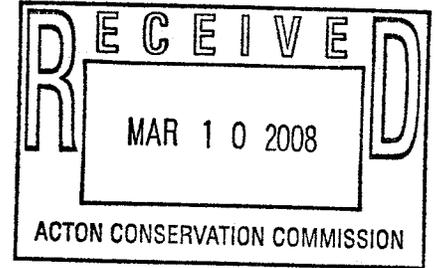


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STEPHEN W. DECOURCEY  
JOHN P. CARR  
SHANNON MICHAUD

March 7, 2008

**Via Certified Mail**

Acton Conservation Commission  
Acton Town Hall  
472 Main Street  
Acton, MA 01720

**Re: Jeanson Homes, Inc. v. Acton Conservation Commission and Its Members, Terry Maitland, Julia S. Miles, William Froberg, Linda Serafini, Janet Adachi, Frances P. Portante, Patty Lee and James Snyder Grant; Civil Docket: MICV2008-00735**

Dear Sir/Madam:

In accordance with the Massachusetts Rules of Civil Procedure, enclosed please find a copy of a summons, Complaint, and Scheduling Order for F Track served upon you in connection with the above-referenced appeal challenging the decision of the Acton Conservation Commission.

For your information, I have also sent a copy of this to Town Counsel.

Please contact this office if you have any questions.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard A. Nysten, Jr." with a stylized flourish at the end.

Richard A. Nysten, Jr.

RAN/kad  
Enclosures

cc: George A. Hall, Jr., Esq.

Return Receipt No. 7006 2760 0003 4503 4182

TO PLAINTIFF'S ATTORNEY: PLEASE CIRCLE TYPE OF ACTION INVOLVED: —  
TORT — MOTOR VEHICLE TORT — CONTRACT —  
EQUITABLE RELIEF — OTHER

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT  
DEPARTMENT  
OF THE  
TRIAL COURT  
CIVIL ACTION  
No. MICV2008-00735-D

MIDDLESEX, ss



JEANSON HOMES, INC., Plaintiff(s)

v.

ACTON CONSERVATION COMMISSION ET AL., Defendant(s)

SUMMONS

To the above-named Defendant: Acton Conservation Commission

You are hereby summoned and required to serve upon ....Richard A. Nysten, Jr., Esq.....  
Lynch DeSimone & Nysten, LLP plaintiff's attorney, whose address is 12 Post Office Square,  
Boston, MA 02109....., an answer to the complaint which is herewith  
served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you  
fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You are also  
required to file your answer to the complaint in the office of the Clerk of this court at Cambridge/Woburn...  
..... either before service upon plaintiff's attorney or within a  
reasonable time thereafter.

Unless otherwise provided by Rule 13(a), your answer must state as a counterclaim any claim which you may  
have against the plaintiff which arises out of the transaction or occurrence that is the subject matter of the plaintiff's  
claim or you will thereafter be barred from making such claim in any other action.

Witness, Barbara J. Rouse, Esquire, at ...Cambridge.....  
the ..... day of ...March.....  
....., in the year of our Lord ..... 2008 .....

*Richard A. Nysten*  
.....  
Clerk

NOTES.

- 1. This summons is issued pursuant to Rule 4 of the Massachusetts Rules of Civil Procedure.
- 2. When more than one defendant is involved, the names of all such defendants should appear in the caption. If a separate summons is used for each defendant, each should be addressed to the particular defendant.

NOTICE TO DEFENDANT — You need not appear personally in court to answer the complaint, but if you claim to have a defense, either you or your attorney must serve a copy of your written answer within 20 days as specified herein and also file the original in the Clerk's Office.

Commonwealth of Massachusetts  
County of Middlesex  
The Superior Court

CIVIL DOCKET # MICV2008-00735-D  
Courtroom Rm 7A (Cambridge) Ct Rm 620 Woburn

RE: Jeanson Homes, Inc. v Acton Conservation Commission et al  
TO:

Richard A Nylan Jr, Esquire  
Lynch DeSimone & Nylan  
12 Post Office Square  
6th Floor  
Boston, MA 02109

**SCHEDULING ORDER FOR F TRACK**

You are hereby notified that this case is on the track referenced above as per Superior Court Standing Order 1-88. The order requires that the various stages of litigation described below must be completed not later than the deadlines indicated, and case shall be resolved and judgment shall issue **12/11/2009**.

