



**Massachusetts Department of Environmental Protection**  
 Bureau of Resource Protection - Wetlands  
**Request for Departmental Action Fee**  
**Transmittal Form**

4  
 DEP File Number:  
 #050-1355  
 Provided by DEP

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

**A. Request Information**

1. Location of Project

55R Pearson Drive Newbury  
 a. Street Address b. City/Town, Zip  
\$245.00  
 c. Check number d. Fee amount

2. Person or party making request (if appropriate, name the citizen group's representative):

Cricket Lane LLC  
 Name  
 92 Middlesex Road, Unit #2  
 Mailing Address  
 Tyngsboro MA  
 City/Town State Zip Code  
 Phone Number Fax Number Email Address

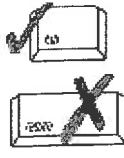
3. Applicant (as shown on Determination of Applicability (Form 2), Order of Resource Area Delineation (Form 4B), Order of Conditions (Form 5), Restoration Order of Conditions (Form 5A), or Notice of Non-Significance (Form 6)):

Cricket Lane LLC  
 Name  
 92 Middlesex Road, Unit #2  
 Mailing Address  
 Tyngsboro MA 01879  
 City/Town State Zip Code  
 978-462-1514 doug@finnic.com  
 Phone Number Fax Number Email Address

4. DEP File Number:

#050-1355

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



**B. Instructions**

1. When the Departmental action request is for (check one):
- Superseding Order of Conditions – Fee: \$120.00 (single family house projects) or \$245 (all other projects)
  - Superseding Determination of Applicability – Fee: \$120
  - Superseding Order of Resource Area Delineation – Fee: \$120

Send this form and check or money order, payable to the *Commonwealth of Massachusetts*, to:

Department of Environmental Protection  
 Box 4062  
 Boston, MA 02211



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Bureau of Resource Protection - Wetlands  
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**B. Instructions (cont.)**

2. On a separate sheet attached to this form, state clearly and concisely the objections to the Determination or Order which is being appealed. To the extent that the Determination or Order is based on a municipal bylaw, and not on the Massachusetts Wetlands Protection Act or regulations, the Department has no appellate jurisdiction.
3. Send a **copy** of this form and a **copy** of the check or money order with the Request for a Superseding Determination or Order by certified mail or hand delivery to the appropriate DEP Regional Office (see <https://www.mass.gov/service-details/massdep-regional-offices-by-community>).
4. A copy of the request shall at the same time be sent by certified mail or hand delivery to the Conservation Commission and to the applicant, if he/she is not the appellant.

FINNERAN & NICHOLSON, P.C.  
ATTORNEYS AND COUNSELORS AT LAW

30 GREEN STREET  
NEWBURYPORT, MA 01950  
Tel. (978)462-1514 \* Fax (978)465-2584

515 GROTON ROAD, SUITE 203  
WESTFORD, MA 01886  
Tel. (978)496-1177 \* Fax (978)496-1146

December 3, 2021

**Via Certified Mail**

Massachusetts DEP  
Northeast Regional Office – Wilmington  
205B Lowell Street,  
Wilmington, MA 01887

Massachusetts DEP  
Main Office - Boston  
Box 4062  
Boston, MA 02211

Newbury Conservation Commission  
12 Kent Way #101  
Byfield, MA 01922

**RE: Request for Departmental Action  
Superseding Order of Conditions  
DEP File # 050-1355**

Dear Sir/Ma'am,

Our office has been retained to represent Cricket Lane LLC in this Request for a Superseding Order of Conditions relative to 55R Pearson Drive, located in the Town of Newbury, Assessor's Map R-20, Lot 75.

The denial of the Order of Conditions was improper, as the Commission did not base its review on a reasonable analysis of the facts of the project, refused to consider in reasonable time the information provided by the applicant, refused to consider in its analysis the findings of the expert Ann Marton, and arbitrarily applied "vernal pool" protections to an environment that is not so entitled.

**The Cricket Lane 40B Project Background**

The applicant is proposing to construct 24 new single family homes on an approximately 15.08 acre site located off of 55 Pearson Drive in Newbury Massachusetts. The proposal will build roughly 850 feet of roadway, community septic systems, stormwater management, and a wetland crossing in addition to the homes. As the proposal is set forth as a cluster development, six acres of the site are to remain open space. Collectively, these improvements to the site shall be referred to as the "Project".

In July 2019, the applicant applied for a Comprehensive Permit under M.G.L.ch. 40B. Said application sought the approval of the Project to build the 24 single family homes, with six to be sold as "affordable" units. On December 12, 2019, Mass Housing, the sponsoring agency, issued a Site Approval Letter, and the applicant began public hearings with the Town of Newbury Zoning Board of Appeals ("ZBA").

To address the environmental impact of the Project, the applicant initially retained the services of Mary Rimmer of Rimmer Environmental Consulting, LLC. However, Mary Rimmer then joined the NCC and could no longer represent the Project. The applicant then retained the services of both Ranger Engineering Group, Inc. ("Ranger") and Norse Environmental Services Inc. ("Norse"). Ranger was retained to prepare the site plans and supporting documents, and Norse was retained to prepare a wetlands restoration report respectively.

For its own review, the Town of Newbury ZBA ("Town") retained the services of Ann Marton, of LEC Environmental Consultants, Inc. for wetlands and environmental impact review. For stormwater and engineering, the Town retained Joseph Serwatka, P.E. Finally, for both water and traffic review the Town retained Stantec and Associates. Each of these experts is well regarded in their field, and has been used by the Town, including the NCC, previously in other projects to provide an expert opinion as to the matters within their specialty.

After her review, Ann Marton, acting as the Town's Wetlands Consultant issued a letter stating that the proposed development addressed her concerns and is in compliance with the Wetlands Protection Act, applicable local regulations, and the DEP's Stormwater Management Policy as applied to wetland resource areas. Further, Ms. Marton suggested certain changes to the plans which were incorporated into the Zoning Board's decision. Mr. Serwatka, P.E., after his review of the stormwater regulations and the requirements of a comprehensive permit, found that the Project met the required stormwater standards as well.

Throughout the review process, Ann Marton provided substantial review of the area, suggested alterations to the original plans, and ultimately certified that the applicant had addressed all of her concerns regarding the Wetlands Protection Act and stormwater management.

On March 18, 2021, the Town issued a Comprehensive Permit approving the Project. No appeal was filed.

On or about May 14, 2021, the applicant filed a Notice of Intent with the Newbury Conservation Commission ("NCC"). After numerous extensions and submissions of additional information, which the NCC either failed to review sufficiently, unreasonably refused to credit, or simply refused to hear, the applicant forced a closing of the public hearing on November 2, 2021 as the Board had more than enough information to adequately condition the Project.

Subsequently, on November 23, 2021, the Board issued an Order of Conditions ("OOC") denying the Project on the grounds it could not be conditioned, and that the applicant did not submit sufficient information.

The applicant appeals this denial.

**The NCC's Statement of Facts is Incomplete, Inaccurate, or False**

In its OOC, the NCC repeatedly states that the Applicant did not provide sufficient information on which the NCC could act. As will be discussed further, the NCC was incomplete in their review, as the applicant had provided the NCC more than adequate resources to condition the Project. The NCC's denial was arbitrary, capricious, and not based on an appropriate set of criteria. As set forth below, the applicant responds to each of the justifications provided by the NCC in its denial as follows:

1. Work within the 100' Buffer Zone to the "D" and "VP" series wetlands:
  - a. The proposed septic system falls at 102' away from the CVP, with the primary absorption area closest to the Buffer Zone line. The septic system also falls partially inside the 100' Buffer to the BVW. Grading for the system is entirely within the 100' BVW and the CVP. The Applicant refused to consider reconfiguring the system to provide additional protections and further limit the impacts of the Buffer Zone work to the resource areas. The Applicant stated they refused to reconfigure the system as requested by the Commission in the September 7 hearing, and the refusal was reaffirmed during the November 2 hearings.
    - i. The Commission would like to note that, while possible Title V violations were initially part of the denial discussed in the November 12 meeting, we have since received new feedback from Claire Golden with Mass DEP stating that associated grading is not considered part of the septic system. The septic system itself is in fact fully compliant with the WPA regulations. For this reason, the Commission would rescind Title V issues from the reasons for denial.

**Response:** *The NCC is correct that the proposed septic system is in full compliance Title V, but does not take this far enough. The Town of Newbury Board of Health issued approval for the septic system on October 28, 2021. Upon approval by the Board of Health, a septic system is presumed to protect the interests of the Wetland's Protection act under 310 CMR 10.03(3). Nothing the NCC raised at any hearing has disturbed this presumption.*

- b. There is a retaining wall as well as drainage swales, both proposed for the purpose of conveying stormwater, located within 100' of the CVP. During the November 2 hearing the Commission discussed the stormwater standard (MA Stormwater Handbook, vol. 1 ch1 Stormwater Standards Table CA 2: Standard 6) that disallows stormwater structures and stormwater BMPS within 100' of a CVP, and in an attempt to deter the concerns of the Commission, Attorney Deschenes was noted on the record as stating, "Shame on us for calling it a swale. All it is, is that backyard is slightly graded so that the water flows in the correct direction, it's not a channelized swale". However, the area in question was

referred to by the Applicant and their representatives throughout the hearing process, and is a proposed depression constructed to convey stormwater. Members of the Commission voiced concerns of the proposed impact of stormwater BMPS in the Buffer zone during every hearing except that on June 22. The Applicant failed to address same.

