



TOWN OF TOPSFIELD Conservation Commission
GENERAL WETLANDS BYLAW Form 5 –
Denial Order

Topsfield General Wetlands Bylaw, Chapter 62 MapLot: 58025

TCC File Number:
307-0724B
57 Perkins Row
New Meadows Development,
LLC

A. General Information

From: Topsfield Conservation Commission

This issuance is for (check one):

- ☐ Order of Conditions
☒ Amended Order of Conditions

To: Applicant:

New Meadows Development, LLC
Name
C/o The Morin-Cameron Group, Inc.
Mailing Address
Topsfield MA 01983
City/Town State Zip Code

Property Owner (if different from applicant):

New Meadows Development, LLC
Name
69 North Street
Mailing Address
Middleton MA 01949
City/Town State Zip Code

1. Project Location:

57 Perkins Row Topsfield
Street Address City/Town
58 025
Assessors Map/Plat Number Parcel/Lot Number

2. Property recorded at the Registry of Deeds for:

Essex South
County Book Page
87747
Certificate (if registered land)

3. Dates:

July 1, 2015 December 2, 2015 December 18, 2015
Date Notice of Intent Filed Date Public Hearing Closed Date of Issuance

4. Final Approved Plans and Other Documents (attach additional plan references as needed):

Title: "Plan to Accompany Notice of Intent at 57 Perkins Row in
Topsfield, Massachusetts" Drawings 1-9, Prepared by The Revised: November 11, 2015
Date
Morin-Cameron Group, Inc., 447 Boston St., Topsfield, MA 01983
Mitigation Plan to accompany a Notice of Intent 57 Perkins Row July 1, 2015

5. Final Plans and Documents Signed and Stamped by:

Scott P. Cameron P.E. Civil No. 47601 & Peter J. McGoldrick, P.L.S. No. 50276
Name

6. Total Fee:

\$6,544.25 Bylaw Fee + \$537.50 (Town's Portion of the State Fee) = \$7,081.75
(from Topsfield Form R:10-17 TCC Form 1: TOPSFIELD GENERAL WETLANDS BYLAW: FEE CALCULATION)



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B. Findings

Findings pursuant to the Topsfield Wetlands Bylaw:

Following the review of the above-referenced Notice of Intent and based on the information provided in this application and presented at the public hearing, this Commission finds that the areas in which work is proposed is significant to the following interests of the Topsfield Wetlands General Bylaw. Check all that apply:

- | | | |
|--|--|---|
| <input checked="" type="checkbox"/> Public or Private Water Supply | <input checked="" type="checkbox"/> Erosion or Sedimentation Control | <input checked="" type="checkbox"/> Fisheries |
| <input checked="" type="checkbox"/> Groundwater or Surface Water | <input checked="" type="checkbox"/> Storm Damage Prevention | <input checked="" type="checkbox"/> Wildlife Habitat Protection |
| <input checked="" type="checkbox"/> Flood Control | <input checked="" type="checkbox"/> Water Quality | <input type="checkbox"/> Recreation |
| | <input checked="" type="checkbox"/> Water Pollution Prevention | |

Furthermore, this Commission hereby finds the project, as proposed, is: (check one of the following boxes)

Approved subject to:

- ☐ the following conditions which are necessary, in accordance with the performance standards set forth in the Bylaw Regulations, to protect those interests checked above. This Commission orders that all work shall be performed in accordance with the Notice of Intent referenced above, the following General Conditions, and any other Special Conditions attached to this Order. To the extent that the following conditions modify or differ from the plans, specifications, or other proposals submitted with the Notice of Intent, these conditions shall control.

Denied because: SEE FINDINGS AND CONCLUSIONS, ATTACHMENT-A

- ☒ the proposed work cannot be conditioned to meet the performance standards set forth in the Bylaw Regulations to protect those interests checked above. Therefore, **work on this project may not go forward unless and until a new Notice of Intent is submitted which provides measures which are adequate to protect these interests, and a final Order of Conditions is issued.**
- ☒ the information submitted by the applicant is not sufficient to describe the site, the work, or the effect of the work on the interests identified in the Topsfield Wetlands General Bylaw. Therefore, work on this project may not go forward unless and until a revised Notice of Intent is submitted which provides sufficient information and includes measures that are adequate to protect the Bylaw's interests, and a final Order of Conditions is issued. A description of the specific information which is lacking and why it is necessary is attached to this Order.

General Conditions (only applicable to approved projects)

1. Failure to comply with all conditions stated herein, and with all related statutes and other regulatory measures, shall be deemed cause to revoke or modify this Order.
2. The Order does not grant any property rights or any exclusive privileges; it does not authorize any injury to private property or invasion of private rights. *N/A*
3. This Order does not relieve the permittee or any other person of the necessity of complying with all other applicable federal, state, or local statutes, ordinances, bylaws, or regulations.



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B. Findings (cont.)