**STAGES OF LITIGATION**

**DEADLINES**

	<b>SERVED BY</b>	<b>FILED BY</b>	<b>HEARD BY</b>
Service of process made and return filed with the Court	05/20/2008	05/20/2008	
Response to the complaint filed (also see MRCP 12)		06/19/2008	
All motions under MRCP 12, 19, and 20	06/19/2008	07/19/2008	08/18/2008
All motions under MRCP 15	06/19/2008	07/19/2008	08/18/2008
All discovery requests and depositions served and non-expert depositions completed	12/16/2008		
All motions under MRCP 56	01/15/2009	02/14/2009	
Final pre-trial conference held and/or firm trial date set			06/14/2009
Case shall be resolved and judgment shall issue by <b>12/11/2009</b>			<b>12/11/2009</b>

- **The final pre-trial deadline is not the scheduled date of the conference.**
- **You will be notified of that date at a later time.**
- **Counsel for plaintiff must serve this tracking order on defendant before the deadline for filing return of service.**

Dated: 02/21/2008

Michael A. Sullivan  
Clerk of the Court

Telephone: 617-494-4010 EXT 4251

CIVIL ACTION COVER SHEET

DOCKET NO.(S)

Trial Court of Massachusetts Superior Court Department County: MIDDLESEX



PLAINTIFF(S) JEANSON HOMES, INC.

DEFENDANT(S) ACTON CONSERVATION COMMISSION AND Its Members, Terry Maitland, Julia S. Miles, William Froberg, Linda Serafini, Janet Adachi, Frances P. Portante, Patty Lee and James Snyder Grant

ATTORNEY, FIRM NAME, ADDRESS AND TELEPHONE Richard A. Nysten, Jr., Esq.(BBO#375280) Lynch DeSimone & Nysten, LLP, 12 Post Office Sq., Boston, MA 02109 Board of Bar Overseers number: (617) 348-4500

ATTORNEY (if known)

Origin code and track designation

Place an x in one box only:

- 1. F01 Original Complaint
2. F02 Removal to Sup.Ct. C.231,s.104 (Before trial) (F)
3. F03 Retransfer to Sup.Ct. C.231,s.102C (X)

- 4. F04 District Court Appeal c.231, s. 97 &104 (After trial) (X)
5. F05 Reactivated after rescript; relief from judgment/Order (Mass.R.Civ.P. 60) (X)
6. E10 Summary Process Appeal (X)

TYPE OF ACTION AND TRACK DESIGNATION (See reverse side)

CODE NO. TYPE OF ACTION (specify) TRACK IS THIS A JURY CASE? C99 Nature of Certiorari (F ) ( ) Yes ( xx) No

The following is a full, itemized and detailed statement of the facts on which plaintiff relies to determine money damages. For this form, disregard double or treble damage claims; indicate single damages only.

TORT CLAIMS

(Attach additional sheets as necessary)

- A. Documented medical expenses to date: 1. Total hospital expenses \$ 2. Total Doctor expenses \$ 3. Total chiropractic expenses \$ 4. Total physical therapy expenses \$ 5. Total other expenses (describe) \$ Subtotal \$
B. Documented lost wages and compensation to date \$
C. Documented property damages to date \$
D. Reasonably anticipated future medical and hospital expenses \$
E. Reasonably anticipated lost wages \$
F. Other documented items of damages (describe) \$
G. Brief description of plaintiff's injury, including nature and extent of injury (describe) \$
TOTAL \$

CONTRACT CLAIMS

(Attach additional sheets as necessary)

Provide a detailed description of claim(s):

TOTAL \$

PLEASE IDENTIFY, BY CASE NUMBER, NAME AND COUNTY, ANY RELATED ACTION PENDING IN THE SUPERIOR COURT DEPARTMENT

I hereby certify that I have complied with the requirements of Rule 5 of the Supreme Judicial Court Uniform Rules on Dispute Resolution (SJC Rule 1:18) requiring that I provide my clients with information about court-connected dispute resolution services and discuss with them the advantages and disadvantages of the various methods.