**Response:** *The area in question was, in fact, redesigned after numerous discussions with the Town's experts Ann Marton and Joseph Swartka. The area was redesigned to ensure that no stormwater flow would impact the Certified Vernal Pool, and so a retaining wall was proposed. The "swale" referred to by the Commission is actually a berm that directs rainwater sheet flow away from lawn areas around the homes and over the septic system away from the vernal pool buffer zone. Regardless of the classification of the map feature as a "swale" or a "berm", the NCC could easily have conditioned an approval requiring the feature be moved five feet back and outside of the buffer zone.*

2. Protection of the 'A' series wetland and the Vernal Pool within its boundary:
  - a. There is impact from work in proximity to the Vernal Pool and its impact on the functionality of the resource as well as the associated wildlife habitat with and surrounding this sensitive area. The Commission expressed concerns over the proximity of work and structures to the Vernal Pool. The Applicant did not revise the plans to address these issues.
  - b. The Applicant's plans included discrepancies between the ORAD, which shows delineation for a Vernal Pool, and the site plans submitted with the NOI, which failed to identify the Vernal Pool. The Board peer review agent noted the discrepancies as did members of the Commission. The Commission and its peer review agent requested the Applicant to treat the area as sensitive habitat, providing a Buffer Zone and protections around it, and the Applicant has refused to do so.

**Response:** *The NCC here makes an error that it repeats throughout its OOC. The 'A' series wetlands are Isolated Land Subject to Flooding ("ILSF"). They do not, however, contain a Vernal Pool.*

*During the submission of the early ORAD plan, there was a question raised as to whether this area had a vernal pool. At the time, Mary Rimmer, the initial wetlands scientist for the site, submitted data to Natural Heritage for vernal pool certification. Jacob Kubel Conservation*

*Scientist for Natural Heritage, responded in an email after his review “As noted previously, a review of aerial imagery over the past 20 years suggests the pool basin does not contain standing water during relatively dry springs. Based on the information you provided, the pool dried prior to 21 July 2017, 22 June 2018, and 9 July 2019 (and 2019 was a wet spring)”. As such, Natural Heritage did not certify. In the months of March and April of 2021, a group of abutters also submitted information to Natural Heritage to certify the area as possessing a vernal pool. Again, Natural Heritage did not certify. Finally, after a third attempt required by the NCC, despite having reviewed evidence submitted for the first two attempts for certification, and a site visit with Ranger Engineering, Norse Environmental Services and the Applicant, Natural Heritage again did not certify. Specifically, Natural Heritage wrote that it would not be appropriate to certify the area as meeting the requirements of a vernal pool.*

*The NCC does not have the jurisdiction to certify a vernal pool, rather it is the Massachusetts Department of Fisheries and Wildlife’s office of Natural Heritage that possesses such authority. That the area was noted on an earlier ORAD plan as a vernal pool is reflective of a possibility, not a fact. The subsequent research into the site made it clear that Natural Heritage would not certify the area as a vernal pool.*

*Without such certification, the area cannot legally be called a vernal pool, only an ILSF. The NCC’s insistence of identifying and designating the area as a vernal pool is without legal support.*

*It should also be noted that the Applicant has not altered the wetlands ILSF area, and has in fact, protected it. After numerous discussions with the Town’s Wetland Consultant, Ann Marton, the proposed plans (Sheet 7 of 30 of the Site Development Plans) call for the following protective measures for the ISLF:*



- a. *Double row of silt fence and erosion control measures*
- b. *Proposed wooden split rail fence along the wetlands line to prevent encroachment*
- c. *Planting of an additional 45 shrubs and 15 trees to provide wildlife habitat*
- d. *Field location of large trees that could be saved to provide canopy*

*The NCC's statement that the Applicant has refused to provide protections is blatantly false. The substantial protections for the ISLF as provided in the design of the area meet or exceed the requirements of the Wetlands Protection Act and were either overlooked or ignored by the NCC.*

3. Buffer Zone Work:

- a. In multiple locations, proposed tree clearing and grading, and associate permanent modifications and impacts of same, run flush with the wetland delineations. Notable locations include the Western portion of the 'D' series wetland, the entire northern half of the 'A' series wetland containing the Vernal Pool, and along most of the 'C' series wetland borders. Additionally, significant amounts of cutting will be conducted with the 100' Buffer Zone to the CVP. This is linked to the deficiencies outlined in Section IV(2)(a) and (b).
- b. Grading in the Buffer Zone of the 'C' series wetland extending right up to the wetland line was also noted as a significant concern, with request to set a limit of work farther away from the edge of the wetland delineation, the Applicant refused to make these adjustments. This is linked to the deficiencies outline in Section IV(1)(a) and (2)(a).

**Response:** *The stormwater management systems are located at the lower portions of the site which is along the wetland edge, and all performance standards have been met. Grading is along the wetland areas, as required, to meet the design requirements of stormwater management systems. Further, in addition and in mitigation of any impact to the site, additional plants and shrubs have been proposed to be planted in these areas (Sheet 7 of 30) at the direction of Ann Marton. Finally, again, the NCC incorrectly identifies the ILSF as a vernal pool.*

4. Insufficient information, refusal to redesign any part of the project to protect the interests of the Act, refusal to answer questions, provision of insufficient answers, insufficient time for review:

- a. There are discrepancies between the ORAD plans (showing a Vernal Pool in the 'A' series wetland) and the site plans submitted with the NOI (did not show the delineated Vernal Pool). This is linked to the deficiencies outline in Section IV (2)(b).

**Response:** *As addressed previously, the ORAD was prepared and documentation was submitted to Natural Heritage, and the area was not certified as a vernal pool three times. Contrary to the NCC's assertions, Natural Heritage never requested additional information regarding the certification process. The Commission cannot arbitrarily apply a higher set of standards to an area not entitled to them.*

- b. The Applicant and their representatives refused to redesign, reconfigure, or shrink the project in order to provide adequate protections to wetland resources and wildlife habitats.
  - i. September 7 – request made to reconfigure septic system (Section IV(1)(a)) . Applicant refused.

**Response:** *The Commission was incorrect when they thought the grading for the system could not be within 100 feet of the CVP. The Applicant had already obtained approval of the septic system from the Board of Health, and it was not necessary to redesign as the system presumptively met the requirements of the Act under 310 CMR 10.03(3).*

- ii. September 7 – request for additional information about wetland replication. Applicant resubmitted copies of the wetland replication sheets from the site plans and a letter issued by Norse Environmental Services, Inc all of which the Commission already had.

**Response:** *While the Commission already had the information, it is unclear at the time if the information had been reviewed. Indeed, one of the Commission members stated that they did not review the replication plan, or possess it, even though an extensive replication plan was submitted. In addition, the wetlands replication plan's proposed plantings significantly exceed*

*the Mass DEP guidelines, and both the size and the area modified was conducted subject to approval by the Town's Wetland consultant, Ann Marton.*

- iii. September 7 – request for additional information about wetland replication. Applicant resubmitted copies of the wetland replication sheets from the site plans and a letter issued by Norse Environmental Services, Inc all of which the Commission already had.

**Response:** *The 100 foot buffer zone to a vernal pool is only considered sensitive habitat when it is located within a wetland resource area. The buffer zone disturbance proposed maintains a 30' minimum undisturbed area along the edge of the wetland that has the certified vernal pool. The applicant refused to redesign the project to do no work in the 100' Buffer Zone as such a request is outside the purview of the Act as designed.*

- iv. November 2 – request for the Applicant to consider shrinking the footprint of the project in order to mitigate issues and concerns voiced by the Commission. Applicant refused to redesign the project.

**Response:** *Applicant refused to shrinking the project as the Town's own wetlands consultant and experts had informed the applicant that the Project met all standards and should be approved.*

- v. November 2- request to reconfigure the project to resolve issues of stormwater management in the 100' Buffer Zone to the CVP. Applicant refused to reconfigures the project.

**Response:** *The applicant meets the Stormwater Management requirements and BMP.*

- c. The Applicant failed to provide additional hydrology data at the request of the NHESP during attempts to certify the Vernal Pool in the 'a' Series wetland. When requested multiple times by the Commission to provide that information, the Applicant repeatedly refused to do so. Requests from NHESP for more data are noted in three sets of email correspondence (Section 11(2),(3) and (4).

**Response:** *The email from Natural Heritage that the NCC is refers to is being misinterpreted by the Commission. Natural Heritage said that the site does not meet all the requirements of a Certified Vernal Pool at this time. At no time did Natural Heritage ever request additional hydrological data.*

*In fact, the area had been observed several times in the past as not having a sufficient hydrologic period to support the species that use a vernal pool. The area has been considered by Natural Heritage at least three times and has been denied certification each time.*

*The NCC does not have the right to demand data be produced to Natural Heritage that Natural Heritage itself never requested. Further, as the applicant asserted at public hearing, the data to certify the area as a vernal pool likely does not exist. Once again, it bears repeating that the certification of vernal pools is not within the jurisdiction of the NCC, and its "creation" of a vernal pool is both arbitrary and capricious.*

- d. The Applicant submitted three documents (Section 11(5),(6), and (7) to the Commission for review on November 2, 2021, all approximately six hours prior to the start time of the hearing (7:00 PM EDT), thus not allowing for sufficient time for the Commission members to review the documents.

**Response:** *The Applicant did submitted documents shortly before the November 2 meeting. However, the NCC fails to include that the documents were in response to false reports and inaccurate allegations submitted by abutters the previous week. The Applicant simply had limited time to respond to the false information. Regardless, however, the NCC did not vote to deny the project until 21 days after the November 2 hearing. It is clear then, that the NCC had more than adequate time available for review the information prior to a decision.*

- e. The Applicant elected to have the Commission close the public hearing for this project during the hearing on November 2. The Commission urged the Applicant to allow for a continuance so they may review recently submitted documents and to address outstanding concerns. The Applicant refused to do so, leaving many concerns unaddressed.

