

This is an actual review prepared for the Hancock Conservation Commission. The applicant/owner/ and representative information has been omitted.

Berkshire Conservation Agent Program (BCAP)
Review sheet prepared for Hancock Conservation Commission

Date: February 6, 2005
Project location: Potter Mt. Rd.
Owner: xxxxxxxx
Representatives: xxxxxxxx

Application: Notice of Intent (NOI)
Assessor's info: map 19 lot 2
Applicant: xxxxxxxx
DEP File # 174-64

Material reviewed: Notice of Intent and the following attachments (Project Narrative; Exhibit A USGS Topo Map; Exhibit B- SCS Soils Map; Exhibit C - Floodplain map; Exhibit D – Natural Heritage Map; Exhibit E – Wetlands Delineation Report; Exhibit F- Plans titled Proposed Single Family Residence prepared for xxxxxxx drawings 1 and 2 of 2 dated 12/9/05; Exhibit G - Wetland Fee Transmittal Form; Exhibit H - Abutter Information) as received on December 13, 2005. Site visit was held on January 23, 2006 with xxxxxxxxxx of the Hancock Conservation Commission and xxxxxx. An additional site visit was done on February 11, 2006 due to the presence of significant snow cover at the first site inspection.

Discussion: Direct quotes from 310 CMR 10.00 are placed in quotation marks and the text is indented. Notations have been made where emphasis has been added to illustrate a point.

Written
owner
permission

OWNER PERMISSION: According to the March 05 changes to the regulations an applicant who submits a Notice of Intent for property they do not own must provide written permission from the owner (see 10.05(4)(a). This needs to be submitted.

Certificates
of mailing;
Owner map
19 lot 4;
MASS
Hghy/town

ABUTTER NOTIFICATION: According to the March 05 changes to the regulations the Commission is responsible for ensuring all abutter notification was done properly. Certificates of mailing must be provided to the Commission for the file. All lots within 100 feet were identified. The owner for map 19 lot 4 is different from what is shown on my copy of the assessors map. How was the owner identified? Does Mass. Highway own Route 43? If so abutter notification should be sent to them as well. If it is a town road notification should be sent to the Town hall.

Need
fees;
vote on
pole
barn;
calc
total
due

FEES: As of the October 04 changes to the regulations the 21-day period during which the Commission must open the public hearing after receipt of a Notice of Intent starts with the date of issuance of the File Notification Form (FNN) from DEP stating the application is complete. A FNN has not been issued for this project as of February 11, 2005. A Notification of insufficient fees was issued by DEP for the project. It is BCAP's understanding that the additional fee **FOR THE HOUSE ONLY AND NOT FOR THE POLE BARN** has been submitted to the state and DEP has until 21 days from the date the additional fees were submitted to issue the FNN, which should be sometime the week of February 13. Has the applicant submitted the **additional fees to the Commission**? If not a Notification of insufficient fees should be submitted and a copy sent to DEP so that the FNN is not issued until the fees are paid (see 10.03(7)(b)1.a.). The fee that was submitted was a category 2a for a single family home (\$500). An additional fee of 50% was added to this because the work was in the riverfront and buffer zone so a total of \$750 was submitted. However, category 2a clearly states that driveway crossings under limited projects at 10.53(3)(e) are not included in this fee and therefore, a fee under category 2f must be submitted for the driveway crossing (500 x 50% = \$750, with half of this going to the state). In addition, the applicant has also applied for a pole barn which would require

a fee under either category 1a (110 x 50% (because it is located in riverfront and within the 100 foot buffer of the stream coming from the adjacent lot) = \$165, with half of this going to the state) or a category 2j (500 x 50% = 750, with half going to the state). The Commission should decide which category the pole barn should be under. The question would be basically whether or not the Commission feels a pole barn is work on a single-family residential lot such as an “addition, deck, garage, garden, pool, shed, or driveway”. Recommendation is to take a vote on this issue then have the additional fee submitted. There was some mention by the applicant that they may withdraw the pole barn from the application. According to 10.03(7)(b) the fee is to be based on “the initial project design as proposed in the Notice of Intent”. Therefore the fee for the pole barn would still be required.

“Category 1 a. Any work on a single family residential lot including a house addition, deck, garage, garden, pool, shed, or driveway. Activities excluded from Category 1 include driveways reviewable under 310 CMR 10.53(3)(e) (See Category 2f); construction of an unattached single family house; and construction of a dock, pier, or other coastal engineering structure.”

“Category f. Construction of each crossing for a driveway associated with an unattached single family house, reviewable under 310 CMR 10.53(3)(e).”

