

Staff Report

Date: February 5, 2021

To: Conservation Commission

From: Whitney McClees, Conservation Agent

Subject: **746 Sconticut Neck Road – Request for Certificate of Compliance – DEP# 023-0725, Fairhaven CON 023-204**

DOCUMENTS REVIEWED

- Request for Certificate of Compliance and associated documents
- Notice of Intent dated July 2000
- Order of Conditions dated August 8, 2000
- 310 CMR 10.00
- Fairhaven Wetlands Bylaw (Chapter 192)

RESOURCE AREAS ON/NEAR SITE

- Barrier Beach
- Salt Marsh
- Bordering Vegetated Wetland
- Buffer Zone
- Land Subject to Coastal Storm Flowage

PERFORMANCE STANDARDS

- **Barrier Beach:** 10.29
(3) ...Significant to Storm Damage Prevention, Flood Control, Marine Fisheries, or Protection of wildlife habitat, 310 CMR 10.27(3) through (6) (coastal beaches) and 10.28(3) through (5) (coastal dunes) shall apply to the coastal beaches and to all coastal dunes which make up barrier beaches.
10.27 (3) Any project on a coastal beach...shall not have an adverse effect by increasing erosion, decreasing the volume or changing the form of any such coastal beach or an adjacent or downdrift coastal beach.
10.27 (5) Beach nourishment with clean sediment of a grain size compatible with that on the existing beach may be permitted.
10.28 (3) Any alteration of, or structure on, a coastal dune or within 100 feet of a coastal dune shall not have an adverse effect on the coastal dune by:
 - (a) affecting the ability of waves to remove sand from the dune;
 - (b) disturbing the vegetative cover so as to destabilize the dune;
 - (c) causing any modification of the dune form that would increase the potential for storm of flood damage;
 - (d) interfering with the landward or lateral movement of the dune;

- (e) causing removal of sand from the dune artificially; or
- (f) interfering with mapped or otherwise identified bird nesting habitat.

- **Salt Marsh: 10.32**

(3) A proposed project in a salt marsh, on lands within 100 feet of a salt marsh, or in a body of water adjacent to a salt marsh shall not destroy any portion of the salt marsh and shall not have an adverse effect on the productivity of the salt marsh. Alterations in growth, distribution and composition of salt marsh vegetation shall be considered in evaluating adverse effects of productivity.

(4) A small project within a saltmarsh, such as an elevated walkway or other structure which has no adverse effects other than blocking sunlight from the underlying vegetation for a portion of each day may be permitted if such a project complies with all other applicable requirements of [the regulations for coastal wetlands].

- **Bordering Vegetated Wetland: 10.55(4)**

(a) work in a Bordering Vegetated Wetland shall not destroy or otherwise impair any portion of the BVW

(b) The ConCom may permit the loss of up to 5000 square feet of BVW when said area is replaced IF:

1. The area is equal;
2. The ground water and surface elevation are approximately equal;
3. The overall horizontal configuration and location are similar;
4. There is an unrestricted hydraulic connection to the same water body or waterway;
5. It is in the same general area of the water body;
6. At least 75% of the surface of the replacement area shall be reestablished with indigenous wetland plant species within two growing seasons; and
7. The replacement area is provided in a manner which is consistent with all other regs in 310 CMR 10.00.

(c) The ConCom may permit the loss of a portion of BVW when;

1. Said portion has a surface area less than 500 square feet;
2. Said portion extends in a distinct linear configuration ("finger-like") into adjacent uplands; and
3. In the judgment of the issuing authority it is not reasonable to scale down, redesign or otherwise change the proposal.