**Response:** *The applicant filed a Notice of Intent on May 5, 2021. In the seven months following, the Applicant provided the NCC thousands of pages of information, 30 pages of Plans, the services of the Town Wetlands Consultant as a peer reviewer, and the services of the Town Engineer as a second peer reviewer. Those two peer reviewers determined the Project met or*

*exceeded all applicable standards. The NCC had all possible information required to condition the Project. Note also, that the NCC flatly refused to review some information provided by the applicant, including the peer review information provided by Ann Marton.*

### **The Findings of the NCC Are Based on Incomplete, Inaccurate, or Exceed Its Authority**

The NCC used an incomplete, inaccurate, and cursory factual background to come to findings that were, similarly, cursory, inaccurate, and exceeded its authority. Each finding is copied below and responded to in kind as follows:

1. There are discrepancies between the approved plans associated with the ORAD issued on August 29, 2019 (DEP File Number 050-1295) and the site plans submitted with the Notice of Intent (NOI).

a. On sheet 1 of 2 of the approved ORAD plans, delineation is shown for an Isolated Wetland with a Vernal Pool and Isolated Land Subject to Flooding within its Boundary” on the southern edge of the property (‘A’ series’ wetland area). The plans submitted with the NOI identify the same area as “isolated Wetland with an Isolated Land Subject to Flooding within its Boundary” on all sheets where the A series wetland is identified and labeled (Sheets 3,5,13, and 25).

b. For the reasons listed above, the Commission finds that the NOI as submitted is factually incomplete, and as such the project cannot be conditioned to meet the performance standards and interests set forth in the WPSA.

**Response:** *As discussed above, the ILSF in this matter is simply not a vernal pool. This early question of whether or not the ILSF was a vernal pool or not was resolved through multiple attempts, and multiple rejections by, Natural Heritage. As the area does not have a vernal pool, the NCC’s denial based on a vernal pool’s presence on an early ORAD plan has no factual basis and is thus both arbitrary and capricious.*

2. Regarding concerns for stormwater BMPS:

a. Under the WPA Regulations (310 CMR 10.00), stormwater BMPS include basins, discharge outlets, swales, rain gardens, filters, or other stormwater treatment practice or measure either alone or in combination including without limitation any overflow pipe, conduit, weir control structure that) is not naturally occurring; b)is not designed as a wetland replication area; and c)has been designed , constructed, and installed for the purpose of conveying , collecting, storing, discharging, recharging, or treating stormwater (310 CMR 10.04)

b. According to Massachusetts Stormwater Handbook and Stormwater Standards, stormwater BMPS must be set back 100' from a CVP, and proponents must perform a habitat evaluation and demonstrate that the stormwater BMPS meet the performance standard of having no adverse impact on the habitat functions of a CVP (MA Stormwater Handbook, vol 1 ch 1 Stormwater Standards, Table CA 2;Standard 6)

c. For the reasons listed above, the stormwater BMPs listed in Section IV(1)(b) of this attachment are not in compliance with the Stormwater Standards and do not protect the interests or meet the performance standards of the WPA.

**Response:** *The Town of Newbury's Wetland Consultant and Engineering Consultant both agreed that the Project met all stormwater management standards. The area that the Commission is erroneously calling a "swale" is rather a "berm" to direct rainwater sheet flow on a lawn area. Regardless of the terminology used, the Commission could have conditioned the project on the swale/berm being moved back five feet outside of the 100 foot setback, thus removing the impact, if any, entirely.*

3. Regarding protection of the 'A' series wetland area and the Vernal Pool within its boundary:

a. This Vernal Pool is significant to the protection of wildlife habitat pursuant to 310 CMR 10.57 (1)(b). Under 310 CMR 10.57 (2)(b)(4) the portions of an ILSF area which shall be presumed to be vernal pool habitat are those determined under procedures established in 310 CMR 10.57 (2)(a)(5), which states that resources areas presumed to be vernal pool habitat are those certified by MA DFW. However, such presumption is rebuttable and may be overcome upon a clear showing to the contrary. In this case, the "clear showing to the contrary" lies in the ORAD issued to the Applicant delineating the Vernal Pool with the 'A' series wetland.

**Response:** *Once again, the NCC insists a vernal pool exists where there simply is none. 310 CMR 10.57(a)(5) provides that the only portions of a resource areas presumed to be vernal pool habitat are those certified by the Massachusetts Division of Fisheries and Wildlife. This is performed through the office of Natural Heritage. In three instances, Natural Heritage declined to certify the area as a vernal pool. The NCC has no authority to create a vernal pool, and so its finding has no factual basis.*

b. Pursuant to 310 CMR 10.52, it is the responsibility of the person proposing work to design and complete his project in conformance with performance standards, and it is the

responsibility of the issuing authority to impose such conditions on a proposed project as to ensure that the project is designed and completed in such a manner consistent with these standards. In the case of this project, however, the Applicant repeatedly refused to redesign any part of the project in order to meet performance standards and allow the Commission to appropriately condition the work. In the case of this project, however, the Applicant repeatedly refused to redesign any part of the project in order to meet performance standards and allow the Commission to appropriately condition the work.

**Response:** *The Applicant has worked cooperatively with the Town and its consultants to design a project that meets all the performance standards and regulations of the WPA. Review by and statements from third party consultants reviewed by the NCC agree that the Project meets all performance standards. The Commission desired to reduce the size of the project without rational basis or demonstration that with the plans and reports submitted failed to meet the requirements of the Wetlands Protection Act.*

c. The Application failed to provide information to overcome the burden of proof rebutting the presumption that the altered land surrounding the 'A' series wetland is significant to the interest specified in 310 CMR 10.57 (1)(a) and (b) pursuant to 310 CMR 10.57 (3).

d. For the reasons above, the Commission believes that the 'A' series wetland and the Vernal Pool within its boundary should be protected and provided an adequate Buffer Zone in order to protect the interests of the Act. The Commission finds that the project as proposed does not protect the interests of the Act and cannot be conditioned to do so.

**Response:** *Again, the NCC vernal pool that NCC insists exists is simply not there. At no point was the area certified as a vernal pool, and at no point did Natural Heritage request additional information to certify the same. The NCC has no authority to create a vernal pool, and so its finding has no factual basis.*

#### 4. Regarding work within the Buffer Zone

a. Pursuant to 310 CMR 10.03 (1)(a) any person who files a NOI to perform any within the Buffer Zone has the burden of demonstrating to the issuing authority that the area is not significant to the protection of any interests identified in the Act, or that proposed work within the Buffer Zone will contribute to the protection of the interests identified in the Act. The Applicant has failed to satisfy this burden to the Commission.

b. Pursuant to 310 CMR 10.53 (1) for work in the Buffer Zone subject to review the issuing authority shall impose conditions to protect the interests of the Act identified for the adjacent resource area. The potential for adverse impacts to resource areas from work in the Buffer

Zone may increase with the extent of the work and the proximity to the resource area. Conditions may include limitations on the scope and location of work in the Buffer Zone as necessary to avoid alteration of resource areas. The issuing authority may require a clear limit of work and the preservation of natural vegetation adjacent to the resource area to protect the interests of the Act. In the case of this project, however, the Applicant repeatedly refused to redesign any part of the project in order to protect the interests of the Act and allow the Commission to appropriately condition work within the Buffer Zone.

c. For the reasons above, the Commission finds that the Applicant has failed to satisfy its burden of proof and provided insufficient information, and as such this project cannot be conditioned to meet the performance standards and protect the interests of the Act.

**Response:** *The Commission has based its assertion that of an insufficient showing of information on an incomplete and cursory reading of the submissions of the applicant. It appears based on the behavior of NCC members that the NCC either failed to review the vast amount of information the applicant has provided or chose not to. Over the course of almost two years and numerous meetings with wetlands scientist, engineers and peer reviewers, the applicant made numerous changes and additions to the plans to incorporate a wide variety of methods to protect the resources under the Act. All the performance standards of the Wetlands Protection Act as well as the appropriate Stormwater Management Techniques and BMP's have been incorporated in the final designs to protect the resource areas. The NCC's apparent definition of "protection" is a blanket prohibition on development, which is simply not the purpose of the Wetlands Protection Act. A list of all the information submitted to the commission is attached, and it supplies more than enough information to show that we have met the burden of proof to protect the resource areas and the performance standards of the Act.*

5. Regarding insufficient information and refusal to provide sufficient information

- a. The Applicant failed to provide additional data for the Vernal Pool with the 'A' series wetland at the request of the Commission and the NHESP. Additionally, the Commission made requests to the Applicant to redesign the project to meet the performance standards and the interests set forth in the Act. The Applicant refused to redesign the project as requested by the Commission, and they failed to satisfy the burden of proof that the project as proposed is designed in such a way that it meets the performance standards and interests set forth in the act.



**Response:** *Natural Heritage did not request additional information regarding the ILSF as the Commission erroneously states. Natural Heritage stated that at the present time there was not enough information to certify the area as a vernal pool. Natural Heritage further stated that the finding could be changed if additional information were submitted, not that it required additional information, or that such information actually existed.*

*At present, and throughout the applicant's hearings, the area is not a vernal pool. The Commission does not have the authority to arbitrarily create a vernal pool where none exists.*

- b. The Applicant provide new documents to the Commission with insufficient time allowed for review of these documents, and then elected to have the Commission close the public hearing for this project.

**Response:** *The Applicant did provide additional documents in response to inaccurate submissions by abutting owners. Although the documents were submitted close to the hearing on November 2 2021, nothing prevented the Commission from reviewing these documents from November 2 to November 23, 2021, when the denial issued.*

*The documents the applicant responded to were from professionals hired by an abutter and were generated with the sole purpose of trying to stop the Project. The abutters consultants were given time at the hearing to discuss their opinions, however the Commission refused to allow the Applicants to rebut the statements by these consultants. Where the Commission has deliberately avoided hearing a contravening viewpoint, it cannot be said that its decision was reached with fairness and without preconception.*

- c. For the reasons listed above, as well as those in Findings 3(c) and 4(b), the Commission finds that insufficient information was provided to satisfy the burden of proof that the project as designed meets the performance standards and the interests set forth in the Act, and therefore cannot approve the project as proposed.