4. The work authorized hereunder shall be completed within three years from the date of this Order unless the Topsfield conservation Commission (TCC) authorizes an extension.
5. This Order may be extended by the Topsfield Conservation Commission (TCC) for one or more periods of up to three years each upon application to the TCC at least 30 days prior to the expiration date of the Order.
6. Any fill used in connection with this project shall be clean fill. Any fill shall contain no trash, refuse, rubbish, or debris, including but not limited to lumber, bricks, plaster, wire, lath, paper, cardboard, pipe, tires, ashes, refrigerators, motor vehicles, or parts of any of the foregoing.
7. No work shall be undertaken until the Order has become final and then has been recorded in the Registry of Deeds or the Land Court for the district in which the land is located, within the chain of title of the affected property. In the case of recorded land, the Final Order shall also be noted in the Registry's Grantor Index under the name of the owner of the land upon which the proposed work is to be done. In the case of the registered land, the Final Order shall also be noted on the Land Court Certificate of Title of the owner of the land upon which the proposed work is done. The recording information shall be submitted to this Conservation Commission on the form at the end of this Order, which form must be stamped by the Registry of Deeds, prior to the commencement of work.
8. A sign shall be displayed at the site not less than two square feet or more than three square feet in size bearing the words,

"File Number _____"

9. Upon completion of the work described herein, the applicant shall submit a Request for Certificate of Compliance (Bylaw Form 8A) to the Topsfield Conservation Commission.
10. The work shall conform to the Plans referenced in section A.4 (page 1 of this document), General Conditions, and Special Conditions referenced in this order.
11. Any change to the plans identified in Condition #10, above, shall require the applicant to inquire of the Conservation Commission in writing whether the change is significant enough to require the filing of a new Notice of Intent or the filing of a request for an Amended Order of Conditions.
12. The Administrator and members of the Conservation Commission shall have the right to enter and inspect the area subject to this Order at reasonable hours to evaluate compliance with the conditions stated in this Order, and may require the submittal of any data deemed necessary by the Conservation Commission for that evaluation.



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B. Findings (cont.)

13. This Order of Conditions shall apply to any successor in interest or successor in control of the property subject to this Order and to any contractor or other person performing work conditioned by this Order.
14. Prior to the start of work, and if the project involves work adjacent to a ~~Bordering Vegetated Wetland~~, the boundary of the wetland in the vicinity of the proposed work area shall ~~be~~ marked by wooden stakes or flagging. Once in place, the wetland boundary markers shall be maintained until a Certificate of Compliance has been issued by the Conservation Commission.
15. All sedimentation barriers shall be maintained in good repair until all disturbed areas have been fully stabilized with vegetation or other means. At no time shall sediments be deposited in a wetland or water body. During construction, the applicant or his/her designee shall inspect the erosion controls on a daily basis and shall remove accumulated sediments as needed. The applicant shall immediately control any erosion problems that occur at the site and shall also immediately notify the Conservation Commission, which reserves the right to require additional erosion and/or damage prevention controls it may deem necessary. Sedimentation barriers shall serve as the limit of work unless another limit of work line has been approved by this Order.

Special Conditions (use additional paper, if necessary):

See FINDINGS and CONCLUSIONS, Attachment-A (11 Pages), and LIST OF DOCUMENTS, Attachment-B (2 Pages) to this Denial Order.



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B. FINDINGS (cont.)

Additional conditions relating to Bylaw:

This Order is valid for three years, unless otherwise specified as a special condition, from the date of issuance.

Date _____

This Order must be signed by a majority of the Conservation Commission. The Order must be mailed by certified mail (return receipt requested) or hand delivered to the applicant. A copy also must be mailed or hand delivered at the same time to the property owner (if different from applicant).

Signatures:

[Signature]
[Signature]
[Signature]
[Signature]

[Signature]

On this sixteenth Of December, 2015
Day Month and Year

Before me, the undersigned notary public, personally appeared

Cheryl Jolley
(name of document signer)

proved to me through satisfactory evidence of identification, which was/were personal knowledge 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.

[Signature]
Notary Public – (Official signature and seal of notary)



This Order is issued to the applicant as follows:

☐ by hand delivery on

☒ by certified mail, return receipt requested, on

Date _____

Date 12/18/2015



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C. Appeals

Any person(s) wishing to appeal this Bylaw Order of Conditions must file an appeal with the Massachusetts Supreme Judicial Court or the Superior Court within SIXTY (60) days of the date of issuance of this Order. The Bylaw Order appeal process is completely distinct from any appeal to the Massachusetts Department of Environmental Protection of an Order of Conditions issued by the Conservation Commission under the Massachusetts Wetlands Protection Act.

D. Recording Information

~~This Order of Conditions must be recorded in the Registry of Deeds or the Land Court for the district in which the land is located, within the chain of title of the affected property. In the case of recorded land, the Final Order also shall be noted in the Registry's Grantor Index under the name of the owner of the land subject to the Order. In the case of registered land, this Order also shall be noted on the Land Court Certificate of Title of the owner of the land subject to the Order Of Conditions. The recording information on Page 7 of this Form shall be submitted to the Topsfield Conservation Commission.~~



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D. RECORDING INFORMATION (cont.)

Detach on dotted line, have stamped by the Registry of Deeds and submit to the Conservation Commission.

