



WPA Form 1- Request for Determination of Applicability

Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

A. General Information

Important:

When filling out forms on the computer, use only the tab key to move your cursor - do not use the return key.



1. Applicant:

John J. Gormally

Name

gormally@comcast.net

E-Mail Address

11 Powers Drive

Mailing Address

Wilbraham

City/Town

MA

State

01095

Zip Code

(413) 537-4241

Phone Number

Fax Number (if applicable)

2. Representative (if any):

Firm

Contact Name

E-Mail Address

Mailing Address

City/Town

State

Zip Code

Phone Number

Fax Number (if applicable)

B. Determinations

1. I request the South Hadley Conservation Cmm. make the following determination(s). Check any that apply:
Conservation Commission

- a. whether the **area** depicted on plan(s) and/or map(s) referenced below is an area subject to jurisdiction of the Wetlands Protection Act.
- b. whether the **boundaries** of resource area(s) depicted on plan(s) and/or map(s) referenced below are accurately delineated.
- c. whether the **work** depicted on plan(s) referenced below is subject to the Wetlands Protection Act.
- d. whether the area and/or work depicted on plan(s) referenced below is subject to the jurisdiction of any **municipal wetlands ordinance** or **bylaw** of:

Town of South Hadley

Name of Municipality

- e. whether the following **scope of alternatives** is adequate for work in the Riverfront Area as depicted on referenced plan(s).



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C. Project Description

1. a. Project Location (use maps and plans to identify the location of the area subject to this request):

Corner of Alvard St and Stonegate Drive

South Hadley

Street Address

City/Town

0042-0067-000 LOT 4 (BOOK/PG 06053/0082)

0042-0067-000 LOT 4

Assessors Map/Plat Number

Parcel/Lot Number

- b. Area Description (use additional paper, if necessary):

This RDA seeks to determine whether this existing town-approved building lot would be subject to the town's amended wetland bylaw. As the Commission may be aware, when the town approved the original bylaw they grandfathered existing NOIs, Order of Conditions, as well as existing, duly approved, "subdivisions" presumably as to not constitute a taking and to treat landowners who went through the town's subdivision approval process with fairness. I was present at that meeting when the bylaw was passed. The building envelope envisioned for this lot will be approximately 10' to 15' (feet) inside the area your bylaw seeks to regulate. I am hoping the Commission will agree that the lot is exempt from this bylaw or, in the alternative, that the commission will grant a waiver to allow for construction of a single family home pursuant to the approvals provided by the town in 1987 for the Stonegate Subdivision and duly recorded thereafter.

- c. Plan and/or Map Reference(s):

<hr/>	<hr/>
Title	Date
<hr/>	<hr/>
Title	Date
<hr/>	<hr/>
Title	Date

2. a. Work Description (use additional paper and/or provide plan(s) of work, if necessary):



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C. Project Description (cont.)

- b. Identify provisions of the Wetlands Protection Act or regulations which may exempt the applicant from having to file a Notice of Intent for all or part of the described work (use additional paper, if necessary).
3. a. If this application is a Request for Determination of Scope of Alternatives for work in the Riverfront Area, indicate the one classification below that best describes the project.
- Single family house on a lot recorded on or before 8/1/96
 - Single family house on a lot recorded after 8/1/96
 - Expansion of an existing structure on a lot recorded after 8/1/96
 - Project, other than a single-family house or public project, where the applicant owned the lot before 8/7/96
 - New agriculture or aquaculture project
 - Public project where funds were appropriated prior to 8/7/96
 - Project on a lot shown on an approved, definitive subdivision plan where there is a recorded deed restriction limiting total alteration of the Riverfront Area for the entire subdivision
 - Residential subdivision; institutional, industrial, or commercial project
 - Municipal project
 - District, county, state, or federal government project
 - Project required to evaluate off-site alternatives in more than one municipality in an Environmental Impact Report under MEPA or in an alternatives analysis pursuant to an application for a 404 permit from the U.S. Army Corps of Engineers or 401 Water Quality Certification from the Department of Environmental Protection.
- b. Provide evidence (e.g., record of date subdivision lot was recorded) supporting the classification above (use additional paper and/or attach appropriate documents, if necessary.)



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D. Signatures and Submittal Requirements

I hereby certify under the penalties of perjury that the foregoing Request for Determination of Applicability and accompanying plans, documents, and supporting data are true and complete to the best of my knowledge.

I further certify that the property owner, if different from the applicant, and the appropriate DEP Regional Office were sent a complete copy of this Request (including all appropriate documentation) simultaneously with the submittal of this Request to the Conservation Commission.

Failure by the applicant to send copies in a timely manner may result in dismissal of the Request for Determination of Applicability.

Name and address of the property owner:

John J. Gormally

Name

11 Powers Drive

Mailing Address

Wilbraham

City/Town

MA

State

01095

Zip Code

Signatures:

I also understand that notification of this Request will be placed in a local newspaper at my expense in accordance with Section 10.05(3)(b)(1) of the Wetlands Protection Act regulations.

Signature of Applicant

7/30/21

Date

Signature of Representative (if any)

