMMISSION at this time, the ACTON CONSERVATION COMMISSION has determined that the area on which the proposed work is to be done is significant to the following interests in accordance with the Presumptions of Significance set forth in the regulations for each Area Subject to Protection under the Act (check as appropriate):

- | | | |
|--|---|--|
| <input type="checkbox"/> Public water supply | <input checked="" type="checkbox"/> Flood Control | <input type="checkbox"/> Land containing shellfish |
| <input checked="" type="checkbox"/> Private water supply | <input checked="" type="checkbox"/> Storm damage prevention | <input type="checkbox"/> Fisheries |
| <input checked="" type="checkbox"/> Ground water supply | <input type="checkbox"/> Prevention of pollution | <input checked="" type="checkbox"/> Protection of Wildlife Habitat |

Total filing fee submitted under Acton Wetlands Protection Bylaw \$ 300.00

Plans and documents submitted by the Applicant:

- 1) Alternative "Common" Drive w/ Alternative Crossing, Lots 2C & 3 Spring Hill Road, Acton, MA, dated August 13, 2007 – Signed & Stamped by: Mark Donohoe, PE, Civil 27148, November 5, 2007.
 - 2) Notice of Intent – Site Details, Lots 2C & 3 Spring Hill Road, Acton MA - Sheet 2, dated 4/19/2007 2007 – Signed & Stamped by: Mark Donohoe, PE, Civil 27148, May 17, 2007.
 - 3) Notice of Intent – Site Notes, Lots 2C & 3 Spring Hill Road, Acton MA - Sheet 3, dated 4/19/2007 2007 – Signed & Stamped by: Mark Donohoe, PE, Civil 27148, May 17, 2007.
 - 4) Supplemental Letter dated November 5, 2007, submitted by Acton Survey & Engineering
 - 5) Supplemental Letter dated November 8, 2007, submitted by Acton Survey & Engineering.
 - 6) Supplemental Letter dated November 26, 2007, submitted by Acton Survey & Engineering.
 - 7) Supplemental Letter dated November 28, 2007, submitted by Acton Survey & Engineering.
 - 8) Supplemental Letter dated November 29, 2007, submitted by Acton Survey & Engineering.
 - 9) Supplemental "Handout for Lots 2C & 3 Spring Hill Road", dated December 5, 2007, submitted by Acton Survey & Engineering.
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**SEE ATTACHED DECISION FOR DENIAL ISSUED BY THE ACTON
CONSERVATION COMMISSION.**

Issued by the

ACTON

Conservation Commission

Signature(s)

William Fobberg
James Wynn
Fran Portant

Terrence Moutland
Paul J. Lee
Linda Seraphim

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

On this 14th day of December, 2007, before me, the undersigned notary public, personally appeared Terrence Moutland proved to me through satisfactory evidence of identification, which were known to me to be the person whose name is signed on the preceding or attached document, and acknowledged to me that (he) (she) signed it voluntarily for its stated purpose as Commissioner for the Acton Conservation Commission.

Andrea H. Ristine
Notary Public -- Andrea H. Ristine

February 27, 2009
My Commission Expires

The applicant, the owner, any person aggrieved by this Order, any owner of land abutting the land upon which the proposed work is to be done, or any ten residents of the city or town in which such land is located, are hereby notified of their right to request the Department of Environmental Protection to issue a Superseding Order, providing the request is made by certified mail or hand delivery to the Department, with the appropriate filing fee and Fee Transmittal Form as provided in 310_CM 10.03(7) within ten days from the date of issuance of this determination. A copy of the request shall at the same time be sent by certified mail or hand delivery to the Conservation Commission and the applicant.

Detach on dotted line and submit to the ACTON CONSERVATION COMMISSION prior to commencement of work.

To ACTON CONSERVATION COMMISSION Issuing Authority

Please be advised that the Order of Conditions for the project at 12 Spring Hill Road, Acton

File Number 75280 has been recorded at the Registry of Middlesex South and

has been noted in the chain of title of the affected property in accordance with General Condition 8 on 19.

