



# TOWN OF GROTON

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## WETLANDS BYLAW REVIEW COMMITTEE

David Black, Chair  
Steven Webber, Vice Chair  
Marshall Giguere, Secretary  
Peter Cunningham  
Robert Pine  
Scott Wilson  
Alexander Woodle

Meeting Date: September 19, 2012

Members in Attendance: David Black, Peter Cunningham, Marshall Giguere, Robert Pine, Steven Webber, Scott Wilson, Alexander Woodle

Others in Attendance: Craig Auman, Michelle Collette, Bruce Easom, Barbara Ganem, Eric Garger, John Goldrosen, Esq.

Handouts: List of Six Questions for Town Counsel  
August 15, 2012 minutes (draft)

Location: Town Hall, First Floor Meeting Room, 173 Main Street, Groton, MA 01450

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David Black called the meeting to order at 4:05 pm and asked committee members to review the minutes from their prior meeting on August 15. Robert Pine pointed out a correction for the sake of clarity regarding a proposed administrative process. John Goldrosen from Kopelman and Paige – the firm that serving as Groton's Town Counsel – was present to provide a presentation on legal aspects of the wetlands laws, bylaws and regulations. Attorney Goldrosen specializes in environmental matters for his firm.

*Peter Cunningham moved to accept the August 15, 2012 minutes as corrected. David Black seconded. Motion carried 7:0.*

Attorney Goldrosen reviewed past meeting minutes of the Committee, the Wetlands Protection Act and its associated regulations and the Bylaw and its associated regulations. In addition, the following set of six questions developed during the Committee's August 15<sup>th</sup> meeting was shared.

1. For activities that might occur in the buffer zone or the wetlands themselves such as invasives removal, trash removal, planting of native vegetation and pruning, what is required under the Wetlands Protection Act and what room might the Town of Groton have to allow certain activities via administrative measures? We would like to consider allowing such activities with notification to the agent rather than the more involved Request for Determination of Applicability (RDA) process.
2. Generally, the committee would like to hear from Town Counsel on the interactions that exist between home rule, the Wetlands Protection Act (WPA) and the local wetlands bylaw. We understand that we cannot weaken the WPA in any way.
3. Can a significant improvement of an existing resource be used as balancing mitigation as set against a portion of a project that creates an adverse impact? This would include such actions as the restoration of a degraded wetland or putting an area under permanent protection.
4. How can public good be identified in a manner that would allow the Town of Groton's Conservation Commission to act in an objective, defensible manner?
5. How might the principles presently used to evaluate a limited project under the WPA be applied to the operation of the local bylaw?
6. Could buffer zone activities be defined as permissible using the same approach as the WPA uses for activities that disturb a wetland resource?

Attorney Goldrosen began with a general suggestion that the Committee examine why the RDA process is perceived as onerous when it was designed to be used as an easier process than the Notice of Intent (NOI). He prepared comments to guide today's presentation that he will provide to the Committee for its reference. If one looks at the Massachusetts Department of Environmental Protection (DEP) regulations to the WPA (see 310 CMR 10.534 and also 310 CMR 10.533 Limited Projects) to the portion that describes a variety of activities subject to eased standards, then the removal of aquatic vegetation from the resource areas needs an order of conditions. Work in the buffer zone would need a determination of applicability. What makes the process cumbersome?

Robert Pine explained that an applicant must fill out the form with numerous copies (nine copies for the Conservation Commission) and another sent to DEP. Next, there will be a Saturday morning site walk from the Conservation Commission and then attend the hearing. This results in a process that takes twenty one days from the day it is filed with the Conservation Commission. Members of the Committee shared that they were keenly aware that some people do not follow the required process.

Attorney Goldrosen suggested that the Conservation Commission might cut out routine site visits of the entire membership. Instead, just send the conservation agent and the Conservation Commission can rely on her reports. Under the WPA, abutter notice is not required which might shorten the time period from application to decision. There is commonly a \$53 legal notice publication fee charged to pay for a notice in the newspapers. There is no filing fee per se.

Committee members described the Town of Weston administrative RDA process that issues a generic set of conditions to allow work in upland areas of buffer zone. Perhaps there could be conditions issued for certain types of activities such as removal of invasives or trail maintenance. Such an order would need to be owner specific. Perhaps that set of conditions could last for up to three years with an annual check in with the conservation agent. Typically, a wetlands permit (OOC) is almost always issued for a period of 3 years and it can be extended. The General Court issued two state-wide automatic blanket extensions recently. Conservation agent Barbara Ganem reports that annual, monthly, weekly monitoring of work under OOC is regularly done by either herself or an outside consultant if the project is likely to have serious impacts.