Date

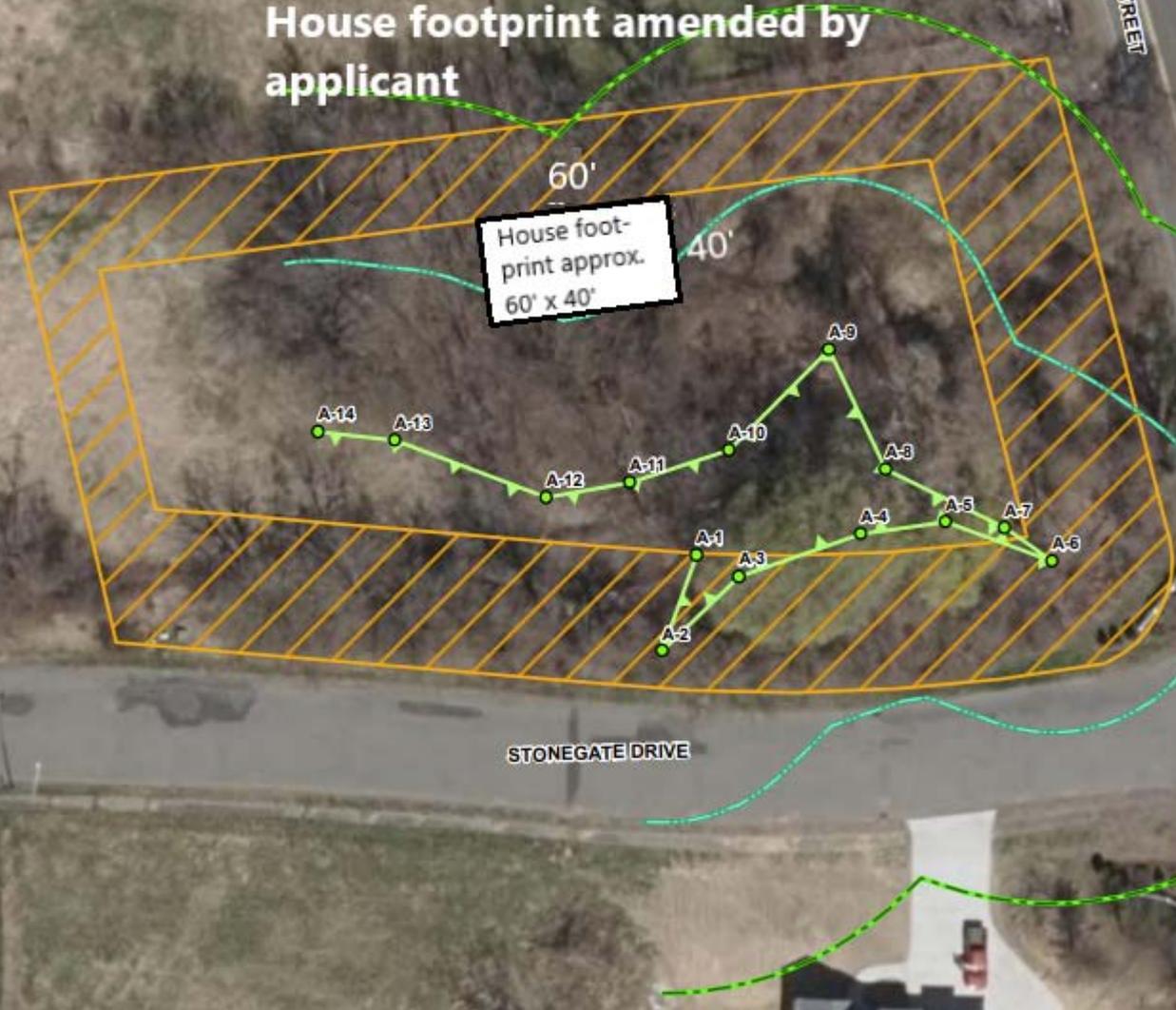
LEGEND

- Wetland Flag
- Wetland Boundary
- 50' Buffer
- 100' Buffer
- POTENTIAL BUILDING LAYOUT
- Setback



House footprint amended by applicant

House footprint approx. 60' x 40'



Service Layer Credits: Massachusetts 2019 USGS Color Ortho Imagery. Data acquired from MassGIS.

UNLESS SPECIFICALLY STATED BY WRITTEN AGREEMENT, THIS DRAWING IS THE SOLE PROPERTY OF GZA GEOENVIRONMENTAL, INC. (GZA). THE INFORMATION SHOWN ON THE DRAWING IS SOLELY FOR THE USE BY GZA'S CLIENT OR THE CLIENT'S DESIGNATED REPRESENTATIVE FOR THE SPECIFIC PROJECT AND LOCATION IDENTIFIED ON THE DRAWING. THE DRAWING SHALL NOT BE TRANSFERRED, REUSED, COPIED, OR ALTERED IN ANY MANNER FOR USE AT ANY OTHER LOCATION OR FOR ANY OTHER PURPOSE WITHOUT THE PRIOR WRITTEN CONSENT OF GZA. ANY TRANSFER, REUSE, OR MODIFICATION TO THE DRAWING BY THE CLIENT OR OTHERS WITHOUT THE PRIOR WRITTEN EXPRESS CONSENT OF GZA, WILL BE AT THE USER'S SOLE RISK AND WITHOUT ANY RISK OR LIABILITY TO GZA.



LOT 1 SAN SOUCHI DRIVE
SOUTH HADLEY, MA

PREPARED BY:
 GZA GeoEnvironmental, Inc.
Engineers and Scientists
www.gza.com

PREPARED FOR:
STEVE MCCRAY
55 ALVORD STREET
SOUTH HADLEY, MA

ESTIMATED CONSTRAINTS MAP

PROJ MGR. DMN	REVIEWED BY. SLL	CHECKED BY. DMN	FIGURE
DESIGNED BY. JRC	DRAWN BY. JRC	SCALE. 1 in = 50 ft	1
DATE. 07/02/2021	PROJECT NO. 15.P000067.22	REVISION NO.	

FIGURE
1

RDA Narrative, Lot 1, Stonegate

1 message

John Gormally <gormally@comcast.net>
To: Anne Capra <acapra@southhadleyma.gov>
Cc: mark.stinson@state.ma.us, gormally@comcast.net

Mon, Aug 30, 2021 at 9:57 AM

Dear Ms. Capra:

You requested that I provide you a narrative regarding the RDA I submitted for Lot 1, San Souci Estates, (Stonegate). The lot in question was approved by the Town of South Hadley on December 8th, 1987. I have attached a copy of the cover page of the approved Sub Division Plan that was endorsed by the South Hadley Planning Board which clearly shows the lot in question (Lot 1); see "Exhibit A", attached. The subdivision and lot in question were approved prior to the town's new by-law.