If recorded land, the instrument number which identifies this transaction is _____

If registered land, the document number which identifies this transaction is _____

Signature _____ Applicant

DECISION
NOTICE OF INTENT FILING
UNDER
TOWN OF ACTON WETLAND PROTECTION BYLAW FOR
WEST OF 8 SPRING HILL ROAD
TOWN ATLAS PLATE E-6, PARCEL 6-1
TOWN OF ACTON BYLAW FILE NO. 75-280

Applicant: Michael Jeanson, Jeanson Homes, Inc.
Representative: Mark Donohoe, PE No. 27148, Acton Survey & Engineering
Date Filed: November 6, 2007
Hearing Closed: December 5, 2007

DECISION

On December 5, 2007, the Acton Conservation Commission voted unanimously to issue an Order of Conditions denying a Notice of Intent filing under the Town of Acton Wetland Protection Bylaw because the proposed project (1) will adversely affect significant resource areas and interests protected by the Bylaw, (2) does not satisfy the buffer-zone resource area setback requirements of the Bylaw, (3) does not meet the requirements for a limited-project exception under the Bylaw and (4) would not meet the requirements for a waiver under the Bylaw.

The Commission bases its decision upon the Findings of Fact and Conclusions set forth below.

FINDINGS OF FACT:

- 1) Procedural History (DEP FILE NO. 85-971). On August 8, 2007, the Commission issued an Order of Conditions (“OOC”) denying a limited-project Notice of Intent (“NOI”) under the Massachusetts Wetlands Protection Act (“Act”) and the Town of Acton Wetland Protection Bylaw (“Bylaw”) for the construction of two four-bedroom, single-family homes with attached garages, including associated driveways, septic disposal systems, private wells, barrier walls, recharge areas, utilities and landscaping, and a shared driveway providing wetlands-crossing access from Spring Hill Road (“NOI-1”). The Massachusetts Department of Environmental Protection (“DEP”) issued a Superseding Order of Conditions (“SOC”) on October 16, 2007, allowing the NOI-1 project under the Act.¹ Currently pending is an appeal of the SOC that a Town of Acton resident and abutter of the project site has filed with the DEP Office of Appeals and Dispute Resolution. The Applicant did not pursue an appeal of the portion of the OOC issued under the Bylaw.
- 2) Project Summary. In this NOI (“NOI-2”), the Applicant, Jeanson Homes Inc. (“Applicant”) is requesting limited-project approval under the Bylaw for the same project proposed in NOI-1. The

¹ Although the Applicant evidently believes that the SOC confirmed the qualification of the Applicant’s project for limited-project status under the Act, the SOC did not refer to, and appears not to have rested upon, the limited-project provisions under the Act.

Applicant confirms that the NOI-2 project is identical to the NOI-1 project and consents to the incorporation of the record for the NOI-1 proceeding in the record for this NOI-2 proceeding.

- 3) Project Site. The project site currently is a single lot, comprising approximately 5.2 acres of undeveloped, forested land on the south side of Spring Hill Road. The parcel is a species-rich wetland and upland habitat supporting a diverse population of fauna and flora. The Applicant intends to further subdivide the parcel into two lots, Lots 2C and 3, of approximately 2.93 acres and 2.25 acres, respectively, to accommodate the two proposed single family residences.

One-half of the project site is 2.56 acres of forested bordering vegetated wetlands (BVW) located at the front, northeast side of the parcel bordering Spring Hill Road. Red maple, white pine, pitch pine, yellow birch, slippery elm, sweet pepperbush, swamp azalea, highbush blueberry, cinnamon and sensitive ferns, sedges and sphagnum moss are predominant; royal fern and interrupted fern also are present. The BVW borders two streams, one flowing in a southeasterly direction from Lot 3 to Lot 2C and the other located only in Lot 2C.