To the Topsfield Conservation Commission

Please be advised that the Order of Conditions for the Project at:

Project Location:

TCC File Number

Has been recorded at the Registry of Deeds of:

Essex South

County

Book

Page

for:

Property Owner

and has been noted in the chain of title of the affected property in:

Book

Page

In accordance with the Order of Conditions issued on:

Date

If recorded land, the instrument number identifying this transaction is:

Instrument Number

If registered land, the document number identifying this transaction is:

Document Number

Signature of Applicant

ATTACHMENT-A TO BYLAW DENIAL ORDER
TOWN OF TOPSFIELD CONSERVATION COMMISSION

TCC refers to the Topsfield Conservation Commission

DEP refers to the Massachusetts Department of Environmental Protection

Act refers to the Massachusetts Wetlands Protection Act, M.G.L. Ch. 131, § 40

Bylaw refers to the Topsfield General Wetlands Bylaw, Chapter 62

DENIED PLANS:

**“Plan to Accompany Notice of Intent at 57 Perkins Row in Topsfield, Massachusetts”
Drawings 1 - 9, Prepared by The Morin-Cameron Group, Inc., 447 Boston Street,
Topsfield, MA 01983, stamped and signed by, Scott P. Cameron P.E. Civil No. 47601 &
Peter J. McGoldrick, P.L.S. No. 50276, dated Revised: November 11, 2015.**

FINDINGS:

1. The interests protected and listed protected Resource Areas under the Topsfield General Wetlands Bylaw differ somewhat from those under the Massachusetts Wetlands Protection Act. Most notably, under the Bylaw, the Buffer Zone, i.e. land within 100 feet of Freshwater Wetlands, Bodies of Water, Land Under Water, Banks, or Vernal Pools, is a jurisdictional Resource Area (See Bylaw Ch. 62-2), whereas the Buffer Zone is listed under the Act Regulations, 310 CMR 10.02: Statement of Jurisdiction, but not as an Area Subject to Protection Under M.G.L. C. 131, § 40. The following findings should be read with knowledge and consideration of the differences.
2. Documents, plans, letters, and other information submitted and reviewed by the TCC during the hearing process are listed in Attachment-B to this Order.
3. Although the October 1, 2008 Map of Estimated Habitats of Rare Wildlife and Certified Vernal Pools (Map), published by the Massachusetts Natural Heritage and Endangered Species Program *does not* show habitat of rare wildlife on this parcel, the Map shows the parcel is approximately 370 feet from NHESP area PH 1299. The Map *does not* show a certified vernal on the parcel.
4. On May 6, 2009, Administrator Spillman made a site visit of the 8.2-acre property with Terry Schumacher, property owner at that time. Ms. Schumacher explained her desire to construct a deck on eight old pilings (the only parts remaining of a dock) in the Ipswich River, and her desire to remove all understory/saplings from the lawn area next to the house all the way down to the Ipswich River.
 - a. Spillman confirmed with DEP-NERO that a Chapter 91 review and Permit would be needed for the new dock and explained to Ms. Schumacher that the proposed clearing of understory would need prior TCC review and a permit authorizing clearing in the Buffer Zone/Riverfront Area.

- b. Status of the former dock area and vegetation in the Buffer Zone/Riverfront Area are documented with photographs taken at the May 6, 2009 site visit and photographs from Ms. Schumacher submitted to the Conservation office on May 13, 2009.
5. On September 18, 2012, Spillman made a site visit with Katie deRonde of DeRosa Environmental to review Resource Area boundary flags that had been placed onsite on September 12, 2012. At the site visit, it was noted that sometime between May 2009 and September 2012 a large area of the understory vegetation in the Buffer Zone/first hundred feet of Riverfront Area was removed without TCC review or authorization, in violation of the Act and the Bylaw. The unauthorized clearing remains obvious.
6. New Meadows Development, LLC became owner of the property on August 14, 2014, recorded at Land Court Document 554669.
7. From the Notice of Intent, the project is for, "Proposed roadway construction within jurisdictional wetland buffer zones as part of a 5-lot definitive subdivision. Project includes a comprehensive wetland replication and buffer zone restoration plan." The Notice was filed on July 1, 2015, under the Massachusetts Wetlands Protection Act, MGL c. 131, §40, and under the Topsfield General Wetlands Bylaw, c. 62.
8. Other than as related to the proposed subdivision roadway, development related to the five proposed lots is not part of the Notice of Intent or the TCC review.
9. Resource Areas on and near the property include the Ipswich River (Perennial Stream), 200-foot Riverfront Area of the Ipswich River, Bordering Land Subject to Flooding (BLSF) on the property (elevation ~37 feet on the July 3, 2012 FEMA FIRM). Bordering Vegetated Wetland (BVW), an Intermittent Stream (well defined and creating a pooled area adjacent/west of the existing driveway crossing), and Buffer Zone Resource Area (to BVWs and the Intermittent Stream).
10. Several definitions in the Bylaw vary from those in the Act and State Regulations 310 CMR 10.00 et. seq. In particular and related to this Notice, the Bylaw defines *Riverfront Area* as, "the area of land measured horizontally 200 feet from the mean annual high-water line of a perennial river or stream. Mean Annual High Water shall mean the farthest horizontal extent of flooding in an average year. When determining the extent of said flooding, the commission shall employ indicators such as changes to vegetational communities; stain lines on abutments, rocks, trees and culverts; fluvial deposits; changes in slope; bank undercuts; and other easily identifiable indicators of the presence or flow of water. When available from a reliable public source, gauge data may also be used to aid in the determination of the extent of flooding in an average year."