I understand you may have questions regarding a deed restriction dated December 10, 1987 which, on its face, appears to restrict development of lots within the subdivision that are within 100 feet of a wetland; see "Exhibit B", attached. This matter has been fully litigated and the "restriction" in question rendered moot by both the DEP and the courts. I have attached a copy of that decision for your reference. That restriction merely memorialized the Commission's desire at the time of approval that showed a number of lots containing building envelopes within the 100 buffer zone, and that grantee file the necessary application for Commission approval to construct a home. The commission requested a deed restriction regarding those lots within the buffer zone to apply for an Order of Conditions pursuant to the Wetlands Protection Act. The restriction requested by the Commission states the following: "The restrictions proposed for lots including "buffer zones" mean that any alterations within the 100-foot buffer zone as proposed by any grantee, said grantee must file an Abbreviated Notice of Intent. No Notice of Intent (Form 3) will be accepted as the Conditions and the restrictive covenants clearly specify that there shall be no alterations of wetlands within the wetland boundaries. The abbreviated Notice of Intent is used when alterations of the buffer zone only is proposed." A copy of the Conservation request to require a NOI to be filed is attached; see "Exhibit C", attached. Further, the Commission approved construction of a house on Lot 1 on June 23, 1988, some six months after the "restrictive covenant" was recorded; see "Exhibit D", attached. The intent of the Commission was to prohibit any alterations of wetlands per the order of conditions it issued for the subdivision in June 1988. I do not plan in any way to alter the wetlands on this property, and any development will show a plan that protects the wetland resource area in question pursuant to the state's Wetlands Protection Act.

With the information I have provided above and attachments contained herein, I respectfully request the Commission acknowledge that the lot in question (Lot 1) is not subject to the town's conservation bylaw that prohibits construction within 50 feet of a wetland.

Regards,

John Gormally

3 attachments

 **Superior Court Decision Affecting Lots.pdf**
336K

 **RDA Attachments.pdf**
280K

 **RDA submission applicaiton.pdf**
292K

1" Exhibit A

THIS SUBDIVISION PLAN IS SUBJECT TO THE FOLLOWING CONDITIONS:

1. Applicant shall be responsible for the protection of the subdivision plan and shall be liable for the cost of any and all damages to the same.
2. Applicant is authorized to use the subdivision plan for the purpose of obtaining a building permit for the subdivision.
3. Applicant shall be responsible for the protection of the subdivision plan and shall be liable for the cost of any and all damages to the same.
4. Applicant shall be responsible for the protection of the subdivision plan and shall be liable for the cost of any and all damages to the same.
5. Applicant shall be responsible for the protection of the subdivision plan and shall be liable for the cost of any and all damages to the same.
6. Applicant shall be responsible for the protection of the subdivision plan and shall be liable for the cost of any and all damages to the same.
7. Applicant shall be responsible for the protection of the subdivision plan and shall be liable for the cost of any and all damages to the same.
8. Applicant shall be responsible for the protection of the subdivision plan and shall be liable for the cost of any and all damages to the same.
9. Applicant shall be responsible for the protection of the subdivision plan and shall be liable for the cost of any and all damages to the same.
10. Applicant shall be responsible for the protection of the subdivision plan and shall be liable for the cost of any and all damages to the same.

The applicant shall be liable for the protection of the subdivision plan and shall be liable for the cost of any and all damages to the same.

0229817
 RESERVED FOR REGISTER USE ONLY

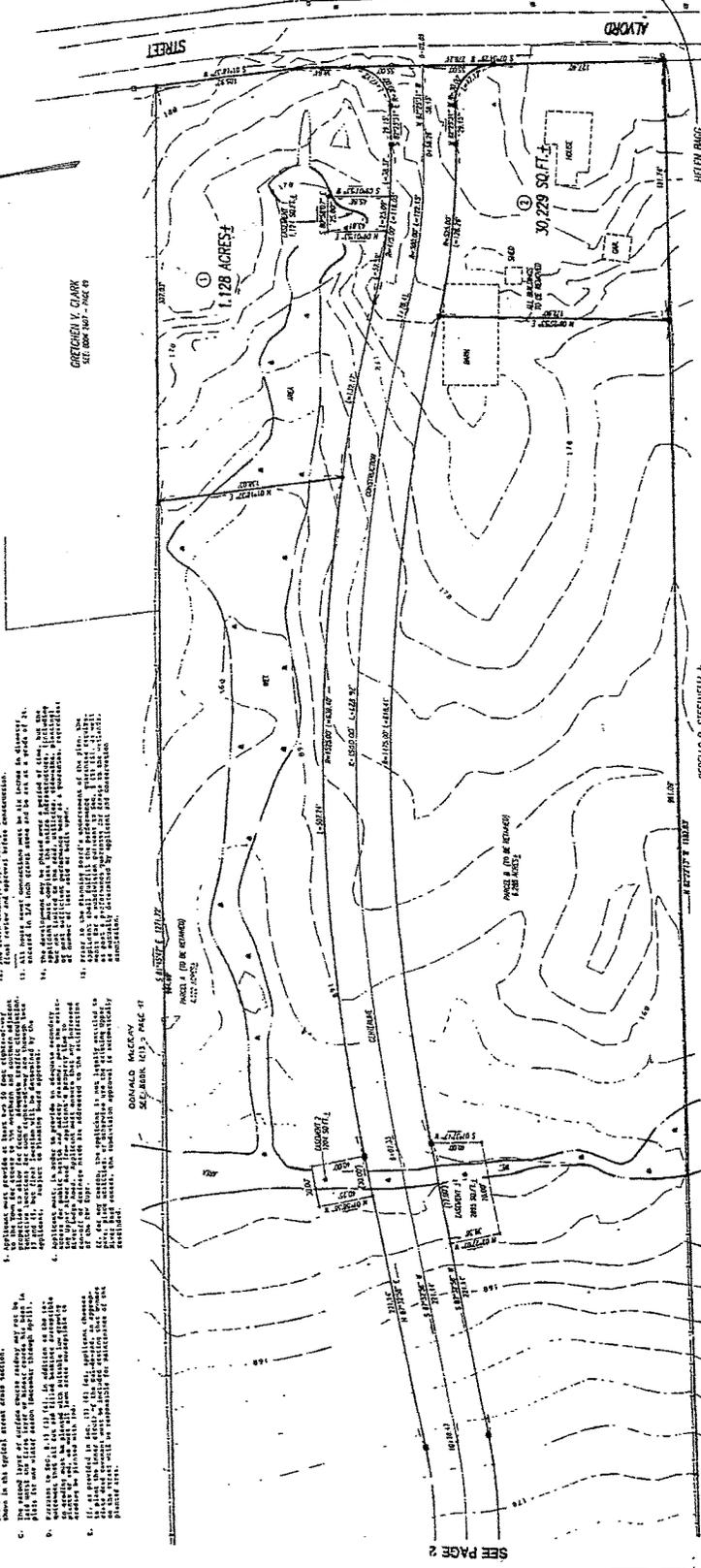
FOR THE RECORD SEE PAGE 114 - PAGE 1
 PLANNING 113 - PAGE 58
 94,054 ACRES TOTAL

