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March 6, 2009

Northampton Conservation Commission
City Hall
212 Main Street
Northampton, MA 01060

RE: Revised Plans, Drainage Report and Mitigation
Notice of Intent
North Street Condominiums
Map 25C, Parcels 12 & 17

Dear Members of the Conservation Commission,

Enclosed please find 10 complete sets of revised plans for our North Street Condominium project, as well as three full copies of the revised Drainage Report and 10 copies of the Drainage Report Summary.

The revised plans, as presented at the public hearing on February 26, 2009, show all work outside the 35-foot buffer zone to the Bordering Vegetated Wetlands. There are 23 dwelling units, all but 3 of which are outside the 50-foot wetland buffer. Most of the associated roadways, driveways and parking areas are outside the 100-foot wetland buffer.

The plans also show mitigation for buffer zone impacts which improve the condition of the buffer zone. There has been some discussion at hearings regarding the interpretation of the Northampton Wetlands Protection Ordinance, specifically with respect to the size of the No-Encroachment Zones and any requirement of mitigation. For infill projects, Section 337-10(B) "waives any of the Section 337-10 performance standards that are over and above state law," which would include 337-10(E)(1), (E)(2), and (E)(2)(b), and states that "the reduced setback requirements in Table 1 shall apply." However, attorney Alan Seewald, representing the North Street Neighborhood Association, has suggested that Section 337-10(E)(2)(b) requires mitigation measures that will improve the condition of the wetlands or adjacent uplands, even though this is over and above state law, and waived by Section 337-10(B). This issue is addressed in a brief by attorney Michael Pill, which is attached to this letter. In any event, we are including mitigation that satisfies Section 337-10(E)(2)(b),regardless of whether it is actually required under the Ordinance or waived by Section 337-10(B), which renders the issue moot with respect to this project.

There are 3 areas which are hatched and labeled on the "Site, Grading & Planting Plan" where mitigation is proposed. The proposed mitigation measures in these areas are as follows:

- All invasive plants within the area of the 10-35 foot buffer zone hatched on the plan and located generally behind units 14-21, will be removed and replaced with native plants with high wildlife value. All work will be done by hand, with no equipment to enter the 35-foot buffer zone. All replacement plants will be nursery grown, and will include species listed on the plant schedule under "Native Species Planting Buffer."

- The significant stand of Japanese Knotweed in the buffer zone hatched on the plan behind units 11-14 will be eradicated and the buffer restored. We will use the following strategy, a combination of initial hand removal of the knotweed followed by chemical treatment, both based on the Nature Conservancy's Best Management Practices found on various websites.

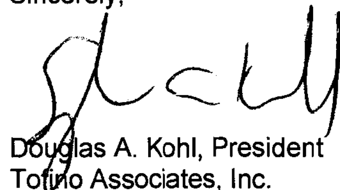
    1. After initial re-growth of knotweed in spring and before flowering in early July, stalks will be cut down, and as much of the root stock and seed source as possible will be removed.
    2. Cuttings and rhizomes will be burned or placed in tough black plastic bags in the sun to "melt" outside the 100-foot wetland buffer for at least one month, and then removed from the site.
    3. After August 1 and before frost, any new knotweed stalks will be cut approximately 2 inches above ground level.
    4. A very small area of knotweed will be cut at a time and a 25% solution of glyphosate (e.g., Rodeo, which is preferable to Roundup since the application will be near wetland areas) will be immediately applied directly into the stem cavity as well as the cut surface via hand wiping, dripping and/or stem injection. This work will be performed by a licensed herbicide applicator.
    5. Any new cuttings will be burned or placed in tough black plastic bags in the sun to "melt" outside the 100-foot wetland buffer for at least one month and then removed from the site.
    6. The area will then be densely replanted with native trees and shrubs following the planting plan and schedule, to provide shade to help prevent the reemergence of knotweed.
    7. Continued vigilance and multiple applications of herbicide to the cut stems of any knotweed re-growth will be required over the years to keep the knotweed from reestablishing. Chemical treatments will take place after August 1 of each year since treatments in late summer or early fall are much more effective in preventing re-growth of Japanese knotweed the following year.

