

ATTACHMENT 5

NW/3P



**Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands**

WPA Form 7 - Extension Permit for Orders of Conditions
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

DEP File Number:

307-0724

Provided by DEP

A. General Information

Important:
When filling out forms on the computer, use only the tab key to move your cursor - do not use the return key.



1. Applicant:

New Meadows Development, LLC

Name

c/o Nancy A.S. McCann, Esq. 89 Newbury Street, Ste. 302

Mailing Address

Danvers

City/Town

MA
State

01923

Zip Code

2. Property Owner (if different):

New Meadows Development, LLC

Name

c/o Nancy A.S. McCann, Esq. 89 Newbury Street, Ste. 302

Mailing Address

Danvers

City/Town

MA
State

01923

Zip Code



567294 (87747) Btch:492626
Southern Essex District Registry
10/23/2017 10:36 AM EXTN Pg: 1/3

B. Authorization

The Order of Conditions (or Extension Permit) issued to the applicant or property owner listed above on:

December 18, 2015

Date

Issued by:

Topsfield

Conservation Commission

for work at:

57 Perkins Row

Street Address

58

Assessor's Map/Plat Number

025

Parcel/Lot Number

recorded at the Registry of Deeds for:

Southern Essex

County

87747

Certificate (if registered land)

Doc # 569923

Book

Page

is hereby extended until:

December 18, 2021

Date

Date the Order was last extended (if applicable)

This date can be no more than 3 years from the expiration date of the Order of Conditions or the latest extension. Only unexpired Orders of Conditions or Extension may be extended.

This Extension Permit must be signed by a majority of the Conservation Commission and a copy sent to the applicant and the appropriate DEP Regional Office

(<http://www.mass.gov/eea/agencies/massdep/about/contacts/find-the-massdep-regional-office-for-your-city-or-town.html>).

Signatures:

[Signature: James Carroll]
[Signature: James Carroll]
[Signature: James Carroll]

[Signature: John Smith]
[Signature: John Smith]
[Signature: John Smith]

10/11/2017

ATTACHMENT 6

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. ESCV2016-00226

NEW MEADOWS DEVELOPMENT LLC

vs.

THE TOPSFIELD CONSERVATION COMMISSION

MEMORANDUM OF DECISION AND ORDER ON
THE PARTIES' CROSS- MOTIONS FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

This is a conservation commission appeal asserted pursuant to the certiorari statute, G. L. c. 249, § 4. The plaintiff, New Meadows Development LLC ("New Meadows"), seeks review of the denial of an Order of Conditions (the "Denial Order") issued by the defendant, the Topsfield Conservation Commission (the "Commission"), on December 18, 2015. This matter is currently before the court on New Meadows' Motion for Judgment on the Pleadings and, the Commission's Cross-Motion for Judgment on the Pleadings. For the reasons explained below, New Meadows' Motion will be DENIED and, the Commission's Cross-Motion will be ALLOWED.

BACKGROUND

I. The Property and the Work

New Meadows owns property at 57 Perkins Row, in Topsfield, Massachusetts (the "Property"). The Property is approximately 8.2 acres in size. Currently, it is occupied by a single-family dwelling. New Meadows seeks to construct a five-lot subdivision on the Property

(the "Subdivision Project"). To carry out the Subdivision Project, New Meadows must make improvements to an existing 500-foot driveway, which crosses a stream located on the Property. Upslope from this crossing, the stream contains a pool (the "Pool").

In June 2015, New Meadows filed a Notice of Intent (the "NOI") with the Commission, seeking approval for the construction of an improved driveway. According to the NOI, the proposed work will result in 470 square feet of permanent alteration to bordering vegetated wetlands ("BVW"), 491 square feet of temporary alteration to BVW, and 24,255 square feet of alteration in the BVW buffer zone.

Because, as discussed in more detail below, the Topsfield generally does not permit work in the buffer zone and, also limits development on lots with existing structures (as of May 2000) to a total of 400 square feet of activity in the buffer zone, to complete the Subdivision Project, New Meadows needed to obtain two waivers from the Commission. Thus, along with the NOI, New Meadows submitted two written waiver requests: (1) a waiver to allow construction of a portion of the new roadway within a wetland resource area; and (2) a waiver to allow work within the 100-foot buffer zone setback area.