**Response:** *Again, Applicant has provided more than ample information has been submitted to the NCC. However, the NCC's review of that information has been haphazard, cursory, incomplete, or otherwise less than fulsome. Applicant has demonstrably satisfied all the performance standards and interests of the Wetlands Protection Act. After seven months, the NCC has had an ample opportunity to review the information provided by the applicant.*

**The NCC's Decision is Not based on the Factual Findings in the Record and is Thus Arbitrary and Capricious.**

In conclusion, for the reasons stated above and reflected in the record of the proceedings, the NCC has based its decision not on the facts submitted, but rather mistaken impressions of that information drawn from a cursory and incomplete review. This has led the NCC to exceed its authority, creating a vernal pool where none exists, and denying a project its own experts inform it has met all applicable standards.

Wherefore the Applicant respectfully requests a Superseding Order of Conditions approving the Project.

Respectfully Submitted,  
Cricket Lane LLC  
By Its Attorneys



Douglas C. Deschenes, Esq. BBO#564235  
Philip Schreffler, Esq. BBO# 691320  
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[philip@finnic.com](mailto:philip@finnic.com)  
[cases@finnic.com](mailto:cases@finnic.com)

CASH ONLY IF ALL CHECK LOCK SECURITY FEATURES

NEWBURYPORT FIVE CENTS SVGS BK  
NEWBURYPORT, MA 01950  
53-7150/2113

21464

**FINNERAN & NICHOLSON, P.C.**  
30 GREEN STREET  
NEWBURYPORT, MA 01950

12/6/2021

PAY TO THE ORDER OF Commonwealth of Massachusetts

\$ \*\*245.00

Two Hundred Forty-Five and 00/100\*\*\*\*\*

DOLLARS

PROTECTED AGAINST FRAUD

Commonwealth of Massachusetts



*Thomas J. White President*



MEMO DEP Appeal Applicaiton

FINNERAN & NICHOLSON, P.C.

Commonwealth of Massachusetts  
Reimbursed client expenses

DEP Appeal Application  
DCD/Eriksen, Walter

12/6/2021

21464

245.00

Checking Account

DEP Appeal Applicaiton

245.00

## Information Submitted to the Newbury Conservation Commission for Cricket Lane

### File named: "Wetransfer 2021-05-11 noi 2021011030

2020-06-30	Village at Cricket Lane Drainage Report Revised	397 pages
2021-03-8	Full Plan Reissued	30 Sheets
2021-05-10	Conservation Commission Notice of Intent	33 pages
	Certified Mail Receipts	
	Checks	

### File named: "2021-06-21 Con Com

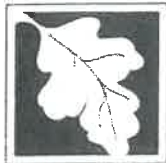
12-17-2020	Village at Cricket Lane LEC Peer Review Memo	28 Pages
17-300	ToNew Peer Review Memo #2	6 Pages
2021-06-21	Con Com – Cricket Lane with Attachments	99 Pages
2021-06-21	Con Com – Cricket Lane (WRD File)	
2021-06-21	Con Com – Cricket Lane (PDF)	1 Page
	Cricket Lane3	11 Pages
	LEC Peer Review Memorandum #1 Cricket Lane 4-29-20	27 Pages
	Serwatka VACL 4-13-20	11 Pages
	Serwatka Round 2 Cricket Lane 7-18-20	10 Pages

### File Named: "2021-11-1 con Com

2021-11-01	Stormwater Letter (WRD File)	5 pages
2021-11-01	Stormwater Letter (PDF)	5 Pages
2021-11-01	Vernal Pool Analysis (WRD File)Ranger	4 Pages
2021-11-01	Vernal Pool Analysis (PDF)	11 Pages
	Letter of Transmittal to DEP 2021-11-03	
	Letter of Transmittal to DEP 2021-11-08	
	Drainage Area to Vernal Pool	
	Drainage Area to Vernal Pool letter	1 page
	Form 11 Soil Sheets	25 Pages
	Grading Plan	1 Page
	Hydrocad	7 Pages
	Signature Pages	2 Pages

### Additional Information Submitted to the Newbury Conservation Commission

2019	ORAD Plan	4 sheets
2020	Villages at Cricket Lane Comprehensive Permit Application	Binder



**Massachusetts Department of Environmental Protection**  
**Bureau of Resource Protection - Wetlands**  
**WPA Form 5 – Order of Conditions**  
 Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

Provided by MassDEP:  
 050-1355  
 MassDEP File #  
 eDEP Transaction #  
 Newbury  
 City/Town

**A. General Information**

**Please note:**  
 this form has been modified with added space to accommodate the Registry of Deeds Requirements

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



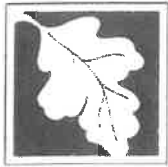
1. From: Town of Newbury  
Conservation Commission

2. This issuance is for (check one):  
 a.  Order of Conditions    b.  Amended Order of Conditions

3. To: Applicant:  
Walter Eriksen  
 a. First Name b. Last Name  
Cricket Lane, LLC  
 c. Organization  
92 Middlesex Road  
 d. Mailing Address  
Tyngsboro MA 01879  
 e. City/Town f. State g. Zip Code

4. Property Owner (if different from applicant):  
Byfield Estates LLC Byfield Estates LLC  
 a. First Name b. Last Name  
 c. Organization  
2 Dearborn Way  
 d. Mailing Address  
Middleton MA 01949  
 e. City/Town f. State g. Zip Code

5. Project Location:  
55 Pearson Drive Newbury  
 a. Street Address b. City/Town  
R20 75  
 c. Assessors Map/Plat Number d. Parcel/Lot Number  
 Latitude and Longitude, if known: 42d45m35.4s -70d55m46.3s  
 d. Latitude e. Longitude



**Massachusetts Department of Environmental Protection**  
**Bureau of Resource Protection - Wetlands**  
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**A. General Information (cont.)**

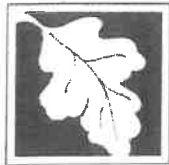
6. Property recorded at the Registry of Deeds for (attach additional information if more than one parcel):  
Essex  
 a. County  
36692  
 c. Book  
 b. Certificate Number (if registered land)  
493  
 d. Page  
 7. Dates: 5/14/2021 11/2/2021 11/23/2021  
 a. Date Notice of Intent Filed b. Date Public Hearing Closed c. Date of Issuance  
 8. Final Approved Plans and Other Documents (attach additional plan or document references as needed):  
40B Comprehensive Permit The Villages at Cricket Lane Byfield, MA  
 a. Plan Title  
Ranger Engineering Group, Inc. Benjamin C. Osgood Jr.  
 b. Prepared By c. Signed and Stamped by  
3/8/2021 Varies  
 d. Final Revision Date e. Scale  
Notice of Intent with all attachments 5/10/2021  
 f. Additional Plan or Document Title g. Date

**B. Findings**

1. Findings pursuant to the Massachusetts Wetlands Protection Act:  
 Following the review of the above-referenced Notice of Intent and based on the information provided in this application and presented at the public hearing, this Commission finds that the areas in which work is proposed is significant to the following interests of the Wetlands Protection Act (the Act). Check all that apply:
- a.  Public Water Supply b.  Land Containing Shellfish c.  Prevention of Pollution  
 d.  Private Water Supply e.  Fisheries f.  Protection of Wildlife Habitat  
 g.  Groundwater Supply h.  Storm Damage Prevention i.  Flood Control
2. This Commission hereby finds the project, as proposed, is: (check one of the following boxes)

**Approved subject to:**

- a.  the following conditions which are necessary in accordance with the performance standards set forth in the wetlands regulations. This Commission orders that all work shall be performed in accordance with the Notice of Intent referenced above, the following General Conditions, and any other special conditions attached to this Order. To the extent that the following conditions modify or differ from the plans, specifications, or other proposals submitted with the Notice of Intent, these conditions shall control.



**Massachusetts Department of Environmental Protection**  
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**B. Findings (cont.)**

Denied because:

- b.  the proposed work cannot be conditioned to meet the performance standards set forth in the wetland regulations. Therefore, work on this project may not go forward unless and until a new Notice of Intent is submitted which provides measures which are adequate to protect the interests of the Act, and a final Order of Conditions is issued. **A description of the performance standards which the proposed work cannot meet is attached to this Order.**
- c.  the information submitted by the applicant is not sufficient to describe the site, the work, or the effect of the work on the interests identified in the Wetlands Protection Act. Therefore, work on this project may not go forward unless and until a revised Notice of Intent is submitted which provides sufficient information and includes measures which are adequate to protect the Act's interests, and a final Order of Conditions is issued. **A description of the specific information which is lacking and why it is necessary is attached to this Order as per 310 CMR 10.05(6)(c).**
- 3.  Buffer Zone Impacts: Shortest distance between limit of project disturbance and the wetland resource area specified in 310 CMR 10.02(1)(a) a. linear feet

**Inland Resource Area Impacts:** Check all that apply below. (For Approvals Only)

Resource Area	Proposed Alteration	Permitted Alteration	Proposed Replacement	Permitted Replacement
4. <input type="checkbox"/> Bank	a. linear feet	b. linear feet	c. linear feet	d. linear feet
5. <input checked="" type="checkbox"/> Bordering Vegetated Wetland	a. square feet	b. square feet	c. square feet	d. square feet
6. <input type="checkbox"/> Land Under Waterbodies and Waterways	a. square feet	b. square feet	c. square feet	d. square feet
	e. c/y dredged	f. c/y dredged		
7. <input type="checkbox"/> Bordering Land Subject to Flooding	a. square feet	b. square feet	c. square feet	d. square feet
Cubic Feet Flood Storage	e. cubic feet	f. cubic feet	g. cubic feet	h. cubic feet
8. <input checked="" type="checkbox"/> Isolated Land Subject to Flooding	a. square feet	b. square feet		
Cubic Feet Flood Storage	c. cubic feet	d. cubic feet	e. cubic feet	f. cubic feet
9. <input type="checkbox"/> Riverfront Area	a. total sq. feet	b. total sq. feet		
Sq ft within 100 ft	c. square feet	d. square feet	e. square feet	f. square feet
Sq ft between 100-200 ft	g. square feet	h. square feet	i. square feet	j. square feet



**Massachusetts Department of Environmental Protection**  
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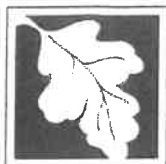
eDEP Transaction # \_\_\_\_\_  
**Newbury**  
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## B. Findings (cont.)