(d) No project may be permitted which will have any adverse effect on specified habitat sites of rare species

(e) No work shall destroy or otherwise impair any Area of Critical Environmental Concern

- **Buffer Zone General Provisions: 10.53(1)** "For work in the Buffer Zone subject to review under 310 CMR 10.02(2)(b)3., the Issuing Authority shall impose conditions to protect the interests of the Act identified for the adjacent Resource Area. ... where prior development is extensive, may consider measures such as the restoration of natural vegetation adjacent to a Resource Area to protect the interest of [the Act]. ... The purpose of preconstruction review of work in the Buffer Zone is to ensure that adjacent Resource Areas are not adversely affected during or after completion of the work."
- **LSCSF General Provisions: 10.24(1)** "If the issuing authority determines that a resource area is significant to an interest identified in [the Act]...,the issuing authority shall impose such conditions as are necessary to contribute to the protection of such interests."

PROJECT SUMMARY

- This Order of Conditions was issued as part of the grant-funded Winsegansett Marsh Restoration project completed in November 2000.
- The Order of Conditions approved the replacement of undersized culverts under three privately-owned footpaths to alleviate tidal restrictions to the upper marsh.

COMMENTS

- The COC request states that the project was for the reconstruction of a building on the property, which is incorrect. However, the request notes that the bank withheld money from the property owner until the Order of Conditions is cleared from the deed.
- This Order of Conditions covers grant-funded work on three privately-owned parcels under one DEP file number. The request for Certificate of Compliance came from one of the property owners listed on the Order of Conditions.
- The final grant report for the project indicates it was completed successfully.
- No special conditions were noted on the Order of Conditions.
- There were three separate Orders of Conditions issued for the same file number because three separate properties were involved. The other two property owners will need to be contacted and asked to submit requests for certificates of compliance for the remaining two orders related to the file number.

RECOMMENDATION

- I recommend issuing a Certificate of Compliance for Complete Certification for SE 023-0725, 746 Scoticut Neck Road.

Staff Report

Date: February 19, 2021

To: Conservation Commission

From: Whitney McClees, Conservation Agent

Subject: **84 Fort Street – Request for Certificate of Compliance – DEP# 023-1280, Fairhaven CON-19-018**

DOCUMENTS REVIEWED

- Request for Certificate of Compliance and associated documents
- Order of Conditions issued December 20, 2018
- Notice of Intent
- 310 CMR 10.00
- Fairhaven Wetlands Bylaw (Chapter 192)

RESOURCE AREAS ON/NEAR SITE

- Coastal Beach
- Buffer Zone
- Land Under Ocean
- Land Containing Shellfish
- Land Subject to Coastal Storm Flowage (LSCSF) Zone AE

PERFORMANCE STANDARDS

- **Coastal Beach:** 10.27
(3) Any project on a coastal beach...shall not have an adverse effect by increasing erosion, decreasing the volume or changing the form of any such coastal beach or an adjacent or downdrift coastal beach.
(5) Beach nourishment with clean sediment of a grain size compatible with that on the existing beach may be permitted.
- **Buffer Zone General Provisions:** 10.53(1) “For work in the Buffer Zone subject to review under 310 CMR 10.02(2)(b)3., the Issuing Authority shall impose conditions to protect the interests of the Act identified for the adjacent Resource Area. ... where prior development is extensive, may consider measures such as the restoration of natural vegetation adjacent to a Resource Area to protect the interest of [the Act]. ... The purpose of preconstruction review of work in the Buffer Zone is to ensure that adjacent Resource Areas are not adversely affected during or after completion of the work.”
- **Land under the Ocean** 10.25
(5) Projects...which affect nearshore areas of land under the ocean shall not cause adverse effects by altering the bottom topography so as to increase storm damage or erosion of coastal beaches, coastal banks, coastal dunes, or salt marshes.

(6) Projects...which affect land under the ocean shall if water-dependent be designed and constructed, using best available measures, so as to minimize adverse effects, and if non-water-dependent, have no adverse effects, on marine fisheries habitat or wildlife habitat caused by:

- (a) alterations in water circulation;
- (b) destruction of eelgrass (*Zostera marina*) or widgeon grass (*Ruppia maritima*) beds;
- (c) alterations in the distribution of sediment grain size;
- (d) changes in water quality, including, but not limited to, other than natural fluctuations in the level of dissolved oxygen, temperature or turbidity, or the addition of pollutants; or
- (e) alterations of shallow submerged lands with high densities of polychaetes, mollusks or macrophytic algae.

