



MEMORANDUM

November 9, 2020

RE: Proposed Wetlands Crossings

MA DEP File No. 315-1227

55 Summer Street, Walpole

(Via Email Delivery Only)

It is our understanding that the Walpole Conservation Commission has raised a question as to whether the Wetlands Protection Act permits more than one wetlands crossing on the property at 55 Summer Street, Walpole, MA ("Property").

The Property consists of approximately 54+/- acres containing two principal upland areas separated from each other and from the frontage on Summer Street by various wetland systems which have been delineated pursuant to orders of resource area delineation. The applicant proposes to develop the Property for 56 duplex and single-family homes, 52 town homes and 2 apartment buildings, to be accessed by an internal system of roadways. In order to provide access to the upland areas where the proposed homes and apartment buildings will be constructed, the applicant has proposed two wetland crossings. Crossing 1 will alter +/- 1,996 square feet of Bordering Vegetated Wetland ("BVW") and +/-86 linear feet of Bank. Crossing 2 will alter +/-2,721 square feet of BVW and +/-152 linear feet of bank. Therefore, the aggregate impacts will total +/-4,717 square feet of BVW and +/-238 linear feet of bank. A detailed wildlife habitat evaluation for the bank to be altered has been provided which demonstrates that the affected bank does not contain or support significant habitat features.

1. **The Crossings Are Permitted Because Both Individually and Cumulatively They Comply With the Performance Standards Applicable to BVW and Bank.**

The Notice of Intent does not seek approval of the wetlands crossings under the "limited project" provisions of 310 CMR 10.53(3)(e) because even cumulatively the proposed wetland crossings comply with the applicable performance standards of the Wetlands Protection Act.

As set forth above, the affected resource areas consist of: (a) Bordering Vegetated Wetlands ("BVW") regulated under 310 CMR 10.55; and (b) inland Bank regulated under 310 CMR 10.54.

The performance standards applicable to Bordering Vegetated Wetlands, set forth in 310 CMR 10.55(4)(b), do not distinguish between roadway crossings and other types of alterations. There is nothing in the performance standards applicable to BVW that limits the permitted alteration to a single contiguous area or limits the number of roadway crossings, so long as the cumulative impacts comply with the performance standards. The performance standards provide that the Commission may permit work "...which results in the loss of up to 5000 square feet of Bordering Vegetated Wetland. . . ," provided that the BVW is replicated in accordance with the standards set forth therein. In the instant case, the combined proposed alteration of BVW is 4,683 square feet (i.e., less than the permitted 5,000 square feet) and replication is proposed in compliance with (and in excess of the amount required under) 310 CMR 10.55(4).

The performance standards applicable to Bank, set forth in 310 CMR. 10.54(4)(a)(5) also do not distinguish between roadway crossings and other types of alterations. Likewise, there is nothing in the performance standards applicable to Bank that limits the permitted alteration to a single contiguous area or limits the number of roadway crossings, so long as the cumulative impacts comply with the performance standards. The performance standards permit the alteration of more than 50 linear feet of bank, provided that "... they will have no adverse effects on wildlife habitat, as determined by procedures contained in 310 CMR 10.60." In accordance with 310 CMR 10.60, the applicant submitted detailed wildlife habitat evaluations (Appendix B) demonstrating that the project would not "substantially reduce [the Bank's] capacity to provide the important wildlife habitat functions listed in 310 CMR 10.60(2)." 310 CMR 10.60(1). Therefore, although the combined crossings will alter 238 feet of Bank, they still meet the performance standards applicable to Bank.

Therefore, in conclusion, as the proposed roadway crossings individually and cumulative comply with the applicable performance standards and because nothing in the performance standards applicable to BVW or Bank limit permitted alterations to a single contiguous area or single roadway crossing, the proposed crossings are permitted under the Wetlands Protection Act.

2. Although Approval Is Not Sought Under the Limited Project Provisions of 310 CMR 10.53(3)(e), Even if it Were, the Limited Project Provisions Do Not Prohibit More Than One Crossing

When the question is raised whether more than one roadway crossing may be permitted, it is usually in the context of a notice of intent requesting an exemption from the performance standards of the Wetlands Protection Act to cross wetlands under the "limited project" provisions of 310 CMR 10.53(3)(e). As set forth above, the applicant is not seeking any exemption from the applicable performance standards, but is in full compliance with the performance standards.

But even if the applicant were seeking to waive the performance standards of 310 CMR 10.54 through 10.55, 310 CMR 10.53 (3)(e) permits the Commission to do so for:

The construction and maintenance of a new roadway or driveway of minimum legal and practical width acceptable to the planning board, where reasonable alternative means of access from a public way to an upland area of the same owner is unavailable.

Nothing in 310 CMR 10.53 (3)(e) limits the exemptions to a single roadway crossing:

The limited project provision ... does not require that the Department deny a roadway crossing limited project because a landowner owns other upland that can be developed without a wetland crossing.

IN THE MATTER OF DOUGLAS STEWART, 2002 WL 31368562, at *5.

In the Stewart case, it was noted that access to the upland the applicant wished to develop required two crossings and the Administrative Law Judge accepted the testimony of the Department's analyst that the limited project provision allowed **“two wetlands crossings to develop a large parcel.”** IN THE MATTER OF DOUGLAS STEWART, 2002 WL 31368562, endnote 6. (Emphasis added.)

The foregoing is consistent with the Department's Wetlands Policy 88-2 “Access Roadways” which states:

This provision does not preclude the possibility of more than one wetland crossing in certain circumstances, such as where an applicant is developing a very large parcel of land and the Planning Board has required, after a review of alternatives as discussed above, the applicant to provide multiple access points into the property. (Emphasis added.)

Simply stated, the limited project provisions of 310 CMR 10.53 (3)(e) allow the Commission to waive applicable performance standards where necessary to provide access to “an upland” that is not otherwise accessible, even if more than one crossing is necessary to access the upland and even if other upland of the same owner is accessible without a crossing.

CONCLUSION

As the two proposed roadway crossings individually and cumulatively comply with the performance standards applicable to BVW and Bank and as nothing the performance standards limit the cumulative impacts to a single, contiguous area or distinguish between roadway crossings and other types of alterations, the roadway crossings are be permitted under the Wetlands Protection Act.

Although no exemption is sought from the applicable performance standards, even if the proposed roadway crossings had been submitted under the limited project provisions of the regulations, the Commission should still approve both crossings.

Respectfully submitted,

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