“Category 2j. Any other activity not described in Categories 1, 3, 4, 5 or 6 (e.g., the determination of whether a stream is perennial or intermittent).”

So the fee that is required is:

cat 2a for the house \$750

cat 2j for the driveway limited project crossing \$750

cat 1a \$165 or cat 2j \$750 for the pole barn

Total is \$750 already submitted + 750 + 165 for cat 1a for pole barn = \$ 915 due, half to state or

\$750 already submitted + 750 +750 for cat 2j for pole barn = \$1500 due, half to state

Consultant
fees paid?

CONSULTANT FEES: Has the applicant submitted the consultant fees to the Commission (\$900 including mileage)? It should be noted that the NOI submitted was incomplete (no alternatives analysis) and review of additional information and plans will be billed in addition to the estimate (once the full estimate value has been reached). The same will be true for attending additional Commission hearings.

RIVERFRONT: Applicant submitted project for review as a limited project under 10.53(3)(e). However, the applicant did not submit the necessary information to review the work under this provision (statement of which performance standards the project cannot meet, written alternatives analysis including discussion of avoid/minimize/mitigate and alternative access, plan showing all property boundaries - see discussion under limited project below). Since the applicant did not state which performance standards cannot be met this review must first look at the proposed project in light of all the performance standards for each impacted resource area to see if there are any that cannot be met that would then allow the Commission to review it under the limited project provisions. Therefore, this review will first address how the project complies with the regulations without filing as a limited project (which is something the consultant should have done to determine whether or not it could meet performance standards and not have to be filed as a limited project). The toughest to review is riverfront so this will be the first resource area to look at. And if there is an economically equivalent alternative with less impacts it has to be used so rather than review the project for all the other resource areas and THEN find out under riverfront that an alternative location must be used, the

review will look first whether or not there appears to be an alternative (again, this is something the applicant should have done).

The first performance standard that must be met is 10.48(4)(a) – see below. This requires that the work meet the performance standards for all the other resource areas. It appears there is an economically equivalent alternative (or two) that has less impacts that will need to be used. These both eliminate the crossing. Then the only other resource area that **might** be impacted would be floodplain but it is impossible to determine extent of work at this time without the alternatives shown on the plan. All of the floodplain is not shown on the plan in either of the other locations but it appears that on both locations the house could be built outside the floodplain. The applicant would also need to flag the wetland boundaries on each of the alternate locations.

“10.58 (4) (a) Protection of Other Resource Areas. The work shall meet the performance standards for all other resource areas within the riverfront area, as identified in 310 CMR 10.30 (coastal bank), 10.32 (salt marsh), 10.55 (Bordering Vegetated Wetland), and 10.57 (Land Subject to Flooding). When work in the riverfront area is also within the buffer zone to another resource area, the performance standards for the riverfront area shall contribute to the protection of the interests of M.G.L. c. 131, § 40 in lieu of any additional requirements that might otherwise be imposed on work in the buffer zone within the riverfront area.”

Next is 10.58(4)(b) – see below. To meet this the work cannot have adverse impacts on rare wetlands or UPLAND vertebrate or invertebrate species, or on vernal pools. The site is not located in a rare wetlands wildlife area or within a priority habitat area – which covers the upland species. There are no vernal pools on the site.

“10.58(4)(b) Protection of Rare Species. No project may be permitted within the riverfront area which will have any adverse effect on specified habitat sites of rare wetland or upland, vertebrate or invertebrate species, as identified by the procedures established under 310 CMR 10.59 or 10.37, or which will have any adverse effect on vernal pool habitat certified prior to the filing of the Notice of Intent.”

Next is 10.58(4)(c) – see below. To figure this one out first the scope of alternatives has to be determined under 10.58(4)(c)2. The applicant stated that the lot was created prior to August 1, 1996. This information is critical to how a project is reviewed under 10.58. Applicant should submit a copy of the deed, plot plan or recording information for the lot to verify this. Assuming the lot was created prior to August 1, 1996 it would have a scope of alternatives that is limited to the lot. If it was created after that date the scope of alternatives that would have to be considered would be the lot, any subdivided lots, and any adjacent lots formerly or presently owned by the same owner.

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Next the applicant must demonstrate that there are no practicable and substantially equivalent economic alternatives (see 10.58 (4)(c)1 below) within the given scope (the lot) with less adverse impacts to the interests of the Wetland Protection Act (WPA), **NOT** just on the riverfront.