The Commission approved the proposed work under the Wetlands Protection Act (the "WPA"), G. L. c. 131, § 40, but, on December 18, 2015, it issued the Denial Order, which denied the project under the Town of Topsfield General Wetlands Bylaw and Regulations (the "Topsfield Bylaw").

II. The Topsfield Bylaw

Like other conservation commissions of its kind, the Commission was created to regulate activities under the WPA. In accord with the WPA, the Commission has the authority to condition proposed work, in or near coastal as well as inland wetlands, to protect eight statutory

interests. Namely, "to protect the private or public water supply; to protect the ground water; to provide flood control; to prevent storm damage; to prevent pollution; to protect land containing shellfish; to protect wildlife habitat; and to protect . . . fisheries[.]" G. L. c. 131, § 40.

In addition to its authority under the WPA, the Commission also has the power to regulate activities in accordance with the Topsfield Bylaw. Under the Topsfield Bylaw, the Commission is permitted to condition work in or near wetlands so long as the conditions serve to protect the interests identified in the Bylaw, which include the same eight interests delineated above plus two additional interests—(1) erosion and sedimentation control and, (2) recreation. *The Topsfield Bylaw, § 62-1*. At all times, it is the applicant that bears the burden of "proving by a preponderance of the credible evidence that the work proposed . . . will not adversely affect . . . [these interests]." *The Topsfield Bylaw, § 62-8*.

Pursuant to the Topsfield Bylaw, freshwater wetlands (including BVW) are presumed significant to the interests protected under the Bylaw. *The Topsfield Bylaw, § R:10-4(a)*. Buffer zones are also presumed significant to these interests. *The Topsfield Bylaw, § R:10-4(e)*. In fact, the Topsfield Bylaw presumes work within the 100-foot buffer zone will "adversely affect the buffer zone's capacity to contribute to the interests of the Bylaw[.]" *The Topsfield Bylaw, § R:10-4(e)(1)(b)*. Consequently, no work is allowed within the buffer zone. *The Topsfield Bylaw, § R:10-4(e)(2)*.

In addition to generally preventing work within the buffer zone, the Topsfield Bylaw also limits development of lots with an existing house or structure as of May 2000 to a total of 400 square feet of activity in the buffer zone. *The Topsfield Bylaw, § R:10-4(e)(2)(a)*.

Finally, for purposes of the current dispute, the court notes that the Topsfield Bylaw also defines vernal pools as protected resource areas. *The Topsfield Bylaw, § R:10-2*. And also that,

because vernal pools "function as essential breeding habitat for a variety of amphibian species . . . and provide other important wildlife habitat functions," vernal pools include "a 100-foot setback," in which constructions is prohibited. *The Topsfield Bylaw*, § R:10-2.

An applicant may circumvent the above alteration and/or setback limitations by applying for, and obtaining, a waiver. *The Topsfield Bylaw*, § R:10-4(i). In accord with the waiver provision, "[t]he Commission may . . . waive the application of one or more of the regulations[,] . . . when the waiver request has been submitted in writing[.]" if the Commission finds that:

(a) [t]here are no alternatives that would allow a project to proceed in compliance with the regulations; and (b) [m]itigating measures are proposed that will allow the project to be conditioned so as to contribute to the interests identified in the Bylaw; and (c) [w]here alteration . . . is proposed, replication is proposed in accordance with the State regulations and . . . [the *Topsfield Bylaw*]; and (d) [t]he waiver is necessary to accommodate an overriding public interest, or that it is necessary to avoid an order that so restricts the use of property as to constitute an unconstitutional taking-without-compensation.

The Topsfield Bylaw, § R:10-4(i)(1)(a)-(d) (emphasis in original).

III. The Public Hearing and the Denial Order

The NOI was subject to an extensive public hearing process. During this process, the Commission reviewed the site plan, the stormwater management plan, the invasive species management plan, and the waiver requests. There are two matters, which are significant to the current dispute. First, the peer review completed by Beals and Thomas, Inc. ("B&T"), an independent environmental consulting firm, which the Commission hired to review the NOI and the waiver requests. Second, the assessment of the Pool located upslope from the crossing, which Matthew Burne ("Burne") from DeRosa Environmental performed.