The Lot 3 stream enters Lot 3 from the abutting property to the west, flows east and then south-southeast across Lot 3 and then converges with the Lot 2C stream in the northern portion of Lot 2C. The Town Agent, Thomas Tidman, has observed that the Lot 3 stream has defined banks and other characteristics of a perennial stream; the Applicant believes that the Lot 3 stream is intermittent. The Lot 3 stream and BVW are associated with a large wetland system connected to the nearby Spring Hill Conservation Area to the north. The Lot 2C stream, which is intermittent, flows north from the southern portion of Lot 2C and appears to include runoff of nutrients from an abutting horse farm. After the two streams converge on Lot 2C, the combined streams flow east to a 1960s-era fire pond in the northeastern corner of Lot 2C, by the road. A third stream that appears to be perennial flows north from the pond via a culvert under Spring Hill Road to the north side of the road, and eventually flows into Spencer Brook. Lot 2C also includes an area, north of the point where the two streams converge and adjacent to Wetland Flags 223 – 225, that Mr. Tidman states “exhibits vernal pool characteristics.”

The other one-half of the project site is 2.62 acres of forested upland located at the back, southwest side of the parcel. Red oak, white oak, red maple, hay-scented fern, witch hazel, sarsaparilla and “princess pine” are predominant; ash trees also are present. Some 2.31 acres of the upland, or approximately 88 percent, lie within the 100-foot buffer zone of the BVW; the upland that is not in the buffer zone is 0.31 acre, or about six percent (6%) of the 5.2-acre property.

- 4) Project Details. The Applicant proposes to use 1.6 acres of the upland, inside and outside the buffer zone, for the two residences and associated infrastructure. Construction of the two residences and shared driveway would require the alteration of 0.58 acre in the buffer zone and necessitate the removal of a large number of mature trees. The Bylaw, which protects the entire buffer zone as “resource area,” requires that structures be located a minimum of 75 feet from wetlands; the Applicant proposes to place the houses no closer than 75 feet from the wetlands, although portions of both houses would sit at or on the 75-foot setback line. Similarly, the Bylaw requires that at least 50 feet of the inner buffer zone remain undisturbed natural vegetation; the Applicant proposes that the limit of disturbance for grading, well-installation, other residence-related work and installation of a driveway-drainage/groundwater-recharging system be at least 50 feet from the BVW, with portions of the limit of disturbance sitting only slightly inside the 50-foot undisturbed-buffer line.

The shared driveway would be a 12-foot-wide bituminous concrete surface with most of the length including a three-foot shoulder on both sides. Beginning at Spring Hill Road in the northern corner of the abutting 8 Spring Hill Road lot, the driveway would follow an access easement on that lot to the Lot 2C property line, and then bisect Lot 2C from east to west, crossing BVW and continuing to the Lot 2C upland. The driveway would span over 400 feet from the road to the 100-foot buffer line in the upland area; that segment also would lie entirely within the buffer zone, and largely within 50 feet of the BVW. In addition to necessitating the filling of wetlands at the proposed crossing, and altering

approximately 40 linear feet of defined bank,² construction of the driveway would require extensive clear-cutting of mature trees in the buffer zone.

The wetlands-crossing structure would include a bridge over the stream flowing from the southern portion of Lot 2C. The crossing and bridge structure would be 12 feet wide and approximately 60 feet long. The elevation of the structure would be about two feet higher than the current elevation of the BVW. The crossing itself would consist of a paved surface on a mechanically compacted gravel base bounded and contained by large boulders. The bridge over the stream would consist of rebar-enforced concrete footings and walls topped by a deck and forming a three-sided culvert through which the stream would continue flowing north and perpendicular to the crossing and driveway.

The Applicant has submitted handwritten stormwater management estimates of post-construction stream-crossing flow, runoff volume and recharge.

