

# FITCH

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## **Via E-mail**

Ian Golding, *Chair*  
Seth Engelbourg, *Vice Chair*  
Linda Williams, *Member*  
Michael Misurelli, *Member*  
Joseph W. Plandowski, *Member*  
Mark Beale, *Member*  
Tim Braine, *Member*  
Nantucket Conservation Commission  
131 Pleasant Street  
2nd Floor  
Nantucket, MA 02554

Dear Members of the Conservation Commission:

On behalf of Martha and Bryan Kim, owners of 46 Union Street and abutters to 21 Meader Street, we urge the Nantucket Conservation Commission (“Commission”) to deny the Notice of Intent Application to build a three-bedroom, four-bathroom single family home and garage, submitted by ACK Hang Ten, LLC (“applicant”). This letter is submitted in advance of the Commission’s August 31, 2023 hearing. While the Commission is familiar with this site’s tortured history, the essential facts are this:

- the applicant purchased an undeveloped lot at an extreme discount due to the presence of wetlands;
- the applicant clear cut, excavated, and destroyed any evidence of a vegetated wetland prior to seeking a permit;

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- the applicant only came forward with a Notice of Intent application after the Conservation Commission issued an Enforcement Order;
- and the applicant now seeks to build a single-family home on the parcel, representing that there is no evidence of wetlands (which it destroyed).

Despite a recent Order of Conditions which approved site restoration and required further monitoring to resolve the existence of a wetland, the Commission has not received sufficient information from the applicant to determine whether a resource area is implicated by the proposed project. Accordingly, the Commission must now deny the NOI, and issue any other enforcement or conditions it deems necessary and appropriate.

## I. Background

### a. Recent Site History

21 Meader Street is a vacant, undeveloped lot located in the center of town, that has had wetland-like characteristics for at least a decade. **Exhibit A.** In February 2020, it was listed for sale for \$1,325,000. **Exhibit B.** Potential buyers hired Haines Hydrogeologic Consulting (“Haines”) to investigate whether the property contained any building constraints due to the presence of wetlands. Haines concluded that 21 Meader Street contained an Isolated Vegetated Wetland, which would greatly impact the placement of any future buildings. The buyers declined to purchase 21 Meader Street. **Exhibit C.**

Over a year later, in August 2021, ACK Hang Ten purchased 21 Meader for \$500,000 – \$825,000 less than the original listing of \$1,325,000. **Exhibit B.** Subsequently, the owner clear-cut the vegetation and excavated the lot.

During this period, the Kims applied for an Order of Conditions to conduct a renovation project on their property. At the hearing for their application, staff for the Conservation Commission indicated that a wetland existed on 21 Meader Street. The minutes of that meeting reflects the same: “Looked at the adjacent lot to the east to assess the potential wetlands; confirmed there is a vegetated wetland on that lot; everything shown here is outside the appropriate setback.” **Exhibit D.** The Order of Conditions for the Kim property, too, reflects the likelihood of a wetland on 21 Meader Street. **Exhibit E.** Additional Finding No. 2 further states “[t]he commission finds that there could be an off-site vegetated wetland based upon information provided by the applicant the buffer zones of which may cross the locus in question.”

### b. February 2022 Enforcement Order

In February 2022, the Conservation Commission unanimously voted to issue an Enforcement Order to the applicant to cease and desist all work at 21 Meader Street (“February 2022 Enforcement Order”). **Exhibit F.** The basis for the Enforcement Order was “[c]learing of

vegetation, installation of landscape timbers, soil disturbance within Land Subject to Coastal Storm Flowage and potential vegetated wetland.” The February 2022 Enforcement Order directed the owner to appear at the March 24, 2022<sup>1</sup> hearing to determine how to remedy the violation.

According to the minutes of the March 23, 2022 meeting, no representative of ACK Hang Ten, LLC appeared.

