



William F. Martin  
Mayor

City known as the Town of  
**GREENFIELD, MASSACHUSETTS**

**CONSERVATION COMMISSION**

Town Hall • 14 Court Square • Greenfield, MA 01301  
Phone 413-772-1551 • Fax 413-772-1309  
Conservation@greenfield-ma.gov • www.greenfield-ma.gov

**Members:**

Blasiak, John (2016)  
DeHoyos, Thomas (2016)  
Haro, Alex (2014)  
Letourneau, Dee (2014)  
Mosher, Timothy (2015)

**GREENFIELD CONSERVATION COMMISSION**

**Minutes of Tuesday April 15, 2014**

**7:00 p.m. Greenfield Department of Planning and Development  
114 Main Street**

The meeting was called to order by chair, Alex Haro at 7:00 p.m. with the following members:

**PRESENT:** Alex Haro, Chair  
Tim Mosher, Vice-chair  
Tom DeHoyos  
Dee Letourneau  
John Blasiak

**ALSO PRESENT:** David Singer  
Karen Miller  
Steven Ronhave  
Patrick Devlin  
Susan Worgaftik  
Maureen Pollock, Assistant Planner & Conservation Agent

**ABSENT:** None

Approval of Minutes:

Approval of Meeting Minutes from April 8, 2014.

**MOTION:** Moved by Blasiak, seconded by DeHoyos, no further discussion and voted 3-0-2 (Haro and Letourneau abstained) to accept the minutes from April 8, 2014, as amended.

Public Meetings/Hearings:

None

Other Business:

**Draft Chapter 195, Greenfield Wetlands Protection Ordinance:** The Appointments & Ordinance Committee (A&O Com) submitted questions to the Commission regarding the Wetlands Protection Ordinance revisions. Commissioners will respond to each of the submitted



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questions. The Commission will submit responses to the A&O Com. The A&O Com will review the responses during an upcoming A&O Com meeting.

Haro inquired who will revise the Ordinance, if needed.

Singer responded the A&O Com will make revisions. The Commission may attend A&O Com meetings to participate in the process. The only way the draft Ordinance would go back to the Commission, is if the A&O Com voted down the draft revisions.

Haro stated in addition to the responses the Commission plans to submit to the A&O Com, the Commission may include recommended revisions/edits.

Mosher stated he attended a MassDEP informational workshop earlier in the day regarding the upcoming revisions to MassDEP Wetlands, Waterways, and Water Quality Certification Regulations. The state's upcoming revisions will likely impact the local Ordinance; therefore, Mosher would like to hold off revising the local Ordinance until the state's revisions go into effect. The state's revisions are expected to become effective in the next 60 days.

**MOTION: Moved by Mosher to recall the draft Greenfield Wetlands Protection Ordinance that was submitted to the A&O Com, pending new changes in the Wetlands Protection Act (WPA) that the local Wetlands Protection Ordinance addresses**

Letourneau stated it is good to review the submitted questions, and then review upcoming revisions to MassDEP Wetlands, Waterways, and Water Quality Certification Regulations when they become effective.

Mosher stated the town can continue to work towards passing the local Ordinance, but the revisions made will likely be out of date once the upcoming revisions to MassDEP Wetlands, Waterways, and Water Quality Certification Regulations become effective.

Singer stated the A&O Com will work with the Commission to make sure the local Ordinance will be reflective of the upcoming revisions to MassDEP Wetlands, Waterways, and Water Quality Certification Regulations.

Singer stated Mosher's motion is appropriate

Blasiak stated he is not sure whether the upcoming revisions to MassDEP Wetlands, Waterways, and Water Quality Certification Regulations will impact the local Ordinance. It is useful to address the questions tonight.



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Mosher stated the Commission needs to address the upcoming revisions to MassDEP Wetlands, Waterways, and Water Quality Certification Regulations. The local Ordinance questions will still remain.

Blasiak stated the 2001 local Ordinance really needed to be updated. The Commission has fixed a lot of the issues in the 2001 local Ordinance.

Blasiak stated he would like to respond to the submitted questions, and have the A&O Com and full Town Council pass the revisions submitted. The Commission will deal with the upcoming revisions to MassDEP Wetlands, Waterways, and Water Quality Certification Regulations as needed, in the future.

Mosher stated if the local Ordinance does need to be updated in reflection to the upcoming revisions, then the Commission can use the draft Ordinance as a working document. The Commission would not need to start from scratch.

Haro stated the Commission can still answer the questions, even if the Commission affirms the recall motion.