“10.58(4)(c). Practicable and Substantially Equivalent Economic Alternatives. There must be no practicable and substantially equivalent economic alternative to the proposed project with **less adverse effects on the interests identified in M.G.L. c. 131 § 40.**

1. Definition of Practicable. An alternative is practicable and substantially equivalent

economically if it is available and capable of being done after taking into consideration costs, existing technology, proposed use, and logistics, in light of overall project purposes. Available and capable of being done means the alternative is obtainable and feasible. Project purposes shall be defined generally (*e.g.*, single family home, residential subdivision, expansion of a commercial development). **The alternatives analysis may reduce the scale of the activity** or the number of lots available for development, **consistent with the project purpose and proposed use**. The alternatives analysis shall not include interior design specifications (*i.e.*, neither the proposed use or project purpose in the Notice of Intent nor the Order of Conditions should specify the number of rooms, bedrooms, etc. within a building). Transactions shall not be arranged to circumvent the intent of alternatives analysis review. The four factors to be considered are:

a. Costs, and whether such costs are reasonable or prohibitive to the owner. The owner means the individual or entity which owns the area where the activity will occur or which will implement the project purpose. Cost includes expenditures for a project within the riverfront area, such as land acquisition, site preparation, design, construction, landscaping, and transaction expenses. **Cost does not include anticipated profits after the project purpose is achieved** or expenditures to achieve the project purpose prior to receiving an Order with the exception of land acquisition costs incurred prior to August 7, 1996. In taking costs into account, the issuing authority shall be guided by these principles:

- i. The cost of an alternative must be reasonable for the project purpose, and cannot be prohibitive.
- ii. Higher or lower costs taken alone will not determine whether an alternative is practicable. An alternative for proposed work in the riverfront area must be a practicable and substantially equivalent economic alternative (*i.e.*, will achieve the proposed use and project purpose from an economic perspective).
- iii. In considering the costs to the owner, the evaluation should focus on the financial capability reasonably expected from the type of owner (*e.g.*, individual homeowner, residential developer, small business owner, large commercial or industrial developer) rather than the personal or corporate financial status of that particular owner. Applicants should not submit, nor should issuing authorities request, financial information of a confidential nature, such as income tax records or bank statements.
- iv. Issuing authorities may require documentation of costs, but may also base their determinations on descriptions of alternatives, knowledge of alternative sites, information provided by qualified professionals, comparisons to costs normally associated with similar projects, or other evidence. Any documentation of costs should be limited to that required for a determination of whether the costs are reasonable or prohibitive.

b. Existing technology, which includes best available measures (*i.e.*, the most up-to-date technology or the best designs, measures, or engineering practices that have been developed and are commercially available);

c. The proposed use. This term is related to the concept of project purpose. In the context of typical single family homes, the project purpose (construction of a single family house) and proposed use (family home) are virtually identical. In the context of projects where the purpose implies a business component, such as residential subdivision, commercial, and industrial projects, the proposed use typically requires economic viability. Practicable and substantially equivalent economic alternatives include alternatives which are economically viable for the proposed use from the perspective of site location, project configuration within a site, and the scope of the project. In the context of publically financed projects, the proposed use includes consideration of legitimate governmental purposes (*e.g.*, protection of health and safety, providing economic development opportunities, or similar public purposes.); and

d. Logistics. Logistics refers to the presence or absence of physical or legal constraints. Physical characteristics of a site may influence its development. Legal barriers include circumstances where a project cannot meet other applicable requirements to obtain the necessary permits at an alternative site. An alternative site is not practicable if special legislation or changes to municipal zoning would be required to achieve the proposed use or project purpose. An alternative is not practicable if the applicant is unable to obtain the consent of the owner of an alternative site for access for the purpose of obtaining the information required by the Notice of Intent or of allowing the issuing authority to conduct a site visit.” Emphasis added.

This is information the applicant is supposed to provide the Commission in accordance with 10.48(4)(c)3 – see below. In order to properly review all the possible alternatives the applicant needs to submit a plan that shows the entire site at a scale similar to the plan submitted (30 scale) and show all the wetland resource areas so that impacts from moving the house to the other locations can be analyzed.

Need full plan of entire site and resource areas

It appears that looking at the cost etc., it would be less costly to have the house either on the south side of the un-named stream, or on the north side of Kinderhook creek because you would eliminate the expense of the crossing and a long driveway. These two locations appear to have less impacts on the resource areas than the location proposed because they eliminate the crossing. If the house would be worth more if built on the other side of the stream this cannot be factored into the cost (see section on costs). As stated above the applicant should address on the plan and in the narrative any possible alternatives to the proposed project within the lot in accordance with 10.58(4)(c)3 – see below. Since it appears that there are other alternative locations for the proposed project with less impacts then the applicant appears to be able to meet this performance standard by moving the house. If the project is found to be able to meet all performance standards and cannot be reviewed as limited project the applicant will have to submit an alternatives analysis that addresses all possible alternatives.