### c. NOI Applications and February 2023 Order of Conditions

In April 2022, the applicant applied for an NOI “for installation of a garden, driveway, and fencing within land subject to coastal storm flowage.” **Exhibit G.** At the April 28, 2022 hearing, the applicant stated that the NOI was submitted in response to the February 2022 Enforcement Order. **Exhibit H.** The NOI application and meeting minutes reflect the NOI’s stated purpose – a garden and driveway. A representative for the applicant stated that the owner wanted “*to construct a garden, which is what he wants to use this property for*” and that he was “committed” to using best management practices for the garden. (YouTube reference starting at 2:15.) This application was withdrawn at the July 14, 2022 Conservation Commission meeting in order to allow all new members of the Commission to sit for additional hearings.

In December, 2022, the applicant filed a new NOI “for site restoration and installation of a driveway and fencing within land subject to coastal storm flowage.” **Exhibit I.** The application included a wetland report conducted by Northeastern Consulting Forestry Services on August 29, 2022. The report assessed current conditions and, unsurprisingly, found no evidence of a wetland. As indicated on the NOI and at the December 22, 2022 and January 19, 2023 hearings, the NOI’s proposed project was described as a site restoration and installation of a fence and driveway. **Exhibits I, J, and K.** On the NOI application, the project type was checked as “other.” Exhibit I, Question 7a.

The minutes of the three hearings reflect the clear intent of the Commission to ensure that site restoration is conducted properly, in a way that would allow the site to return to pre-disturbance conditions, so that the Commission could properly determine the existence of a vegetated wetland. While there is already sufficient documentation of the evidence needed to designate the appropriate portion of this parcel as a vegetated wetland, the Commission decided to defer a formal determination until the site was restored.

This intent is reflected throughout the Order of Conditions, issued on February 10, 2023 (“February 2023 Order of Conditions”). **Exhibit L.** The Additional Findings demonstrate that the Commission suspected a vegetated wetland existed on the site prior to disturbance, and that by requiring site restoration, the Commission would be able to evaluate whether a vegetated wetland exists on the site. These findings include:

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<sup>1</sup> Presumably, the Commission intended March 23, 2022, the date a hearing was scheduled and had.

2. The Commission finds that due to the level of disturbance on the site that complete evaluation of the site needs further information. Stabilization of the site to original grade levels coupled with the construction of the rain garden will serve to allow for proper evaluation of the site in any future applications.
3. The Commission finds that the only resource area that can be confirmed at this time is Land Subject to Coastal Storm Flowage.
4. The Commission finds that based upon historic photographic evidence and evidence taken at the site indicating high groundwater, there are characteristics indicative of freshwater marshes and or meadows existing on site.

In accordance with these findings, the Commission's Order of Conditions included conditions which would allow proper monitoring of the site conditions. These conditions include:

21. The applicant shall install a minimum of three monitoring wells and record groundwater levels on a seasonable basis with that information provided to the Commission for review. The final location of the wells shall be reviewed and approved by Commission staff.
- ...
23. The applicant shall provide photographs of the site at the beginning and end of the growing season with photos specific of the rain garden.

These conditions in the February 2023 Order of Conditions were included to ensure proper monitoring would be able to occur, in order to assess wetland conditions at the site.

#### **d. Monitoring report**

The applicant submitted a monitoring report to the Commission on July 26, 2023. **Exhibit M.** No monitoring wells appear to have been installed (much less were locations reviewed by Commission staff). No groundwater levels have been provided.<sup>2</sup> No photographs of the rain garden, taken at the beginning and end of the growing season, have been provided.<sup>3</sup> Rather, the applicant provided the new grade and four photographs of the site taken on the day the monitoring report was submitted, July 27, 2023.

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<sup>2</sup> Much less provided on a seasonal basis – impossible at this point because the season is not yet complete.

<sup>3</sup> Same comment as above.

### **e. Current NOI Application**

Less than six months after receiving the February 2023 Order of Conditions for a driveway and fence, the applicant has filed a Notice of Intent for a single-family dwelling and garage. The plans depict a three-bedroom, four-bathroom, 1,536 square foot house that will occupy a majority of the parcel. On the NOI application, the project type was checked as “Single Family Home.”<sup>4</sup> NOI, Question 7a. The NOI, currently before the Commission, indicates that only Land Subject to Coastal Storm Flowage is implicated.