Blasiak stated he does not want to delay the process

Haro stated the Commission has already submitted the draft Ordinance to the A&O Com, so the motion to recall would be considered just a request to the A&O Com to recall the draft Ordinance. The A&O Com does not need to comply.

Singer stated it is good to hear the responses to the questions submitted to help the A&O Com and residents understand the Commission's rationale to the revisions made.

**MOTION: Moved by Mosher, seconded by DeHoyos, no further discussion and voted 2-3-0 to recall the draft Greenfield Wetlands Protection Ordinance that was submitted to the A&O Com, pending new changes in the Wetlands Protection Act (WPA) that the local Wetlands Protection Ordinance addresses**

Haro stated the Commission will now respond to the submitted questions.

Question 1: Why was this rewrite of the Wetlands Ordinance done? And the reasons and rationale for so doing? (Submitted by Alfred Siano, A&O Com member)

Haro stated the Ordinance was rewritten at the request of the Town Council. When Greenfield was established as a City, rather than a Town, a requirement arose to reclassify the Bylaw as an Ordinance. Also, the current Bylaw was by then over 10 years old, and several changes had already been made to the WPA, so a rewrite was timely.



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DeHoyos stated he believes Ralph Kunkel, former Conservation Agent requested the Commission to rewrite the Ordinance.

Letourneau stated starting in 2007, the Commission was asked to consider the “waiver” provision. The Commission was able to justify the waiver provision, and passed the provision in 2008.

DeHoyos stated the Commission wanted to include more definitions that were not specified in the 2001 Ordinance, e.g. vernal pools and ponds.

Letourneau stated the Commission wanted to clarify various sections in the Ordinance.

Haro stated there were a lot of reasons to update the Ordinance.

Question 2: Is the new proposed Ordinance more or less restrictive? What supports this position? Will it hold up when reviewed? (Submitted by Alfred Siano, A&O Com member)

Haro stated the Commission assumes it is meant that the proposed Ordinance is more and less restrictive than the current Bylaw, not the WPA. More restrictive in some cases, perhaps less restrictive in others (depends on interpretation of Waiver, and interpretation of verbiage on Replication). Largely it is more restrictive because verbiage is clarified and specific definitions are given. Some resource areas are given specific protection that were not in the original Bylaw; e.g., vernal pools by definition. Fines were increased, also addition of a requirement for expert consultation for special studies.

Mosher stated the term, restrictive is not quantifiable. Each project that comes before the Commission is situational, whether it's a homeowner who wants to cut down a dead tree that is lending towards their house, or a contractor that is trying to build a house.

Blasiak stated he agrees with Mosher. There is no metric to quantify the term, restrictive. Restrictive is not defined; restrictive of what? That would need to be defined in order to respond to this question. The Ordinance is not supposed to be restrictive, but rather, protective. The question that needed to be asked, does the proposed Ordinance protect the wetland resources more or less.

Pollock stated the local Ordinance is required to be stricter than the state Wetlands Protection Act.

*Question 3: Why was the word "shall" replaced and how will this be interpreted? (Submitted by Alfred Siano, A&O Com member)*



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Haro stated that this may have been an error in editing. Most “may” in the documents were to have been replaced by “shall.” Haro will review and correction of all “may” and “shall” terms.

Letourneau stated that there was a previous discussion for one section to replace a single “shall” to “may.” Letourneau stated she will review her notes.

Letourneau does not recall any discussion to replace all “shalls” to “mays.”

DeHoyos stated there were a lot of “shalls” in the original Ordinance.

Blasiak stated that the proposed Ordinance does have some “shalls” present. Not all of the “shalls” were replaced with “mays.”

Blasiak stated the “shalls” presented in the draft Ordinance were things that were definitive. The “mays” presented in the draft Ordinance were for things that were not anticipated, so the Commission wanted to be able to take them into consideration. The “mays” are mostly clustered around the §195-7 C. Denials (pages 5 and 6). “Mays” are used in the denial section because there are many factors to consider when denying a project. The Commission wants to keep their flexibility if any unusual situation arose.

Blasiak stated the only times the “mays” are presented are where the Commission was faced with a degree of uncertainty, and the Commission wanted to be able make a reasonable response. Other than those areas, the draft Ordinance has “shalls.”

Haro stated he still wants double check to see where each “may” and “shall” is supposed to be used.

Blasiak stated he does not deem the term “may” as a loophole, rather a safeguard.