Appears to be able to meet 10.58(4)(c) by using other house sites

“10.58(4)(c) 3. Evaluation of Alternatives. The applicant shall demonstrate that there are no practicable and substantially equivalent economic alternatives as defined in 310 CMR 10.58(4)(c)1., within the scope of alternatives as set forth in 310 CMR 10.58(4)(c)2., with **less adverse effects on the interests identified in M.G.L. c. 131 § 40**. The applicant shall submit information to **describe sites and the work both for the proposed location and alternative site locations and configurations sufficient for a determination by the issuing authority under 310 CMR 10.58(4)(d)**. The level of detail of information shall be commensurate with the scope of the project and the practicability of alternatives. Where an applicant identifies an alternative which can be summarily demonstrated to be not practicable, an evaluation is not required.

Need to submit plan and narrative to address all possible alternatives

The purpose of evaluating project alternatives is to locate activities so that impacts to the riverfront area are avoided to the extent practicable. Projects within the scope of alternatives must be evaluated to determine whether any are practicable. As much of a project as feasible shall be sited outside the riverfront area. If siting of a project entirely outside the riverfront area is not practicable, the alternatives shall be evaluated to locate the project as far as possible from the river.

The issuing authority shall not require alternatives which result in greater or substantially equivalent adverse impacts. If an alternative would result in no identifiable difference in impact, the issuing authority shall eliminate the alternative. If there would be no less adverse effects on the interests identified in M.G.L. c. 131, § 40, the proposed project rather than a practicable alternative shall be allowed, but the criteria in 310 CMR 10.58(4)(d) for determining no significant adverse impact must still be met. If there is a practicable and substantially equivalent economic alternative with less adverse effects, the proposed work shall be denied and the applicant may either withdraw

the Notice of Intent or receive an Order of Conditions for the alternative, provided the applicant submitted sufficient information on the alternative in the Notice of Intent.” Emphasis added.

The final performance standard to look at is 10.58(4)(d) – see below. This requires that there be no adverse impacts on the riverfront and sets forth criteria to ensure this.

“10.58(4) (d) No Significant Adverse Impact. The work, including proposed mitigation measures, must have no significant adverse impact on the riverfront area to protect the interests identified in M.G.L. c. 131, § 40.

1. Within 200 foot riverfront areas, the issuing authority may allow the alteration of up to 5000 square feet or 10% of the riverfront area within the lot, whichever is greater, on a lot recorded on or before October 6, 1997 or lots recorded after October 6, 1997 subject to the restrictions of 310 CMR 10.58(4)(c)2.b.vi., or up to 10% of the riverfront area within a lot recorded after October 6, 1997, provided that:

a. At a minimum, a 100 foot wide area of undisturbed vegetation is provided. This area shall extend from mean annual high-water along the river unless another location would better protect the interests identified in M.G.L. c. 131 § 40. If there is not a 100 foot wide area of undisturbed vegetation within the riverfront area, existing vegetative cover shall be preserved or extended to the maximum extent feasible to approximate a 100 foot wide corridor of natural vegetation. Replication and compensatory storage required to meet other resource area performance standards are allowed within this area; structural stormwater management measures may be allowed only when there is no practicable alternative. Temporary impacts where necessary for installation of linear site-related utilities are allowed, provided the area is restored to its natural conditions. Proposed work which does not meet the requirement of 310 CMR 10.58(4)(d)1.a. may be allowed only if an applicant demonstrates by a preponderance of evidence from a competent source that an area of undisturbed vegetation with an overall average width of 100 feet will provide equivalent protection of the riverfront area, or that a partial rebuttal of the presumptions of significance is sufficient to justify a lesser area of undisturbed vegetation;

b. Stormwater is managed according to standards established by the Department in its Stormwater Policy.

c. Proposed work does not impair the capacity of the riverfront area to provide important wildlife habitat functions. Work shall not result in an impairment of the capacity to provide vernal pool habitat identified by evidence from a competent source, but not yet certified.

For work within an undeveloped riverfront area which exceeds 5,000 square feet, the issuing authority may require a wildlife habitat evaluation study under 310 CMR 10.60.

d. Proposed work shall not impair groundwater or surface water quality by incorporating erosion and sedimentation controls and other measures to attenuate nonpoint source pollution.