11. An Order of Resource Area Delineation 307-0720 was issued May 14, 2015 under the Act and the Bylaw, verifying Riverfront Area, BVW, BLSF (at elevation 36.5 feet), and Buffer Zone (a Bylaw Resource Area) boundaries.
12. The pool of the Intermittent Stream has characteristics of a Vernal Pool, i.e. it holds water for months at a time and has an abundance of life much of the year, including frogs, turtles, and invertebrates (see site visit reports – Spillman 07/28/15, Burne 08/24/15). TCC has not received evidence that the pool is not a Vernal Pool.
13. A definitive subdivision application currently is before the Topsfield Planning Board, proposing five single-family house lots.
14. The public hearing was opened on July 15, 2015 and was continued over a period of five months to the next meeting date, including December 2, 2015, at which the TCC voted to close the hearing and began deliberation. On September 9, 2015, October 14, 2015, and on October 28, 2015, the hearing was continued without submission of new information.
15. At the public hearing on July 15, 2015, the TCC agreed to a contract for peer review of the Notice of Intent, including proposed stormwater management and proposed mitigation. In addition, a review of the impounded area for evidence of it being a vernal pool was sought from vernal pool expert Matthew Burne.
16. Consultant engineering and wetlands science firm Beals and Thomas, Inc. was hired by TCC and paid for by the Applicant under the provisions of the Bylaw Regulation, R:10-26 and M.G.L. Ch. 44, § 53G. The consultants provided valuable insight and second opinions that were important to the review process.
17. At the public hearing on August 19, 2015, The Morin-Cameron Group presented their response letter of August 18, 2015, including alternatives to the proposed subdivision project, with corresponding conceptual plans. Alternatives presented included:
 - a. Comprehensive Permit - MGL Ch. 40B
 - b. Common Driveway
 - c. 3-Lot Subdivision
 - d. 7-Lot Subdivision
 - e. No Waiver (from Planning Board) Subdivision

The argument presented against the Common Driveway alternative is that the property does not have the frontage required by Planning Board Rules and Regulations for a common drive. The argument presented against the 3-Lot subdivision alternative is that the same roadway, with its associated infrastructure/drainage features, would be required as for the proposed 5-Lot subdivision.

The alternatives of improving/enlarging the existing single-family house on the property, or re-developing the property with a new/replacement house were not presented.

18. The proposal includes that a 1,300 sq. ft. Replication Area would mitigate for the loss of approximately 470 sq. ft. of Bordering Vegetated Wetland.
19. The submitted Mitigation Plan prepared by The Morin-Cameron Group, Inc., and DeRosa Environmental Consulting, Inc. identifies six dominant invasive species within the restoration areas to be targeted plants for the invasive species removal portion of the project --- Asiatic bittersweet (*Celastrus orbiculatus*), glossy buckthorn (*Frangula alnus*), multiflora rose (*Rosa multiflora*), burning bush (*Euonymus sp.*), privet (*Ligustrum sp.*), and honeysuckle (*Lonicera japonica*). Two specific areas identified for invasive species removal, totaling 24, 200 sq. feet. Importantly, the proposal includes that the construction oversight, follow-up observations, and supervision of plant installations would be performed by a qualified professional. As stated in the Summary, "The intent of this restoration plan is to substantially improve the function and value of the buffer zone to the bordering vegetated wetland at the site and re-establish a native plant community adapted to this wetland environment."
20. Although mature trees within the Buffer Zone that would be lost with creation of the constructed pocket wetland and associated clearing were not inventoried, DeRosa of DeRosa Environmental reported that the area currently contains several Shagbark Hickories, as well as invasive Norway Maples and Black Locusts. Planted trees would be Red Oak, Hickory, Beech, and Tupelo.
21. On August 14, 2015, Commissioner Luther made a site visit to review the pool in the Intermittent Stream with Scott Cameron, P.E., Matthew Burne, and Tyler Ferrick of DeRosa Environmental. Luther noted in his submitted report of the same day, a "giant pin oak standing on the northerly side of the driveway." Health of the tree and the possibility of saving it were subjects of subsequent discussions and investigation.
22. In his August 22, 2015 letter to the Commission, Matthew Burne reported on his August site evaluation of the pool in the Intermittent Stream for evidence of vernal pool habitat function. His concluding paragraph states, "My survey was inconclusive as to whether the pool at 57 Perkins Row meets the definition of vernal pool habitat as established by the Massachusetts Natural Heritage & Endangered Species Program. It does, however, clearly provide important wildlife habitat functions, including those of typical vernal pools."
23. Peer reviewer Beals and Thomas, Inc. submitted comment letters dated July 28, September 16, October 21, and November 16, 2015.
24. The Morin-Cameron Group, Inc. submitted response letters dated August 18, October 6, and November 11, 2015.
25. DEP online says, "The entire impervious area must be considered for recharge, not just the increase. Please clarify, who will be maintaining the stormwater BMPs after the lots are sold off? Please note that either a 401 WQC or deed restriction must be

submitted to MassDEP prior to any construction due to the increase of BVW loss at the road crossing.” The Morin-Cameron Group responded to this comment as stated at the end of the October 6, 2015 response letter, “The Groundwater recharge calculation has been revised to demonstrate that the recharge volume is provided to the entire impervious area of the site pursuant to the MassDEP comment.”