LEGEND

- 1. 100' WIDE ROAD
- 2. 50' WIDE ROAD
- 3. 25' WIDE ROAD
- 4. UNIMPROVED ROAD
- 5. DRAINAGE
- 6. 10' WIDE DRIVE
- 7. 5' WIDE DRIVE

DATE OF SUBDIVISION PLAN APPROVAL:
 11/13/1987

APPROVED BY:
 [Signatures]



REGISTERED PROFESSIONAL ENGINEER
 SOUTH HADLEY, MASSACHUSETTS
 PREPARED FOR
STEPHEN M. REILLY & JOSEPH TURKEL
 1100 WASHINGTON STREET, SUITE 200
 NORTHAMPTON, MASS.

REGISTERED PROFESSIONAL ENGINEER
 SOUTH HADLEY, MASSACHUSETTS
 PREPARED FOR
ALMER HURKLEY, JR. & ASSOCIATES, INC.
 SURVEYORS - ENGINEERS - PLANNERS
 1100 WASHINGTON STREET, SUITE 200
 NORTHAMPTON, MASS.

REILLY & MACHONJAN INC.
 1100 WASHINGTON STREET, SUITE 200
 NORTHAMPTON, MASS.

GRAPHIC SCALE 1" = 40'

SEE PAGE 2

"Exhibit B"

3103 0326

029852

RESTRICTION & COVENANT

We, STEPHEN M. REILLY and JOSEPH J. TUREK, JR. both of Springfield, owners of land shown on a Plan entitled "Definitive Subdivision of Land in South Hadley, Massachusetts, prepared for Stephen M. Reilly and Joseph Turek, August 26, 1987, Almer Huntley, Jr. & Associates, Inc.", hereby impose the following restriction on Lots 1, 2, 5, 6, 18, 19, 20, 21, 22, 23, 24, 25, 28, 51, 52, 53 and 65:

1. No structure may be erected within 100 feet of wetlands located on said lots.
2. No dredging, filling or disturbance or alteration of wetlands or wetland boundaries shall ever be performed other than those authorized in Order of Condition issued by the South Hadley Conservation Commission, DEQE File 288-72.
3. This restriction and covenant shall run in perpetuity with the title of the Lot affected by the particular wetland area
4. This Restriction and Covenant is for the benefit of the public as represented presently by the Massachusetts Department of Environmental Quality Engineering and may be altered or amended only by said Department or its successors.

R.B. 151 P. 27-34

Witness our hands and seals this 10th day of DECEMBER, 1987.

Stephen M. Reilly

 STEPHEN M. REILLY
Joseph J. Turek, Jr.

 JOSEPH J. TUREK, JR.

COMMONWEALTH OF MASSACHUSETTS

Hampden , ss

Then personally appeared the above named STEPHEN M. REILLY and JOSEPH J. TUREK, JR. and acknowledged the foregoing to be their free act and deed before me

Thomas D. Murphy, Jr.

 THOMAS D. MURPHY, JR., Notary Public
 My commission expires 11/12/88

Hampshire ss. Dec. 11 1987 at 10 o'clock and 23 minutes M. Rec'd. ent'd and exam'd with Hampshire Reg. of Deeds. book 3103 page 326

Attest _____

"Exhibit C" =

949



Town of South Hadley

CONSERVATION COMMISSION

June 2, 1988

Paul M. Kalill, Esq.
135 State Street
Springfield, MA 01103

all pages

Re: San Souci Estates;
DEQE File# 288-72

Dear Mr. Kalill:

As per our telephone discussion on June 2, 1988, I have enclosed a proposed deed restriction in accordance with Condition number 20 for the above-referenced project.

For each lot mentioned in Condition number 20, I trust that the Commission will receive a copy of each deed with the adequate restrictions, as approved by the Commission, as they are recorded in the Hampshire County Registry of Deeds.

Please be advised that although property may be transferred at any time, no construction can begin until all wetlands replication areas have begun succession (Condition number 17) and the roadway has been completed in accordance with Rich Perlot's construction-time plan once approved by the Commission.

Furthermore, I cannot issue an amended Order of Conditions until the next meeting of the Commission (June 14, 1988) as they must be signed by a majority of the Commission.

The restrictions proposed for lots including "buffer zones" mean that any alterations within the 100-foot buffer zone as proposed by any grantee, said grantee must file an Abbreviated Notice of Intent. No Notice of Intent (Form 3) will be accepted as the Conditions and the restrictive covenants clearly specify that there shall be no alterations of wetlands within the wetland boundaries. The Abbreviated Notice of Intent is used when alterations of the buffer zone only is proposed.

I am looking forward to communicating with you to fulfill project compliance in an expeditious manner. If you have any questions, please contact me.

Sincerely,

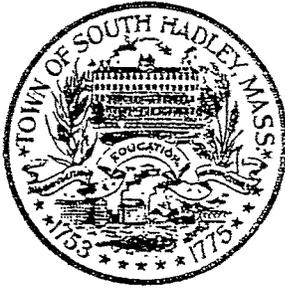
Stephen W. Niec
Stephen W. Niec
Conservation Officer

Enclosure: Proposed Restrictive Covenant - June 2, 1988

lis: This was written by Paul Kalill on June 2, 1988.