- 5) Assessment of Adverse Impact on Wetlands, Buffer Zone and Bank as Resource Areas; Assessment of Potential Vernal Pool. The Applicant has neither arranged for nor submitted an assessment by a wetlands expert of the impact that the proposed project would have on the functions of the wetlands, buffer zone and bank. The Applicant also has not provided an expert opinion as to whether the potential vernal pool is, in fact, functioning as a vernal pool. The Applicant stated that it would provide a wetlands expert evaluation only if the evaluation were a requirement of a Commission OOC approving the project, and the requirement were upheld on appeal.
- 6) Proposed Mitigation for Adverse Impact on Resource Areas. The Applicant proposes to create 961 square feet of replicated wetlands adjacent to the driveway in the area just west of the proposed crossing. The NOI-2 plans identify the approximate location of the proposed replication area and provide general information, including a simple cross-section diagram, about the proposed construction of the replication area.

The Applicant also proposes to place three conservation restrictions on approximately 75 percent of the parcel containing principally wetlands. The two restrictions on Lot 2C would apply to approximately 2.18 acres (94,785 square feet) of now-continuous wetlands that would be fragmented by the shared driveway; the conservation restriction on Lot 3 would apply to approximately 1.78 acres (77,450 square feet) of wetlands located between Spring Hill Road and the Lot 3 upland.

- 7) Site Owners; 1999 NOI Proceeding (DEP File Nos. 85-644, 85-645). The owners of the project site are William and Deanne Angell ("Angells"). The Angells also formerly owned the abutting upland lot at 8 Spring Hill Road as part of a single 7.3-acre lot that included the 5.2-acre project site. The 7.3-acre parcel contained a single residence and associated driveway, now part of the 8 Spring Hill Road lot. At the back of that lot is an old cart path formerly used for access across wetlands to the upland portions of Lots 2C and 3.

In 1999, the Angells filed two NOIs, both seeking limited-project authorization under the Act and Bylaw for a project that related to the 7.3-acre property but was substantially the same as the project that the Applicant proposes for the 5.2-acre lot that originally was part of the 7.3-acre parcel. After extensive hearings, the Commission issued an OOC denying the project because the project did not qualify for a limited-project authorization under the Act or Bylaw, and an economic-hardship-based waiver of requirements was not appropriate. In support of the denial, the Commission cited the relatively small developable uplands in comparison to the wetlands on the site; the presence on the site of the Mystic Valley Amphipod and Spotted Turtle, which at the time were classified as species of "special concern" by the Massachusetts Natural Heritage and Endangered Species Program (MNHESP); the value of the site particularly as wildlife habitat, given its unbroken wetlands and buffer zone connection to the nearby Spring Hill Conservation Area; the existing residential access to upland and corresponding benefit to the Angells of the existing residence, which countered the asserted

² In the NOI-2 application, the "Resource Area Effects" section does not disclose that the project will alter a bank.

need for the limited-project crossing and also demonstrated that no economic hardship would result from a denial of the limited project; and the impossibility of conditioning the project to adequately protect the interests of the Act and Bylaw, given the irreversible impairment of the wetlands and the buffer zone that the project would cause.

Since the Commission's 1999 decision, the Angells have subdivided the 7.3-acre lot into two lots. One lot is the 8 Spring Hill Road upland lot with the residence and driveway that were present at the time of the 1999 proceeding. The other lot is the undeveloped 5.2-acre project site. In November 2006, the Angells sold the 8 Spring Hill Road lot, reserving in the deed an access easement across the northern corner for the benefit of Lots 2C and 3. The deed for the 8 Spring Hill Road lot indicates that the Angells received consideration of \$620,000 for that property.

- 8) 2003 Increase of Bylaw Setbacks. In 2003, the Town of Acton approved an amendment of the Bylaw, effective July of 2003, which increased the minimum setbacks for activities in the buffer zone. The minimum setback for structures increased from 40 feet to 75 feet, and the minimum required buffer of undisturbed vegetation increased from 25 feet to 50 feet.
- 9) Site Visit, Site Conditions. During the NOI-1 proceeding, Members of the Commission and the Town Conservation Agent, Mr. Tidman, visited the project site on June 1, 2007. The characteristics and conditions of the undeveloped land are essentially the same as they were during the 1999 NOI proceeding.