Question 4: What are the reasons for and against the Waiver provision? (Submitted by Alfred Siano, A&O Com member)

For reasons in support of the waiver provision, Haro advises the A&O Com to refer to the letter from the Massachusetts Association of Conservation Commissions (MACC) addressed to Maureen Pollock, dated March 25.

As stated in the MACC letter, “MACC regards the waiver provision as essential to avoid or limit claims of regulatory takings (a claim that there has been an unconstitutional land use restriction). It is an available safety valve for landowners to request justified waivers based on evidence and reasons on the record at a hearing. Such waivers have been approved by the Attorney General in most local wetlands bylaws and were recommended and supported by the Attorney General's Office in the current MACC model bylaw/ordinance. It is MACC's experience in practice that the



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waiver provision is not used as a free pass around the bylaws or ordinances, and waivers are not granted casually. One of the most important reasons is that the waiver provision contains several objective criteria that by law must be met before a waiver can be granted. We believe that a bylaw or ordinance without the waiver provision will result in many more lawsuits challenging a commission decision than with the provision. It is better to circumscribe that a conservation commission may grant properly justified waivers in very limited circumstances.” The Commission feels this is an accurate synopsis of a rationale for a Waiver.

Letourneau stated she was on the Commission when they were asked to consider the “waiver” provision starting in 2007. It was not a quick decision. The Commission looked at other MA towns and cities that include the waiver; and reviewed the MACC model bylaw/ordinance that includes the waiver. The Commission reviewed the proposed provision and was able to justify its 2008 approval. The Commission is now being asked to consider removing the waiver provision. It is difficult to justify removing the waiver, since the Commission was able to justify approving the waiver in 2008.

DeHoyos stated that the state does not have a 25-foot No Disturb Zone. The 25-foot No Disturb Zone is a provision administered by the Commission via the local Ordinance. By having the waiver, it gives the Commission flexibility to allow certain activities to occur within the 25-foot No Disturb Zone. DeHoyos stated that in his research a lot of the MA towns and cities that have a 25-foot No Disturb Zone, also have the waiver. DeHoyos stated that he is in support of the waiver because the Commission needs flexibility when considering certain activities to occur within the 25-foot No Disturb Zone.

Pollock stated the State does have a waiver, it is called a variance. A variance from the state is a waiver from the requirements of the WPA regulations. A variance does not waive any requirement of the local Ordinance.

Blasiak stated he was against including the waiver provision, because he believes it is not needed. The Commission can do anything they should be doing without the waiver. The waiver provision is an invitation to do wrong.

Haro stated the reasons to be opposed to the Waiver provision. The conditions for invoking a Waiver are open to interpretation by members of the Conservation Commission; e.g., “no reasonable conditions or alternatives;” “avoidance, minimization, mitigation have been employed to the maximum extent;” “overriding public interest;” “restriction of use of property to constitute a taking.” Some of these criteria may be outside the knowledge, expertise, or technical jurisdiction of members of a Conservation Commission. An uninformed or poorly trained Commission might invoke (or be persuaded to invoke) a Waiver unnecessarily. By not having a Waiver, applicants can technically be denied a permit due to Ordinance regulations, but can appeal the Commission’s decision issued under the local Ordinance to superior court of the county in which the property lies.



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Pollock stated a dissatisfied applicant can appeal the decision issued under the local Ordinance, and file as a civil action, in the trial court, typically the superior court of the county in which the property lies, but they can be filed in the Land Court as well. See MGL Ch. 249, § 4 and MGL Ch. 185, § 1. An appeal under the WPA must be filed with the MassDEP. MassDEP will process the appeal, issuing a Superseding Order of Conditions or Determination of Applicability. This decision may in turn be appealed to an administrative magistrate in the form of a request for an adjudicatory hearing. A variance from the state is a waiver from the requirements of the WPA regulations. A variance does not waive any requirements from the local Ordinance. A Commission cannot grant a variance. Variances (310 CMR 10.05(10)) may be granted only by the commissioner of MassDEP, and only when:

- There are no reasonable alternatives;
- Mitigation is adequate;
- The variance is necessary, either to accommodate an overriding community, regional, state, or national public interest or to prevent a regulatory “taking.”

Mosher inquired who pays for the appeal process.

Haro responded the applicant is responsible for paying all fees associated with the appeal process.