"Exhibit D"

512



Town of South Hadley

CONSERVATION COMMISSION

June 23, 1988

Pierre Van Belle
Building Inspector
Town Hall
South Hadley, MA .01075

Re: Lot #s 1 and 2; Alvord St.

Dear Pierre:

At the meeting of the South Hadley Conservation Commission [Commission] held on June 21, 1988, the Commission voted to allow the construction of two single-family homes on the above-referenced lots.

Therefore, the Commission concurs with the release of building permits for said two lots if you so permit.

Thank you for your cooperation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen W. Niec".

Stephen W. Niec
Conservation Officer
Agent, S.H.C.C.

Enclosure: Amended Order of Conditions; 288-72
Condition number 30.(f) - June 21, 1988

Wolfe v. Gormally, No

Opinion

NO. 02-3554H

September 4, 2003

Search All Caselaw on Casetext. Get red flags, copy-with-cite, case summaries and more.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS PURSUANT TO [MASS.R.CIV.P. 12\(b\)\(1\)](#) and (6)

PAUL E. TROY, Justice of the Superior

Background

In 1987, the South Hadley Planning Board ("SHPB") approved a subdivision plan for an area of land in South Hadley that is now named the Stonegate Estates ("Stonegate"). The plan included 80 numbered lots and two large parcels, identified as Parcel A "TO BE RETAINED" and Parcel B "TO BE RETAINED." The plan was properly recorded at the Hampshire Registry of Deeds on December 11, 1987. Under the language of the subdivision plan, development was subject to three conditions imposed by the SHPB relevant to wetlands protection ("subdivision plan conditions"). These three conditions were as follows:

The original applicant group who proposed the development was called the South Hadley Group and the subdivision project was then named the San Souci Estates.

2. Applicant must conform to all Order of Conditions set forth by the Conservation Commission.

4. Applicant must also place appropriate use restriction covenants in deeds for lots in the wetland buffer zones. ("subdivision plan condition 4")

7. There must be no disruption of any natural drainage systems (except as permitted by Conservation Commission Order of Conditions). In addition, applicant shall not cause any increased run-off or drainage to flow onto any adjacent property.

The same day that the subdivision plan was recorded, the original applicants, pursuant to subdivision plan condition 4, filed a document containing four restrictive covenants regarding wetland protection to which they intended to be bound. The document stated that the covenants were imposed on lots 1,2,5,6,18-25,28,51-53 and 65 of the subdivision but did not state that the restrictions would apply to or affect development of Parcel A or Parcel B in any way. One of the covenants stated: "No structure may be erected within 100 feet of the wetlands located on said lots." This document was recorded at the Hampshire Registry of Deeds, book 3103, page 0326.

Following the subdivision plan's approval, the South Hadley Conservation Commission (SHCC) issued an order of conditions ("1988 order of conditions") which governed all development work affecting wetlands in the subdivision. The order was once amended and recorded in 1988. No appeal was taken following the issuance of the order. This order contained the following relevant conditions ("1988 conditions"):

Greenbelts (existing trees and vegetation) should not be clear-cut to provide more land for development or a better view, within the resource area and buffer zone.

No road salt shall be used at any time, present or future, within the project area.

Lot numbers 1,2,5,6,8,19-24,28,51-53, and 65 shall have restrictive covenants protecting wetlands in perpetuity, running within the land; and the Conservation Commission/ Officer shall receive a copy(s) of the deeds specifying said restrictive covenants.

24. This order shall apply to all successors or assigned in interest or control of the subject property.

At no time, present or future, is there to be any disturbance or alteration, direct or indirect, within the wetland system boundary other than those proposed on the submitted site plans or stated elsewhere in these Orders of Conditions.

The development work on the subdivision was subsequently completed. On February 10, 1993, the SHCC issued a certificate of compliance which stated that the development work regulated by the 1988 order of conditions has been satisfactorily completed in accordance with the requirements of the order. The certificate did not include any language designed to extend the 1988 conditions into the future. The section of the certificate in which the SHCC would have properly designated any conditions that it wished to survive the completion of development was left blank. The certificate was recorded on February 23, 1993.

This section of the certificate of compliance stated: "The following conditions of the Order shall continue: Set forth any conditions continued in the Final Order, such as maintenance or monitoring, which are to continue for a longer period." The section was left blank and it included a box which was left unchecked.

Defendant, John J. Gormally (Gormally) is the current owner of 13 lots (lot numbers 1,2,5,6,19,20-23 and 51-54) within Stonegate. He also owns two additional parcels, Parcel A and Parcel B, consisting of approximately nine acres within Stonegate, which he plans to subdivide into seven new building lots. Parcel A and Parcel B were conveyed to Gormally by the previous owner, Shirley Hallberg, on October 27, 2000 for a total consideration of \$90,000.

In January, 2001, Gormally submitted to the Massachusetts Department of Environmental Protection (Department) seven notices of intent, one for each lot within Parcels A and B which he wished to develop, describing how the proposed development work would potentially affect neighboring wetlands. On April 23, 2001, a number of residents of Stonegate, entered a request with the SHCC asking the Commission to issue an amended certificate of compliance continuing the 1988 conditions so that they could be enforced against Gormally. These residents asserted that it had been the SHCC's and the original applicant's intent that the conditions apply to the land in perpetuity and that it was only by mistake that the SHCC had omitted reference to the 1988 conditions in the 1993 certificate of compliance. The residents also requested that the SHCC enforce the subdivision plan conditions against Gormally which had been imposed by the SHPB. Both requests were denied by the SHCC on July 16, 2001.

The SHCC subsequently issued seven new orders of conditions allowing construction on each of the seven proposed lots within Parcel A and Parcel B ("2001 orders of conditions"). On October 9, 2002, the residents sought superceding orders of conditions from the Department, pursuant to [310 Code Mass. Regs. 10.05\(6\)](#). In its superceding orders of conditions, the Department affirmed the SHCC's 2001 orders of conditions and approved construction on each of the seven lots.