Following its hire, B&T communicated frequently with the Commission as well as New Meadows' consulting firm, the Morin-Cameron Group, Inc. ("MCG"), regarding the Subdivision

Project. B&T's final letter, dated November 16, 2015, summarized its findings. *A.R.*, pp. 649-681. In addressing the waiver provision, B&T concluded New Meadows "adequately addressed" the alternatives analysis. *A.R.*, p. 655. Then, with respect to mitigation and replication, B&T stated: "In our opinion, [New Meadows] . . . has provided appropriate information documenting the proposed replication. Furthermore, [New Meadows] . . . has committed to having a Professional Wetland Scientist oversee the proposed mitigation, and has provided further acknowledgement of monitoring requirements Therefore, we consider this comment adequately addressed." *A.R.*, p. 659.

Finally, as to the public interest requirement, B&T noted that New Meadows had previously summarized the public interests it contended would be served by the Subdivision Project, including: improving the structural integrity of the existing driveway/roadway; improving stormwater management, by adding a new box culvert for drainage; restoring the wildlife corridor currently obstructed by the existing driveway/roadway; expanding the wetland resource area with its replication plans; and extending the municipal water main to provide additional hydrants for fire protection as well as to provide hookup points for existing dwellings currently using private wells. *A.R.*, pp. 663-664. Nevertheless, B&T made no conclusion as to whether these proposed benefits complied with the waiver provision, stating "[t]he Commission must find that these items result in an overriding public interest in order to grant the waiver." *A.R.*, p. 664.

Along with the information obtained from B&T, during its review of the NOI, the Commission also considered Burne's assessment of the Pool. This assessment was inconclusive. *A.R.*, pp. 361-363. While Burne was unable to definitively determine whether the Pool was a vernal [p]ool, he stated the Pool "provides important wildlife habitat functions, including those

typical of vernal pools." *A.R.*, pp. 361-363. Further, he opined that "it would not be unreasonable to expect that the . . . [Pool] could be designated a vernal pool if obligate vernal pool organisms were found with an appropriately timed survey," which, according to him, should take place in the spring, rather than the summer, which is when his survey was performed. *A.R.*, pp. 361-363.

In the Denial Order, based on Burne's report, the Commission found that the Pool "has numerous wildlife habitat values" and, concluded that the Pool could "function as a [v]ernal [p]ool and be certified as such after a further assessment in the early part of next year (2016)." *A.R.*, p. 72. The Pool also played a role in the Commission's conclusions regarding New Meadows' compliance with the Bylaw's waiver provision.

The Commission addressed each of the four criteria set out in the waiver provision, concluding as follows as to each requirement: (a) "that *given the present frontage* the parcel cannot be developed as a multi-lot development except as a subdivision[;]" (b) "that mitigation measures have been offered relative to the proposed work[;]" but the Commission "is not persuaded that these in their aggregate are sufficient to preserve the water quality of the [P]ool and its continued function as [an] important wildlife habitat upon completion of the project[;]" (c) "that the proposed replication . . . is in compliance with . . . [the Topsfield Bylaw][;]" however, the Commission "is not persuaded that the [P]ool's water quality can be protected upon completion of the project as required[;]" and (d) that an 800-foot extension of the water main down Perkins Row "serves the public interest," but that "the proposed project . . . does not meet the criterion for such, as it is not pursued by a public agency [n]or is the development of the subdivision in the public interest as it takes place on private property." *A.R.*, pp. 74-75.

DISCUSSION

In support of its request for judgment on the pleadings, New Meadows argues the Denial Order is not supported by substantial evidence and, that, in particular, the denial of the waiver requests was arbitrary and capricious. In reply, the Commission argues the Denial Order should be affirmed because New Meadows failed to demonstrate it met the criteria required for the Commission to grant a waiver. The Commission also contends that New Meadows failed to produce sufficient evidence to demonstrate the Pool was not a vernal pool subject to protection under the Topsfield Bylaw. As discussed below, the court agrees with the Commission.