Question 5: Comparing the current section 195-2 B(4) with the new section 195-2A. d., the Commission has removed the current (4)(b) language, and removed the intention clause. Please explain your thoughts and intentions in making that change. (Submitted by David Singer, A&O Com Chair)

Haro stated under the Section 195-2.B(4) Wetlands Crossings, the following (4)(b) verbiage was removed: “*Adjacent property, which would have provided dry access to the uplands, has not been sold off or built on by the current or previous owner; and.*” The Commission considered the (4)(b) language to be implied in revised Section 195-2A.d.i. The intention clause (in italics) is identical to that in the original Bylaw and was not removed. The Commission does need to define what is meant of the intention clause.

Singer stated that in the 2001 local Bylaw, there were clauses that states the intention. In the current ordinance those sentences are in italics. Singer inquired whether the sentences in italics have weight.

Letourneau stated the sentences in italics are clarification points.

Mosher stated that he recalls the sentences in italics are supposed to be rationale for each Ordinance section and do not have legal weight.



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Blasiak stated Section (4)(b) is an example of how a law quickly becomes absurd. The Commission makes decisions based on various factors, including the property's site characteristics. Section (4)(b) verbiage causes the Commission to make decisions based on the property's title history, not property's site characteristics. For example, there could be two identical properties requesting a permit for a wetland crossing. The Commission could approve the wetland crossing for one of the properties for meeting all the site characteristics among other factors, but the other property would be prohibited based on who had previously owned the property.

Blasiak stated there are practical problems to determine whether the applicant could have dry access to the uplands on the original property and adjacent. While the applicant is able to determine whether there is dry access to the upland on the original property, the applicant would have practical problems to determine whether there is dry access to the divided property lot. The only way the applicant could determine whether there is dry access to the upland located on the adjacent property is by conducting an engineering study on the adjacent property, which would require the applicant to request permission to enter and perform study on the property. The applicant who is able to establish dry land access from the original property is able to change the property's title to a new person, because then the previous owner did not have dry land access more than the new person. So the original property owner would not have dry land access, but whomever the original property owner deeds the property to will be able to have dry land access. This is an example of the reasons why the Ordinance needed to be revised. Blasiak stated that he understands the purpose of Section (4)(b) – to keep property owners from subdividing their land, hence requiring multiple culverts. A better way to address this issue is to include it in the Subdivision Regulations.

Question 6: Comparing the current section 195-2 B (5) with the new 195-2 A e, the Commission has changed the standards needed to replicate, and has removed the intention clause. Please explain your thoughts and intentions in making that change. Also, please explain how the new section 195-2 A e may be implemented as compared to the current section. (Submitted by David Singer, A&O Com Chair)

Haro stated the first sentence of the 2001 bylaw is strongly worded, suggesting replication will not be allowed, but the second sentence states that replication can be allowed under some circumstances. The Commission sought to clarify this contradiction. We opted to include MACC Model bylaw verbiage in this section because it explicitly stated that replication could be allowed, but only under specific conditions, and what specifically is required for replication. However the revised Ordinance does not specify under what conditions replication could be allowed. The 2001 bylaw states that replication will be allowed "only where the landowner will be deprived of substantially all economic use of the property, there are no reasonable alternatives, and the wetland area to be lost is minimized to the greatest extent possible," but the Commission thought that these criteria were somewhat subjective, and possibly out of the purview (i.e., economics) of the Commission. The verbiage to specify under what conditions replication could be allowed



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could be strengthened and made more specific. Alternatively, replication could not be allowed, period. These are ways to rectify the section. Again, the Commission sought to clarify the replication section, though it did not specify what additional conditions under the local Ordinance should be required. Specifying additional conditions may be something the Commission and/or A&O Com should consider including.

Blasiak stated he agrees that removing the economics aspect was a good decision, because economics become subjective.

Blasiak stated the draft Ordinance currently does not include what specific conditions under replication should be required, and this should be added.

Blasiak stated the following verbiage could be used to clarify when a replication could be allowed. "Replication shall only be allowed when a preponderance of evidence demonstrates to the satisfaction of the Conservation Commission that the hydrological and ecological value of the replicated wetland would be greater than that of the wetland to be replaced. Estimation of wetland value shall be based upon the guidelines for wetland replication as described in the 2002 'Massachusetts Inland Wetland Replication Guidelines,' Commonwealth of Massachusetts Guidance No. BRP/DWM/WetG02-2." (source: <http://www.mass.gov/eea/docs/dep/water/laws/i-thru-z/replicat.pdf>)

Blasiak stated this verbiage would allow the Commission to have an objective determination of what would be lost, and what would be gained. The Commission would receive a listing of these components. The verbiage would preserve the spirit of what replication would be held in terms of a standard; that whatever the applicant produce as a replicated wetland would have to exceed what was removed as a wetland.