The calculation of square footage of alteration shall exclude areas of replication or compensatory flood storage required to meet performance standards for other resource areas, or any area of restoration within the riverfront area. The calculation also shall exclude areas used for structural stormwater management measures, provided there is no practicable alternative to siting these structures within the riverfront area and provided a wildlife corridor is maintained (e.g. detention basins shall not be fenced).

2. Within 25 foot riverfront areas, any proposed work shall cause no significant adverse impact by:

a. Limiting alteration to the maximum extent feasible, and at a minimum, preserving or establishing a corridor of undisturbed vegetation of a maximum feasible width. Replication and compensatory storage required to meet other resource area performance standards

- are allowed within this area; structural stormwater management measures shall be allowed only when there is no practicable alternative;
- b. Providing stormwater management according to standards established by the Department;
 - c. Preserving the capacity of the riverfront area to provide important wildlife habitat functions. Work shall not result in an impairment of the capacity to provide vernal pool habitat when identified by evidence from a competent source but not yet certified; and
 - d. Proposed work shall not impair groundwater or surface water quality by incorporating erosion and sedimentation controls and other measures to attenuate nonpoint source pollution.
3. Notwithstanding the provisions of 310 CMR 10.58(4)(d)1. or 2., the issuing authority shall allow the construction of a single family house, a septic system if no sewer is available, and a driveway, on a lot recorded before August 7, 1996 where the size or shape of the lot within the riverfront area prevents the construction from meeting the requirements of 310 CMR 10.58(4)(d)1. or 2., provided that:
- a. The lot can be developed for such purposes under the applicable provisions of other municipal and state law; and
 - b. The performance standards of 310 CMR 10.58(4)(d) are met to the maximum extent feasible. In difficult siting situations, the maximum extent of yards around houses should be limited to the area necessary for construction. Except where the lot contains vernal pool habitat or specified habitat sites of rare species, a wildlife habitat evaluation study shall not be required.
4. Notwithstanding the provisions of 310 CMR 10.58(4)(d)1. or 2., the issuing authority may allow the construction of a commercial structure of minimum feasible dimension, on a lot recorded before August 7, 1996 where the size or shape of the lot within the riverfront area prevents the construction from meeting the requirements of 310 CMR 10.58(4)(d)1. or 2., only if:
- a. The lot can be developed for such purposes and cannot be developed for any other purposes under the applicable provisions of other municipal and state law;
 - b. The work is not eligible for 310 CMR 10.58(5); and
 - c. The performance standards of 310 CMR 10.58(4)(d)1. or 2. are met to the maximum extent feasible.”

This is quite a lot to digest and is something that should be addressed by the applicant in the narrative. Once the equivalent economic alternative with the least environmental impact is approved by the Commission the project can be reviewed under this section. The key here is that for a single family home, even though the project may not be able to meet the performance standards under this section there is a provision that states that the Commission SHALL allow construction of a single family house – see 10.48(4)(d)3 above. There are some criteria under this section that have to be met. The lot has to have been recorded on or before August 7, 1996. According to the applicant this is the case. The lot has to be able to be developed for a single family house under other laws. The performance standards under 10.58(4)(d) must be met to the degree they can be met. This would have to part of the review once the preferred alternative is chosen. Note that the limit of work is that necessary to build the house and driveway and septic, no huge yards etc. It does appear that moving the house to eliminate the crossing would meet this criteria as well.

It appears that the project could be redesigned to avoid the crossing and still meet the riverfront performance standards, and in fact that one or more of these alternatives are economically equivalent to the proposed location yet have lesser impacts on the interests of the WPA and the Commission would therefore be required to have the project re-designed to use the other locations.

Rather than continue the review at this point it seems better to allow the applicant time to prepare an alternatives analysis to see if this is the situation and the project has to be redesigned to eliminate the crossing. If for some reason the alternatives analysis is able to show that the proposed location has less or equivalent impacts to the interests of the WPA compared to the locations without the crossing then the project can be reviewed further to determine compliance with the other resource areas and whether or not a limited project filing is warranted. The applicant should have included the alternatives analysis with the NOI so that this could have been addressed in the first place.

Once the final location is approved the other topics that will need to be addressed are floodplain, buffer zone, erosion control. As an fyi, when the second site visit was done there was no evidence of a jurisdictional stream channel past the tree line from the stream that had been diverted upgradient of the site and is now flowing to the northwest from the stream and onto the site. There is a channel within the wooded area that is jurisdictional but it ends (currently) at the field. This may change if flows continue across the field and create a channel.