During the site walk, the Commissioners requested that the Applicant re-determine and re-flag the wetlands. The re-flagging indicates that portions of the BVW immediately north of the upland have migrated closer to the proposed house and septic system locations. The wetlands lines otherwise remained largely unchanged from 1999. The proposed location of replicated wetlands has not been flagged.

The MNHESP has determined that the Mystic Valley Amphipod and Spotted Turtle no longer are species of "special concern."

- 10) NOI Site Plan, Alternative Common Drive Plan. The NOI Site Plan, Sheets 1-3, dated April 19, 2007 (Rev. 6/26/2007 on Sheet 1) are the same NOI Site Plan that the Applicant submitted in the NOI-1 proceeding. In addition to the NOI Site Plan, the Applicant has provided an Alternative Common Drive Plan, dated August 13, 2007, that the Applicant filed with the DEP during the SOC proceeding. The Alternative Common Drive Plan depicts a winding common drive extending in a roughly southwesterly direction from Spring Hill Road to the rear of the 8 Spring Hill Road property and continuing in a northwesterly direction along the old cart path to enter the project site. The Applicant asserts that the alternative-access route would increase the alteration of wetlands by about sixty percent (60%), from 928 square feet to approximately 1500 square feet, and would increase the amount of impervious surface.
- 11) Hearing. The Commission opened the NOI-2 hearing on November 21, 2007 and, with the Applicant's consent, immediately continued the hearing to December 5, 2007. Mark Donohoe, Professional Engineer, of Acton Survey & Engineering, represented the Applicant, Jeanson Homes Inc.; the law firm of McGregor & Associates, P.C. (Gregor I. McGregor, Esq. and Luke H. Legere, Esq. via written submission and Mr. Legere attending the hearing), represented a number of Town of Acton residents. William C. Sawyer, Esq. appeared in his own behalf as an abutter. The Commission closed the hearing on December 5, 2007. The record for the NOI-2 proceeding includes the record for the NOI-1 proceeding, as well as written and oral submissions that the Commission received during its consideration of NOI-2.

CONCLUSIONS:

The project must be denied because (1) it will adversely affect significant resource areas and interests protected by the Act and the Bylaw, (2) it does not satisfy the buffer-zone resource area setback requirements

of the Bylaw, (3) it does not meet the requirements for a limited-project exception under either the Act or Bylaw and (4) it would not meet the requirements for a waiver under the Bylaw.

1) The project will adversely affect significant resource areas and interests protected by the Bylaw.

Under the Bylaw, an applicant proposing to work in wetlands and associated buffer zone, any bank or within 100 feet of a vernal pool has the burden of showing that the work will protect wetlands-related interests such as public and private water supply, groundwater supply, flood control, storm damage prevention, pollution prevention and wildlife habitat.³

The project site, in its current, undeveloped condition, indisputably serves the interests of the Bylaw. The site is forested land, largely undisturbed, on which wetlands occupy one-half of the total land and are part of a larger wetland system that connects to the Spring Hill Conservation Area. The parcel is habitat for a wide variety of wildlife and plants.

The project will produce significant physical changes on the site that are likely to undermine the condition of Bylaw resource areas and the interests that they serve, specifically, the wetlands and buffer zone, defined bank and an area possibly functioning as a vernal pool. Construction will necessitate the substantial clearing of trees and vegetation and other construction disturbance within 50 feet of BVW, will alter approximately 40 feet of bank, will require the crossing and filling of BVW and will create an extended impervious surface in the middle of the now-undivided wetlands area. The removal of trees and tree canopy, the fragmentation of wetlands and the introduction of impervious structures will have an immediate impact on site characteristics such as temperature, hydrology and wildlife activity. Those changes, in turn, are likely to give rise to adverse changes in the condition and functioning of the resource areas, and to diminish the interests that the Bylaw protects. The wetlands replication and conservation restrictions that the Applicant has proposed in mitigation do not satisfy Bylaw requirements and are ill-suited to either ameliorate or compensate for the anticipated negative impact of the project. The Applicant has not provided, and declines to provide, an assessment by an expert in wetlands science of the impact that the project would have on the interests of the Bylaw. Without any objective evidence that the project would have no negative impact, the Commission concludes that the project will adversely affect the condition and functioning of wetlands, the buffer zone, the defined bank and a probable vernal pool, and that denial of the project is necessary to protect the resource areas and wetlands-related interests under the Bylaw.

