

**APPEAL REGARDING
CONSERVATION COMMISSION
PEER REVIEWS**

INTRODUCTION

This appeal results from the developer filing a totally new set of subdivision plans with the Department of Environmental Protection during an appeal to the DEP of the Conservation Commission's denial of their project, and asking the DEP to reverse the Commission's decision and approve those plans, all without providing a copy of those plans to the Commission for peer review, a public hearing, and comment to the DEP.

The developer now wants this Board to reject the peer reviewers selected by the Commission to review and comment upon those new plans at a public hearing.

ISSUE

In this Appeal Did the Developers Carry Their Burden to Prove that the Conservation Commission's Peer Reviewers Lack the Required Qualifications or Have a Conflict of Interest?

The Board is being asked to determine whether peer reviewers selected by the Commission should be disqualified. As to be discussed, pursuant to state law, this Board has a very limited jurisdiction with regard to this appeal and the only grounds for this appeal are the peer reviewers' lack of required qualifications or a conflict of interest. The developer has the burden to prove that to you. The developer cannot appeal the amount of the reviewers fees to this Board.

SUBDIVISION SEQUENCE

- Application to Planning Board
- Professional Engineer Daniel MacRitchie hired as peer reviewer for Planning Board – No objection by the D’Annolfos
- Town Counsel assists D’Annolfos’ attorney in determining what Town Board/Committee has control of Lot 17
- Town Counsel assists D’Annolfos’ attorney with phrasing of temporary Construction License over Lot 17 which was approved by Selectmen and School Committee with no cost to the D’Annolfos
- Planning Board approves subdivision (since revised by D’Annolfos in September 2018)
- Planning Board has not held a hearing on, and has not approved, the September, 2018 revised subdivision plan

HISTORY OF LITIGATION

- **Lawsuit #1**

2014:

- Application to Conservation Commission for wetlands delineation
- Conservation Commission hires LEC Environmental as peer reviewer – no objection by developer

August, 2015:

- Based upon LEC Environmental report Commission issues Order of Resource Delineation with Town's Wetlands Bylaw which is different from developer's delineation

October, 2015:

- D'Annolfos sue the Town of Andover and Conservation Commission in Superior Court requesting (1) rejection of LEC Environmental's delineation and accepting developer's delineation and (2) return of fees paid for Town's peer reviewers
- The Record Appendix of the Conservation Commission hearings which was filed with the Court by the Commission contains 1,063 pages

December 26, 2018:

- The Superior Court 24 page decision dismisses the case and in effect affirms LEC Environmental's wetlands delineation and with regard to the claim for reimbursement of peer review fees states:
"The court will dismiss without discussion so much of the amended complaint that asks the court to adjudicate the billing dispute between the parties."
- Thus, in the 24 page decision, the Court did not deem the D'Annolfos' claim regarding the fees worthy of discussion and dismissed the claim outright.

January, 2019:

- Developers file notice of appeal to Massachusetts Appeals Court which is pending

HISTORY (cont.)

- **Lawsuit #2**

June, 2016:

- Developers file Notice of Intent (NOI) with Commission to do work on proposed subdivision
- Commission hires LEC Environmental and Daniel MacRitchie, P.E. for peer review. No objection by developer to either peer reviewer

February, 2018:

- Commission issues Order of Conditions denying the project

March, 2018 – Two concurrent appeals

- Developer appeals to Department of Environmental Protection under state wetlands law
- Developer sues Conservation Commission in Superior Court requesting rejection of peer review conclusions under the Town's wetlands bylaw and overturning the Commission's decision
- The Record Appendix of the Conservation Commission which was filed with the Court by the Commission contains 1,499 pages

June, 2018:

- DEP orders that any new information filed with DEP should also be provided to other parties

September, 2018:

- Developer files with DEP a new set of plans (with a retaining wall) and stormwater calculations asking DEP to approve those plans, but does not provide copies to Commission

November 5, 2018:

- DEP issues a Superseding Order of Conditions (SOC) which allows the project as described in the new plans. Commission then notifies DEP that Commission never saw the new plans

HISTORY (cont.)

Lawsuit #2 (cont.)

November 15, 2018:

- DEP letter revokes the November 5, 2018 SOC because the developer “acknowledged that the information and plans submitted to DEP on September 19, 2018 were not submitted to the Andover Conservation Commission as instructed.”
- DEP states:

“It is MassDEP’s opinion that the Superseding Order of Conditions is invalid because it was not issued in accordance with the procedural requirements in the Wetlands Protection Act Regulations, 310 CMR 10.05(7)(i) which state that any party presenting information shall provide copies to all other parties.”
- Therefore, there is no DEP Superseding Order of Conditions currently in effect even though the developer keeps referring to a DEP Superseding Order

January, 2019:

- In lawsuit #2 Superior Court enters Order of Remand for Conservation Commission to hold public hearing on new plans and states explicitly:

“The Plaintiffs shall pay the costs of notice, publication and the Commission’s peer review fees relating to the peer reviews of the foregoing documents.”