I. Standard of Review

“The avenue for review of the denial of a waiver or variance from a wetlands bylaw is in the nature of certiorari under G. L. c. 249, § 4.” *Pierce v. Conservation Comm’n of Falmouth*, 63 Mass. App. Ct. 1114, 2005 WL 1106689, at *1 (Mass. App. Ct. 2005) (Unpublished Rule 1:28), citing *Balcam v. Hingham*, 41 Mass. App. Ct. 260, 264 (1996). When undertaking certiorari review, “the court is limited to correcting ‘substantial errors of law apparent on the record adversely affecting material rights.’” *FIC Homes of Blackstone, Inc. v. Conservation Comm’n of Blackstone*, 41 Mass. App. Ct. 681, 684 (1996), quoting *Commissioner of Revenue v. Lawrence*, 379 Mass. 205, 208 (1979). The standard of review the court applies to this analysis “varies according to the nature of the action for which relief is sought.” *T.D.J. Dev. Corp. v. Conservation Comm’n of N. Andover*, 36 Mass. App. Ct. 124, 128 (1994).

Where the action reviewed is a conservation commission’s denial of a project, an arbitrary and capricious standard is typically applied. *Fieldstone Meadows Develop. Corp. v. Conservation Comm’n of Andover*, 62 Mass. App. Ct. 265, 267 (2004); *Fafard v. Conservation Comm’n of Reading*, 41 Mass. App. Ct. 565, 568 (1996). This is an “agency-friendly” standard.

Conservation Comm'n of Falmouth v. Pacheco, 49 Mass. App. Ct. 737, 739 n.3 (2000). The court gives deference to a conservation commission's findings of fact as well as to its interpretation of the bylaws and regulations entrusted to its enforcement. *Rogers v. Conservation Comm'n of Barnstable*, 67 Mass. App. Ct. 200, 208 (2006). "A decision is not arbitrary and capricious unless there is no ground which 'reasonable [persons] might deem proper' to support it[.]" *FIC Homes of Blackstone, Inc.*, 41 Mass. App. Ct. at 684-685, quoting *T.D.J. Dev. Corp.*, 36 Mass. App. Ct. at 128.

II. Analysis

A. The Pool

As an initial matter, before the court discusses the waiver requests, the court notes that the Denial Order seems premised, at least in part, upon New Meadows's failure to properly address how the Subdivision Project will impact the Pool—an issue, which New Meadows does not address in detail in the pending Motion for Judgment on the Pleadings. On this basis alone, the court concludes the Commission's decision should be affirmed.

As the applicant, New Meadows bears the burden of "proving by a preponderance of the credible evidence" that the Subdivision Project will not adversely affect the interests and wetland resource areas protected under the Topsfield Bylaw. *The Topsfield Bylaw*, § 62-8. Since a vernal pool is a protected resource areas, *The Topsfield Bylaw*, § R:10-2, New Meadows was responsible for demonstrating either that the Pool was not a vernal pool entitled to protection under the Bylaw or, that, even if deemed a vernal pool, the Subdivision Project would not "adversely" impact the Pool's function as a wildlife habitat and breeding ground. In the Denial Order, the Commission concluded New Meadows had not met this burden, finding that "the

[P]ool may well function as a [v]ernal [p]ool and be certified as such after a further assessment in the early part of next year[.]” The court cannot say this finding was arbitrary and capricious.

Record evidence demonstrates New Meadows was not able to prove the Pool was not a protected wetland resource area. The only assessment of the Pool—performed by Burne—was not sufficient to determine whether the Pool was a vernal pool, as the term is defined in the Topsfield Bylaw. Instead, the question was left unresolved. The assessment was performed in August and, while the Pool had some characteristics of a vernal pool even at that time, Burne opined that a springtime survey was necessary to make a definitive conclusion. Burne’s determination that he could not decide whether the Pool was a vernal pool is not the same as a definitive conclusion that the Pool was *not* a protected resource area, despite New Meadows’ apparent treatment of the conclusion as such. Thus, the Commission’s conclusion, that New Meadows failed to meet its burden to demonstrate the Subdivision Project would not adversely impact a protected wetland resource area, was reasonable.

B. The Waiver Requests

In accordance with The Topsfield Bylaw, the Commission may grant a waiver of a bylaw requirement, if an applicant demonstrates compliance with the four criteria set out above. *The Topsfield Bylaw*, § R:10-4(l)(1)(a)-(d). New Meadows argues that, because B&T was satisfied it met the requirements for waiver, the Commission’s contrary conclusion was improper, not supported by the record, and arbitrary and capricious. There are several problems with New Meadows’ position.