The plaintiffs, sixty one individuals who own lots in the Stonegate subdivision ("plaintiffs"), then sought appellate review of the superceding orders of conditions before a Department of Environmental Protection administrative law judge. The plaintiffs requested that: 1) the certificate of compliance issued by the SHCC be amended to include the 1988 conditions; and 2) the subdivision plan conditions imposed by the SHPB be enforced against Gormally. The Department judge (Travis, J.) dismissed the plaintiffs' action for failure to state a claim and made final the superceding orders of conditions. In doing so, the Department judge stated that the Department's authority to act is limited to that which is necessary to ensure the protection of wetland resource areas. The judge ruled that no showing had been made that inclusion of 1988 conditions, or the enforcement of the subdivision plan conditions was necessary in order to ensure that the seven superceding orders of conditions comply with the Wetlands Protection Act, [G. L. c. 131, § 40](#) and wetland regulations under 310 Code Mass. Regs., and that the relief requested was therefore not within the Department's authority to grant. On July 15, 2002, The Commissioner of the Department, Lauren A. Liss, issued a "final decision" adopting the decision of the Department judge.

The plaintiffs have filed a complaint with the Superior Court naming as defendants, Gormally, the Department, the Town of South Hadley, and the SHCC. The complaint requests that, through the vehicle of declaratory judgment, the court make the following declarations of rights:

A Conservation Commission has the legal authority to correct a mistake by amending a Certificate of Compliance to reinstating permanent conditions included in an original Order of Conditions.

The South Hadley Conservation Commission has the legal authority to amend the Certificate of Compliance for the Original Stonegate Subdivision Order of Conditions, DEP file Number 288-072.

The South Hadley Conservation Commission has the Legal authority to amend the Certificate of Compliance for the original Stonegate Subdivision Order of Conditions, DEP File Number 288-072 to list Conditions numbered 18-20, 24 25 in said Order of Conditions as "Ongoing Conditions" in Section B of the Certificate of Compliance.

A Conservation Commission has the legal authority to enforce subdivision plan conditions concerning wetlands, under the authority of [310 Code Mass. Regs. 10.06\(j\)](#), which states: "Failure to comply with conditions stated in the Order and with all related statutes and other regulatory measures shall be deemed cause to revoke or modify the Order of Conditions."

In their complaint, the plaintiffs mistakenly cite [310 Code Mass. Regs. 10.06\(j\)](#) for this language, however, the court recognizes the plaintiffs' clear intention to cite [310 Code Mass. Regs. 10.05\(6\)\(j\)](#) as authority.

The South Hadley Conservation Commission has the legal authority to enforce subdivision conditions concerning wetlands that are expressly stated on the Stonegate Subdivision Plan.

The DEP has jurisdiction over plaintiffs' adjudicatory administrative appeal.

Public Policy requires that a Conservation Commission, DEP, or both must be able to amend or rescind either an Order of Conditions or a Certificate of Compliance where a mistake is discovered, in order to protect the interests enumerated by the wetlands act and regulations in areas subject to protection. [G.L. c. 131, 40](#); [310 Code Mass. Regs. 10.01\(2\)](#), 10.02(1).

The plaintiffs also request that the court "reverse or remand the adjudicatory decision of the Department of Environmental Protection which is the subject of this appeal." Defendants, Gormally and the Department each filed motions to dismiss, asserting both [Mass.R.Civ.P. 12\(b\)\(6\)](#) and 12(b)(1) objections. The court will consider the plaintiffs' requests and the motions to dismiss filed by these two defendants.

Discussion Plaintiffs' Requests for Declarations I, II, III, and VII

Relief in the form of declaratory judgment is not granted by the court as a matter of right; rather it is granted where appropriate, as a matter of judicial discretion. [Hogan v. Hogan](#), [320 Mass. 658, 663](#) (1947). In order for the court to

consider the plaintiffs' requests for declaratory judgment, it must be satisfied that an actual controversy exists and that a declaration of rights with regard to that controversy will remove the uncertainty underlying the dispute. [G.L. c. 231A, § 2](#); [Enos v. Secretary of Executive Office of Environmental Affairs, 48 Mass. App. Ct. 239](#) (1999); [Carlton Hotel v. Abrams, 322 Mass. 201, 202](#) (1948). If it does not appear that the relief sought will terminate an existing controversy between the parties, the court should not grant declaratory relief. [Brown v. Neelon, 335 Mass. 357, 360](#) (1957). An actual controversy is a real dispute caused by the combination of one party's assertion of a legal relation, status, or right in which he has a definite interest and another party's denial of that assertion, where both parties have a definite interest in the dispute and where the matter, if not adjudicated, will almost immediately and inevitably lead to litigation. [District Attorney for Suffolk Dist. v. Watson, 381 Mass. 648](#) (1980).

As explained above, the plaintiffs have exhausted every available avenue of administrative review in their attempt to challenge the 2001 orders of conditions, issued by the SHCC, allowing Gormally to develop the land in question. In doing so, the plaintiffs have sought to impose the 1988 conditions on the new development project proposed by Gormally. The plaintiffs now, through requests for declarations I, II, III, and VII, seek to amend the language of the 1993 certificate of compliance to include the 1988 conditions. The plaintiffs allege that it was the intent of the both the SHCC and the original applicants to include the 1988 conditions within the certificate so that the conditions would apply to the land in perpetuity and burden any future development.

The administrative scheme of relief available to a plaintiff seeking to challenge an order of conditions is detailed with succinct clarity in [Wilczewski v. Commissioner of Department of Environmental Quality Engineering, 404 Mass. 787](#) (1989). The Wetlands Protection Act, [G.L. c. 131, § 40](#), provides that no person may interfere with wetlands without filing a notice of intention to do so with the local conservation commission. The statute structures a system of review by the commission and DEQE (now known as the Department of Environmental Protection) designed to promote protection of the following interests: the public and private water supply, the groundwater supply, flood control, storm damage prevention, prevention of pollution, protection of land containing shellfish, protection of wildlife habitat and fisheries. The Legislature empowered the commissioner of DEQE to promulgate rules and regulations to effectuate the purposes of the act. Under those regulations, after the local commission receives a notice of intent, it has twenty-one days to hold a public hearing. [310 Code Mass. Regs. § 10.05\(5\)](#). The commission then has twenty-one days in which to determine whether the project proposed is "significant to one or more of the interests" described in the statute, and issue an order of conditions to insure that the project complies with performance standards set out in the wetlands regulations. [310 Code Mass. Regs. § 10.05 \(6\)](#).

