



Acton Conservation Commission

Meeting Minutes

July 5th, 2023

7:15 PM

Hybrid Meeting

Present: Terry Maitland (Chair), Jim Colman, Kate Warwick, Amy Green, Jillian Peters, Peter Hocknell

Absent: Zywia Chadzynska

Conservation Agent: Mike Gendron

7:15 The Chairman, Terry Maitland opened the meeting and read virtual meeting guidelines.

Regular Business

7:15 **Discussion:** 12 Spring Hill Road DEP 85-1347 Denial

The Commission reviewed the draft of the denial argument drafted by the Conservation Agent and made the following edits outlined in *Enclosure 1*.

7:50 **Request for COC 117 Concord Road DEP 85-1241**

The discussion for the COC request was continued to the following hearing and an additional inspection was scheduled.

8:03 Meeting adjourned

All documents can be found at: <http://doc.acton-ma.gov/dsweb/View/Collection-16989>

Enclosure 1: Conservation Commission Denial Edits

Notice of Intent: 12 Spring Hill Road (E6-6-1); DEP 85-1347

Applicant: Westminster Homes

Representative: Goddard Consulting

Date Filed: April 3, 2023

Hearing Closed: June 21, 2023

Decision:

On June 21, 2023, the Acton Conservation Commission voted unanimously to issue an Order of Conditions denying the Notice of Intent (DEP 85-1347) under both the Massachusetts Wetlands Protection Act MGL ch. 131 Sec. 40 ("the Act") and the Acton Bylaw Ch. F: Environmental Protection ("the Bylaw"). The Commission determined the proposed project (1) failed to submit the necessary information and plans requested by the Commission, (2) failed to avoid or prevent unacceptable significant or cumulative effects upon the wetland values/interests protected by the Act and Bylaw and (3) no conditions were adequate to preserve and protect the values/ interests of the Act and the Bylaw.

Hearing History:

There is an extensive history on this parcel that includes the following Notice of Intents:

- 1999 NOI DEP 85-645 (denied by Conservation Commission)*
- 2007 NOI Acton Bylaw 75-280 (denied by Conservation Commission)*
- 2007 NOI DEP 85-971 (denied by Conservation Commission – SOC from DEP)*
- 2021 NOI DEP 85-1292 (withdrawn by applicant)*
- 2023 NOI DEP 85-1347 (denied by Conservation Commission)*

Although it is important to understand the long history of wetland filings on this parcel, the applicable filings for this decision are DEP 85-1292 and DEP 85-1347. In 2021 the applicant submitted a proposal to build two single family homes and a stream crossing for access. Eventually, the project was scaled back to one single family home and a stream crossing. After nearly 2 years of deliberation and some turnover on the Commission, the applicant withdrew the application (December 2022). A few months later (April 2023) the applicant submitted the same project with a few minor changes and some supplemental information. All of the information (plans, meeting minutes, peer reviews, etc.) from DEP 85-1292 was submitted as part of the application for DEP 85-1347. The following hearings were held for the two filings:

Public Hearing: January 6th, 2021 (DEP 85-1292)

Site Walk: March 17, 2021 (DEP 85-1292)
Public Hearing: November 3rd, 2021 (DEP 85-1292)
Public Hearing: February 16th, 2022 (DEP 85-1292)
Public Hearing: August 17th, 2022 (DEP 85-1292)
Public Hearing: September 7th, 2022 (DEP 85-1292)
Public Hearing: October 19th, 2022 (DEP 85-1292)
Public Hearing: November 16th, 2022 (DEP 85-1292)
Public Hearing: April 19th, 2023 (DEP 85-1347)
Site Walk: May 11th, 2023 (DEP 85-1347)
Public Hearing: June 21st, 2023 (DEP 85-1347)

Project Site Description:

The project site is a 5.2-acre lot of undeveloped, forested land on the south side of Spring Hill Road comprised of species-rich bordering vegetated wetlands (BVW) and a 5-10-foot-wide intermittent stream (3-6-inch banks) that runs through the east side of the parcel. The parcel includes dominant wetland indicator plants such as: red Maple, yellow birch, red oak, highbush blueberry, arrowwood, winterberry, sphagnum moss, cinnamon fern and wood fern. Approximately half of the parcel is wetland, the other half (2.62 acres) is forested upland. Only .32 acres of the upland is outside of the wetland buffer zone.