First, while the Commission cannot wholly ignore record evidence, there is nothing that requires it to reach the same conclusions as those of a hired consultant. It is the Commission’s responsibility to condition proposed work in or near wetland resource areas to protect the

interests identified in the Bylaw. This is not a duty that can be delegated to a third-party consultant. Thus, the fact that the Commission may not have agreed with B&T's conclusions is not dispositive as to the propriety of its decision to deny the waiver requests.¹

Second, it is a well-settled principle that no applicant is absolutely entitled to a waiver or variance of a wetlands bylaw. *FIC Homes of Blackstone, Inc.*, 41 Mass. App. Ct. at 686 ("it is well established that no one is entitled to a variance"), citing *Pendergast v. Board of Appeals of Barnstable*, 331 Mass. 555, 559 (1954). Here, even if an applicant demonstrates compliance with all four criteria, the Commission is not *required* to waive any particular requirement of the Topsfield Bylaw. Rather, if an applicant makes the required showing, then the Commission "may" issue a waiver.

Third, the court cannot say the Commission's determination that New Meadows failed to meet its burden under the waiver provision was arbitrary and capricious. Under the waiver provision, compliance with all four criteria is necessary to even be considered for a waiver. And, the court cannot conclude New Meadows demonstrated the waiver requests were necessary to "accommodate an overriding public interest."

The court does not necessarily agree with the Commission's apparent conclusion that no privately owned development project on private property can ever serve "an overriding public interest." The court can certainly contemplate a situation where a private owner plans to develop private property in a manner that would be "necessary to accommodate an overriding public interest[.]" However, it cannot conclude that, in this case, the Commission's conclusion that the Subdivision Project was not such a project was improper.

¹ Here, the court notes that, contrary to New Meadows' assertion, B&T did not definitively conclude that it had met all the requirements under the waiver provision. In particular, with respect to the public interest criteria, B&T deferred to the Commission, stating it was the Commission's responsibility to determine whether the proposed benefits New Meadows identified would "result in an overriding public interest[.]" *A.R.*, p. 664.

The “overriding public interest” standard “is ‘obviously one that involves a large measure of judgment . . . [and] discretion[.]’” *Pierce*, 2005 WL 1106689, at *3. In fact, an applicant’s burden of proof under this standard is substantial. “With respect to appeals concerning ‘public interest’ waivers, ‘the burden . . . on the objector to show error . . . is nearly insupportable.’” *Id.*, at *4, quoting *Windsor v. Planning Bd. of Wayland*, 26 Mass. App. Ct. 650, 657 (1988). While New Meadows argues that granting the waiver requests will permit seven existing homes to be connected to town water, will provide enhanced fire protection, and will improve the existing roadway, the court cannot say these benefits are “overriding[ly]” in the public’s interest, especially when weighed against the potential harm to wetland resource areas, which the Commission is charged with protecting.

CONCLUSION AND ORDER


For the reasons explained above, it is hereby **ORDERED** that:

1. New Meadows’ Motion for Judgment on the Pleadings be **DENIED**; and
2. the Commission’s Cross-Motion for Judgment on the Pleadings be

ALLOWED, AFFIRMING the Denial Order issued on December 18, 2015.

SO ORDERED.

Dated: September ^{12th} 2017


Thomas Drechsler
Justice of the Superior Court

2

**JUDGMENT ON THE PLEADINGS****Trial Court of Massachusetts
The Superior Court**

DOCKET NUMBER

1677CV00226

Thomas H. Driscoll, Jr., Clerk of Courts

CASE NAME

New Meadows Development LLC

vs.

The Topsfield Conservation Commission and its Members, Cheryl
Jolly Chair, Holger Luther, Member, James Carroll, Member, and
Dodds Shamroth, Vice Chair and Jen DiCarlo

COURT NAME & ADDRESS

Essex County Superior Court - Lawrence
43 Appleton Way
Lawrence, MA 01841

This action came before the Court, Hon. Thomas Drechsler, presiding, upon a motion for judgment on the pleadings,

After hearing or consideration thereof;

It is **ORDERED AND ADJUDGED**:

1. Plaintiff New Meadows' Motion for Judgment on the Pleadings is **DENIED**; and
2. The Defendant Commission's Cross-Motion for Judgment on the Pleadings be **ALLOWED**, **AFFIRMING** the Denial Order issued on December 18, 2015.

Dated 9/12/17.

DATE JUDGMENT ENTERED
09/14/2017CLERK OF COURTS/ASST. CLERK
X