Mosher inquired what size ratio would the replicated wetland need to be increased

Blasiak responded that size is only one function and value of increasing the hydrological and ecological value.

Mosher inquired what is Haro's thoughts regarding Blasiak's statements

Haro stated that before the Commission evaluates a replication plan, the Commission considers alterations in the project design by the applicant in an attempt to avoid and minimize wetland impacts. Replacement of lost wetland functions through replication is only considered by the Commission for unavoidable losses that cannot be further reduced by redesign of the project.

Haro stated he believes Blasiak's response is within the jurisdiction of the Conservation Commission which is to protect the interests of the wetland resources. For projects that the Commission consider replication warranted, Blasiak is suggesting including additional conditions



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that require the hydrological and ecological value of the replicated wetland would be greater than that of the wetland to be replaced. Blasiak is not necessarily saying the size would have to be greater, but the hydrological and ecological value of the replicated wetland would have to be greater than before. For example, there is a poorly degraded wetland which receives stormwater runoff and sediment from an adjacent roadway. The applicant wants to replicate that existing wetland which would improve the water quality and wildlife habitat but it would not necessarily increase the area size of the wetland. This would be acceptable criteria of increasing the hydrological and ecological value of the replicated wetland. This is something the Commission can judge as a board because the Commission knows what constitutes a viable wetland. The Commission may want to seek additional assistance from a wetland scientist in determining the viability of the proposed replication. Haro stated that he believes Blasiak wants to use a standard the Commission can judge.

Singer stated that replication of wetlands was the biggest struggle for the A&O Com and residents to understand during A&O Com's recent public hearing. Replication is mandated by the WPA. There was a feeling among the residents and A&O Com that if you are a property owner with a small lot, your project would become stuck. Singer stated he would like to see Blasiak's verbiage as part of the Commission's response. Singer stated during the recent A&O Com public hearing, Singer was waiting for the Commission to discuss the balance between protecting wetlands and working with property owners with small lots. Singer stated the A&O Com may not agree with everything the Commission states, but he likes that replication of wetlands is measured by the increase the hydrological and ecological value, and not just the increase of area size.

Mosher stated WPA regulations require that replication areas be designed at a 1:1 replacement to impact ratio after avoidance and minimization efforts are complete. Blasiak is suggesting that in addition to the 1:1 ratio that the applicant is required to increase the hydrological and ecological value.

Question 7: How does the new section 195-2 A e work in conjunction with new paragraph 195-7 G? Are both set of criteria/standards needed for replication? (Submitted by David Singer, A&O Com Chair)

Haro stated verbiage is nearly identical in both sections, so it is somewhat of duplication. The MACC Model Bylaw/Ordinance refers to replication in its section on Permits and Conditions; the Commission felt some mention of replication should be made in this section as well. Both sections could be rewritten; for example with the section Jurisdiction stating that the Commission will limit (or prohibit) replication (and under what circumstances), while the Permitting Conditions section could define what would be required should replication be allowed.

In 195-7G, is this the appropriate place for language about posting a bond to be added? (Submitted by David Singer, A&O Com Chair)



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Haro stated Bonds are currently mentioned only in 195-10. A. Some mention of a Bond could also be put in 195-7.G., but there may be other circumstances (i.e., restoration, enforcement orders) where a Bond may also be chosen to be issued. Haro stated the Commission would need to research further and also may need legal consultation

Question 8: The Waiver under current 195-4 H. and under new 195-7 D is the same. Can you provide an example of circumstances when this waiver might be used by the Commission? (Submitted by David Singer, A&O Com Chair)

Haro stated technically, the Waiver could be invoked under any of the conditions specified (“no reasonable conditions or alternatives;” “avoidance, minimization, mitigation have been employed to the maximum extent;” “overriding public interest;” “restriction of use of property to constitute a taking.”)

Haro stated there may be other circumstances that the Waiver could be used.

Pollock stated she will look for examples the Commission has previously invoked the Waiver provision.

Mosher stated that every time an applicant proposes a project that impacts a wetland, the Commission must ask the applicant to perform an alternative analysis in determination of whether the design may be changed so it does not impact the wetland in mention.

Blasiak stated that though he is not in favor of the waiver, he does want to find a way to allow an educational walking path within the 25-foot No Disturb Zone located at the town’s community farm. This is an example when the Waiver would give the Commission flexibility to allow a worthy project, but so far, he has not been able to figure how to allow the walking path without invoking the waiver.