 - Thus the Court Order is clear and unambiguous that the D’Annolfos must pay the peer review fees.

NEW PLANS TO BE REVIEWED BY PEER REVIEWERS AND COMMISISON

1. The Subdivision Modification Plan, Frederick Drive (fka Frederick Street), Andover, Massachusetts, prepared by Andover Consultants (the “plans”), which include:

Sheet 1 of 9 Cover Sheet, revised September 12, 2018

Sheet 2 of 9 Site Grading and Utility Plan, revised September 12, 2018

Sheet 3 of 9 Site Utility and Profile Plan, revised September 12, 2018

Sheet 4 of 9 Roadway Grading Plan, revised September 12, 2018

Sheet 5 of 9 ESC Plan, revise September 12, 2018

Sheet 6 of 9 Construction Details Plan, revised September 12, 2018

Sheet 7 of 9 Wetland Replication Plan, revised September 12, 2018

Sheet 8 of 9 Drainage Details, revised September 12, 2018

Sheet 9 of 9 Existing Conditions Plan, dated March 7, 2017

2. The Stormwater Management Report, Frederick Drive, Andover, Massachusetts, Dated May 26, 2017, revised through September 12, 2018, prepared by Andover Consultants, Inc.

3. A Storm Water Pollution Prevention Plan (SWPPP) dated September 12, 2018, prepared by Andover Consultants, Inc.

- Note these new plans all have revision date of September 12, 2018
- The Planning Board has not reviewed these plans so the previously approved subdivision plan is moot.

MASSACHUSETTS LAW AND THE CONSERVATION COMMISSION'S RULES AND REGULATIONS REGARDING CONSULTANT FEES LIMIT THIS APPEAL TO CLAIMS THAT THE PEER REVIEWERS HAVE A CONFLICT OF INTEREST OR DO NOT POSSESS THE REQUIRED QUALIFICATIONS

M.G.L. Chapter 44, Section 53G provides that a Conservation Commission may adopt Rules and Regulations which:

“...provide for an administrative appeal from the selection of the outside consultant to the city council or town board of selectmen. The grounds for such an appeal shall be limited to claims that the consultant selected has a conflict of interest or does not possess the minimum required qualification. The minimum qualifications shall consist either of an educational degree in or related to the field at issue or three or more years of practice in the field at issue or a related field.” (emphasis supplied)

- Under that law, a developer must pay for peer review fees and there is no right to appeal those fees to this Board.

THE COMMISSION'S RULES AND REGULATIONS

Pursuant to M.G.L. ch. 44, section 53G the Commission adopted Rules and Regulations in 2006. This is the first appeal to be heard by this Board since the Rules and Regulations were adopted in 2006

The Rules and Regulations provide that the only ground of appeal to this Board is:

“limited to claims that the consultant selected has a conflict of interest or does not possess the minimum, required qualifications.”

Since there is no challenge to the professional qualifications of the Commission's peer reviewers, the only other ground is conflict of interest which is defined as:

“**conflict of interest.** A real or seeming incompatibility between one's private interest and one's public or fiduciary duties.” Black's Law Dictionary, Abridged Tenth Edition.

Nothing which has been presented by the developer fits such a definition of conflict of interest.

It is clear that under state law and the Commission's rules that peer review fees are not within the jurisdiction of this Board and are not an allowed subject for an appeal to this Board.

SOME CONCERNS ABOUT THIS PROJECT

Per 2/12/2019 memo of Robert Douglas, Director of Conservation:

- “It is important to know that the proposed Frederick Drive subdivision will not be constructed at the edge or buffer of a wetland, but portions of it will actually fill and destroy an existing jurisdictional wetland. Additionally, the plan reflects the proponent’s apparent desire to maximize the number of house lots and reduce the size of the stormwater treatment areas to a size that is less than needed to make them fit into the remaining area of the site. The filling of a wetland resource area in Andover of this scale is fairly rare. (In recent memory the widening of the State roadway at Dascomb Road and the construction of the Bancroft School are the only examples which come to mind). Furthermore, the site is problematic. Soils on the property do not drain well, some of which contain fill.”
- “Contrary to regular procedures, this new plan has never been seen in a public setting by the Commission, nor had the ‘sunshine’ of a public meeting or hearing. It is critical that this review must take place, and that the Commission can make informed decisions about it.
- “Lastly, I feel portions of this new plan may be dangerous. Our peer review consultants are critical of the design and lack of adherence to engineering design standards in the plan. The plan includes a stormwater detention basin contained by a retaining wall that if built as planned, will hold back large quantities of water just 15 to 20-feet away from the neighbor’s house. Through the findings of our engineering peer review consultant, and in conversations I have had with other engineers – including our Town Engineer – there have been some serious questions raised. Should this retaining wall fail there would be damage to the wetlands and major consequences to down gradient properties. We have specifically retained the firm Milone & MacBroom for their expertise in this matter.” (emphasis supplied)