After the commission issues an order of conditions conditioning or prohibiting the work, [G.L. c. 131, § 40](#), Thirteenth par., and [310 Code Mass. Regs. § 10.05\(7\)\(a\)](#), specify various parties who may request that DEQE issue an order of conditions which supersedes the prior order of the commission. DEQE must then conduct an informal meeting, including an on-site inspection, at which all parties may present "any information necessary or useful to a proper and complete review of the proposed activity." [310 Code Mass. Regs. § 10.05\(7\)\(i\)](#). DEQE may then issue a superseding order of conditions. At this point, the same parties who were entitled to request a superseding order "whether or not previously a participant in the proceedings," may request an adjudicatory hearing. [310 Code Mass. Regs. § 10.05\(7\) \(j\)](#). Once DEQE has issued its final order following an adjudicatory hearing, the administrative process is exhausted and any person

still aggrieved by the agency's final order is then entitled to judicial review under [G.L. c. 30A, § 14](#). [Wilczewski v. Commissioner of Department of Environmental Quality Engineering, 404 Mass. 787, 791-792](#) (1989).

In order to assert their case, the plaintiffs ask the court to invent a new procedure, not provided for within 310 Code Mass. Regs. Although [310 Code Mass. Regs. § 10.05](#) includes detailed review processes for parties aggrieved by other administrative actions taken by a conservation commission, such as an order of conditions or variance, [310 Code Mass. Regs. § 10.05](#) establishes no review process for parties seeking to appeal the language or issuance of a certificate of compliance. [310 Code Mass. Regs. § 10.05\(1\)](#), (9), (10).

The court will not create a novel regulatory review process where the Department has not seen fit to establish one. First, the court lacks the power to do so. The court has no authority to promulgate rules and regulations to effectuate the purposes of the Wetlands Protection Act where the Legislature has specifically empowered the Commissioner of the Department with the ability to do so. [G.L. c. 131, § 40](#), 40A. The plaintiffs point to no provision of [G.L. c. 131, § 40](#), applicable regulations, or G.L. c. 231A which grants the court the authority to create such relief.

Second, the court sees the invention of such a procedural step as unnecessary. A developer whose proposed project affects wetlands is required to seek an order of conditions from a local conservation commission before commencing development. If a developer who has received a certificate of compliance from a conservation commission which fails to specify that any conditions will continue, and thereby releases the developer from the terms of a prior order of conditions, wishes to re-initiate development, he must again apply to that same commission, detailing the potential effects of his proposed development. The commission, at that point, may issue a new order of conditions restricting development with whatever restrictive conditions are deemed necessary to insure that the project complies with performance standards set out in the wetlands regulations. The commission may, if it deems appropriate, include the prior conditions which were placed on the land under the prior order of conditions and removed when they were omitted from the certificate of compliance. Therefore, even where a conservation commission intended to include the conditions within a certificate of compliance but mistakenly omitted them, the commission could easily remedy the problem by simply reinstating the conditions in a new order of conditions. The SHCC has refused to take this step because it does not believe that reinstatement of 1988 conditions is necessary to insure that Gormally's proposed developments comply with relevant wetlands regulations.

Even if the court were to create the review process that the plaintiffs request, it is unlikely that the plaintiffs' appeal would be successful. "If the final order [of conditions] contains conditions which continue past the completion of work . . . The certificate [of compliance] shall specify which, if any of such conditions shall continue. The certificate shall also specify to what portions of the work it applies, if it does not apply to all the work regulated by the order." [310 Code Mass. Regs. § 10.05\(9\)\(e\)](#). Since no conditions

were specified by the SHCC in the 1993 certificate of compliance, the 1988 conditions were rendered inapplicable.

The plaintiffs' argument that the 1988 conditions were mistakenly omitted from the certificate of compliance lacks merit. The SHCC has already refused the plaintiffs' request to amend the certificate of compliance to include the 1988 conditions, and refused to include the conditions in its 2001 order of conditions. The Department has upheld the SHCC's decision that the conditions are no longer necessary and declined to include them in its superceding order of conditions.

Anne Hazzard, Conservation Officer for the town of South Hadley, filed an affidavit, dated June 7, 1994 stating that the Certificate of Compliance recorded at the Hampshire County Registry of Deeds on February 23, 1993, Document 4295, was intended to release both the original order of conditions, recorded at the Hampshire Registry of Deeds on June 29, 1988, Book 3199, Page 242, and the instrument as amended which was recorded at the Hampshire Registry of Deeds on June 29, 1988, Book 3199, Page 250.

For the above reasons, the court refuses to create any novel process by which the plaintiffs may seek to amend or rescind the language of the 1993 certificate of compliance. Further, the plaintiffs have exhausted all avenues of administrative review in their attempt to appeal the 2001 order of conditions. Since the plaintiffs may not seek administrative review of either the 1993 certificate of compliance or 2001 order of conditions, no actual controversy exists with respect to plaintiffs' requests for declaratory relief numbered I, II, III, and VII. A motion to dismiss for lack of subject matter jurisdiction, pursuant to [Mass.R.Civ.P. 12\(b\)\(1\)](#), should be granted where a plaintiff fails to allege facts showing an actual controversy entitling them to a declaratory judgment. [Bonan v. City of Boston](#), [398 Mass. 315, 318](#) (1986). The court therefore grants the defendants' motion pursuant to [Mass.R.Civ.P. 12\(b\)\(1\)](#) with regard to the plaintiffs' requests for declarations I, II, III, and VII.

Plaintiffs' Requests for Declarations IV and VI

Even if the court were to grant the declaratory relief sought by the plaintiffs through requests IV and VI, this would not, in any way affect their substantive rights as abutters to Gormally's proposed development project. The plaintiffs' questions with regard to administrative authority and jurisdiction are moot with regard to the dispute between the parties. The plaintiffs are not entitled to review of either the 1988 order of conditions or 1993 certificate of compliance. Thus, the plaintiffs' requests, if granted, would not further the resolution of any actual controversy . The court therefore lacks subject matter jurisdiction to grant the declaratory relief that the plaintiffs' seek and must grant the defendants' motion pursuant to [Mass.R.Civ.P. 12\(b\)\(1\)](#) with regard to the plaintiffs' requests for declarations IV, and VI.