Blasiak stated the Waiver provision is only dangerous in the hands of a Commission without integrity. If you have a Commission without integrity, you will have a lot more problems beyond the Waiver provision. One of the Commission’s biggest responsibilities is to ensure that all special conditions are satisfactorily met and all work completed is in compliance with the WPA and local Ordinance. Not all Commissions follow-up to ensure all special conditions are met and the project work completed is in compliance of the WPA and local Ordinance. So a town can have the strictest local Ordinance, but if the Commission is not doing their job properly, then the strict local Ordinance will not be enforced. It really comes down to the quality of the Commission. If the Commission is composed of members with integrity, good judgment and experience, then the waiver would not be problematic, and should be considered as a Commission tool.



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DeHoyos stated all projects the Commission reviews are also reviewed by MassDEP. The Commission has a good track record with MassDEP.

Question 9: Under the new Ordinance you have added language in 195-14. Can you please explain what this section means and why it was added? (Submitted by David Singer, A&O Com Chair)

Haro stated Section 195-14 was compiled from verbiage in the MACC Model Bylaw; specifically Section XIV. Relation to the Wetlands Protection Act (1st paragraph of 195-14 in revised Ordinance) and the Notes section, Item #6 (2nd paragraph of 195-14 in revised Ordinance). The Commission felt it was important to have a section explaining the relationship between the Ordinance and the WPA, which is not explicitly done in the 2001 Bylaws.

Letourneau stated that this was done so the lay person could understand the relationship between the local Ordinance and the WPA.

Question 10: In general, why did you take out the intentions clauses from the current Ordinance and place them outside the new ordinance provisions and thus render the language useless for enforcement purposes? (Submitted by David Singer, A&O Com Chair)

Haro stated the intentions clauses (assuming meaning text in italics) are only included in the Jurisdiction section. Most of these clauses are nearly identical to those of the 2001 Bylaw; however, in the 2001 bylaw, the statement “In general, the Commission shall not permit replication of wetlands because replication does not in fact substitute for many wetlands values” was removed from the intentions clause (in italics). This was done because it again suggested a contradiction (see response to #2, above; “shall not permit replication” vs. “replication shall be permitted only”). This and other sections can be reviewed to identify areas where provisions may have been compromised by delegation of text to the intentions clauses.

Note: Sections 195-2.B.6&.7 of the 2001 Bylaw have been moved to other sections.

Haro stated the Commission wanted to avoid any contradictory statements

Mosher stated the intention clauses were always meant to be clarifications and opinions. Mosher stated as he recalls the Commission wanted to make the Ordinance revisions clear enough so the Commission could remove all intention clauses.

Question 11: Could you clarify the role of MACC? What is this group? Why did you chose to rely on a model law written by MACC? (Submitted by Karen Shapiro Miller, Town Council member)



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Haro stated per the MACC website ([www.maccweb.org](http://www.maccweb.org)): “MACC is a private, non-profit 501(c)(3) organization incorporated in the Commonwealth of Massachusetts. Since 1961, MACC has created and disseminated critical education materials describing commissioner’s duties and outlining methods to help attain commission’s goals. MACC builds support for community conservation by working with agencies, legislators, the courts, nonprofits and corporate partners. MACC advocates for strong, science-based laws, regulations and policies, assists agencies in outreach efforts and serves as mentor for other conservation groups.”

MACC is funded largely from dues from its membership (which includes members of Conservation Commissions), grants and contributions, and educational programs. The MACC Model Bylaw/Ordinance has been adopted by numerous MA cities and towns.

Singer inquired whether MACC is a lobbyist group that is influenced by groups that have self interested agendas or is MACC an organization whose sole purpose is to help Conservation Commissions.

Haro stated that it is to his understanding MACC is a neutral 501 non-profit organization. MACC has an outstanding reputation amongst the state regulators and MassDEP officials. Commissions value MACC’s legal opinions. They do receive funding from private entities, such as environmental consulting firms, vendors for equipment that might be used in the field. Haro stated that it is to his understanding that no one at MACC actively lobbies state legislation.

Mosher stated MACC provides annual training for Conservation Commissions.

Question 12: My understanding is that there actually is no waiver in the state wetlands law. There are exceptions for emergency situations, but no waiver. So, if a town can only strengthen a state law, but not weaken it, how is our town able to legally put in a waiver that allows an exception to the law when the state itself does not provide for an exception to the law? (Submitted by Karen Shapiro Miller, Town Council member)

Haro stated the Commission assumes that having the Waiver (as written) is technically legal, based on the fact that the MACC model includes it. The Commission is not sure how modifying the Waiver might result in some legal complications. Theoretically, if there is a conflict in a Commission decision with respect to the WPA, MassDEP should step in.