26. A November 18, 2015 report from Ben Staples, ISA Board Certified Master Arborist, concerning his evaluation of the large red oak tree states, “In conclusion it is my opinion this tree is in the later stages of senescence. There are no known treatments for Armillaria Root Rot and the end result of this disease is tree decline and failure. Given the site and its parameters preservation is not recommended.”
27. A response letter from The Morin-Cameron Group, Inc. to the Planning Board dated November 18, 2015, discusses Ben Staples’ evaluation of the large oak tree.
28. Beals and Thomas, Inc. staff visited the Site on November 9, 2015 with Town personnel, representatives of the Applicant, and a few abutters, “to evaluate the existing conditions with regard to the proposed development.”
29. Concluding comments from Beals and Thomas, Inc., in their comment letter dated November 16, 2015, include:
 - a. (Page 11) “In our opinion, the Applicant has provided appropriate information documenting the proposed replication. Furthermore, the Applicant has committed to having a Professional Wetland Scientist oversee the proposed mitigation, and has provided further acknowledgement of monitoring requirements elsewhere herein.”
 - b. (Page 13) “We recommend that a singular construction sequence be prepared by the Applicant, or that reference to its location be provided to facilitate review.”
 - c. (Page 13) “As a singular comprehensive monitoring plan has not been submitted for the project, we recommend that the Commission incorporate reference to the Aftercare and Maintenance Plan as well as the monitoring requirements of R:10-22.3.12, as acknowledged by the Applicant.”
 - d. (Page 14) “We note that it is our understanding, pursuant to the Bylaw, Regulations, and information provided by the Applicant herein, that plantings and mitigation will occur coincidentally with wetland impacts.”
 - e. (Page 20) “We acknowledge and agree with the Applicant’s regulatory analysis regarding a wildlife habitat evaluation for BVW impacts pursuant to the Act, and further acknowledge the Applicant’s provision of the wildlife habitat discussion above, which addresses the requirement for wildlife habitat analysis pursuant to the local Regulations. However, we reiterate our request for clarification as to whether Bank impact is proposed.”

30. It is understood that the Topsfield Planning Board will require establishment of a Homeowners Association with responsibilities related to the subdivision infrastructure, including implementation of the Operation and Maintenance Plan and any related reporting.
31. Several abutters submitted letters and/or spoke during the open hearing, expressing concerns about the submitted alternatives analysis, clearing near the Ipswich River that occurred under previous ownership, time of year the pool in the Intermittent Stream was evaluated, potential loss of important wildlife habitat, etc.
32. From the Bylaw Regulations, R:10-4. e. "Buffer Zones are presumed significant to the protection of groundwater and surface water; flood control; erosion/sedimentation control; water quality; water pollution prevention; wildlife habitat and fisheries." The Regulation states the presumption that work within Setback Areas (100-foot Buffer Zone), "will adversely affect the buffer zone's capacity to contribute to the interests of the Bylaw."
33. R:10-4. E. *Buffer Zones* 2. of the Bylaw Regulations states that, "No work shall occur in the Setback Areas, except as provided pursuant to paragraph g. (maintenance) or i. (Waiver Provision) of this section. Considerations in association with the granting of a waiver shall include but not be limited to (a.) through (c.)..." (a.) through (c.) list criteria for consideration based on whether to property already is developed, is a property not yet developed, or is a newly formed lot after May 2, 2000.
34. Criteria for granting a waiver(s) of the Bylaw Regulations are spelled out in Section R:10-4.i., 1. and 2., of the Regulations. All four criteria of Section R:10-4.i.1. [(a) through (d)] are to be met in order for a waiver to be granted. Section R:10-4.i.2. lists six "reasons for possible denial of waivers."
35. The Morin-Cameron Group November 11, 2015 response letter (to Beals and Thomas October 21, 2015 peer review letter) lists (on Page 6) five reasons why, in their opinion, a waiver could be granted, including that "The structural integrity of the existing driveway is compromised," "The roadway will ensure that the hydrologic conditions of the wetland system are maintained," "Drainage infrastructure ...as well as replicated wetland area would expand the wetland habitat area and improve the management of stormwater runoff from the property," "The extension of the water main is in the public interest," and "Compliance with the zoning bylaw is in the public interest."
36. The TCC sought a legal opinion from Town Counsel, Kopelman and Paige, P.C., of Bylaw Regulations R:10-4. i. *Waiver Provision* 1. (d), specifically the definition/legal interpretation of the phrase, "...it is necessary to accommodate an overriding public interest..." The resulting December 2, 2015 legal opinion letter from Attorney John Goldrosen refers to similarities to the DEP Variance Provision, and concludes that, "...a project must be undertaken by a public entity, or a private entity that is

performing a public function (such as a public utility), in order to meet the “overriding public interest” criterion” (see [4], below)