An appeal of an order of conditions must be sought, but was not sought by the plaintiffs, within 10 days of the issuance of the order. [310 Code Mass. Regs. § 10.05\(7\)\(b\)](#).

Plaintiffs' Request for Declaration V

The plaintiffs request that the court declare that the SHCC has the legal authority to enforce the subdivision plan conditions issued by the SHPB. It is unclear how, if at all, Gormally's proposed development will violate any of three subdivision plan conditions imposed by the SHPB. Since the plaintiffs have failed to demonstrate that any actual controversy which will almost immediately and inevitably lead to litigation exists with regard to request for declaration V, the court lacks the subject matter jurisdiction to consider the request.

As stated above, the subdivision plan conditions imposed by the SHPB were as follows.

2. Applicant must conform to all Order of Conditions set forth by the Conservation Commission.

4. Applicant must also place appropriate use restriction covenants in deeds for lots in the wetland buffer zones.

7. There must be no disruption of any natural drainage systems (except as permitted by Conservation Commission Order of Conditions). In addition, applicant shall not cause any increased run-off or drainage to flow onto any adjacent property.

There is no indication that Gormally will violate condition 2 by failing to comply with the 2001 order of conditions. There is no allegation that the proposed development will violate condition 7 by causing any increased run-off or drainage to flow onto any adjacent property or by disrupting any natural drainage systems beyond what is permitted by under the 2001 order of conditions.

The plaintiffs seek to impose subdivision plan condition 4 against Gormally. In support of this end, the plaintiffs raise the following novel argument. [310 Code Mass. Regs. § 10.05\(6\)\(j\)](#) allows a conservation commission to revoke or modify an order of conditions if an applicant fails to comply with conditions stated in the order or with "all related statutes and other regulatory measures." Plaintiffs' claim that the subdivision plan conditions imposed by SHPB qualify as "related statutes and other regulatory measures" within the meaning of the regulation; therefore, violation of any of these conditions would allow the SHCC to revoke Gormally's 2001 order of conditions.

Plaintiffs' allege further that since subdivision plan condition 4 states that "appropriate use restriction covenants shall be placed in deeds for lots in the wetland buffer zones," and was intended to run in perpetuity, Gormally is restricted in his development of Parcels A and B by the restrictive covenants that were placed upon the original subdivision. Plaintiffs seek, specifically, to enforce the restrictive covenant that "no structure may be erected within 100 feet of the wetlands located on said lots."

The court need not declare the rights of the parties with respect to this issue because, as stated above, the document filed by the original applicants containing the restrictive covenants that the plaintiffs' seek to enforce did not apply to the land Gormally has proposed to develop. The "said lots" designated as restricted under the covenant

include only lots 1,2,5,6,18-25,28,51-53 and 65. Parcels A and B were not included within the language of covenant and are therefore not affected by its terms. The plaintiffs allege that inapplicability of this covenant to Parcels A and B may have been the result of mistake or fraud. Such assertions are speculative. The court will not interpret the covenant, which was drafted, filed, and recorded without objection in 1987, by anything other than its plain language. Therefore, no actual controversy exists with regard to plaintiffs' request for declaration V and the court grants the defendants' motion, pursuant to [Mass.R.Civ.P. 12\(b\)\(1\)](#) with respect to this request.

IV. Plaintiffs' Request for Judicial Review

The plaintiffs, without specifically invoking [G.L. c. 30A, § 14](#) as their avenue of appeal, request in their complaint that the court "reverse or remand the adjudicatory decision of the Department of Environmental Protection which is the subject of this appeal." In their appeal before a Department administrative law judge, the plaintiffs asserted two requests for relief: 1) that the 1993 certificate of compliance should be amended to include the 1988 conditions; and 2) that the subdivision plan conditions imposed by South Hadley Planning Board restricting development of the Stonegate Estates should be enforced against Gormally. Both requests were dismissed by the administrative law judge for failure to state a claim. The first request, with regard to amending the certificate of compliance, has already been discussed and the court will not disturb the Department's ruling with respect to this issue.

The administrative law judge dismissed the plaintiffs' second claim, that the subdivision plan conditions should apply to Gormally as the new owner, because the Department lacked authority to consider the issue presented. The judge stated:

"The Department's authority under the Act is limited to that which is necessary to ensure the protection of identified wetland resource areas. If the Department had thought that the conditions in the subdivision approval were necessary to ensure compliance with the Act and regulatory standards, it could have imposed them. But nothing requires it to do so. Nowhere does the petitioner suggest that the three [subdivision plan] conditions are necessary to ensure compliance with the Department's responsibilities under the Act. Accordingly, I dismiss [the issue] for failure to state a claim on which relief can be granted."

The court agrees with the Department judge's position that it is not within the Department's scope of authority to determine whether Gormally, as a successor developer, is bound by the restrictions agreed to by the original owners of the subdivided land under the SHPB issued subdivision plan. The Department is charged with determining whether administrative orders violate regulatory performance standards for wetland resource areas. Whether the burden of the subdivision plan conditions run with the land to affect Gormally is a matter of property law which may not be raised before the Department. As already determined by the court, this question is moot because there is no indication that Gormally's proposed development will violate any of the conditions which the plaintiffs seek to enforce. The Department administrative law judge's decision that the plaintiffs' appeal fails to state a claim on which relief may

be granted does not violate the rights of any party in any manner set forth under [G.L. c. 30A, § 14\(7\)](#) and is therefore affirmed.

Order

The court **ALLOWS** defendants' motion to dismiss, pursuant to [Mass.R.Civ.P. 12\(b\)\(1\)](#), with regard to each of plaintiffs' requests for declaratory relief and the decision of the Department is **AFFIRMED** .

Paul E. Troy Justice of the Superior