2) The project does not satisfy the no-structure and no-disturbance setback requirements of the Bylaw.

Sections F3.5 and F3.18 of the Bylaw provide for the protection of the 100-foot buffer zone, as well as the wetlands to which it relates, as “resource area.” Section F8.3 sets minimum setbacks to restrict

³ Section F3.18 of the Bylaw defines “resource area” to include “any bank, wetland, vernal pool, buffer zone, lands subject to flooding or riverfront area.”

Section F3.14 of the Bylaw defines “vernal pool” as follows:

“The term ‘vernal pool’ as used by this Bylaw shall include, in addition to that already defined under the [Act and Act regulations], any confined basin or depression not occurring in existing lawns, gardens, landscaped areas, or driveways that meets the certification criteria established in the Guidelines for Certification of Vernal Pool Habitat published by the Massachusetts Division of Fisheries and Wildlife, regardless of whether the site has been certified by the Massachusetts Division of Fisheries and Wildlife. The buffer zone for vernal pools shall extend 100 horizontal feet from the mean annual high-water line defining the depression.”

Section F8.1 of the Bylaw provides that an applicant has the burden of proving that the proposed work will not harm the interests of the Bylaw. Section F1 provides that the interests of the Bylaw include 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.

activities in the buffer zone, and authorizes the Commission to increase those minimum setbacks as necessary to protect the interests of the Bylaw. In particular, Section F8.3 (2), (3) requires that:

- the inner 50 feet of the buffer zone be undisturbed natural vegetation; and
- driveways, roadways and structures be at least 75 feet from wetlands.

Over 400 feet of the shared driveway will be constructed inside the buffer zone and largely inside of the 50-foot undisturbed-vegetation buffer in violation of the minimum requirements of the Bylaw. Unless the project qualifies as a limited project, for which the Bylaw requires no setback, or unless the project merits a waiver of Bylaw requirements, the Commission must deny the project under the requirements of the Bylaw.

3) The project does not meet the requirements for a limited project under the Bylaw.

The Bylaw, in Section F4.5, gives the Commission discretion to approve the limited projects specified in Section 10.53(3) of the regulations under the Act, contained in Chapter 310 of the Code of Massachusetts Regulations (“Act regulations”). An applicant seeking approval of a limited project under the Bylaw must comply with the more protective standards under the Bylaw, and not simply the general standards of the Act regulations and DEP Policies.

Under Section 10.53(3)(e), which is the Act regulation that authorizes limited-project roadways and driveways, the Commission may approve a wetlands-crossing driveway as a limited project where the driveway would provide access from a public road to upland and the Commission concludes that no reasonable alternative means of access from the road to the upland exists. In deciding whether reasonable alternative access exists under the Act, the Commission may consider and require alternative configurations or locations of the proposed driveway to minimize adverse impacts on wetlands including on land that the applicant currently owns or formerly owned or in which the applicant has or could acquire an ownership interest. In evaluating alternative-access routes under the Bylaw, the Commission will be additionally concerned with minimizing adverse impact on buffer zone as resource area.

Even if a proposal meets the no-reasonable-alternative-access requirement and other general standards for a driveway under Section 10.53(3)(e), DEP Wetlands Policy 88-2 stresses that the Commission still may deny limited-project status if the magnitude of proposed wetlands impact and significance of the wetlands to the interests of the Act are sufficient to warrant a denial. Denial of a limited-project proposal under the Bylaw therefore will be justified where a project site contains wetlands and buffer zone of significant importance to the interests of the Bylaw, and the project will have a significantly adverse impact on those wetlands and buffer zone.