- **Land Containing Shellfish** 10.34

(4) ...any project on land containing shellfish shall not adversely affect such land or marine fisheries by a change in the productivity of such land caused by:

- (a) alterations of water circulation;
- (b) alterations in relief elevation;
- (c) the compacting of sediment by vehicular traffic;
- (d) alterations in the distribution of sediment grain size;
- (e) alterations in natural drainage from adjacent land; or
- (f) changes in water quality, including, but not limited to, other than natural fluctuations in the levels of salinity, dissolved oxygen, nutrients, temperature or turbidity, or the addition of pollutants

(5) ...projects which temporarily have an adverse effect on shellfish productivity but which do not permanently destroy the habitat may be permitted if the land containing shellfish can and will be returned substantially to its former productivity in less than one year from the commencement of work, unless an extension of the Order of Conditions is granted, in which case such restoration shall be completed within one year of such extension

- **LSCSF General Provisions:** 10.24(1) "If the issuing authority determines that a resource area is significant to an interest identified in [the Act]...,the issuing authority shall impose such conditions as are necessary to contribute to the protection of such interests."

PROJECT SUMMARY

- The Order of Conditions approved a pier, ramp, and float. The pier is comprised of a 130-ft x 4-ft pile-supported timber ramp/deck section and a 25-ft x 3-ft aluminum gangway which provides access to a 6-ft x 30-ft pile-supported float. An 8-ft x 8-ft timber or composite deck patio anchors the pier ramp landward of the mean high water line.

COMMENTS

- The submitted COC request included a signed and stamped letter from an engineer certifying that the dock was constructed in compliance with the approved plans.
- The shellfish mitigation fee has been paid.
- The dock appears to have been constructed in accordance with the plans.

RECOMMENDATION

- I recommend issuing a Certificate of Compliance for Complete Certificate for SE 023-1280, CON-19-018, 84 Fort Street.

Staff Report

Date: February 19, 2021

To: Conservation Commission

From: Whitney McClees, Conservation Agent

Subject: **14 Turner Avenue – Request for Determination of Applicability – No DEP#, Fairhaven CON 023-203**

DOCUMENTS REVIEWED

- Request for Determination of Applicability and associated documents
- 310 CMR 10.00
- Fairhaven Wetlands Bylaw (Chapter 192)

RESOURCE AREAS ON/NEAR SITE

- Coastal Dune
- Coastal Beach (no work proposed in the resource area)
- Barrier Beach (no work proposed in the resource area)
- Bordering Vegetated Wetland (no work proposed in the resource area)
- Buffer Zone
- Land Subject to Coastal Storm Flowage (LSCSF) Zone VE

PERFORMANCE STANDARDS

- **Coastal Dune: 10.28**
(3) Any alteration of, or structure on, a coastal dune or within 100 feet of a coastal dune shall not have an adverse effect on the coastal dune by:
 - (a) affecting the ability of waves to remove sand from the dune;
 - (b) disturbing the vegetative cover so as to destabilize the dune;
 - (c) causing any modification of the dune form that would increase the potential for storm of flood damage;
 - (d) interfering with the landward or lateral movement of the dune;
 - (e) causing removal of sand from the dune artificially; or
 - (f) interfering with mapped or otherwise identified bird nesting habitat.
- **Buffer Zone General Provisions: 10.53(1)** “For work in the Buffer Zone subject to review under 310 CMR 10.02(2)(b)3., the Issuing Authority shall impose conditions to protect the interests of the Act identified for the adjacent Resource Area. ... where prior development is extensive, may consider measures such as the restoration of natural vegetation adjacent to a Resource Area to protect the interest of [the Act]. ... The purpose of preconstruction review of work in the Buffer Zone is to ensure that adjacent Resource Areas are not adversely affected during or after completion of the work.”

- **LSCSF General Provisions:** 10.24(1) “If the issuing authority determines that a resource area is significant to an interest identified in [the Act]...,the issuing authority shall impose such conditions as are necessary to contribute to the protection of such interests.”