PEER REVIEWERS HAVE A DUTY TO THE CONSERVATION COMMISSION AND NOT TO DEVELOPERS

- It must be emphasized that the Conservation Commission peer reviewers are not agents of the D'Annolfos.
- The contract for peer review services is signed by the Town and not by the D'Annolfos.
- The contract provides that the peer reviewers report to the Conservation Commission, not to the D'Annolfos.
- The peer reviewer task is to report to the Commission whether the developers' project is complying with appropriate laws, bylaws, rules and regulations of the Commonwealth, and Commission and Andover.
- Their task is not to advise the D'Annolfos on the way they should design their project.
- Their duty is not to the D'Annolfos but to the Commission and the D'Annolfos have absolutely no right to determine who the Commission selects as peer reviewers.
- Pursuant to state law the funds are paid by the D'Annolfos but the client for the peer reviewer is the Conservation Commission, not the D'Annolfos.
- The first time that the D'Annolfos objected to the Commission's peer reviewers was after the December 26, 2018 Court ruling in favor of LEC Environmental's wetlands delineation.

LEC ENVIRONMENTAL

- It is totally understandable and logical why the developers want you to disqualify LEC Environmental, whose President is Ann Marton.
- In the first lawsuit the Superior Court, in a 24 page decision, rejected the wetlands delineation made by the D'Annolfos consultant and affirmed the delineation made by LEC Environmental.
- The Court also dismissed the D'Annolfos' claim regarding LEC Environmental's peer review fees.
- Having their consultant's opinion, and their claim regarding LEC Environmental's fees, rejected by the Superior Court, they now want another bite at the apple by this appeal to you to disqualify the firm whose opinion and fees the Superior Court upheld.
- Again, the appeal here is not on "qualifications" but on the grounds of a phantom "conflict of interest" because LEC Environmental has criticisms of this project.

DANIEL MacRITCHIE, P.E.

- Attorney Borenstein’s letter criticizes Daniel MacRitchie, a Professional Engineer, because he questioned whether a new proposed retaining wall might be located too close to an abutting property in violation of the property line setback of the Town’s Zoning Bylaw.
- That wall is considered a structure and one of the first questions any engineer, surveyor, or attorney (or perhaps a member of this Board) would ask for such a structure is whether that structure is within the setback provision of Andover’s local zoning bylaw.
- Asking that question is an indication of Mr. MacRitchie’s competence and not an indication of an alleged conflict of interest.
- Criticizing Mr. MacRitchie for asking such a legitimate and obvious question demonstrates the futility of the alleged “conflict of interest” argument.
- Also, the criticism of Mr. MacRitchie on page 5 of Attorney Borenstein’s February 15 letter refers, once again, to a Superseding Order of Conditions which has been revoked, where the letter states:

“As discussed above, MA-DEP’s Superseding Order of Conditions explicitly rejected MacRitchie’s interpretation of the guidelines.”
- The developer’s reliance upon, and repeated reference to a revoked Superseding Order of Conditions which does not exist, as grounds for disqualification, demonstrates the futility of their arguments.

MICHAEL R. GAGNON, P.E.

- Specializes in structural engineering
- Robert Douglas's memo describes the safety concerns relating to the new retaining wall
- The objection to Michael Gagnon, who is a Professional Engineer, is not on the grounds that he does not possess "required qualifications" or has a "conflict of interest" which are the only grounds upon which an appeal can be brought to this Board. The developer argues that Mr. Gagnon's services "are not relevant."
- Mr. Gagnon will do a peer review of plans and supporting documentation relative to the structural design of the proposed retaining wall.
- Even though qualifications and conflict of interest are the only grounds to appeal to this Board, the developers argue to this Board they have the authority to dictate to the Conservation Commission not only which peer reviewers the Commission may select but also the authority to dictate the subject matter which a peer reviewer would be allowed to investigate.
- No such authority exists for developers to dictate the subject matter which is appropriate for the peer review.

CONCLUSION

- The Commission adopted Rules and Regulations regarding peer reviewers in 2006.
- This is the first appeal to be heard by this Board under those rules.
- The grounds for this appeal is not to qualifications of the Commission's peer reviewers but an alleged "conflict of interest" because those peer reviewers disagree with the developers' consultants.
- In one instance, the grounds are that the peer reviewer's services "are not relevant."
- The state statute and the Conservation Commission rules do not give developers a veto power over peer reviewers but in Attorney Borenstein's letter you are being asked to "direct the Commission to select new peer reviewers in consultation with the D'Annolfos' Project Team." (emphasis supplied)
- If you give these developers such a veto power, you will be setting a precedent and establishing a path for developers to appeal to this Board any time a developer objects to peer reviewers who disagree with them.
- That is a very slippery slope for this Board to travel.
- For the foregoing reasons the D'Annolfos did not carry their burden of proof and the Board should vote to deny this appeal.