**Coastal Resource Area Impacts:** Check all that apply below. (For Approvals Only)

	Proposed Alteration	Permitted Alteration	Proposed Replacement	Permitted Replacement
10. <input type="checkbox"/> Designated Port Areas	Indicate size under Land Under the Ocean, below			
11. <input type="checkbox"/> Land Under the Ocean	_____ a. square feet	_____ b. square feet		
	_____ c. c/y dredged	_____ d. c/y dredged		
12. <input type="checkbox"/> Barrier Beaches	Indicate size under Coastal Beaches and/or Coastal Dunes below			
13. <input type="checkbox"/> Coastal Beaches	_____ a. square feet	_____ b. square feet	_____ c. nourishment cu yd	_____ d. nourishment cu yd
14. <input type="checkbox"/> Coastal Dunes	_____ a. square feet	_____ b. square feet	_____ c. nourishment cu yd	_____ d. nourishment cu yd
15. <input type="checkbox"/> Coastal Banks	_____ a. linear feet	_____ b. linear feet		
16. <input type="checkbox"/> Rocky Intertidal Shores	_____ a. square feet	_____ b. square feet		
17. <input type="checkbox"/> Salt Marshes	_____ a. square feet	_____ b. square feet	_____ c. square feet	_____ d. square feet
18. <input type="checkbox"/> Land Under Salt Ponds	_____ a. square feet	_____ b. square feet		
	_____ c. c/y dredged	_____ d. c/y dredged		
19. <input type="checkbox"/> Land Containing Shellfish	_____ a. square feet	_____ b. square feet	_____ c. square feet	_____ d. square feet
20. <input type="checkbox"/> Fish Runs	Indicate size under Coastal Banks, Inland Bank, Land Under the Ocean, and/or inland Land Under Waterbodies and Waterways, above			
	_____ a. c/y dredged	_____ b. c/y dredged		
21. <input type="checkbox"/> Land Subject to Coastal Storm Flowage	_____ a. square feet	_____ b. square feet		
22. <input type="checkbox"/> Riverfront Area	_____ a. total sq. feet	_____ b. total sq. feet		
Sq ft within 100 ft	_____ c. square feet	_____ d. square feet	_____ e. square feet	_____ f. square feet
Sq ft between 100-200 ft	_____ g. square feet	_____ h. square feet	_____ i. square feet	_____ j. square feet





Massachusetts Department of Environmental Protection  
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## B. Findings (cont.)

\* #23. If the project is for the purpose of restoring or enhancing a wetland resource area in addition to the square footage that has been entered in Section B.5.c (BVW) or B.17.c (Salt Marsh) above, please enter the additional amount here.

23.  Restoration/Enhancement \*:

a. square feet of BVW \_\_\_\_\_

b. square feet of salt marsh \_\_\_\_\_

24.  Stream Crossing(s):

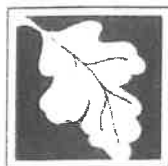
a. number of new stream crossings \_\_\_\_\_

b. number of replacement stream crossings \_\_\_\_\_

## C. General Conditions Under Massachusetts Wetlands Protection Act

The following conditions are only applicable to Approved projects.

1. Failure to comply with all conditions stated herein, and with all related statutes and other regulatory measures, shall be deemed cause to revoke or modify this Order.
2. The Order does not grant any property rights or any exclusive privileges; it does not authorize any injury to private property or invasion of private rights.
3. This Order does not relieve the permittee or any other person of the necessity of complying with all other applicable federal, state, or local statutes, ordinances, bylaws, or regulations.
4. The work authorized hereunder shall be completed within three years from the date of this Order unless either of the following apply:
  - a. The work is a maintenance dredging project as provided for in the Act; or
  - b. The time for completion has been extended to a specified date more than three years, but less than five years, from the date of issuance. If this Order is intended to be valid for more than three years, the extension date and the special circumstances warranting the extended time period are set forth as a special condition in this Order.
  - c. If the work is for a Test Project, this Order of Conditions shall be valid for no more than one year.
5. This Order may be extended by the issuing authority for one or more periods of up to three years each upon application to the issuing authority at least 30 days prior to the expiration date of the Order. An Order of Conditions for a Test Project may be extended for one additional year only upon written application by the applicant, subject to the provisions of 310 CMR 10.05(11)(f).
6. If this Order constitutes an Amended Order of Conditions, this Amended Order of Conditions does not extend the issuance date of the original Final Order of Conditions and the Order will expire on 11/23 /2024 unless extended in writing by the Department.
7. Any fill used in connection with this project shall be clean fill. Any fill shall contain no trash, refuse, rubbish, or debris, including but not limited to lumber, bricks, plaster, wire, lath, paper, cardboard, pipe, tires, ashes, refrigerators, motor vehicles, or parts of any of the foregoing.



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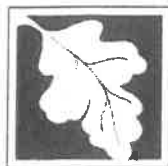
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### **C. General Conditions Under Massachusetts Wetlands Protection Act**

8. This Order is not final until all administrative appeal periods from this Order have elapsed, or if such an appeal has been taken, until all proceedings before the Department have been completed.
9. No work shall be undertaken until the Order has become final and then has been recorded in the Registry of Deeds or the Land Court for the district in which the land is located, within the chain of title of the affected property. In the case of recorded land, the Final Order shall also be noted in the Registry's Grantor Index under the name of the owner of the land upon which the proposed work is to be done. In the case of the registered land, the Final Order shall also be noted on the Land Court Certificate of Title of the owner of the land upon which the proposed work is done. The recording information shall be submitted to the Conservation Commission on the form at the end of this Order, which form must be stamped by the Registry of Deeds, prior to the commencement of work.
10. A sign shall be displayed at the site not less than two square feet or more than three square feet in size bearing the words,
 

"Massachusetts Department of Environmental Protection" [or, "MassDEP"]  
 "File Number            050-1355            "
11. Where the Department of Environmental Protection is requested to issue a Superseding Order, the Conservation Commission shall be a party to all agency proceedings and hearings before MassDEP.
12. Upon completion of the work described herein, the applicant shall submit a Request for Certificate of Compliance (WPA Form 8A) to the Conservation Commission.
13. The work shall conform to the plans and special conditions referenced in this order.
14. Any change to the plans identified in Condition #13 above shall require the applicant to inquire of the Conservation Commission in writing whether the change is significant enough to require the filing of a new Notice of Intent.
15. The Agent or members of the Conservation Commission and the Department of Environmental Protection shall have the right to enter and inspect the area subject to this Order at reasonable hours to evaluate compliance with the conditions stated in this Order, and may require the submittal of any data deemed necessary by the Conservation Commission or Department for that evaluation.
16. This Order of Conditions shall apply to any successor in interest or successor in control of the property subject to this Order and to any contractor or other person performing work conditioned by this Order.



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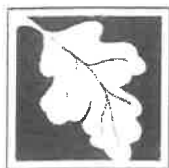
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**C. General Conditions Under Massachusetts Wetlands Protection Act (cont.)**

17. Prior to the start of work, and if the project involves work adjacent to a Bordering Vegetated Wetland, the boundary of the wetland in the vicinity of the proposed work area shall be marked by wooden stakes or flagging. Once in place, the wetland boundary markers shall be maintained until a Certificate of Compliance has been issued by the Conservation Commission.
18. All sedimentation barriers shall be maintained in good repair until all disturbed areas have been fully stabilized with vegetation or other means. At no time shall sediments be deposited in a wetland or water body. During construction, the applicant or his/her designee shall inspect the erosion controls on a daily basis and shall remove accumulated sediments as needed. The applicant shall immediately control any erosion problems that occur at the site and shall also immediately notify the Conservation Commission, which reserves the right to require additional erosion and/or damage prevention controls it may deem necessary. Sedimentation barriers shall serve as the limit of work unless another limit of work line has been approved by this Order.
19. The work associated with this Order (the "Project")
- (1)  is subject to the Massachusetts Stormwater Standards
- (2)  is NOT subject to the Massachusetts Stormwater Standards

**If the work is subject to the Stormwater Standards, then the project is subject to the following conditions:**

- a) All work, including site preparation, land disturbance, construction and redevelopment, shall be implemented in accordance with the construction period pollution prevention and erosion and sedimentation control plan and, if applicable, the Stormwater Pollution Prevention Plan required by the National Pollution Discharge Elimination System Construction General Permit as required by Stormwater Condition 8. Construction period erosion, sedimentation and pollution control measures and best management practices (BMPs) shall remain in place until the site is fully stabilized.
- b) No stormwater runoff may be discharged to the post-construction stormwater BMPs unless and until a Registered Professional Engineer provides a Certification that:
- i. all construction period BMPs have been removed or will be removed by a date certain specified in the Certification. For any construction period BMPs intended to be converted to post construction operation for stormwater attenuation, recharge, and/or treatment, the conversion is allowed by the MassDEP Stormwater Handbook BMP specifications and that the BMP has been properly cleaned or prepared for post construction operation, including removal of all construction period sediment trapped in inlet and outlet control structures;
  - ii. as-built final construction BMP plans are included, signed and stamped by a Registered Professional Engineer, certifying the site is fully stabilized;
  - iii. any illicit discharges to the stormwater management system have been removed, as per the requirements of Stormwater Standard 10;



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**C. General Conditions Under Massachusetts Wetlands Protection Act (cont.)**

iv. all post-construction stormwater BMPs are installed in accordance with the plans (including all planting plans) approved by the issuing authority, and have been inspected to ensure that they are not damaged and that they are in proper working condition;

v. any vegetation associated with post-construction BMPs is suitably established to withstand erosion.