PROJECT SUMMARY

- The applicant is proposing to do the following:
 - Replace the existing 8’ x 10’ shed with a new shed in the same dimensions on the existing concrete pad
 - Relocate and pave the driveway from the side of the house to the rear of the property
 - Replace the old driveway with a wrap-around deck
 - Replace the existing wooden fence with vinyl plastic with 50% opening

COMMENTS

- The shed is not expanding and utilizing the existing concrete pad. No new footings are being added.
- The deck will need to be placed on sonotubes to be compliant with flood zone regulations.
- The fence will need to meet flood zone regulations as well.
- The size of the proposed driveway is 20 feet by 60 feet.
- The amount of impervious surface on the property is just about doubling.
 - Current estimated impervious surface: 1,598 square feet
 - Proposed estimated impervious surface: 3,110 square feet
 - Total lot size: 7,715 square feet
 - The driveway alone is an additional 1,200 square feet of impervious surface
- The applicant has included some native plantings on either side of the driveway, but doesn’t specify how many of what kind of native bushes.
- The current driveway does not appear to be paved.
- The proposed driveway is across the road from a bordering vegetated wetland. The edge of the property is approximately 50 feet from the estimated edge of the wetland.
- The Commission should consider whether the amount of impervious surface both in a velocity flood zone and within the buffer zone to a resource area might have an impact on storm damage prevention, flood control, and prevention of pollution.

RECOMMENDATION

- If the Commission feels the project will have a negative impact on the interests of the Act and the Bylaw, I recommend asking the applicant to revise the plan to include a pervious driveway rather than paved.
- If the Commission feels the project will not have a negative impact on the interests of the Act and the Bylaw, I recommend closing the public hearing for 14 Turner Ave, CON 023-203, and issuing a Negative 3 and Negative 6 Determination with the following conditions:
 - CAP-1
 - CAP-3
 - A more detailed planting plan shall be submitted for review and approval by the Commission or its Agent prior to the start of work.

Staff Report

Date: February 19, 2021

To: Conservation Commission

From: Whitney McClees, Conservation Agent

Subject: **1 Bella Vista Island – Notices of Intent – DEP# 023-1309, Fairhaven CON 023-110 – DEP# 023-1340, Fairhaven CON 023-195**

DOCUMENTS REVIEWED

- Notice of Intent and associated site plans and documents
- MassDEP Administrative Consent Order with Penalty and Notice of Noncompliance dated June 25, 2019
- Previous Notices of Intent, Order of Conditions, Enforcement Orders
- Division of Marine Fisheries comments dated January 7, 2020
- 310 CMR 10.00
- Fairhaven Wetlands Bylaw (Chapter 192)
- Preliminary Peer Review Report, prepared by LEC Environmental Consultants, Inc. dated February 13, 2020
- Overall Site Plan dated April 16, 2020
- Existing Conditions plan dated June 6, 2020
- Additional revised documents submitted February 1, 2021

RESOURCE AREAS ON/NEAR SITE

- Salt Marsh
- Coastal Beach
- Coastal Dune
- Coastal Bank
- Land Containing Shellfish
- Land Under the Ocean
- Buffer Zone
- Land Subject to Coastal Storm Flowage (LSCSF)
- Isolated Vegetated Wetlands

PERFORMANCE STANDARDS

- **Salt Marsh: 10.32**
 - (3) A proposed project in a salt marsh, on lands within 100 feet of a salt marsh, or in a body of water adjacent to a salt marsh shall not destroy any portion of the salt marsh and shall not have an adverse effect on the productivity of the salt marsh. Alterations in growth, distribution and composition of salt marsh vegetation shall be considered in evaluating adverse effects of productivity.
 - (4) A small project within a saltmarsh, such as an elevated walkway or other structure which has no adverse effects other than blocking sunlight from the underlying vegetation for a portion of each

day may be permitted if such a project complies with all other applicable requirements of [the regulations for coastal wetlands].