### **II. The Conservation Commission should deny this NOI on the basis that the Commission requested more information about the site, which necessarily includes proper restoration of the site prior to the owner’s disturbance.**

The Conservation Commission should deny the current NOI because the Commission does not have the requested information to determine whether a vegetated wetland exists on the site. This information requires restoration of the site to its prior, pre-disturbance condition, which, despite prior representations, has not occurred. It would be manifestly contrary to the purpose of the Wetlands Protection Act (“WPA”) and the Nantucket Wetland Protection Regulations if an owner were allowed to destroy site conditions (knowingly or not) evident of a wetland, and then use the current conditions, not reflective of what recently once was, to determine the presence or absence of a wetland.

That the Commission requires additional information should come as no surprise to the applicant. The February 2023 Order of Conditions included findings that acknowledged prior evidence of a wetland, as well as specific requests for site restoration and monitoring, such as monitoring wells to monitor the groundwater levels over time. See Exhibit M. Not only is the applicant’s Monitoring Report (presumably submitted to comply with the February 2023 Order of Conditions) woefully lacking in any useful information, much less the information the applicant is required to provide, but a full growing season has not even had time to complete.

The Commission was well within its rights to place such monitoring conditions on the February 2023 Order of Conditions. The Commission has broad authority to impose conditions which further the interests of the WPA, and the Nantucket Wetland Protection Regulations.<sup>5</sup> The

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<sup>4</sup> The quick turnaround begs the question as to why the applicant did not disclose plans to build a single-family house at the prior NOI hearings less than a year ago.

<sup>5</sup> The WPA states:

If after said hearing the conservation commission, selectmen or mayor, as the case may be, determine that the area on which the proposed work is to be done is significant to public or private water supply, to the groundwater supply, to flood control, to storm damage prevention, to prevention of pollution, to protection of land containing shellfish, to the protection of wildlife habitat or to the protection of fisheries or to the protection of the riverfront area consistent with the following purposes: to protect the private or public water supply; to protect the ground

information the Commission requires in order to properly assess this site has not been provided – in a monitoring report or in the application currently before the Commission. Accordingly, the Commission should deny the NOI on the basis that sufficient information has not been provided.

**III. The Applicant is not entitled to rely on the February 2023 Order of Conditions as definitive proof that no wetlands exist at 21 Meader Street.**

Instead of the round-about procedural route this applicant has taken, the wetlands protection regulations and the Nantucket Wetland Protection Regulations provide a clear remedy at the outset of a project for this very situation: “To obtain confirmation of a delineated boundary of bordering vegetated wetlands and other resource areas on the site,” the owner is to make a Request for a Determination of Applicability. 310 CMR 10.05(3)(a)1.; Nantucket Wetland Protection Regulations 1.03(B).<sup>6</sup> The Conservation Commission shall then determine whether wetlands protections apply to the land and/or proposed work. 310 CMR 10.05(3)(b). “The responsibility to delineate boundaries fall on the applicant, not on the Department” or Conservation Commission. *In the Matter of Roger Beaulieu*, Recommended Final Decision, OADR Docket Nos. WET-2008-076 (April 30, 2009).

Indeed, resource areas determined an Order of Conditions may generally be relied upon and protected against later challenges for three years. *In the Matter of Delaney*, Docket No. 2002-223 (2003). The major exception, however, is in the case of fraud or mutual mistake.<sup>7</sup> *Id.* “If and when an applicant chooses to file a notice of intent, it must then clearly an accurately describe existing site conditions,’ including ‘the boundaries of resource areas.’” *In the Matter of Roger Beaulieu*, Recommended Final Decision, OADR Docket Nos. WET-2008-076 (April 30, 2009) (quoting *In the Matter of Busby*, Docket No. 96-039). However, it cannot be the case as is here,

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water; to provide flood control; to prevent storm damage; to prevent pollution; to protect land containing shellfish; to protect wildlife habitat; and to protect the fisheries, such conservation commission, board of selectmen or mayor shall by written order within twenty-one days of such hearing impose such conditions as will contribute to the protection of the interests described herein, and all work shall be done in accordance therewith.