Findings of Fact:

1. The proposed project would impact resource areas protected by the Act and the Bylaw including: Bordering Vegetated Wetlands (BVW) and Bank. Additionally, the project would impact the interests preserved and protected by the Act and the Bylaw including: protection of public and private water supply, protection of groundwater supply, flood control, storm damage prevention, prevention of pollution and protection of wildlife habitat. MA Stream Crossing Standards states that although a box culvert meets the "general standards" criteria for a stream crossing it does not meet the optimum standards which would be a bridge. On February 16th, 2022 the Commission asked for an analysis of the impacts on the resource area due to the use of a box culvert vs. a bridge. Six hearings followed February 16th, 2022 where the applicant did not provide an adequate analysis of these two options. On June 21st, 2023 the applicant stated that based on his experience, a bridge would have the same impact on the resource area as a box culvert because lack of sunlight would kill the vegetation below. The Commission did not feel that there was proper data to back this analysis. Short of a condition that would mandate the construction of a bridge, there was no reasonable condition that could be issued to resolve the lack of information.

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2. The Massachusetts Stream Crossing Standards state that although a box culvert meets the “general standards” criteria for a stream crossing it does not meet the optimum standards which would be a bridge. On February 16th, 2022 the Commission asked for an analysis of the impacts on the resource area due to the use of a box culvert vs. a bridge. Six hearings followed February 16th, 2022 where the applicant did not provide an adequate analysis of these two options. On June 21st, 2023 the applicant stated that based on his experience, a bridge would have the same impact on the resource area as a box culvert because lack of sunlight would kill the vegetation below. The Commission did not feel that there was proper data to back this analysis. Short of a condition that would mandate the construction of a bridge, there was no reasonable condition that could be issued to resolve the lack of information.

2.3. Section F8.3 of the Bylaw states that the minimum setback for structures necessary for upland access is 0 feet “where reasonable alternative access is unavailable”. Based on the information outlined in Finding #2, the Commission determined that the applicant did not prove that that a reasonable alternative was unavailable. Section F8.1 of the Bylaw states that the applicant bears the burden of proof and failure to do so is sufficient cause for denial.

2.4. The proposed project includes a driveway that is 715 feet in length and 12 feet wide. Approximately 400 linear feet of the driveway (4,800 square feet) is within 50 feet of the resource area, including approximately 350 linear feet (4,200 square feet) within 20 feet of the resource area. and would impact almost 400 linear feet within 50 feet of the wetland, including the crossing. The majority of this length (about 350 linear feet) is within 20 feet of the wetland. At 12 feet wide, this puts almost 5,000 sf of impervious area abutting the wetland. According to the preface of the WPA’s 2005 regulatory revisions, “extensive work in the inner portion of the buffer zone, particularly clearing of natural vegetation and soil disturbance is likely to alter the physical characteristics of resource areas by changing their soil composition, topography, hydrology, temperature, and the amount of light received”. This work is not consistent with the interests of the Bylaw, including Section F8.3 which discusses a 75-foot setback from driveways and 50-foot setback for undisturbed natural vegetation. This could not be conditioned in a way to protect the interests of the Bylaw or the Act, or the Act and the project could not be condition in a way to preserve or protect the interests of the Bylaw.

3.5. The proposed house and associated work/grading would impact most of the 75 to 100-foot buffer zone. The applicant reported that 79 trees would be removed within the limit of work in the buffer zone. This work would have adverse impacts on the interests of the Bylaw and the Act. Additionally, the collateral impact that the removal of these trees would have on the surrounding trees and the cumulative impacts that this would have on the wetland and associated buffer zone were not considered by the

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applicant. Finally, there are multiple locations where the erosion controls and limit of work could have been pulled closer in order to limit the number of impacted trees; the applicant was not willing to make these changes to the plan. The impact of the removal of the trees tree removal could not be conditioned in a way to ensure no alteration of the wetland resource area preserve and protect the interests of the Bylaw and the Act.

6. The plan included the installation of a new well which was not considered within the limit of work and does not account for the short-term impact on the wetland buffer zone and resource area. Additionally, the well is proposed inside of the 75-foot wetland setback. Section F8.3 of the Bylaw states that there is a 75-foot setback to the edge of driveways, roadways and structures.

4.7. The project proposes to alter 48 linear feet of bank and 834 square feet of BVW (replacing 48 linear feet and 879 square feet, respectively). Considering the amount of buffer zone work described in the findings above, the Commission believes there will likely be a larger impact on the resource area than proposed. According to the preface of the WPA's 1983 regulatory revisions, "it has been the Department's experience that any project undertaken in close proximity to a wetland's resource area has a high likelihood of resulting in some alteration of that area, either immediately, or as a consequence of daily operation of the complete project". Additionally, the MA Inland Wetland Replacement Guidelines state that "MassDEP is wary of placing too much reliance on replacement, even under improved standards" due to a 2018 UMASS study, Wetland Replacement in Massachusetts, which details the high rate of failure for wetland replication across the state. For these reasons, the applicant's proposal of approximately 1:1 replication was determined to be insufficient and would not preserve and protect the interests of the Act and Bylaw.