Peter Cunningham asked whether the Bylaw or the regulations should be changed first. Robert Pine suggested that the regulations be changed first. Attorney Goldrosen cautioned that there needs to be a clear delineation between a town using policies versus regulations. Any process that Groton intends to follow and apply should be promulgated as regulations.

Michelle Collette (Town Planner) asked Attorney Goldrosen about the NOI process that might be needed for the connections to sewer should the Lost Lake sewer project pass. There are 341 properties. Could the Town act as applicant (excepting wetlands crossings) as a way to remove a burden from subject property owners? The physical connection would probably be undertaken by a licensed drain layer. David Black asked if applicants would have to be present at a hearing. Attorney Goldrosen did not foresee a problem with it so long as all owners endorse the effort. A comment was made that an order of conditions is a way of imposing best practices.

Peter Cunningham stated that it looked like certified notices were mailed to abutters for RDAs. Attorney Goldrosen agreed that this is a typical practice. If a requirement is in the regulations or the Bylaw, then it can be changed if needed. Conservation agent notes that the abutter notification is never required under a RDA - only a legal notice in the newspaper; however, this could be better defined in the regulations. David Black suggested that the applicant can volunteer to accept a certain list of conditions. Marshall Giguere commented that conditions are imposed on a case by case basis after the Commission's review, assuming an NOI is not required. The Conservation Commission strives to keep conditions few and simple in a Determination of Applicability if a project does not rise to the level of a NOI. Marshall Giguere noted that DEP *requires* that conditions be few and simple; otherwise, an RDA is required.

The DEP might issue a superseding order of conditions if it disagrees with the Town of Groton. Attorney Goldrosen stated that the appeal procedures are different. [Note: if the Conservation Commission bases its denial on WPA grounds only, the appeal goes to DEP. If the Conservation Commission bases its denial on Bylaw grounds only, the appeal goes to Superior Court. If the Conservation Commission bases its denial on dual grounds of WPA and Bylaw, then appeal goes to Superior Court first and afterwards to DEP.] Attorney Goldrosen provided the hypothetical of a denial based on a bylaw provision echoes the WPA. In that instance, it would be proper for the appeal to go directly to DEP. If the Bylaw is more stringent than the WPA, then an appeal goes to Superior Court as stated in the Bylaw.

Town of Groton purposes are different in the areas of recreation versus agriculture. The Conservation Agent notes that recreation and agricultural interests are protected under the Bylaw. By contrast, the WPA offers broad exemptions for agriculture and these are duplicated in the Bylaw which is silent on agricultural practices.

Courts have not yet said that localities can have differing procedures. For example, continuances must be done with the permission of the applicant because a Conservation Commission cannot extend the hearing through a continuance or extension to avoid blocking applicant's right to appeal to DEP. To sum up, Attorney Goldrosen concluded that standards can be different but do not let the processes diverge.

For question number three, the answer is yes. Offsetting on site is the first choice and offsetting off site is the second choice. What about the form that mitigation takes? Attorney Goldrosen cited a case where the DEP was looking at square footage rather than the form of mitigation. Marshall Giguere added the Conservation Commission would expect same elevation and same resource for proposed wetlands replications. The Bylaw asks for a 3:1 ratio rather than a 1:1 ratio. This uneven ratio provides an added measure of protection for the resources since it can be difficult to gauge the adequacy and efficacy of a wetlands replication effort. The Conservation Commission's experience with smaller than 3:1 ratios or the replication for small areas is that they are apt to fail.

For question number four, Attorney Goldrosen asked for the original intent behind the public good provision. Might that encompass Town projects or a private developer proposing affordable housing?

Steven Webber left the meeting at 4:55 p.m.

Attorney Goldrosen stated that in this instance the Bylaw is more stringent than the WPA and he is uncomfortable with an exception that is not for an environmental reason. The group discussed the condition that such intrusions would be limited to projects where there was no technical or feasible alternative. Attorney Goldrosen noted that this condition is not in this section. The DEP Commissioner can issue a variance on behalf of an overriding public interest. Does a public good exception get challenged because it is not rationally related to the purposes of the WPA and the Bylaw?

Attorney Goldrosen continued with the suggestion that the Committee might look at 310 CMR 10.53(3)(a) - (s) for "Limited Projects" and perhaps put public good projects there. Also, there may be a stronger case to be made on behalf of public utilities rather than a more general public good. Scott Wilson followed up with Attorney Goldrosen on this point noting that the Conservation Commission has authority but this determination may go beyond its area of expertise. Peter Cunningham suggested that the Master Plan helps define areas of public good.

Marshall Giguere reminded that the preservation of the resource and buffer zone is also a public good. This Bylaw asks the Conservation Commission to balance public good for a government identified purpose and the public good of preserving wetlands.