37. The vernal pool assessment by Matt Burne was inconclusive. The TCC finds that the pool (potential Vernal Pool), adjacent/upslope of the crossing has numerous significant wildlife habitat values and may provide evidence of Vernal Pool activity in the spring. The pool may well function as a Vernal Pool and be certified as such after a further assessment in the early part of next year (2016).
38. A champion pin oak (*Quercus palustris*) located in the Buffer Zone of the Intermittent stream in the parcel with a girth of 3.83 m is the fifth largest tree in the world after one in Germany (girth 3.88 m) [1, below]. TCC finds that complete removal of this very large tree would create a substantial disturbance to both the Buffer Zone and its adjoining Resource Area.
39. While the present limited frontage on Perkins Row is insufficient to provide for a multiplicity of ANR lots, the Applicant has restricted the alternative development analysis to multi-lot ANR or subdivision developments of the parcel. TCC finds that an alternative option not included in that analysis is the resale of the parcel as a luxury single residential dwelling lot with appropriate ancillary amenities.
40. The TCC finds that while the area of the proposed constructed pocket wetland has a substantial growth of invasive plants, it is a forested area (rather than an open/cleared area), with important Resource Area functions and values, including related to vegetation, soils, temperature, shade, over-wintering habitat, etc. that currently are critical features for wildlife in the area. Although the site is not within Natural Heritage and Endangered Species rare species habitat area, there is an identified rare species habitat within 370 feet, and on a contiguous property (MA Audubon) and studies of wildlife at this site have not been made (see document 40, List of Documents, Beals and Thomas November 16, 2015 Peer Review Letter, Comment 10., pages 18 20).
41. TCC is not persuaded that Applicant has adequately pursued the possibility of adding sufficient frontage from neighboring vacant lots on either side of 57 Perkins Row to develop the lot as an ANR development with a common driveway that will not need to be as wide as a subdivision way, and therefore not require the proposed work in the resource areas. Specifically no mention was made of the adjoining lot (53 Perkins Row, Map 58, Lot 26).
42. TCC finds that the proposed Constructed Pocket Wetland on the west side of the ponded area could be permitted under the provisions of 310 CMR 10.02(2)(d)

provided it is consistent with the guidelines of the Mass. Stormwater Handbook (vol. 1, Ch. 2, page 5 and vol. 2, Ch. 2, page 36) to ensure that stormwater run-off into the pond will not adversely affect aquatic fauna in the pond with pollutants washed off the public way. However, the TCC finds that, even with the mitigations proposed, the impact of a roadway would exceed that of the current or a replacement driveway based on increased application of road sand and salt (of particular concern if the pool is a Vernal Pool). TCC finds that nothing has been added to the proposal to assure that road deicing salts applied to the public way in the winter and early spring, and the close proximity of a residential dwelling upgrade of the pond, and stormwater facilities directly connected to the pond will not compromise the water quality in the pond by the addition of road salts, septic system effluent, and lawn fertilizer run-off.

43. TCC Regulations, Section R:10-4.e.2.(c) requires a 100-foot Buffer Zone of “no activities,” with *undisturbed* soil and vegetation, adjacent to Freshwater Wetlands, Bodies of Water, Land under Water, Banks, and Vernal Pools on newly created lots (after May 2, 2000).
44. The Applicant asserts that the proposed project will require the alteration of approximately $\frac{1}{4}$ acre all located in and about the Buffer Zone of the pool and Intermittent Stream and claims that these alterations will improve the functions of the Resource Areas affected by them. TCC finds that argument unpersuasive as there is insufficient data provided to ascertain the present pre-development wetland functions to afford a realistic comparison between pre- and post-development conditions. As an example, assuming the proposed plan is implemented and the way becomes a public road, deicing salts applied to it in winter and spring will end in the pond *by design*. Deicing salts have been shown to threaten the existence of amphibian species exposed to them – particularly wood frogs and salamanders [3, below]. Further there is testimony by abutters about the extent and locus of surface water transport during the winter (rainy) season that is at variance with the Hydro-Cad analysis of the Applicant. This makes a determination of the margins allowed for post-development conditions rather difficult to ascertain.
45. The TCC finds that since the property owner/developer is a private entity proposing a private subdivision project, the project does not meet the “overriding public interest” criterion (see [4], below).
46. The TCC finds that investment-backed expectation of the owner/developer could be realized by improvement of/redevelopment of the property as a single-family house lot, or, possibly, with acquisition of abutting land, up to three house lots on a common driveway. The applicant’s argument that a prohibition from work in the 100-foot Buffer Zone as stated in R:10-4.i.1.(d) will constitute “a regulatory taking” is not

persuasive as applicant has the right to build and offer for sale a house on a legal lot with appropriate frontage for one lot as it was when applicant purchased it [2, below]. Thus, the TCC is not persuaded that denial of the current proposal would be a plausible claim of taking-without-compensation.

47. The Applicant owned the property in the spring of 2015, the opportune time for evaluation for Vernal Pool activity and presence of related rare species. While the Applicant has contacted NEHSP for data on rare and endangered species, there is no indication that a search was conducted on the site generally and the pool in particular for such, even though the adjoining Ipswich River Sanctuary is naturally connected to the site and hosts a number of rare and endangered species inclusive of blue-spotted salamanders and rare dragon flies (*Carol Decker, James MacDougall*).
48. The applicant claims that “The structural integrity of the existing driveway is compromised,” at the crossing, and that a probable failure of the culvert could cause major flooding downstream, endangering neighboring properties. While such an event cannot be ruled out a priori, TCC is not convinced of the assertion of a clear and present danger, as insufficient evidence of such has been presented; nor does the driveway pavement show signs of an imminent failure other than a slight depression that incidentally was also noted recently in a driveway at nearby 67 Perkins Row.
49. Relative to the criteria listed in Bylaw Regulations R:10-4.i.1. *Waiver Provision*:
 - (a) TCC finds that *given the present frontage* the parcel cannot be developed as a multi-lot development except as a subdivision compliant with Topsfield Subdivision Rules and Regulations.
 - (b) TCC finds that mitigating measures have been offered relative to the proposed work in the Buffer Zone and Wetland Resource Areas. The TCC is not persuaded that these in their aggregate are sufficient to preserve the water quality of the pool and its continued function as important wildlife habitat upon completion of the proposed project. This is particularly so as the Applicant did not provide a definitive measure of the present pool flora and fauna, as no such inventory was submitted. [R:10-22. d.2. (d) and(f)]
 - (c) TCC finds that the proposed replication of Wetland Resource Area that would be lost to the proposed project is in compliance with R:10-22.d.1. However, TCC is not persuaded that the pool’s water quality can be protected upon completion of the project as required pursuant to R:10-22.d.2.(g).
 - (d) A waiver for the construction of the proposed Constructed Pocket Wetland and the Replication Area requires the Commission to make a finding pursuant to the Topsfield General Wetland Bylaw Regulations that the proposed work is required to (a) “accommodate an overriding public interest” or (b) “that it is