The Applicant’s project does not qualify as a limited project under the Bylaw because the Applicant has not proven that no reasonable alternative access exists; and even if no reasonable alternative access exists, the buffer zone, wetlands and bank collectively are of such significance, the suspected vernal pool of such potential significance, and the likely adverse impact of the project e so great, that a denial is warranted.

The Applicant has not demonstrated that no reasonable access exists. The Applicant asserts that no reasonable alternative access exists, but has submitted only one plan, depicting an improbable alternative access that meanders across the 8 Spring Hill parcel, enters the project site via the old cart path and purportedly would require the alteration of more wetlands than does the proposed access. The Applicant has omitted information as to the impact of that alternative access on the buffer zone, which also is protected resource area under the Bylaw. The Applicant also has provided no information about any other alternative-access configurations that would use the old cart path. The Commission lacks sufficient information to conclude that no reasonable alternative access exists.

Furthermore, even if no reasonable alternative access exists, which the Applicant has not demonstrated, the Applicant has proposed insufficient mitigation for the adverse impact of the project

on the interests of the Bylaw. The proposed wetlands replication plan lacks the detail that the Bylaw and Bylaw Rules and Regulations require.⁴ The Commission also is aware that replications are not notably successful. Replication aside, the Applicant has proposed essentially no mitigation for the significant encroachment on the buffer zone, including the inner portion that the Bylaw requires to be undisturbed, and has neither acknowledged nor proposed mitigation for the adverse impact that the project will have on the 40 feet of bank and could have on the area possibly functioning as a vernal pool. The three proposed post-construction conservation restrictions would be of limited value, applying to the fragmented and compromised Bylaw resource area remaining after the driveway was in place.

Finally, the Applicant has failed to bear its burden under the Bylaw of proving that the project will not significantly undermine the wetlands, buffer zone, bank and potential vernal pool and contravene the interests of the Bylaw.⁵ The Applicant has made repeated assurances that the project will protect and not harm the interests of the Act and Bylaw, but has provided the Commission with only handwritten stormwater management estimates of post-construction stream-crossing flow, runoff volume and recharge, and an undetailed replication proposal. The Commission has not received the wildlife habitat diversity plan and other information that the Bylaw Rules and Regulations require for a proposed replication plan. The Applicant further has declined to arrange for an evaluation and report by a wetlands expert about existing conditions on the site and likely impact of the project. On a forested site where ninety-four percent (94%) of the land is either wetlands or buffer zone, the Applicant is proposing to build an extended driveway, which will cross wetlands, alter some 40 feet of bank and lie inside the 75-foot no-structure setback and 50-foot undisturbed-vegetation buffer that are “resource area” under the Bylaw; the purpose of the driveway, moreover, will be to provide access to two sizeable residences that the Applicant intends to build on the same site. The project will significantly alter conditions on the site through the removal of numerous large trees and their canopy within 50 feet of BVW, the removal and disturbance of other vegetation within the 50-foot buffer zone, the

⁴ Section 4.2 of the Bylaw Rules and Regulations provides in pertinent part as follows:

“Projects involving [w]etlands [f]illing and/or permanent [a]lterations shall meet the requirements of [the Act regulations] and the following [r]equirements of the Commission:

- (A) The proposed [r]eplacement area design must be submitted to the Commission for approval as part of the submittal of the project Notice of Intent. Applicants are advised to appear before the Commission for preliminary discussion, comments and review prior to submittal of the [r]eplacement [p]lan with the Notice of Intent;
- (B) The [r]eplacement area must be shown to sufficiently duplicate the functions of the [w]etland proposed to be [a]ltered;
- (C) The [r]eplacement area shall be constructed, to the extent possible, immediately after [a]lteration of the existing [w]etland and during the same growing season;
- (D) The proposed [r]eplacement area must be clearly flagged for Commission site inspection before the Notice of Intent filing shall be considered complete, and said flagging shall be numerically coded and correspondingly shown on the [p]lans
- (E) The Notice of Intent submittal for a [r]eplacement area shall include a detailed [sic] of [r]eplacement showing:
 - (i) cross-section with indication of [g]roundwater level, soil profile and thickness of organic soil in the existing and proposed [w]etlands.
 - (ii) Plant species detail, including species found in the area to be [a]ltered, and number, types and locations of species to be introduced into the [r]eplacement area;
 - (iii) Detail of stabilization [p]lans for [r]eplacement area [b]anks;
 - (iv) [w]ildlife [h]abitat diversity plan.
...”