c) The landowner is responsible for BMP maintenance until the issuing authority is notified that another party has legally assumed responsibility for BMP maintenance. Prior to requesting a Certificate of Compliance, or Partial Certificate of Compliance, the responsible party (defined in General Condition 18(e)) shall execute and submit to the issuing authority an Operation and Maintenance Compliance Statement ("O&M Statement") for the Stormwater BMPs identifying the party responsible for implementing the stormwater BMP Operation and Maintenance Plan ("O&M Plan") and certifying the following:

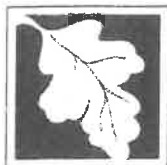
i.) the O&M Plan is complete and will be implemented upon receipt of the Certificate of Compliance, and

ii.) the future responsible parties shall be notified in writing of their ongoing legal responsibility to operate and maintain the stormwater management BMPs and implement the Stormwater Pollution Prevention Plan.

d) Post-construction pollution prevention and source control shall be implemented in accordance with the long-term pollution prevention plan section of the approved Stormwater Report and, if applicable, the Stormwater Pollution Prevention Plan required by the National Pollution Discharge Elimination System Multi-Sector General Permit.

e) Unless and until another party accepts responsibility, the landowner, or owner of any drainage easement, assumes responsibility for maintaining each BMP. To overcome this presumption, the landowner of the property must submit to the issuing authority a legally binding agreement of record, acceptable to the issuing authority, evidencing that another entity has accepted responsibility for maintaining the BMP, and that the proposed responsible party shall be treated as a permittee for purposes of implementing the requirements of Conditions 18(f) through 18(k) with respect to that BMP. Any failure of the proposed responsible party to implement the requirements of Conditions 18(f) through 18(k) with respect to that BMP shall be a violation of the Order of Conditions or Certificate of Compliance. In the case of stormwater BMPs that are serving more than one lot, the legally binding agreement shall also identify the lots that will be serviced by the stormwater BMPs. A plan and easement deed that grants the responsible party access to perform the required operation and maintenance must be submitted along with the legally binding agreement.

f) The responsible party shall operate and maintain all stormwater BMPs in accordance with the design plans, the O&M Plan, and the requirements of the Massachusetts Stormwater Handbook.



**Massachusetts Department of Environmental Protection  
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**C. General Conditions Under Massachusetts Wetlands Protection Act (cont.)**

- g) The responsible party shall:
1. Maintain an operation and maintenance log for the last three (3) consecutive calendar years of inspections, repairs, maintenance and/or replacement of the stormwater management system or any part thereof, and disposal (for disposal the log shall indicate the type of material and the disposal location);
  2. Make the maintenance log available to MassDEP and the Conservation Commission ("Commission") upon request; and
  3. Allow members and agents of the MassDEP and the Commission to enter and inspect the site to evaluate and ensure that the responsible party is in compliance with the requirements for each BMP established in the O&M Plan approved by the issuing authority.
- h) All sediment or other contaminants removed from stormwater BMPs shall be disposed of in accordance with all applicable federal, state, and local laws and regulations.
- i) Illicit discharges to the stormwater management system as defined in 310 CMR 10.04 are prohibited.
- j) The stormwater management system approved in the Order of Conditions shall not be changed without the prior written approval of the issuing authority.
- k) Areas designated as qualifying pervious areas for the purpose of the Low Impact Site Design Credit (as defined in the MassDEP Stormwater Handbook, Volume 3, Chapter 1, Low Impact Development Site Design Credits) shall not be altered without the prior written approval of the issuing authority.
- l) Access for maintenance, repair, and/or replacement of BMPs shall not be withheld. Any fencing constructed around stormwater BMPs shall include access gates and shall be at least six inches above grade to allow for wildlife passage.

Special Conditions (if you need more space for additional conditions, please attach a text document):

**See Attachment "A"**

20. For Test Projects subject to 310 CMR 10.05(11), the applicant shall also implement the monitoring plan and the restoration plan submitted with the Notice of Intent. If the conservation commission or Department determines that the Test Project threatens the public health, safety or the environment, the applicant shall implement the removal plan submitted with the Notice of Intent or modify the project as directed by the conservation commission or the Department.



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## D. Findings Under Municipal Wetlands Bylaw or Ordinance

1. Is a municipal wetlands bylaw or ordinance applicable?  Yes  No
2. The \_\_\_\_\_ hereby finds (check one that applies):

Conservation Commission

- a.  that the proposed work cannot be conditioned to meet the standards set forth in a municipal ordinance or bylaw, specifically:

1. Municipal Ordinance or Bylaw

2. Citation

Therefore, work on this project may not go forward unless and until a revised Notice of Intent is submitted which provides measures which are adequate to meet these standards, and a final Order of Conditions is issued.

- b.  that the following additional conditions are necessary to comply with a municipal ordinance or bylaw:

1. Municipal Ordinance or Bylaw

2. Citation

3. The Commission orders that all work shall be performed in accordance with the following conditions and with the Notice of Intent referenced above. To the extent that the following conditions modify or differ from the plans, specifications, or other proposals submitted with the Notice of Intent, the conditions shall control.

The special conditions relating to municipal ordinance or bylaw are as follows (if you need more space for additional conditions, attach a text document):



Massachusetts Department of Environmental Protection  
Bureau of Resource Protection - Wetlands  
**WPA Form 5 – Order of Conditions**  
Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

Provided by MassDEP:  
050-1355  
MassDEP File #

eDEP Transaction #  
Newbury  
City/Town

**E. Signatures**

This Order is valid for three years, unless otherwise specified as a special condition pursuant to General Conditions #4, from the date of issuance.

Please indicate the number of members who will sign this form. This Order must be signed by a majority of the Conservation Commission.

The Order must be mailed by certified mail (return receipt requested) or hand delivered to the applicant. A copy also must be mailed or hand delivered at the same time to the appropriate Department of Environmental Protection Regional Office, if not filing electronically, and the property owner, if different from applicant.

11/23/2021

1. Date of Issuance

4

2. Number of Signers

[Signature]  
Signature

Benjamin Gahagan  
Printed Name

[Signature]  
Signature

DANIEL STREETER  
Printed Name

[Signature]  
Signature

Brian Collieran  
Printed Name

[Signature]  
Signature

[Signature]  
Printed Name

[Signature]  
Signature

[Signature]  
Printed Name

[Signature]  
Signature

[Signature]  
Printed Name

[Signature]  
Signature

[Signature]  
Printed Name

[Signature]  
Signature

[Signature]  
Printed Name

by hand delivery on

by certified mail, return receipt requested, on

11/23/2021  
Date

Date



**Massachusetts Department of Environmental Protection**  
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## F. Appeals

The applicant, the owner, any person aggrieved by this Order, any owner of land abutting the land subject to this Order, or any ten residents of the city or town in which such land is located, are hereby notified of their right to request the appropriate MassDEP Regional Office to issue a Superseding Order of Conditions. The request must be made by certified mail or hand delivery to the Department, with the appropriate filing fee and a completed Request for Departmental Action Fee Transmittal Form, as provided in 310 CMR 10.03(7) within ten business days from the date of issuance of this Order. A copy of the request shall at the same time be sent by certified mail or hand delivery to the Conservation Commission and to the applicant, if he/she is not the appellant.

Any appellants seeking to appeal the Department's Superseding Order associated with this appeal will be required to demonstrate prior participation in the review of this project. Previous participation in the permit proceeding means the submission of written information to the Conservation Commission prior to the close of the public hearing, requesting a Superseding Order, or providing written information to the Department prior to issuance of a Superseding Order.

The request shall state clearly and concisely the objections to the Order which is being appealed and how the Order does not contribute to the protection of the interests identified in the Massachusetts Wetlands Protection Act (M.G.L. c. 131, § 40), and is inconsistent with the wetlands regulations (310 CMR 10.00). To the extent that the Order is based on a municipal ordinance or bylaw, and not on the Massachusetts Wetlands Protection Act or regulations, the Department has no appellate jurisdiction.





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**G. Recording Information**

Prior to commencement of work, this Order of Conditions must be recorded in the Registry of Deeds or the Land Court for the district in which the land is located, within the chain of title of the affected property. In the case of recorded land, the Final Order shall also be noted in the Registry's Grantor Index under the name of the owner of the land subject to the Order. In the case of registered land, this Order shall also be noted on the Land Court Certificate of Title of the owner of the land subject to the Order of Conditions. The recording information on this page shall be submitted to the Conservation Commission listed below.

Town of Newbury  
 Conservation Commission

Detach on dotted line, have stamped by the Registry of Deeds and submit to the Conservation Commission.

To:

Town of Newbury  
 Conservation Commission

Please be advised that the Order of Conditions for the Project at:

55 Pearson Drive  
 Project Location

050-1355  
 MassDEP File Number

Has been recorded at the Registry of Deeds of:

Essex South  
 County

Book

Page

for: Property Owner

and has been noted in the chain of title of the affected property in:

Book

Page

In accordance with the Order of Conditions issued on:

November 23, 2021  
 Date

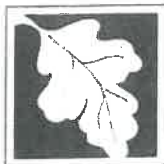
If recorded land, the instrument number identifying this transaction is:

Instrument Number

If registered land, the document number identifying this transaction is:

Document Number

Signature of Applicant



**Massachusetts Department of Environmental Protection**  
Bureau of Resource Protection - Wetlands

**Request for Departmental Action Fee  
Transmittal Form**

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

DEP File Number:

050-1355

Provided by DEP

**A. Request Information**

1. Location of Project

55 Pearson Drive

a. Street Address

Newbury, MA 01922

b. City/Town, Zip

c. Check number

d. Fee amount

2. Person or party making request (if appropriate, name the citizen group's representative):

Name

Mailing Address

City/Town

State

Zip Code

Phone Number

Fax Number (if applicable)

3. Applicant (as shown on Determination of Applicability (Form 2), Order of Resource Area Delineation (Form 4B), Order of Conditions (Form 5), Restoration Order of Conditions (Form 5A), or Notice of Non-Significance (Form 6)):

Name

Mailing Address

City/Town

State

Zip Code

Phone Number

Fax Number (if applicable)

4. DEP File Number:

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



**B. Instructions**

1. When the Departmental action request is for (check one):

- Superseding Order of Conditions – Fee: \$120.00 (single family house projects) or \$245 (all other projects)
- Superseding Determination of Applicability – Fee: \$120
- Superseding Order of Resource Area Delineation – Fee: \$120



Massachusetts Department of Environmental Protection  
Bureau of Resource Protection - Wetlands

**Request for Departmental Action Fee  
Transmittal Form**

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

DEP File Number:

050-1355

Provided by DEP

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**B. Instructions (cont.)**

Send this form and check or money order, payable to the *Commonwealth of Massachusetts*, to:

Department of Environmental Protection  
Box 4062  
Boston, MA 02211

2. On a separate sheet attached to this form, state clearly and concisely the objections to the Determination or Order which is being appealed. To the extent that the Determination or Order is based on a municipal bylaw, and not on the Massachusetts Wetlands Protection Act or regulations, the Department has no appellate jurisdiction.
3. Send a **copy** of this form and a **copy** of the check or money order with the Request for a Superseding Determination or Order by certified mail or hand delivery to the appropriate DEP Regional Office (see <https://www.mass.gov/service-details/massdep-regional-offices-by-community>).
4. A copy of the request shall at the same time be sent by certified mail or hand delivery to the Conservation Commission and to the applicant, if he/she is not the appellant.