Likewise, the Nantucket Wetland Protection Regulations provide for conditions which “requirements set forth in a written Permit issued by the Commission for the purpose of permitting, regulating, or prohibiting any activity that alters an area or adversely impacts an interest subject to protection under the Bylaw.” Nantucket Wetland Protection Regulations 1.02.

<sup>6</sup> The state regulations also provide that a *boundary* of a bordering vegetated wetland or other resource area may be confirmed through the filing of an NOI. 310 CMR 10.05(3)(a)1.

<sup>7</sup> Unlike in *Delaney*, where the Department issued a negative superseding determination of applicability after allegations were made that a determination in a prior-issued Order of Conditions was based on an inaccurate description of the wetlands boundaries, here there is a “genuine factual dispute,” with supporting evidence, as to whether wetland conditions existed prior to the applicant’s disturbance. This is notwithstanding the fact that the February 2023 Order of Conditions was plainly conditioned to further study the site for the existence of wetland conditions after the unpermitted disturbances had been restored.

where an applicant altered the existing site conditions so as to remove the wetland conditions, that an applicant gets to rely on only the existing site conditions.<sup>8</sup> Such reliance is on a mere procedural technicality, one which the applicant is attempting to capitalize on.

Furthermore, any type of reliance must be reasonable. Here, it is not reasonable for the applicant to rely on the February 2023 Order of Conditions as an affirmative statement that no vegetated wetland conditions exist at 21 Meader Street when the February 2023 Order of Conditions acknowledges that there may be such wetlands conditions – but they were destroyed by the applicant – and the Commission imposed specific conditions to find the answer. The matter before us here is analogous to willful blindness seen in *Weston Forest & Trails Ass’n, Inc. v. Fishman*, 66 Mass. App. Ct. 654, 660 (2006). There, despite knowledge that a conservation restriction prohibited construction, the owner built a barn. *Id.* at 656. During construction of the barn, staff from the local conservation commission, as well as the land trust holding the restriction, had seen the construction but did not take immediate action to remedy the violation. *Id.* at 656-657. The Appeals Court held that the owner could not rely on the failure to contest the construction of the barn as an implicit blessing of the project. *Id.* at 659-660.

The applicant knew, or should have known, that there was a high likelihood a vegetated wetland exists on this property. One of the major facts to consider is that the 21 Meader Street was purchased at an extreme discount, after an expert found evidence of a wetland. Instead of requesting a resource area delineation from the Conservation Commission, the applicant chose to clear cut the property and illegally fill the parcel. If the applicant – a sophisticated developer – did not know the property contains wetlands, it is because the applicant willfully chose to ignore such facts as they appeared – literally – on the ground. “If a person confronted with a state of facts closes his eyes in order that he may not see that which would be visible and therefore known to him if he looked, he is chargeable with ‘knowledge’ of what he would have seen had he looked.” *Emmons v. White*, 8 L.C.R. 218, 225 (2000) (quoting *West’s Case*, 313 Mass. 146, 151 (1943)), *aff’d*, 58 Mass. App. Ct. 54, 67-68 (2003).

#### **IV. Conclusion**

If the Commission approves this NOI, it will be sending a signal that the old adage “it is easier to ask forgiveness than beg for permission” is a viable development strategy. Approval would also be an affront to those who do follow proper procedure. We urge that the Commission to avoid setting this dangerous precedent, deny the proposed NOI application, and further impose any other enforcement or conditions it deems necessary and appropriate. Further, due to the continued actions of the applicant to undermine the objectives of the Commission, we believe there is no benefit to be derived by delaying a determination of the presence of wetlands at 21 Meader

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<sup>8</sup> Further, it was represented to the Conservation Commission that the purpose of the proposed project for February 2023 Order of Conditions was for a driveway and installation of a fence. This is drastically different than the building of a house. The type of proposed project does have a bearing on why the February 2023 Order of Conditions was not appealed by the abutters – a driveway, fence, and rain garden has a dramatically less impact to the abutters property than a house that takes up a majority of the parcel.

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Street. There is more than enough information about this site to make that determination now, as one Commissioner has suggested, and we urge you to do so.

Sincerely,

*/s/ Jonathan W. Fitch*

Jonathan W. Fitch

*/s/ Alessandra W. Wingerter*

Alessandra W. Wingerter