

McGREGOR & LEGERE

ATTORNEYS AT LAW, P.C.

15 COURT SQUARE – SUITE 500
BOSTON, MASSACHUSETTS 02108
(617) 338-6464
FAX (617) 338-0737

GREGOR I. MCGREGOR, ESQ.
E-mail: gmcgregor@mcgregorlaw.com
(617) 338-6464 ext. 123

VIA E-MAIL (dkaye@concordma.gov)
AND U.S. MAIL

March 9, 2020

Gregory Higgins, Chair
Natural Resources Commission
Town of Concord
141 Keyes Road, Concord, MA 01742

**RE: Concord Country Club - Notice of Intent
DEP File # 137-1517
Our File No. 2907/Initial Comments**

Dear Chair Higgins and Members of the NRC:

We represent Rebecca and Bernd Comjean of 99 Williams Road regarding the after-the-fact Notice of Intent filed by the Concord Country Club to clear and grade land and install a large, lined irrigation pond at its property in close proximity to Jennie Dugan Brook. This filing was required following a cease-and-desist letter sent on behalf of the NRC to the Applicant by Delia Kay, Natural Resources Director.

Based on our initial review of the Notice of Intent and revised project plan, we urge the NRC to deny this project. In summary, due to several procedural infirmities, specific errors in the legal notices, and the lack of information provided by the Applicant, the Applicant has failed to meet its burden of proof that the proposed work will not have a significant or cumulative effect on the resource area values protected by the Wetlands Protection Act (“WPA”) as well as the Town of Concord Wetlands Bylaw (the “Bylaw”).

It is our position, on the merits of the project, when and if the Club files proper applications with proper legal notices, that the NRC should not allow this project in this watershed!

The destruction of trees, grubbing of land, extensive excavation, and the installation of a large lined pond resulting in greater irrigation capacity will negatively affect groundwater flows to the Brook by intercepting rainfall and surface flow, decreasing groundwater flows, increasing evaporation rates, and removing trees and vegetation that enhance water retention, recharge, and quality.

McGREGOR & LEGERE

The Brook feeds into Town's water supply and the project locus is within the recharge zone of one of Town's drinking water wells.

The NRC Should Require Complete Restoration Before Considering the NOI

The NRC should require full restoration of Resource Areas before it takes any further action on this after-the-fact application. The WPA and a recent appellate court decision give it authority to do so. G.L. c. 131, § 40 ("Any person who violates the [WPA] may be ordered to restore property to its original condition."); Craig v. Conservation Commission of Mattapoissett, 93 Mass. App. Ct. 1108 (2018)(1:28 decision) (holding conservation omission well within its authority under WPA to order restoration of property).

The Bylaw also gives the NRC authority to require full restoration. Bylaw, § 9.3 ("Any person who violates provisions of this Bylaw may be ordered to restore the property to its original condition".)

The NRC should not merely make restoration a condition in an Order of Conditions. An Order of Conditions allows work, it is permissive. It is legally a permit; it does not require work to be done. A better practice is to issue an Enforcement Order requiring preparation, submitting, and implementation of a restoration plan, on terms and on a schedule approved by the NRC. This restoration can and should be done pending an NOI.

This belt-and-suspenders approach would provide better control over the restoration, independent of project permitting which may and usually is on a different schedule.

A second point in favor of this approach is that, after much delay, the Club filed its NOI but what the Club filed so far lacks even the basic, customary requisites of a restoration program: pre-work site conditions on a surveyed plan, documentation of vegetation and soil removed, and erosions controls, slope protections, and plantings all shown on the plan.

A final point in favor of enforcement-for-restoration is the contumacious behavior of the Club. The Applicant rebuffed the NRC staff's initial inquiries late last year into the activities reported by neighbors. The Applicant then said wrongly that no work was within the NRC's jurisdiction. The NRC's agent, unable to access the Club's property, had to view work from an abutter's property. This led to discovery of violations not only of the WPA and the Concord Wetlands Bylaw, but also Concord's Zoning and Earth Removal bylaws.

Thus, the starting point for review of this NOI should not be the altered conditions, but the original/pre-disturbance conditions. The NRC can deny this NOI "without prejudice" to this applicant filing proper applications under the WPA and the Bylaw, once the NRC is satisfied with the required restoration.

McGREGOR & LEGERE

This NOI Is Filed Only Under the WPA and Not the Concord Wetland Bylaw

Contrary to the clear directive in the NRC agent's January 7, 2020 Enforcement Letter to the Applicant, the Applicant failed to file a NOI under the Bylaw. This after-the-fact NOI is only filed under the WPA.

The notice to abutters and the NOI do not cite or mention the Bylaw. The Affidavit of Service says that it was filed under the WPA and the Lexington wetlands bylaw. It seems this was some cut and paste. The abutter notice does have a heading mentioning both the WPA and Bylaw, but the text itself makes no mention of the Bylaw. The NOI package shows only WPA filing fees. Furthermore, the NOI does not recognize the Buffer Zone as the Resource Area it is under the Bylaw nor address it thus in its insufficient project narrative.

Your March 4, 2020 hearing therefore was not under the Bylaw but only under the WPA. Therefore, this NOI cannot legalize the work under the Bylaw. As noted above, this NOI and plans do not comply with your Enforcement Letter. The Concord Country Club did not appeal your Enforcement Letter to court, meaning it is now final and binding. And as of now the Club has not complied with your requirements and those of the Bylaw.

The NOI Lacks Essential Information to Determine Wetland Impacts

This after-the-fact NOI and plan are inadequate under both the WPA and the Bylaw. The plans fail to show conditions prior to the violation which included extensive grading. Existing conditions are difficult to ascertain. As discussed in the Concord Public Work's March 2, 2020 memorandum to the Town Planner, the Applicant needs to provide much more information so the NRC can assess the Project's impacts. Meanwhile, the NRC should deny the NOI for lack of this necessary information.

When the Applicant does apply legally under both the Bylaw and WPA, the NRC should hire a peer reviewer, at the applicant's expense, to review the BVW, Bank, Buffer Zone, and Riverfront Area delineations and look for any additional wetland resource areas that might be present.

We note that it is absurd for the Applicant to say that the only impervious surface is the proposed pump house. The proposed lined pond is a large area of impervious surface; it's no different than a large swimming pool.

Conclusion

For the foregoing several independent reasons, each of them legally and factually sufficient, the NRC should reject this NOI. It is not the NRC's fault that the situation is what it is. The Club is a violator and has not complied in any respect.

McGREGOR & LEGERE

You can expect our clients to oppose the project at the NRC as well as at the ZBA for drying out the watershed already (by the work already done) and over time (if the proposed project were built and operated), risking the Brook, its associated Riverfront Area, BVW, Bank, and Buffer Zone (a Bylaw resource area), and the impoundment sooner or later overflowing (accidentally or as designed), causing erosion and sedimentation into, or otherwise altering, all of these resource areas after the fact from this near distance with no adequate margin for error.

Thank you for considering our comments. Please contact us should you have questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Gregor I. McGregor" followed by "(N.S.)" in parentheses.

Gregor I. McGregor

A handwritten signature in black ink, appearing to read "Nathaniel Stevens".

Nathaniel Stevens