**Town of Newbury  
Conservation Commission  
"Attachment A"**

DEP File Number: 050-1355

Address: 55 Pearson Drive

OOB Issue Date: *November 23, 2021*

Under the Order of Conditions ("the Order", or "OOB") issued under **MassDEP File Number 050-1355**, the Newbury Conservation Commission ("the Commission" or "NCC") hereby finds that the information submitted by the Applicant is not sufficient to describe the site, the work, or the effect of the work on the interests identified in the Wetlands Protection Act. Additionally, the proposed work cannot be conditioned to meet the performance standards set forth in the wetland regulations. Therefore, work on this project may not go forward unless a revised Notice of Intent is submitted which provides sufficient information and includes measures which are adequate to protect the Act's interests, and a final Order of Conditions is issued. Descriptions of the performance standards which the proposed work cannot meet, as well as the specific information which is lacking and why it is necessary, are outlined in this Attachment.

**I. Referenced Documents & Plans:**

<b>WPA Form 3: Notice of Intent with all attachments</b>	<b>Prepared For:</b> Walter Eriksen Cricket Lane, LLC 92 Middlesex Rd Tyngsboro, MA 01879	<b>Prepared By:</b> Benjamin C. Osgood Jr., PE Ranger Engineering Group, Inc 13 Branch St, Suite 101 Methuen, MA 01844
<b>Site Plans (30 Sheets)</b>	<b>Entitled:</b> 40B Comprehensive Permit The Villages at Cricket Lane Byfield, MA	<b>Prepared By:</b> Benjamin C. Osgood Jr., PE Ranger Engineering Group, Inc Last revision date: March 8, 2021
<b>WPA Form 4B: Order of Resource Area Delineation</b>	<b>Issued To:</b> Walter Eriksen DEP File #050-1295 <b>For the Property at:</b> 55 Pearson Drive, Byfield, MA Issue Date: August 29, 2019	<b>Referenced Plans:</b> ANRAD Plan Byfield Estates <b>Prepared By:</b> Benjamin C. Osgood Jr., PE Ranger Engineering & Design, LLC

## **II. Supplemental Documents & Materials:**

The Commission's decision considered the following documents and materials in addition to those listed in the preceding section:

1. ZBA Peer Review Memorandums from Ann Marton, submitted by Benjamin C. Osgood Jr (Ranger Engineering Group, Inc) on June 21, 2021
2. Email correspondence from Jacob Kubel with the Natural Heritage Endangered Species Program (NHESP), forwarded/received August 14, 2019
3. Email correspondence from Jacob Kubel with the NHESP, sent to Applicant and representatives July 10, 2021
4. Email correspondence from Jacob Kubel with the NHESP, received August 25, 2021
5. Response to the Certified Vernal Pool Analysis from Patrick Garner, submitted by Benjamin C. Osgood Jr (Ranger Engineering Group, Inc) on November 2, 2021 at 12:46 PM
6. Response to Stormwater Review by John Chessia, submitted by Benjamin C. Osgood Jr (Ranger Engineering Group, Inc) on November 2, 2021 at 12:46 PM
7. Title V Form 11 – Soil Suitability Assessment for On-site Sewage Disposal, submitted by Benjamin C. Osgood Jr (Ranger Engineering Group, Inc) on November 2, 2021 at 12:47 PM

## **III. Public Hearing History:**

The public hearing/meeting history for this project is as follows and includes only the dates of meetings where discussion on this project was held. This list does not include the dates of the three meetings at which the hearing was opened and immediately continued with no discussion:

1. June 1, 2021 (first public hearing)
2. June 22, 2021
3. August 3, 2021
4. September 7, 2021
5. November 2, 2021 (close of public hearing)
6. November 12, 2021 (Commission meeting to hold vote to issue Denial OOC, this meeting was publicly accessible but was closed to public comment)

## **IV. Introduction:**

This OOC addresses a Notice of Intent (NOI) filed with the Commission for proposed work located at 55 Pearson Drive, Newbury, MA. The work proposed is to construct twenty-four (24) single-family homes with 800 feet of roadway, a common septic system, water and sewer lines, and a stormwater management system. The roadway includes limited wetland crossing, filling, and replacement with work in the Buffer Zone. The land is currently vacant and covers approximately 15.08(+/-) acres. The proposed project has been approved as a Chapter 40B development by the Town of Newbury

Zoning Board of Appeals (ZBA) and was issued a Comprehensive Permit Decision on March 18, 2021.

The following wetland areas are identified in the approved plans for the Order of Resource Delineation (ORAD) issued by the Commission on August 29, 2019:

- Isolated Wetland with Vernal Pool and Isolated Land Subject to Flooding within its boundary ('A series wetland')
- Isolated Wetland (non-jurisdictional) ('B series wetland')
- Bordering Vegetated Wetland ('C series wetland')
- Bordering Vegetated Wetland with Intermittent Stream ('D' & 'E series wetland')
- NHESP Certified Vernal Pool ('VP series wetland')

The Applicant engaged the professional services of Ranger Engineering Group, Inc to prepare the NOI, project site plans, and supporting narrative. The Applicant engaged the services of Norse Environmental Services, Inc for a wetland restoration report. The Applicant was also represented by Attorney Douglas C. Deschenes with Finneran and Nicholson, P.C.. The Town of Newbury engaged Ann Marton with LEC Environmental Consultants, Inc for wetland science peer review services during both the ZBA process and the Conservation Commission hearing process. During the ZBA process, Ms. Marton issued the Applicant an extensive review of the project plans which resulted in revisions that were ultimately accepted and approved in the Comprehensive Permit.

The Applicant and their representatives repeatedly referred back to the ZBA peer review and Comprehensive Permit stating they believed it addressed any concerns the Commission could have had. During the August 3 hearing Attorney Deschenes noted that the ZBA was "acting as the Conservation Commission" during their review process, and that Ms. Marton's ZBA peer review resulted in plan revisions that address Conservation concerns. Similar statements were made by the Applicant and their representatives in the September 7 hearing as well. The Conservation Commission, however, is the permit granting authority under M.G.L. c. 40B sections 21 through 23 for the purposes of applying the WPA. The Zoning Board of Appeals did not determine nor claim to issue an Order of Conditions under the Act. The Applicant specifically requested that the public hearing for this project be closed at the November 2, 2021 meeting.

Over the course of the Conservation Commission hearing process, a number of concerns were noted and expressed by the Commission. Throughout the process, the Commission attempted numerous times to gain clarification on these concerns from the Applicant, either by requesting additional information or by requesting the Applicant to reconfigure the project. Notwithstanding said requests, the Applicant did not provide sufficient information upon which the Commission could properly approve an Order of Conditions that would address the performance standards and interests of the Act. Specifically, the Commission has determined:

1. Work within the 100' Buffer Zone to the 'D' and 'VP' series wetlands:
  - a. The proposed septic system falls at 102' away from the CVP, with the primary absorption area closest to the Buffer Zone line. The septic system also falls partially inside the 100' Buffer to the BVW. Grading for the system is entirely within the 100' Buffer to the BVW and the CVP. The Applicant refused to consider reconfiguring the system to provide additional protections and further limit the impacts of the Buffer Zone work to the resource areas. The Applicant stated they refused to reconfigure the system as requested by the Commission in the September 7 hearing, and this refusal was reaffirmed during the November 2 hearing.
    - i. The Commission would like to note that, while possible Title V violations were initially part of the denial discussed in the November 12 meeting, we have since received new feedback from Claire Golden with Mass DEP stating that associated grading is not considered part of the septic system. The septic system itself is in fact fully compliant with the WPA regulations. For this reason, the Commission would rescind Title V issues from the reasons for denial.
  - b. There is a retaining wall as well as drainage swales, both proposed for the purpose of conveying stormwater, located within 100' of the CVP. During the November 2 hearing the Commission discussed the stormwater standard (MA Stormwater Handbook, vol. 1 ch. 1 Stormwater Standards, Table CA 2: Standard 6) that disallows stormwater structures and stormwater BMPs within 100' of a CVP, and in an attempt to deter the concerns of the Commission, Attorney Deschenes was noted on the record as stating, "Shame on us for calling it a swale. All it is, is that backyard is slightly graded so that the water flows in the correct direction, it's not a channelized swale." However, the area in question was referred to by the Applicant and their representatives throughout the hearing process, and is a proposed depression constructed to convey stormwater. Members of the Commission voiced concerns of the impact of stormwater management BMPs in the Buffer zone during every hearing except that on June 22. The Applicant failed to address same.
2. Protection of the 'A' series wetland and the Vernal Pool within its boundary:
  - a. There is impact from work in proximity to the Vernal Pool and its impact on the functionality of the resource as well as the associated wildlife habitat within and surrounding this sensitive area. The Commission expressed concerns over the proximity of work and structures to the Vernal Pool. The Applicant did not revise the plans to address these issues.
  - b. The Applicant's plans included discrepancies between the ORAD, which shows delineation for a Vernal Pool, and the site plans submitted with the NOI, which failed to identify the Vernal Pool. The Board peer review agent noted the discrepancies as did members of the Commission. The Commission and its peer review agent requested the Applicant to treat

the area as sensitive habitat, providing a Buffer Zone and protections around it, and the Applicant has refused to do so.