- The existing lawn area between the wetland edge and the 35' buffer behind units 1 and 11-14, will be converted to functional buffer zone through re-vegetation. The area will no longer be mowed or cultivated in any way, and native tree and shrub species with high wildlife habitat and forage value will be planted in accordance with the planting plan and schedule.

In addition, native plantings of trees and understory shrubs will be installed by hand just within the 35-foot buffer zone and on the side slopes of the detention basin, as shown on the plan. This planted buffer edge will improve the wildlife habitat value of the existing buffer and will also help to demarcate the edge of the No Disturb Zone.

We look forward to continuing our discussion on the plans and the proposals for mitigation at our hearing next week.

Sincerely,



Douglas A. Kohl, President
Tofino Associates, Inc.
Northern Avenue Homes, Inc.

Michael Pill, J.D., M.A., Ph.D.

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January 5, 2009 Via email attachment only[1]

TO: Douglas Kohl

RE: Northern Avenue housing development in Northampton

(1) Any ambiguity, uncertainty or conflict in Northampton Wetlands Ordinance § 337-10, subsections B & E(2)(b) is resolved in favor of the land owner;

(2) You may voluntarily comply with subsection E(2)(b) without waiving your right to argue that it is rendered inapplicable by subsection B.

Dear Doug,

Introduction and statement of the issue

You have requested my opinion concerning subsections B and E(2)(b) of § 337-10 (entitled "Performance standards. [Amended 10-4-2007]") of the Northampton Wetlands Ordinance (City Code Chapter 337). Subsections 337-10 B and 337-10 E(2)(b) state as follows (underlining added):

> B. To encourage infill development, which is considered more sustainable under the principles of smart growth and generally has a smaller environmental footprint than development in outlying areas, in the Central Business, General Business, Highway Business, Neighborhood Business, General Industrial, Special Industrial, Planned Village, Medical, Urban Residential-B and Urban Residential-C Zoning Districts, within those portions of the Water Supply Protection Overlay District which was zoned industrial as of January 1, 2006, the Conservation Commission hereby waives any of the § 337-10 performance standards that are over and above state law with the exception of the setback

[1] When sent via email attachment only, this legal opinion letter shall have the same force and effect as a signed hard copy original.

requirements in Table (1). The reduced setback requirements in Table (1) shall apply.

* * * * * *

E. Work within upland areas adjacent to wetlands. A growing body of research evidence suggests that even "no disturbance" areas reaching 100 feet from wetlands may be insufficient to protect many important wetland resource characteristics and values. Problems with nutrient runoff, erosion, siltation, loss of groundwater recharge, poor water quality, vegetation change and harm to wildlife habitat are greatly exacerbated by activities within 100 feet of wetlands. These impacts may happen either immediately, or over time, as a consequence of construction, or as a consequence of daily operation. Thus, in general, work and activity within 100 feet of wetlands should be avoided and discouraged and reasonable alternatives pursued.

* * * * * *

> (2) The City's general policy is no encroachment within 50 feet of wetlands. The Commission may allow work within the fifty-foot nonencroachment zone in response to a written request for a waiver, which shall include a written and plan view assessment as part of the application process as follows:
>
> * * * * * *
>
> > (b) Projects in certain infill areas, in accordance with Table (1) in § 337-10, where development includes mitigation measures that will improve the existing condition of the wetlands or adjacent upland area and is otherwise permissible under the Massachusetts Wetlands Protection Act.

* * * * *

[Table 1:]

Zoning District	No-Encroachment Zone
* *	* * *
Urban Residential-B and Urban Residential-C	35 feet from wetlands 10 feet from wetlands may be allowed at the discretion of the Conservation Commission if applicant provides extraordinary mitigation, replication, restoration or open space preservation measures

The fact that Table 1 is not expressly labeled in the above quoted ordinance does not mean there is any ambiguity about what constitutes that table. It does not, for example, open the door to trying to claim that subsection E(2)(b) is somehow part of Table 1.

Subsection B quoted above is a statement of public policy supporting "infill development" that creates an exemption, which is implemented by the specific provisions of Table 1. Table 1 specifies a 35 foot unqualified no-build zone around wetlands, and a 10 foot no-build zone at the discretion of the Conservation Commission "if applicant provides extraordinary mitigation, replication, restoration or open space preservation measures." The other performance standards of Section 337-10 are expressly rendered inapplicable by the above quoted "infill development" exemption in subsection B to the extent they are "are over and above state law with the exception of the setback requirements in Table (1). The reduced setback requirements in Table (1) shall apply."