Attorney Goldrosen asked whether the one hundred foot no build zone has been a problem. Meeting attendee Eric Garger spoke up and commented. Garger explained that he lives at the Lake and it is not always clear if you need a permit such as for weed removal or putting sand in a swimming area. In practice, many of his fellow Lake residents undertake such activities without a permit all the time. There are a few exempt minor activities such as pruning trees off the ground as opposed to clear cutting at ground level. David Black answered that the Committee is trying to sort these issues out and cannot give a definitive answer to many of these questions now.

Attorney Goldrosen was asked whether in any particular application, the Board of Selectmen and the Planning Board might submit a letter or note that creates a presumption of public good. Craig Auman commented that the final wording of the Bylaw and regulations should not suggest to any applicant that they are exempt. Attorney Goldrosen suggested that elements of question number five (WPA limited projects language) can be applied to address question number four (Bylaw's public good provision). Note that the Town could not act to weaken the WPA by broadening the list of limited projects. Attorney Goldrosen pointed to 310 CMR 10.02 and noted that exemption or lesser requirements might be possible for 'unpaved walkways'. Regarding previously disturbed areas, Attorney Goldrosen stated that the WPA does not focus on the present state of a buffer zone with the exception of riverfront areas. Look at 310 CMR 10.58(5) -- redevelopment within previously developed riverfront areas.

Appeals to Superior Court are made based on the Conservation Commission record whereas appeals to DEP are considered a new instance with no particular deference shown to prior decision rendered by a Conservation Commission. With this information in mind, Attorney Goldrosen recommends that Conservation Commissions write out its decision with reasons and suggest further that abutters submit written statements. Peer review is generally suggested and there may be an implication that Conservation Commissions can require peer review.

Attorney Goldrosen directed attention to the Bylaw Chapter 215-7(a) (Presumptions) and the regulations at 344-22 (Security). For disturbance of the buffer zone, does Groton allow permanent disturbance in the outer fifty feet? Yes. Conservation agent Barbara Ganem notes that the standard is not applied for existing houses, but a permanent disturbance in the outer fifty feet for new structures is generally not permitted without some form of mitigation. And for the inner fifty feet? A limited disturbance with no structures.

Attorney Goldrosen questioned the section on performance standards of subdivision roadways (amended March 28, 2006). For Ch. 344-19 Subsection G. Riverfront area protection it is possible that the Bylaw is less stringent than the WPA. There was brief discussion of security and bonding – surety bonds, statutory exceptions, cash security, etc. The use of bonding cash as a surety drew an admonition of caution from Attorney Goldrosen. Generally, the Town of Groton should avoid language that results in a taking.

Scott Wilson left the meeting at 5:45 p.m.

Conservation restrictions are becoming more stringent due to IRS tax implications and place an extra burden of enforcement on the Commission. The end result for the Town is that the Department of Conservation and Recreation (DCR) might not approve a particular conservation restriction. For example, Attorney Goldrosen said that sometimes small area conservation restrictions are not approved. Marshall Giguere pointed out that DCR once accepted a 12 foot by 75 foot conservation restriction on Lost Lake, jokingly referred to as a vertical turtle highway.

Storm water exceptions at Ch. 344-14 C. list several things that are not exempt but they are written to look like they might be exemptions. Rain gardens and swales are viewed as storm water structures by WPA regulations.

Attorney Goldrosen then looked at recording requirements. Under the WPA, the order of conditions is recorded. The Conservation Commission may record the Order if the applicant fails to do so. Attorney Goldrosen questioned the purpose of recording Enforcement Orders or a notice of violation (Ch.344-23 Enforcement. A) Possible purposes include the intent to inform future homeowners or prevent a sale? If it is the latter, then this is problematic purpose. Closing attorneys do not necessarily tell home buyers about orders of conditions. In one court case, a new homeowner was not told by its counsel about an order of conditions that required \$250,000 to implement/follow. The court dismissed suit against attorney for negligence. An order of conditions should not affect the title. There is a cause of action known as slander of title aimed at addressing groundless criticisms that improperly cloud the title. For the Conservation Commission, it is the Enforcement Order that is of particular concern as this is a unilateral order. A revocation for outstanding fines is an unusual condition, but acceptable in Attorney Goldrosen's opinion. However, using an applicant's prior history as grounds for denial (see regulations) is problematic on paper.

Next meeting set for Wednesday, October 24, 2012 at 4 p.m.

Eric Garger commented that this proposed start time is early for typical working people. Peter Cunningham responded that a future public hearing designed to elicit public comment and share information with the public will be scheduled for a more convenient time – perhaps during the evening.

*Peter Cunningham moved to adjourn the meeting at 6:07 pm. Marshall Giguere seconded. Motion carried 5:0 (Steven Webber and Scott Wilson both absent).*

Notes by Fran Stanley.