necessary to avoid an order that so restricts the use of property as to constitute an unconstitutional taking-without-compensation". While TCC notes that an 800-foot extension of the water main down Perkins Row serves the public interest, the proposed project nevertheless does not meet the criterion for such, as it is not pursued by a public agency such as the Topsfield Water Department or is under its auspices [see [4, below]/#51, List of Documents]. Instead, the water main is a requirement of the Topsfield Planning Board that it was not willing to waive even though a waiver was initially sought by the Applicant. Nor is the development of the subdivision in the public interest as it takes place on private property.

Relative to a regulatory taking finding, TCC is not persuaded that a denial of a waiver constitutes a regulatory taking without compensation based on the SCOTUS opinion of *Pennsylvania Coal v. Mahon*, 1922, (see [2.], below)

50. At the continuation of the deliberation at the TCC meeting on December 16, 2015, TCC voted unanimously to approve findings as amended, voted to issue an Order of Conditions under the Act with conditions as discussed, and voted unanimously to issue a Denial Order under the Bylaw, denying the project as proposed.

51. CONCLUSIONS:

Therefore, the **Topsfield Conservation Commission denies the Notice of Intent and included project activities as proposed and presented** under the Bylaw. No activities/work proposed with this project may go forward unless and until a new Notice of Intent is filed that:

- Provides sufficient information for the Commission's review, including addressing the alternatives of developing the property without the need for a subdivision roadway, e.g. as a single family house property or with a common driveway, and
- Meets the Performance Standards for activities in Buffer Zone Resource Area, and
- Provides measures adequate to protect the Interests of the Topsfield General Wetlands Bylaw.

52. There is a legally separate Order of Conditions issued under the Wetlands Protection Act, M.G.L. Chapter 131, Section 40 and Regulations 310 CMR 10.00 et. seq.
53. This Denial Order is issued under the Topsfield General Wetlands Bylaw, Ch. 62 and Regulations R:10-1, et. seq.

REFERENCES:

[1]

Nr	Country	Girth	Location	Measurement	Year
1	Netherlands	4.49 m	Purmerhof, Eindhoven	Hans Verbeekhof	2015
		4.28 m	Oudekerk, Amsterdam	Wim Binkhorst	2014
		4.01 m	Amsteijkade, Eindhoven	Hans Verbeekhof	2015
2	Germany	3.88 m	Schlosspark, OT Marquardt	Frank Grallert	2013
		3.62 m	Waldhof Park, Witten	Frank Grallert	2015
		3.01 m	Nimberg, Pommern, Nimberg	Andreas Gierke	2009
3	United Kingdom	3.71 m	Hill Place, Leam, Yorkshire	Theresa Haggard-Croft-Johnson	2007
4	Belgium	2.76 m	Park of Woluwe, Woluwe-Saint-Pierre	Leo Goldrosen	2011

<http://www.monumentaltrees.com/en/trees/quercuspalustris/records/>

[2]

A regulation does not, however, go "too far" so as to require compensation for a takings when it merely decreases property value or prevents property owners from doing exactly what they want with their property. As long as a regulation allows property to be put to productive economic use, the property has value and the regulation will not be deemed to deny all reasonable economic use of the property; there is no regulatory taking in that situation. Property owners do not have a constitutional right to the most profitable use of their property.

SCOTUS 1922 – Pennsylvania Coal v Mahon.

<http://mrsc.org/Home/Explore-Topics/Legal/Planning/Regulatory-Takings.aspx>

[3] Winston, R.J., et. al., "Road Salt and its Effect on Amphibians, a Concern for North Carolina?" Dept. of Biology and Agriculture & Engineering, NCSU, N.C. Dept. of Transportation TA 2012-05, Oct. 19, 2012.

[4] Goldrosen, John J., Esq., Kopelman and Paige, P.C., letter Dec. 2, 2015, Re: Interpretation of Waiver Provision in (Topsfield) Wetlands Regulations.