(1) Any ambiguity, uncertainty or conflict in Northampton Wetlands Ordinance § 337-10, subsections B & E(2)(b) is resolved in favor of the land owner;

Any ambiguity, uncertainty, or conflict in the Northampton Wetlands Ordinance should be resolved in favor of less restrictive regulation of land use, because local land-use legislation should be construed strictly against the municipality.

Provisions in a land use regulation ordinance are considered ambiguous when they are either undefined in the ordinance, or can be interpreted in more than one way. *See Slater v. U.S. Fidelity and Guaranty Co.,* 379 Mass. 801, 804, 400 N.E.2d 1256, 1259 (1980) (Use of phrase in an insurance policy, "without giving a definition or other aid to help determine the sense in which the words were used, gives rise to an ambiguity which must be construed against the insurer, who wrote the policy."); *Panesis v. Loyal Protective Life Insurance Co.*, 5 Mass. App. Ct. 66, 71, 359 N.E.2d 319, 323 (1977) ("If an insurer chooses to use language in a policy which permits two rational interpretations, that more favorable to the insured is to be adopted.").

A leading Massachusetts legal treatise sums up the governing principles in these words:

> It is often stated in zoning treatises and cases from other jurisdictions that zoning regulations shall be strictly construed against the municipality because they are in derogation of the common law rights attached to the private ownership of land. See, e.g., 6 P. Rohan, Zoning and Land Use Controls, § 36.03(2) (1994 & Supp. 1994) and the cases cited therein at n. 9. Generally, this formulation is not found in Massachusetts cases. But see *Manchester v. Phillips,* 343 Mass. 591, 596, 180 N.E.2d 333, 337 (1962) ("[t]here is no such ambiguity about the language of the by-law as to lead us to interpret it strictly against the public interest because it will operate in derogation of the landowner's ability at common law to make unrestrained use of his property"). *See also Moore v. Marblehead,* Land Court, Misc. Case No. 124963 (Apr. 7, 1989) (where zoning bylaw silent on designation of front lot line for lots that are not corner lots, determination of front line should be that most favorable to, or chosen by, the landowner).

Martin R. Healy (ed.), 1 Massachusetts Zoning Manual, § 12.2.4 "Strict vs. Liberal Construction" at page 12-9 (4th ed. 2007).

Local wetland ordinances and bylaws are in derogation of common law property rights because they are an exercise of the government's police power. *Lovequist v. Conservation Commission of Town of Dennis,* 379 Mass. 7, 19-20, 393 N.E.2d 858, 866 (1979) and cases cited in the second paragraph of section 4 of the court's decision entitled "Unconstitutional taking."

Manchester v. Phillips, supra, cited an earlier decision, which stated, "statutes and building laws made in derogation of the common law are to be construed strictly." *Corcoran v. S.S. Kresge Co.,* 313 Mass. 299, 303, 47 N.E.2d 257, 259 (1943). The *Corcoran* case was cited by the Massachusetts Supreme Judicial Court in 2004 for the same proposition, in these words: "[S]tatutes like MAPA [Massachusetts Art Preservation Act] that alter common-law property rights and impose new obligations totally unknown at common law are ordinarily construed strictly, *Corcoran v. S.S. Kresge Co.,* 313 Mass. 299, 303, 47 N.E.2d 257 (1943),

unless the obvious legislative purpose behind the statute would be defeated by doing so." *Phillips v. Pembroke Real Estate, Inc.,* 443 Mass. 110, 119 n. 12, 819 N.E.2d 579, 585 n. 12 (2004). In the case of the Northampton Wetlands Ordinance, the stated purpose of the exemption created by § 337-10, subsection B (quoted in full above in this memorandum) is as follows:

> To encourage infill development, which is considered more sustainable under the principles of smart growth and generally has a smaller environmental footprint than development in outlying areas, ... the Conservation Commission hereby waives any of the § 337-10 performance standards that are over and above state law with the exception of the setback requirements in Table (1). The reduced setback requirements in Table (1) shall apply.