Signature of Attorney of Record

Richard Nysten

DATE:

2.19.08

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS

SUPERIOR COURT  
CIVIL ACTION NO. MICV2008-0735

**JEANSON HOMES, INC.,  
Plaintiff,**

v.

**TOWN OF ACTON CONSERVATION  
COMMISSION and its Members, Terry  
Maitland, Julia S. Miles, William Froberg,  
Linda Serafini, Janet Adachi, Frances P.  
Portante, Patty Lee and James Snyder  
Grant.**

**Defendants.**

**COMPLAINT  
AND  
APPEAL OF DECISION OF  
ACTON CONSERVATION  
COMMISSION**

**I. INTRODUCTION**

This is an action in the nature of certiorari pursuant to M.G.L., c. 249, §4 challenging the decision of the Acton Conservation Commission (the "Commission" or "Defendant") under the Acton non-zoning Wetlands Bylaw (the "Bylaw") and its regulations denying the construction of a common drive roadway, wetland crossing, grading and site work in connection with providing access to two residential lots under the Bylaw. The Project is located off Spring Hill Road, Acton, Massachusetts (the "Property"). The Project is proposed by Jeanson Homes, Inc., (the "Plaintiff"). The Property consists of two (2) undeveloped lots in a residential zone. Defendant issued an Order of Conditions denying the Project on or about December 26, 2007.

Plaintiff maintains that the Commission's Order under the Bylaw denying the Project is arbitrary, capricious and not supported by the facts or the law. Plaintiff maintains that based upon its application, the plans and the Department of Environmental Protection's Superseding

Order, the Administrative Record provided substantial evidence that the Project and the wetland crossing should go forward.

## **II. PARTIES**

- a. Plaintiff, Jeanson Homes, Inc., (the “Plaintiff”) is the Applicant and seeks a permit from the Acton Conservation Commission under its Bylaw to construct the Project on Spring Hill Road.
- b. Defendants, Town of Acton Conservation Commission, Terry Maitland, Julia S. Miles, William Froberg, Linda Serafini, Janet Adachi, Frances P. Portante, Patty Lee and James Snyder Grant, as they are members of the Acton Conservation Commission, and are authorized to administer the Wetlands Protection Act, M.G.L., c. 131, §40 and the Acton Wetland Protection Bylaw and which issued the Order of Conditions (the “2007 Order”).

## **III. THE PROPERTY AND THE PROJECT**

1. The Property is located off Spring Hill Road in Acton, Massachusetts.
2. The Project is a common drive proposed as a wetland crossing in a residential zone and the construction of two single-family homes with garages in the buffer zone.
3. The Property contains limited bordering vegetated wetlands (bvw), buffer zone and considerable upland.
4. The Property contains intermittent streams and a buffer zone to the bvws.
5. The shared or common driveway will be twelve (12’) feet wide with a three (3’) foot shoulder, and sixty (60’) feet long.

6. The work includes the alteration of less than 1000 square feet of bvw with the use of mitigating measures such as retaining walls.
7. Limited grading work is proposed in the outer edges of the bvw. The houses are proposed more than 75 feet from the bvw in accordance with the Bylaw.
8. The Bylaw requires fifty (50') feet of undisturbed natural wetland vegetation and Plaintiff's design met this requirement with the exception of the crossing.
9. The residential units are proposed at the outer edge of the buffer zone. A replication area is proposed adjacent to the proposed fill approximately 960 square feet in size. The replication area will be larger than the filled area.
10. Plaintiff provided stormwater management calculations even though they are not required under the Bylaw.
11. Plaintiff performed an alternatives analysis that provided evidence that there is no other access route for the roadway that would result in a lesser alteration of wetland resource areas.
12. In addition, Plaintiff has proposed to place permanent conservation restrictions upon 75% of the property.