Pollock stated the state does offer a waiver under the WPA. It is called a variance, which can only waive requirements of the WPA regulations. A variance does not waive any requirement of the local Ordinance. A Commission cannot grant a variance. Variances (310 CMR 10.05(10)) may be granted only by the commissioner of MassDEP, and only when:

- There are no reasonable alternatives;
- Mitigation is adequate;



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- The variance is necessary, either to accommodate an overriding community, regional, state, or national public interest or to prevent a regulatory “taking.”

Pollock stated the waiver under the local Ordinance is only applicable to the local Ordinance, and not the WPA.

Pollock stated MassDEP may assert jurisdiction over a case without anyone requesting it to do so for only matters under the WPA. This can occur when MassDEP, in reviewing the Order of Conditions, finds that an obvious procedural mistake has been made, that necessary information was not submitted, that the Order of Conditions improperly permits activities (e.g., filling of more than 5,000 square feet of Bordering Vegetated Wetland by a nondiscretionary project), or that the Order of Conditions inadequately protects one or more of the eight statutory interests.

Question 13: If it is somehow legal to have this waiver, and the conservation commission chooses to recommend keeping it, would it be possible to change the language, to be much more specific about when waivers are allowed? Is it possible to allow a waiver only for ecological reasons, or to benefit the public good (being more specific about the language, of course)? Is there a downside to doing that? (Submitted by Karen Shapiro Miller, Town Council member)

Haro stated the language could potentially be made more specific as to under what circumstances a Waiver might be invoked, and to what degree certain activities might be allowed. There are many different types of cases where a Waiver could be invoked, however, and language would need to be as specific and comprehensive as possible. The downside might be that not all foreseeable circumstances could be addressed in the language; under these scenarios where a decision cannot be made, deference to MassDEP (Superseding Order of Conditions) should be stated.

Haro stated similar to the replication provision, the waiver provision may need to be tighten up. As earlier discussed, there are a number of examples that may merit the waiver provision.

Blasiak restated he views the waiver as a safeguard, not a loophole.

Blasiak stated it is useful to have for unexpected situations

Letourneau stated when the waiver provision was approved in 2008; the provision was vetted through a review process including legal review and approval from the Attorney General’s Office.

Haro stated the waiver provision came directly out of the MACC Model Bylaw/Ordinance, which presumably was vetted through MACC legal review.

Haro stated the waiver provision could be revised so it is more specific.



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Question 14: If the Conservation Commission chooses not to have a waiver, and thus cannot permit a particular land use, we discussed that the landowner has the option of going to the state to get a waiver. If a landowner can apply for a waiver from the state, and get the waiver that way, then why is it really necessary for the town to have a waiver also? (Submitted by Karen Shapiro Miller, Town Council member)

Haro stated there are other reasons than to protect against a possible lawsuit? Technically, under this scenario, a Waiver would not be needed. Having the Waiver would avoid this step and resultant complications/delays, and also potentially facilitate a decision for smaller projects or applicants unwilling or unable to deal directly with MassDEP. How much oversight MassDEP would have (or undertake) under these more minor projects is unknown; smaller projects permitted under a Waiver may not receive significant attention from MassDEP.

Pollock stated an applicant can only request a variance under the WPA, and not for matters under the local Ordinance. The only way a dissatisfied applicant can appeal the Commission's decision issued under the local Ordinance, is to file a civil action, in the trial court, typically the superior court of the county in which the property lies, but can be filed in the Land Court as well. MassDEP is only authorized to take action under the WPA, not the local Ordinance.

Mosher stated the town also has the option to exercise home rule authority.

DeHoyos stated the state does not recognize the 25-foot No Disturb Zone

Question 15: Why should the ordinance allow wetland mitigation/replacement as a strategy when it so rarely works? Is there a better option? (Submitted by Karen Shapiro Miller, Town Council member)

Haro stated if there is truly no alternative, replication is the only option to preserve a net amount of wetland resource area. It is not frequently an effective method, and prone to failure, but has been successful in a few cases. Success rate is often site-specific (i.e. base hydrology favorable to replication), and post-replication monitoring needs to be conducted for several years before being deemed successful. Mandating replication at higher ratios (2:1 or greater) may be viewed as a method to offset the low success rate. Restoration (reconstructing a degraded wetland in situ) tends to be more effective than replication.