- **Coastal Beach:** 10.27

(3) Any project on a coastal beach...shall not have an adverse effect by increasing erosion, decreasing the volume or changing the form of any such coastal beach or an adjacent or downdrift coastal beach.

(5) Beach nourishment with clean sediment of a grain size compatible with that on the existing beach may be permitted.

- **Coastal Dune:** 10.28

(3) Any alteration of, or structure on, a coastal dune or within 100 feet of a coastal dune shall not have an adverse effect on the coastal dune by:

(a) affecting the ability of waves to remove sand from the dune;

(b) disturbing the vegetative cover so as to destabilize the dune;

(c) causing any modification of the dune form that would increase the potential for storm of flood damage;

(d) interfering with the landward or lateral movement of the dune;

(e) causing removal of sand from the dune artificially; or

(f) interfering with mapped or otherwise identified bird nesting habitat.

- **Coastal Bank:** 10.30

(4) Any project on a coastal bank or within 100 feet landward of the top of a coastal bank...shall not have an adverse effect due to wave action on the movement of sediment from the coastal bank to coastal beaches or land subject to tidal action.

(6) Any project on [a coastal bank significant to storm damage prevention or flood control] or within 100 feet landward of the top of such coastal bank shall have no adverse effects on the stability of the coastal bank.

- **Land Containing Shellfish:** 10.34

(4) Any project on land containing shellfish shall not adversely affect such land or marine fisheries by a change in the productivity of such land...

(6) ...the issuing authority may, after consultation with the Shellfish Constable, permit the shellfish to be moved from such area under the guidelines of, and to a suitable location approved by, the Division of Marine Fisheries, in order to permit a proposed project on such land.

- **Land Under Ocean:** 10.25

(3) Improvement dredging for navigational purposes affecting land under the ocean shall be designed and carried out using the best available measures so as to minimize adverse effects...

(4) Maintenance dredging for navigational purposes affecting land under the ocean shall be designed and carried out using the best available measures so as to minimize adverse effects...

(5) Projects...which affect nearshore areas of land under the ocean shall not cause adverse effects by altering the bottom topography so as to increase storm damage or erosion of coastal beaches, coastal banks, coastal dunes, or salt marshes.

(6) Projects...shall...be designed and constructed...so as to minimize adverse effects [or] have no adverse effects on marine fisheries habitat or wildlife habitat...

- **Buffer Zone General Provisions:** 10.53(1) "For work in the Buffer Zone subject to review under 310 CMR 10.02(2)(b)3., the Issuing Authority shall impose conditions to protect the interests of the Act identified for the adjacent Resource Area. ... where prior development is extensive, may consider measures such as the restoration of natural vegetation adjacent to a Resource Area to protect the interest of [the Act]. ... The purpose of preconstruction review of work in the Buffer Zone is to ensure that adjacent Resource Areas are not adversely affected during or after completion of the work."

- **LSCSF General Provisions:** 10.24(1) “If the issuing authority determines that a resource area is significant to an interest identified in [the Act]...,the issuing authority shall impose such conditions as are necessary to contribute to the protection of such interests.”

PROJECT SUMMARY

- This NOI is a result of an Administrative Consent Order with Penalty (ACOP) with MassDEP that establishes corrective actions to bring the property into compliance.
- The applicant proposes to:
 - repair the existing eastern groin and provide beach nourishment
 - dredge under the bridge to allow the bridge channel to be deep enough for small crafts to navigate and place the dredged sand on the beach for nourishment purposes
 - repair the southeast end of the causeway side slope by placing large stones
- The applicant is seeking after-the-fact approval for:
 - Wooden posts and rope line that extend north and south perpendicular to the causeway along the eastern property line
 - Reconstruction of the existing stone seawall, including removing the southern end of the seawall
 - Conversion of seasonal depressions to manicured lawn and relief from installing the previously agreed-to plantings