#### **IV. STATEMENT OF FACTS AND LAW**

13. Under M.G.L., c. 131, §40 (the "Wetlands Act") and its implementing regulations, 310 CMR 10.00 et seq., the Defendant Commission regulates activities that dredge, remove, grade, fill or otherwise alter inland wetland resource areas.
14. In addition to its authority under the Wetlands Protection Act under the Bylaw, the Defendant Commission also regulates activities that dredge, remove, grade, fill or

otherwise alter inland wetland resource areas. The Commission has jurisdiction to regulate activities that may have an effect upon wetland values and interests identified in the Bylaw. Under the non-zoning Bylaw activities proposed in flood plains, bordering vegetated wetlands and activities within one hundred feet of certain resource areas (the “buffer zone”) that may impact wetland resource areas are regulated by the Commission.

15. Under M.G.L., c.131, §40 and the Bylaw, an applicant must apply for and receive two separate approvals to conduct an activity that may affect the interests protected under the Bylaw and the Wetlands Act within wetlands or within the buffer zone. If an activity is proposed that may impact a wetlands resource area, a Notice of Intent (“NOI”) is submitted to the Commission outlining the proposed activity. The purpose of a NOI is to explain how the project will contribute to the protection of the eight (8) statutory interests of the Wetlands Act and the interests of the Bylaw. The Bylaw authorizes the Commission to issue a permit with conditions to protect the wetland resource areas.
16. In 2007, Plaintiff submitted a Notice of Intent (“NOI”) to the Commission seeking approval of the Project. The NOI is a form prescribed by the Massachusetts Department of Environmental Protection (“DEP” or the “Department”) which outlined the proposed activities, described the proposed construction and identified how the Plaintiff would mitigate potential impacts to the wetlands with the crossing.
17. In its NOI, Plaintiff presented plans to construct the crossing and common driveway to construct two single-family houses at the edge of the buffer zone, to install erosion control within the buffer zone, and to construct a wetland replication area.
18. Plaintiff, after a public hearing, denied the Project under the Wetlands Act and the Bylaw in August 2007.

19. Plaintiff appealed the Commission's Denial under the Act to the Department. Plaintiff did not appeal the initial Bylaw denial in August 2007.
20. After a site visit and review of the plans, the Department issued a Superseding Order of Conditions ("SOC") under the Wetlands Act overturning the denial and approving the Project in October 2007.
21. In November 2007, Plaintiff returned to the Commission with a new Notice of Intent under the Bylaw only, including a copy of the SOC approval as part of its submission to the Commission.
22. At the public hearing, the Plaintiff presented the plan and description of how the Project met the interests of the Bylaw.
23. Plaintiff submitted information that the stream to be crossed is intermittent, that the stream channel will not be altered, that the work will not alter the stream carrying capacity, that most parking will be outside the buffer zone, that there will be no increase in flooding, that barrier walls will be constructed to preserve the 50-foot no disturbance zone, that recharge trenches will collect and disperse runoff, that the structures are proposed outside the 75-foot Bylaw setback; and that there is no work proposed within 100 feet of any alleged vernal pools.
24. Plaintiff submitted information that construction was in accordance with Bylaw section F4.5 for crossings of wetlands to access upland areas.
25. At the final public hearing, Plaintiff answered all questions regarding wildlife habitat and other matters.
26. Supplemental letters were filed on behalf of Plaintiff.
27. In November 2007, the Defendant Commission closed the hearing.

28. On December 5, 2007, the Commission voted to deny the Project.
29. Defendant Commission issued the Denial on December 26, 2007.
30. The Commission's Order of Conditions denying the Project under the Bylaw referenced four (4) reasons for the denial.
31. In its Order, Defendant Commission states that the Project will adversely affect significant resource areas and that the Plaintiff did not meet his burden to show the alteration and impact of the Project.
32. Plaintiff presented evidence that alteration of any resource areas will not take place, other than with the crossing. The Superseding Order of Conditions was further evidence.
33. Defendant Commission's second reason for its denial is that the Project does not meet the setbacks of Sections F.3.5 and 3.18 of the Bylaw.
34. Plaintiff submitted evidence that other than the roadway, there is no work that violates the Bylaw setbacks.
35. Plaintiff submitted evidence that the roadway is exempt from the setback because the Project is a limited project under the Bylaw.
36. Defendant Commission's third reason for its denial is that in its opinion the Project does not qualify as a limited project under the Bylaw.
37. Plaintiff submitted substantial evidence that the Project met the requirements for limited project.
38. Defendant Commission's fourth reason for denial was that the Project would not qualify for a waiver under Section 4.6 of the Bylaw even though Plaintiff did not apply for one.
39. Plaintiff states that it was not required to submit a waiver request but it was entitled to a waiver.