Blasiak stated as defined by the state, wetland mitigation involves reducing the impacts to wetland resources through a three-step process often referred to as "sequencing":

1. Avoidance of wetland impacts;
2. Minimizing necessary impacts as much as possible; and
3. Replicating losses that cannot be avoided.



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Blasiak stated the WPA regulations require the issuing authority (Conservation Commission) to consider “sequencing” in the review of wetland impacts associated with Limited Projects (310 CMR 10.53(3)(a-s)). The WPA regulations allow the issuing authority to consider, on a case by case basis, the relevance and propriety of “sequencing” for projects that propose to alter less than 5000 square feet of BVW under 310 CMR 10.55 (4) (b).

Blasiak stated that since the WPA regulations require Conservation Commission to consider replication, the town can not ban replication of wetlands in the local Ordinance. The Conservation Commission does have the authorization to impose specific conditions when approving a replication. Section 310 CMR 10.55 (4)(b) of the WPA regulations states, in part, that the Order of Conditions may include “any additional, specific conditions the issuing authority deems necessary to ensure that the replacement area will function in a manner similar to the area that will be lost.” Examples of additional requirements that Conservation Commissions can impose include vegetation goals, specific approaches to planting or soil translocation, and completion of the replication site before any project work begins.

Because the state allows replication, the Commission cannot deny a project if they meet all performance standards. As stated above, the Commission does have the authority to issue additional, specific conditions in part of the issued Order of Conditions.

Devlin stated people who attended the A&O Com public hearing were concerned with replication, and its low success rate. Some people thought of replications as a loophole.

Haro responded it is a fair concern. There are often low success rate. The Commission wants to avoid replication plans at all costs. The current Commission has not dealt with a replication project, but only has dealt with a restoration in situ project. The Commission is very cautious with replication plans.

Haro stated the state allow replication, the Commission cannot ban replication in the local Ordinance. The Commission does have the authority to issue additional, specific conditions in part of the issued Order of Conditions.

DeHoyos stated applicants that come before the Commission want to avoid replication projects, because it cost a lot of money and requires on-going monitoring.

Blasiak stated that a lot of the failed examples are often in strip mining sites found in the mid-west. Blasiak handed Singer a copy of “Pennsylvania Wetland Replacement Project Monitoring Report, Summer 2000” (website: <https://www.dep.state.pa.us/dep/deputate/watermgt/wc/Subjects/WWEC/general/wetlands/WetReplacFd-2000.htm>) This document presents several replication projects that are deemed successful. As earlier discussed, the Commission would require specific conditions to ensure the project would increase its hydrological and ecological value.



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Miller stated there must be best practices that are used for replication projects. As earlier discussed, the success rate relates to the hydrology of the site. If the site characteristics are suitable for a wetland, then a replication would likely be successful.

Mosher stated best management practices (BMPs) are used for replication projects. The project is managed throughout the project, from when the construction period starts to when the monitoring period ends. Management and monitoring are key components for achieving a successful project.

Blasiak stated wetlands do not occur in isolation. Wetlands are just one feature within a landscape. The entire landscape contributes to each wetland. If the wetland is separated from its landscape, you have destroyed it. You cannot replicate “the wetland,” you may only replicate “a wetland.” You will not get the exact features and characteristics of what the wetland was before, as it would depend on the landscape features situated around the wetland. This is why replicated wetlands should be measured for its hydrological and ecological value, and not necessarily its size. Successful replications with increased hydrological and ecological value are often projects that expand into existing pristine wetlands.

Singer stated tonight has been very helpful for him to understand replicated wetlands among other topics.

Singer stated the A&O Com will likely hold two more events before presenting the draft ordinance to the full Town Council. If there any substantial changes made, the A&O Com will need to hold a public hearing.

Singer stated the Commission should consider having the draft ready for Town Council prior to the upcoming elections.

Singer stated he hopes and expects the Commission to come to the A&O Com meeting regarding the draft Ordinance.

Singer, Miller, Ronhave, and Devlin each thanked the Commission for their hard work on the draft Ordinance.

Project Monitoring:

Enforcement Updates/Possible Violations:

Correspondence:



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Site Visit Scheduling:

Next Meeting:

7:00 PM on Tuesday, April 22, 2014, at the Greenfield Department of Planning and Development; 114 Main Street

Adjournment:

**MOTION: Moved by Blasiak, seconded by DeHoyos, no further discussion and voted 5-0-0 to adjourn the meeting at 9:24 PM.**

Respectfully Submitted,

Maureen Pollock  
Assistant Planner & Conservation Agent

Alex Haro  
Chair