To impose on an "infill development" the provisions of subsection 337-10 E(2)(b) would defeat the above quoted legislative purpose of promoting such projects. Under these circumstances, the exemption of subsection 337-10 B must prevail.

The holding in *Corcoran v. S.S. Kresge Co., supra,* is consistent with a canon of statutory construction so well established that it is cited in the leading national treatise on the subject, which states the rule in these words:

> Statutes which impose duties or burdens or establish rights or provide benefits not recognized by the common law have frequently been held subject to strict, or restrictive, interpretation. Where there is any doubt about their meaning or intent they are given the effect which makes the least, rather than the most, change in the common law. [FN1]

Norman J. Singer and J.D. Shambie Singer, 3 Sutherland Statutory Construction § 61:1 "Strict construction of statutes in derogation of common law" at note 1 (6th ed. & Supp. 2008).

The Land Court case cited above by the Massachusetts Zoning Manual presented the court with a lot which fronted on two different roads. *Moore v. Town of Marblehead,* Misc. Case No. 124963, Decision and Judgment dated April 7, 1989 (A copy of this case is available from the Hampshire County Law Library collection as their Land Court Opinion No.

660, or upon request from Michael Pill). The lot in question in the *Moore* case was bounded on one side by a public way, and on the opposite side by a private way. The court was called upon to determine which street line constituted the "front lot line" for zoning purposes:

> As stated, there are two issues to be determined. First, whether the front lot line, or "Lot Line, Front" as defined by the Zoning By-law, is at the southerly end abutting on Redstone Lane, or on the northerly end abutting the right of way. The Zoning By-law definitions are not particularly helpful in this determination. Section II.1M defines "Lot Line, Front" as a "line separating the lot from a street or private way." The definition of "Lot Line, Rear", as stated in Section II.1N of the Zoning By-law, offers some guidance in establishing that for a corner lot "the rear lot line shall be the line opposite from the street on which the principal building faces." Of course, the Plaintiff's lot is not a corner lot nor does the building face either a street or way. From the most recently filed plan, it appears that the building faces westerly, with its principal access, as noted by a Board member, apparently being via the right of way along the northerly end of the property to Allerton Place. Rather than determine the lot line by the placement of the building, or what appears to be the probable most convenient access route, a probability which could vary, I determine the front lot line to be on the undisputedly public, and most likely permanent access, Redstone lane. While, as I find below, the northerly right of way is a private way, it is not a private way open to the public nor one "used and maintained as a public way." It is more in the nature of a driveway than a public way. As noted, I find nothing in the Zoning By-law (except for the inapplicable Section II.1N) which determines the "front" of the lot by the facing of the building or the generally used access. Indeed it would appear that the southerly garages can be accessed from Redstone Lane only. Moreover, <u>where the Zoning By-law is specific as to corner lots and silent as to other lots, the determination of the front line in instances such as this should be that most favorable to, or chosen by, the land owner.</u> [Underlining added.]

Moore v. Town of Marblehead, supra, at pages 3-4.

Under the rule adopted by the Land Court in *Moore v. Town of Marblehead, supra,* if there is any remaining question about possible ambiguity in the Northampton Wetlands Ordinance, it should be resolved in favor of the land owner who is the project applicant.

The authors of the Massachusetts Zoning Manual, quoted above, apparently missed the court case of *Clarke v. Board of Appeals of Nahant,* 338 Mass. 473, 155 N.E.2d 754 (1959). There the court took the position that in order to compel a merger of two adjoining

"back-to-back" lots with frontage on separate streets, the drafters of a local by-law "should have expressed that intention more clearly, if that was their purpose." 338 Mass. at 480, 155 N.E.2d at 757. The ambiguity in the zoning bylaw was resolved in the landowner's favor. 338 Mass. at 480, 155 N.E.2d at 758. The Massachusetts Zoning Manual also omits *Town of Auburn v. Johnson,* 11 Mass. App. Ct. 1037, 1037, 421 N.E.2d 88, 88-89 (1981) ("Had the drafters of the by-law intended the term 'existing trailer park' to mean 'existing trailer camps occupying the same land as now occupied', they should have made such intention clear. They should have defined the term or otherwise indicated their purpose within the by-law.") citing *Manchester v. Phillips,* 343 Mass. 591, 595-596, 180 N.E.2d 333 (1962) and 3 Anderson, American Law of Zoning s 16.02 (2d ed. 1977)." Both *Clarke v. Board of Appeals of Nahant, supra,* and *Town of Auburn v. Johnson, supra,* suggest that the Northampton City Council may if it wishes clarify the Wetlands Ordinance, but in the meantime the ordinance is to be interpreted in favor of the land owner.