<u>ATTACHMENT-B</u>		<u>LIST OF DOCUMENTS</u>		NOI 307-0724, 57 Perkins Row			
	<u>Received</u>		<u>Title</u>	<u>Source</u>	<u>Doc./Plan</u>	<u>Date</u>	<u>Comments</u>
1	05/06/09		Site Visit Notes	Lana Spillman	Document	05/06/09	
2	05/06/09		Photos of former dock area and vegetation in buffer zone	Ms. Schumacher	Photos	05/06/09	
3	09/18/12		Site Inspection Report	Lana Spillman	Document	09/18/12	
4	05/14/15		ORAD issued, File No. 307-0720	TCC	Document	05/14/15	
5	06/03/15		Copy of letter to PB re: safety concerns - 57 Perkins Row	Tops. Public Safety Committee	Letter	06/02/15	
6	07/01/15		Notice of Intent Application, Including DeRosa Mitigation Plan	The Morin-Cameron Group	Application	06/29/15	2 copies
7	07/01/15		Plan to Accompany Notice of Intent	The Morin-Cameron Group	Plan	06/25/15	2 copies
8	07/01/15		Stormwater Management Summary	The Morin-Cameron Group	Document	06/16/15	1 copy
9	07/13/15		DEP Comments and file number assigned (307-0724)	DEP	Document	07/13/15	
10	07/28/15		Site Inspection Report	Lana Spillman	Document	07/28/15	
11	07/28/15		NOI Peer Review, Letter #1	Beals & Thomas	Report	07/28/15	
12	08/13/15		Abutter Letter	Carol Decker/MA Audubon	Letter	08/12/15	
13	08/13/15		Abutter Letter (E-mail)	Katherine Carlson	Letter	08/12/15	
14	08/13/15		Abutter Letter	Kim Sherwood	Letter	08/12/15	
15	08/15/15		Finding re: 57 Perkins Row - pin oak	Holger Luther	Document	08/14/15	
16	08/17/15		Abutter Letter	Natalie Whelan	Letter	08/12/15	
17	08/18/15		Response to Peer Review Comments #1	The Morin-Cameron Grp	Document	08/18/15	
18	08/19/15		Public Hearing Continuation Form, signed	TCC	Document	08/19/15	
19	08/24/15		Resource Area Evaluation	Matt Burne	Document	08/22/15	
20	08/31/15		Abutter Letter with photos	Walter Levitsky	Letter	08/27/15	2 photos attached
21	09/09/15		Public Hearing Continuation Form, signed	TCC	Document	09/09/15	
22	09/16/15		NOI Peer Review, Letter #2	Beals & Thomas	Report	09/16/15	
23	09/23/15		Public Hearing Continuation Form, signed	TCC	Document	09/23/15	
24	10/08/15		Waiver Request - 1 week prior submittal requirement	The Morin-Cameron Group	Letter	10/08/15	
25	10/08/15		Response to Peer Review Comments #2	The Morin-Cameron Group	Document	10/06/15	
26	10/08/15		Notice of Intent Project Summary	The Morin-Cameron Group	Document	Rev 10/06/15	
27	10/08/15		Revised Plan to Accompany a Notice of Intent	The Morin-Cameron Group	Plan	Rev 10/06/15	
28	10/08/15		U.S. Army Corps of Engineers Self-Verification Notification Form	The Morin-Cameron Group	Document	10/06/15	
29	10/08/15		Revised Stormwater Management Summary	The Morin-Cameron Group	Document	10/06/15	2 copies
30	10/14/15		Request to continue public hearing	The Morin-Cameron Group	Letter	10/14/15	
31	10/14/15		Public Hearing Continuation Form, signed	TCC	Document	10/14/15	
32	10/21/15		NOI Peer Review, Letter #3	Beals & Thomas	Report	10/21/15	
33	10/23/15		Meeting Certification 9-23-15	Cheryl Jolley	Document	10/23/15	
34	10/28/15		Request to continue public hearing	The Morin-Cameron Group	Letter	10/27/15	
35	10/28/15		Public Hearing Continuation Form	TCC	Document	10/28/15	
36	11/04/15		Request to continue public hearing	The Morin-Cameron Group	Letter	11/04/15	
37	11/04/15		Public Hearing Continuation Form, signed	TCC	Document	11/04/15	2 copies
38	11/12/15		Response to Peer Review Comments #3	The Morin-Cameron Group	Document	11/11/15	

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39	11/12/15	Revised Plan to Accompany a Notice of Intent	The Morin-Cameron Group	Plan	Rev 11/11/15	2 copies
40	11/16/15	NOI Peer Review, Letter #4	Beals & Thomas	Report	11/16/15	
41	11/16/15	Copy of letter to PB re: tree near driveway	Beals & Thomas	Letter	11/16/15	
42	11/17/15	Email response on tree	Dave Bond	Email	11/17/15	
43	11/18/15	Email to Lana Spillman from Gale Biermann	Gale Biermann	Email	11/18/15	
44	11/18/15	Site Inspection Report - evaluation of mature oak near driveway	Lana Spillman	Document	11/18/15	
45	11/18/15	E-mail to Lana Spillman re: evaluation of mature oak	Ben Staples, Cicoria Tree	Email	11/18/15	
46	11/18/15	Public Hearing Continuation Form, signed	TCC	Document	11/18/15	
47	11/18/15	E-mail from Gale Bierman re: FIFTY SEVEN Perkins Row	Gale Biermann	Email	11/18/15	
48	11/18/18	Copy of 2nd response to Peer Review Comments - Definitive Subdivision	The Morin-Cameron Group	Letter	11/18/15	
49	11/18/15	Copy of Supplemental Notice of Intent Peer Review	Beals & Thomas	Document	11/16/15	
50	11/23/15	Interoffice Memorandum re: water supply 57 Perkins Row	Greg Krom	Memo	06/02/15	
51	12/02/15	Legal opinion, Kopelman and Paige, P.C.	John Goldrosen, Esq.	Letter	12/02/15	
52	12/02/15	Atty. Letter, representing Whelans, re: their concerns	Atty. Philip Lake	Letter	12/02/15	
53	12/02/15	Abutter Letter (Sherwood) re: special conditions for OOC	Kim Sherwood	Letter	12/02/15	