3. Buffer Zone work:

- a. In multiple locations, proposed tree clearing and grading, and associated permanent modifications and impacts of same, run flush with the wetland delineations. Notable locations include the Western portion of the 'D' series wetland, the entire northern half of the 'A' series wetland containing the Vernal Pool, and along most of the 'C' series wetland borders. Additionally, significant amounts of cutting will be conducted within the 100' Buffer Zone to the CVP. This is linked to the deficiencies outlined in Section IV(2)(a) and (b).
- b. Grading in the Buffer Zone of the 'C' series wetland extending right up to the wetland line was also noted as a significant concern, with requests to set a limit of work farther away from the edge of the wetland delineation, the Applicant refused to make these adjustments. This is linked to the deficiencies outlined in Section IV(1)(a) and (2)(a).

4. Insufficient information, refusal to redesign any part of the project to protect the interests of the Act, refusal to answer questions, provision of insufficient answers, insufficient time for review:

- a. There are discrepancies between the ORAD plans (showing a Vernal Pool in the 'A' series wetland) and the site plans submitted with the NOI (did not show the delineated Vernal Pool). This is linked to the deficiencies outlined in Section IV(2)(b).
- b. The Applicant and their representatives refused to redesign, reconfigure, or shrink the project in order to provide adequate protections to wetland resources and wildlife habitats.
  - i. September 7 – request made to reconfigure septic system (Section IV(1)(a)), Applicant refused
  - ii. September 7 – request for additional information about wetland replication, Applicant resubmitted copies of the wetland replication sheets from the site plans and a letter issued by Norse Environmental Services, Inc, all of which the Commission already had
  - iii. September 7 – request to have no work in the 100' Buffer Zone to the CVP in order to protect sensitive habitat, Applicant refused to redesign the project
  - iv. November 2 – request for the Applicant to consider shrinking the footprint of the project in order to mitigate issues and concerns voiced by the Commission, Applicant refused to redesign the project
  - v. November 2 – request to reconfigure the project to resolve issues of stormwater management in the 100' Buffer Zone to the CVP, Applicant refused to reconfigure the project



- c. The Applicant failed to provide additional hydrology data at the request of the NHESP during attempts to certify the Vernal Pool in the 'A' series wetland. When requested multiple times by the Commission to provide that information, the Applicant repeatedly refused to do so. Requests from NHESP for more data are noted in three sets of email correspondence (Section II(2), (3), and (4))
- d. The Applicant submitted three documents (Section II(5), (6), and (7)) to the Commission for review on November 2, 2021, all approximately six hours prior to the start time of the hearing (7:00PM EDT), thus not allowing for sufficient time for the Commission members to review the documents.
- e. The Applicant elected to have the Commission close the public hearing for this project during the hearing on November 2. The Commission urged the Applicant to allow for a continuance so they may review recently submitted documents and to address outstanding concerns. The Applicant refused to do so, leaving many concerns unaddressed.

**V. Findings:**

1. There are discrepancies between the approved plans associated with the ORAD issued on August 29, 2019 (DEP File Number 050-1295) and the site plans submitted with the Notice of Intent (NOI).
  - a. On sheet 1 of 2 of the approved ORAD plans, delineation is shown for an "Isolated Wetland with a Vernal Pool and Isolated Land Subject to Flooding within its Boundary" on the southern edge of the property ('A series' wetland area). The plans submitted with the NOI identify the same area as "Isolated Wetland with an Isolated Land Subject to Flooding within its Boundary" on all sheets where the 'A series' wetland is identified and labeled (Sheets 3, 5, 13, and 25).
  - b. For the reasons listed above, the Commission finds that the NOI as submitted is factually incomplete, and as such the project cannot be conditioned to meet the performance standards and interests set forth in the WPA.
2. Regarding concerns for stormwater BMPs:
  - a. Under the WPA Regulations (310 CMR 10.00), stormwater BMPs include basins, discharge outlets, swales, rain gardens, filters, or other stormwater treatment practice or measure either alone or in combination including without limitation any overflow pipe, conduit, weir control structure that:
    - a) is not naturally occurring;
    - b) is not designed as a wetland replication area;
    - and c) has been designed, constructed, and installed for the purpose of conveying, collecting, storing, discharging, recharging, or treating stormwater (310 CMR 10.04).
  - b. According to the Massachusetts Stormwater Handbook and Stormwater Standards, stormwater BMPs must be set back 100' from a CVP, and proponents must perform a habitat evaluation and demonstrate that the

stormwater BMPs meet the performance standard of having no adverse impact on the habitat functions of a CVP (MA Stormwater Handbook, vol. 1 ch. 1 Stormwater Standards, Table CA 2: Standard 6).

- c. For the reasons listed above, the stormwater BMPs listed in Section IV(1)(b) of this Attachment are not in compliance with the Stormwater Standards, and do not protect the interests or meet the performance standards of the WPA.
3. Regarding protection of the 'A' series wetland area and the Vernal Pool within its boundary:
    - a. This Vernal Pool is significant to the protection of wildlife habitat pursuant to 310 CMR 10.57(1)(b). Under 310 CMR 10.57(2)(b)(4) the portions of an ILSF area which shall be presumed to be vernal pool habitat are those determined under procedures established in 310 CMR 10.57(2)(a)(5), which states that resources areas presumed to be vernal pool habitat are those certified by MA DFW. However, such presumption is rebuttable and may be overcome upon a clear showing to the contrary. In this case, the "clear showing to the contrary" lies in the ORAD issued to the Applicant delineating the Vernal Pool within the 'A' series wetland.
    - b. Pursuant to 310 CMR 10.52, it is the responsibility of the person proposing work to design and complete his project in conformance with performance standards, and it is the responsibility of the issuing authority to impose such conditions on a proposed project as to ensure that the project is designed and completed in such a manner consistent with these standards. In the case of this project, however, the Applicant repeatedly refused to redesign any part of the project in order to meet performance standards and allow the Commission to appropriately condition the work.
    - c. The Applicant failed to provide information to overcome the burden of proof rebutting the presumption that the altered land surrounding the 'A' series wetland is significant to the interests specified in 310 CMR 10.57(1)(a) and (b), pursuant to 310 CMR 10.57(3).
    - d. For the reasons above, the Commission believes that the 'A' series wetland and the Vernal Pool within its boundary should be protected and provided an adequate Buffer Zone in order to protect the interests of the Act. The Commission finds that the project as proposed does not protect the interests of the Act and cannot be conditioned to do so.
  4. Regarding work within the Buffer Zone:
    - a. Pursuant to 310 CMR 10.03(1)(a), any person who files a NOI to perform any work within the Buffer Zone has the burden of demonstrating to the issuing authority that the area is not significant to the protection of any interests identified in the Act, or that proposed work within the Buffer Zone will contribute to the protection of the interests identified in the Act. The Applicant has failed to satisfy this burden to the Commission.

- b. Pursuant to 310 CMR 10.53(1), for work in the Buffer Zone subject to review the issuing authority shall impose conditions to protect the interests of the Act identified for the adjacent resource area. The potential for adverse impacts to resource areas from work in the Buffer Zone may increase with the extent of the work and the proximity to the resource area. Conditions may include limitations on the scope and location of work in the Buffer Zone as necessary to avoid alteration of resource areas. The issuing authority may require a clear limit of work and the preservation of natural vegetation adjacent to the resource area to protect the interests of the Act. In the case of this project, however, the Applicant repeatedly refused to redesign any part of the project in order to protect the interests of the Act and allow the Commission to appropriately condition work within the Buffer Zone.
  - c. For the reasons above, the Commission finds that the Applicant has failed to satisfy its burden of proof and provided insufficient information, and as such this project cannot be conditioned to meet the performance standards and protect the interests of the Act.
5. Regarding insufficient information and refusal to provide sufficient information
- a. The Applicant failed to provide additional data for the Vernal Pool within the 'A' series wetland at the request of the Commission and the NHESP. Additionally, the Commission made requests to the Applicant to redesign the project to meet the performance standards and the interests set forth in the Act. The Applicant refused to redesign the project as requested by the Commission, and they failed to satisfy the burden of proof that the project as proposed is designed in such a way that it meets the performance standards and interests set forth in the Act.
  - b. The Applicant provided new documents to the Commission with insufficient time allowed for review of these documents, and then elected to have the Commission close the public hearing for this project.
  - c. For the reasons listed above, as well as those in Findings 3(c) and 4(b), the Commission finds that insufficient information was provided to satisfy the burden of proof that the project as designed meets the performance standards and the interests set forth in the Act, and therefore cannot approve the project as proposed.

## **VI. Conclusion:**

Based on the preceding information and findings, the Newbury Conservation Commission denies this project as proposed pursuant to the Massachusetts Wetlands Protection Act (M.G.L. Chapter 131 Section 40) and the associated regulations (310 CMR 10.00). After careful consideration of the information provided, current site conditions, and the proposed project, the Commission finds that it is unable to condition an approval to adequately protect the wetland resources and interests of the WPA. The Applicant's refusal to provide additional information requested by the

Commission and the NHESP, or to allow sufficient time for review of information that was submitted, on the significant matters discussed in this Attachment makes it impossible for the Commission to conclude that all WPA performance standards will be met, the interests of the Act will be protected, and that the Applicant has satisfied its burden of proof of the same.

**VII. Severability:**

The invalidity of any provision of this Order of Conditions shall not invalidate any other provision thereof.