⁵ See Note 3.

fragmentation of wetlands, and the addition of impervious surfaces and structures. These changes and others that follow are likely to have a significant, negative impact on the condition and functioning of the wetlands, buffer zone, bank and potential vernal pool, thereby undermining wetlands-related values such as flood-control, storm-damage prevention and wildlife habitat that the Act and Bylaw protect.

The Applicant has provided essentially unsubstantiated conjecture that does not allay the Commission's concerns. In the absence of persuasive evidence indicating otherwise, the Commission concludes that the project will significantly harm rather than further the interests of the Bylaw. Denial of limited-project status therefore is appropriate under the Bylaw.^{6,7}

4) The project would not qualify for a waiver under the Bylaw even if the Applicant had requested one, which it did not.

Section F4.6 of the Bylaw authorizes the Commission, upon an applicant's written request at the time of initial filing, to waive strict compliance with the Bylaw where the Commission determines that "such action is in the public interest and is consistent with the intent and purpose of the Bylaw."

Even if the Applicant had requested a waiver under the Bylaw, which the Applicant did not, the Commission could not have granted one based upon these facts and circumstances. More than 400 feet of the proposed paved, shared driveway will be in the buffer zone, which is resource area under the Bylaw. Furthermore, much of the driveway in the buffer zone will not meet the 75-foot no-structure setback or 50-foot undisturbed-buffer requirement, and one part will cross and require the filling of 928 square feet of BVW. The setback requirements, which the Town of Acton approved in 2003, are more stringent than the setbacks in effect at the time of the 1999 proceeding, and reflect the Town's intention to strengthen the protection of wetlands under the Bylaw. A waiver of the setback requirements would, on the one hand, benefit private individuals on a privately-owned parcel and, on the other hand, put wetlands and buffer zone resource area at risk, contravening not only the purpose of the Bylaw to protect resource areas, but the interest and will of the public as embodied in the 2003 Bylaw amendment.

The Applicant's proposed conservation restrictions would not transform the project into one justifying a waiver of Bylaw setback requirements. The conservation restrictions would apply in patchwork fashion, on privately owned land, to wetlands and buffer zone that would become fragmented and otherwise compromised as a result of the project. The restrictions would come too late to serve the interests of the public and wetlands protection in a meaningful way, and would not compensate for the harm likely to result if the project moved forward pursuant to a waiver. In the absence of evidence that the project would serve the public interest and be consistent with the purposes of the Bylaw, the Commission would be required to deny a waiver.

⁶ See Note 1. The SOC is not controlling in this decision. Even if the SOC had stated unambiguously that the project qualified for limited-project status under the Act, the Commission would not be obliged to reach the same conclusion in evaluating the project under the significantly different standards of the Bylaw.

⁷ During the course of the NOI-1 proceeding, the Applicant suggested that the Commission's denial of the project would unfairly deny the full economic use of the property. The Supreme Judicial Court decision in Giovanella v. Conservation Commission of Ashland, 447 Mass. 720 (2006) would refute any claim by the Applicant that the Commission's denial was an unconstitutional taking of property without compensation, (where owner owned two abutting lots, one with house that owner sold, and one predominantly wetlands that owner sought to develop, lots were considered single property for purposes of "takings" analysis of impact on economic value, and Commission's denial of permission to develop wetlands lot was not a taking because denial did not render property economically valueless). In the current filing, the value of the project site would be combined with the value of the 8 Spring Hill Road house lot and a taking claim would fail by virtue of the significant financial consideration stated in the deed to the 8 Spring Hill Road house lot.