5.8. The applicant had nine hearings and two site walks over multiple years to provide all of the information required by the commission and to prove that the project would have limited impact on preserve and protect the interests of the Act and the Bylaw, however they failed to do so.

Applicable Regulations:

The Bylaw, Section F1: "The purpose of this Bylaw 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

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damage prevention, water pollution prevention, fisheries, protection of endangered or threatened species, and wildlife habitat”

The Commission determined that this regulation could not be satisfied based on the information described in Findings of Fact #1, #4, #5, #6, #7 and #8.

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The Bylaw, Section F8.1: *“The applicant shall bear the burden of proving that the work proposed in the application will not harm the interests protected by this Bylaw. Failure to provide adequate evidence to the Commission that the proposed work will not harm any of the interests protected by this Bylaw shall be sufficient cause for the Commission to deny the application or to grant a permit with an Order of Conditions, or, at the Commission's discretion, to continue the hearing to another date to enable the applicant or others to present additional evidence.”*

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The Commission determined that this regulation could not be satisfied based on the information described in Findings of Fact #2, #3, #5 and #8.

The Bylaw, Section F10: *“The Conservation Commission is empowered to deny a permit for failure to meet the requirements of this bylaw; for failure to submit necessary information and plans requested by the Commission; for failure to meet the design specifications, performance standards, and other requirements in regulations of the Commission; for failure to avoid or prevent unacceptable significant or cumulatively adverse effects upon the wetland values protected by this bylaw; or where the Commission deems that no conditions are adequate to protect those values. Due consideration shall be given to any demonstrated.”*

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The Commission determined that this regulation could not be satisfied based on the information described in all of the Findings of Fact.

310 CMR 10.01(2): *“M.G.L. c. 131, § 40 sets forth a public review and decision-making process by activities affecting Areas Subject to Protection under M.G.L. c. 131, § 40 are to be regulated in order to contribute to the following interests: protection of public and private water supply, protection of ground water supply, flood control, storm damage prevention, prevention of pollution, protection of land containing shellfish, protection of fisheries, protection of wildlife habitat.”*

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The Commission determined that this regulation could not be satisfied based on the information described in Findings of Fact #1, #4, #5, #6, #7 and #8.

310 CMR 10.03(1)(a): *“Any person who files a Notice of Intent to perform any work within an Area Subject to Protection under M.G.L. c. 131, § 40 or within the Buffer Zone has the burden of demonstrating to the issuing authority:*

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1. that the area is not significant to the protection of any of the interests identified in M.G.L. c. 131, § 40; or

2. that the proposed work within a resource area will contribute to the protection of the interests identified in M.G.L. c. 131, § 40 by complying with the general performance standards established by 310 CMR 10.00 for that area.

3. that proposed work within the buffer zone will contribute to the protection of the interests identified in M.G.L. c. 131, § 40, except that proposed work which lies both within the riverfront area and within all or a portion of the buffer zone to another resource area shall comply with the performance standards for riverfront areas at 310 CMR 10.58. For minor activities as specified in 310 CMR 10.02(2)b.1. within the riverfront area or the buffer zone to another resource area, the Department has determined that additional conditions are not necessary."

The Commission determined that this regulation could not be satisfied based on the information described in Findings of Fact #2, #3, #5 and #8.

310 CMR 10.05(6)(c): *"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 M.G.L. c. 131, § 40, it may issue an Order prohibiting the work. The Order shall specify the information which is lacking and why it is necessary."*

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The Commission determined that this regulation could not be satisfied based on the information described in Findings of Fact #2, #3 and #8.

310 CMR 10.53(1): *"For work in the Buffer Zone subject to review under 310 CMR 10.02(2)(b)(3), the Issuing Authority shall impose such 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".*

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The Commission determined that this regulation could not be satisfied based on the information described in Findings of Fact #1, #2, #4 and #6

Conclusion:

The Acton Conservation Commission has determined that the work proposed in the Notice of Intent filing DEP 85-1347 would have adverse impacts on the interests of the Act and the Bylaw, the applicant did not produce the necessary information for the commission to approve the project, and proposed plans could not be conditioned in a way that could meet the intent of the above regulations. For these reasons the Commission determined that no work shall be performed on this project.