40. Under the provisions of M.G.L., c. 131, §40 and its implementing regulations, Plaintiff filed an appeal of the c.131, §40 decision immediately and requested a Superseding Order of Conditions from the DEP. The Department found that the Project met the performance standards and issued an SOC approving the Project.
41. Plaintiff hereby files an action alleging that the Commission's decision under the Bylaw was arbitrary, capricious, not supported by the facts, not supported by the law, and not supported by any credible evidence and that the denial constitutes a taking of the property without compensation.

**Error of Law - Certiorari**

42. Plaintiff realleges the facts and allegations contained in paragraphs one through forty-one.
43. The issuance of the Order of Conditions as a denial constitutes an error as a matter of law and is not supported by substantial evidence, as the decision is contrary to the information in the Administrative Record. Plaintiff filed site plans, a Notice of Intent, an alternatives analysis and stormwater calculations to support its position that the Project met the requirements for work under the Bylaw.
44. As a matter of law, the Commission erred in not issuing an Order of Conditions allowing the Project.
45. As a matter of law, Plaintiff presented evidence that it was entitled to approval of the wetland crossing to access the two (2) lots and to construct the single-family houses.
46. Plaintiff presented evidence that other work proposed was outside the setbacks applied by the Commission.

47. Plaintiff states that the enforcement of a setback associated with the wetland crossing conflicts as a matter of law with the regulations that allow for a wetland crossing.

**Abuse of Discretion and Error**

48. Plaintiff realleges the facts and allegations contained in paragraphs one through forty-seven.
49. The Commission's decision was arbitrary and capricious and did not include any factual finding or evidence in the Administrative Record to find that the Property contained a vernal pool or that the wetland delineation confirmed by its experts was inaccurate.
50. The Bylaw regulates activities in wetland resource areas or in the buffer zone which could alter resource areas. The Commission offered no factual evidence on the record to support its position that the buffer zone setbacks were not met, except for the wetland crossing.
51. Defendant Commission had the opportunity to submit additional materials or wildlife habitat to establish vernal pool boundaries and chose not to submit the information.
52. There is no work proposed in the area identified as a potential vernal pool habitat by Defendant.
53. Plaintiff met the requirements of the Bylaw for a wetland crossing and for a limited project.

**V. TAKING**

54. Plaintiff realleges the facts and allegations contained in paragraphs one through fifty-three.

55. The decision of the Commission results in a taking of the Property without compensation.

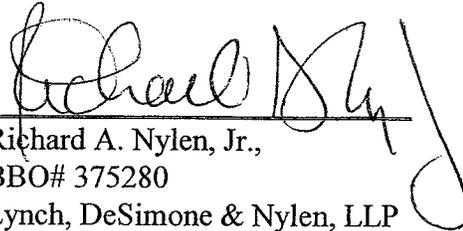
**RELIEF SOUGHT**

For the reasons stated above Plaintiff hereby requests that the Court:

1. Issue an Order that the records of the proceeding be brought before the Court in accordance with the Standing Order 1-96.
2. Pursuant to M.G.L., c. 249, §4, issue an Order in the Nature of Certiorari, finding that the Order was error and requiring the Commission to issue an Order of Conditions under the Acton Bylaw allowing the Project to go forward consistent with the Plans of Record and Administrative Record.
3. In the alternative, find that there is a taking.
4. Grant any other equitable relief or remedies at law that the Court deems appropriate.

Respectfully Submitted,

Jeanson Homes, Inc.  
By Its Attorney,

  
Richard A. Nylén, Jr.,  
BBO# 375280  
Lynch, DeSimone & Nylén, LLP  
12 Post Office Square, Suite 600  
Boston, MA 02109  
(617) 348-4500

Date: February 20, 2008