COMMENTS

- MA DMF has provided commentary on the project with regard to potential impacts to several marine fisheries resources and habitat.
 - Prohibit silt-producing activities or dredging from January 15 through May 31 of any year
 - Plan does not indicate where beach fill will be deposited. Disposal of beach fill in the intertidal area should be consistent with DEP’s Beach Nourishment Guide and be of equal grain size and appropriate slope to avoid premature loss from the beach and impacts to nearshore bottom habitat.
 - Proposed relocated seawall shall not be constructed below the mean high water line within the intertidal area
 - Plan does not depict the groin work. MA DMF recommends that groin repairs remain within the existing footprint. Groin shall be constructed with interstitial spaces to support marine fisheries habitat for macroalgae
- The NOI is missing the square footage of Land Subject to Coastal Storm Flowage impacted and the square footage of Land Containing Shellfish impacted.
- A portion of the proposed dredging is located within Natural Heritage Estimated Habitat.
- The applicant has submitted to Natural Heritage.
- The peer reviewer provided a preliminary review, stating “due to the complicated and extensive history of enforcement actions and Conservation filings dating back to the Applicant’s purchase of the property in 2009, this letter is intended to be a preliminary review report outlining our initial comments and requests for information. Once the comments provided below are addressed, we will provide a more specific review of the project.”
- The peer review letter provided an overview of the background, previous filings, and the current filing.
- The peer review letter outlined findings and recommendations, including the following:
 - The site plans submitted with the NOI are lacking information and should be updated to reflect existing conditions and clarify scope of work proposed. The plans are lacking a current wetland delineation.

- The existing conditions plan should be based on a current land survey...[and] should clearly label all features which are subject to the ACOP and current NOI. No proposed features or activities should be depicted on the existing conditions plan.
- The applicant should clarify which activities have been completed and which activities have not been completed under the previous filings.
- The Commission should seek additional clarification on the permitting status of the “toe plate” located at the base of the seawall.
- Numerous items should be removed from resource areas as soon as possible, including booms, anchors, and associated wires, the wooden float, and the 6” x 6” wooden posts along the property line near the entrance.
- The Commission should not issue a COC for File No. SE 023-1127
- The applicant should address the comments provided in DMF’s letter in response to the NOI dated January 7, 2020.
- A site visit was performed on May 11, 2020 with the applicant’s engineer.
- The applicant’s representative submitted additional information on February 1, 2021 including revised plans, revised Notice of Intent, photographs of the dredge area, and some photographs of areas that had debris, but not all.
- The submitted photographs of debris removal do not document all areas where debris was located.
- The Commission conducted a site visit with the applicant’s engineer on February 17, 2021. The items discussed at the site visit included:
 - The debris still has not been removed from the resource area. Before any decisions are made on either filing, numerous items should be removed by hand from resource areas as soon as possible, including booms, anchors, and associated wires, the wooden float, and the 6” x 6” wooden posts along the property line near the entrance. These items need to be removed by the March 8 Conservation Commission meeting and proof provided to the Commission. Otherwise, the applicant may risk daily fines.
 - Under the non-ACOP filing, the applicant needs to submit a planting plan for the buffer zone that includes the removal of the planting beds, electrical features, etc. and the installation of native shrubs and grasses within the first 25 feet of the resource areas and then another 25-50 feet at least of meadow creation, complete with maintenance plan involving limited mowing and no fertilizers, herbicides, or pesticides. This should also include a phased installation plan and monitoring.
 - If the float that is currently on the coastal beach is intended to be used, it should be depicted on the non-ACOP plans.
 - This plan, once approved, needs to be started by the end of May 2021. Otherwise, the applicant will face daily fines for an ongoing violation of non-permitted items installed within a jurisdictional area.
 - Under the ACOP filing, proof should be submitted that the disposal of beach fill in the intertidal area is consistent with DEP’s Beach Nourishment Guide and be of equal grain size and appropriate slope to avoid premature loss from the beach and impacts to nearshore bottom habitat.

RECOMMENDATION

- Given the items discussed at the site visit, I would recommend asking the applicant to request a continuance to the March 8 meeting to allow time for the applicant to submit all of the items requested and to completely remove all debris from resource areas.