(2) You may voluntarily comply with subsection E(2)(b) without waiving your right to argue that it is rendered inapplicable by subsection B.

You may, if you wish, choose to show voluntarily that the Northern Avenue project does satisfy subsection 10-337 E(b)(2) because it is a:

> development [which] includes mitigation measures that will improve
> [i] the existing condition of the wetlands or
> [ii] adjacent upland area
> and is otherwise permissible under the Massachusetts Wetlands Protection Act.
> [Letters in brackets added as an aid in parsing subsection E(2)(b).]

If you choose to do so, you reserve your right to argue that: subsection E(2)(b) is not part of Table 1; or, subsection E(2)(b) is included in the exemption set forth in subsection B of § 337-10; or, both.

To comply with the wording of subsection E(2)(b), you would have to show that the "development includes mitigation measures that will improve" *either* "the existing condition of the wetlands *or* adjacent upland area [italics added]," in addition to demonstrating that the development "is otherwise permissible under the Massachusetts Wetlands Protection Act."

Whether the Northern Avenue project will improve *either* "the existing condition of the wetlands *or* adjacent upland area [italics added]" is a technical question to be answered by qualified experts.

I can frame the issue for the question of whether the project "is otherwise permissible under the Massachusetts Wetlands Protection Act." The state wetlands regulations make clear that the issue is whether activity in the buffer zone will have an impact on the wetland resource area. 310 CMR 10.02 (2)(b) ("Any activity ... proposed or undertaken within ... the Buffer Zone, which, in the judgment of the issuing authority, will alter an area Subject to Protection under M.G.L. c. 131, § 40 is subject to regulation under M.G.L. c. 131, § 40 and requires the filing of a Notice of Intent."). The Department of Environmental Protection "Commentary" at the end of 310 CMR 10.02 states that "The issuing authority shall not require the filing of a Notice of Intent of it determines that the activity proposed within the Buffer Zone will not alter an Area Subject to Protection under M.G.L. c. 131, § 40."

The words "activity" and "alter" appearing in the above quoted state wetland regulations are both technical terms defined this way in 310 CMR 10.04 "Definitions":

> Activity means any form of draining, dumping, dredging, damming, discharging, excavating, filling or grading; the erection, reconstruction or expansion of any buildings or structures; the driving of pilings; the construction or improvement of roads and other ways; the changing of run-off characteristics; the intercepting or diverging of ground or surface water; the installation of drainage, sewage and water systems; the discharging of pollutants; the destruction of plant life; and any other changing of the physical characteristics of land.

* * * * * *

Alter means to change the condition of any Area Subject to Protection Under M.G.L. c. 131, § 40. Examples of alterations include, but are not limited to, the following:

(a) the changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood retention areas;
(b) the lowering of the water level or water table;
(c) the destruction of vegetation;
(d) the changing of water temperature, biochemical oxygen demand (BOD), and other physical, biological or chemical characteristics of the receiving water.

Provided, that when the provisions of 310 CMR 10.03(6) and 10.05(3) or 333 CMR 11.03(9) have been met, the application of herbicides in the Buffer Zone in accordance with such plans as are required by the Department of Food and Agriculture pursuant to 333 CMR 11.00: Right of Way Management, effective July 10, 1987, is not an alteration of any Area Subject to Protection Under M.G.L. c. 131, § 40.

Whether any proposed project "activity" will "alter" wetland resource areas on the project site is a technical question to be answered by qualified expert consultants.

Conclusion

On the one hand, compliance with subsection E(2)(b) is not required for the reasons set forth above in section (1) of this memorandum. On the other hand, voluntary compliance with subsection E(2)(b), as outlined in section (2) *infra,* eliminates any legitimate basis for legal challenge on that ground by project opponents.

Please let me know if you have questions or need additional information concerning anything set forth above.

Very truly yours,

Michael Pill

MP/csh/L1.872.1.NorthernAve