

OFFICE OF
BOARD OF APPEALS

TOWN OF NORWELL

345 MAIN STREET, P.O. BOX 295
NORWELL, MASSACHUSETTS 02061
(781) 659-8018 • Fax (781) 659-1892

Members

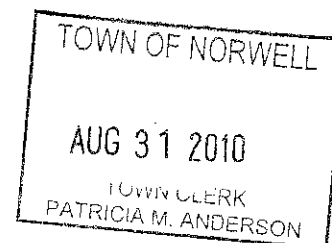
Lois S. Barbour, Chair
Philip Y. Brown, Vice Chair
David Lee Turner

Associate Members

Michael E. Kiernan, Clerk
Thomas P. Harrison

FINDINGS AND DECISION OF THE NORWELL BOARD OF APPEALS

File No. 10-13



A public hearing was held on August 18, 2010, by the Norwell Zoning Board of Appeals ("the Board") under Massachusetts General Laws Chapters 40A and 40B at the Norwell Town offices, 345 Main Street Norwell, MA on the Application ("the Application") of:

**Jacobs Pond Estate LLC.
7 Assinippi Avenue
Norwell MA 02061**

For **modification** of a **Comprehensive Permit** ("the Permit") filed with the Norwell Town Clerk on February 4, 1999, to remove Condition No. 10, which requires the developer and its successor condominium association to make an annual contribution of \$5,000 to the Town of Norwell as further noted in Special Condition No. 14 of the Norwell Conservation Commission Order of Conditions issued on November 24, 1998. The subject property is located in Residential District B at **7 Assinippi Avenue**, and is comprised of approximately 5.68 acres, as shown on Assessor's Map 18B Block 27 Lot 1 and recorded at Land Court Certificate # 95440.

The Public Hearing for this application was duly noticed in *The Patriot Ledger* on August 3, 2010, and *The Norwell Mariner* on August 12, 2010, and posted by the Town Clerk as required by the Open Meeting Law.

Attorney Steven M. Guard of 80 Washington Street, Norwell, represented the interests of the condominium unit-owners. There were approximately twenty members of the public present during the hearing with many speaking in opposition. Three people spoke in favor of the proposed action.

The Chair opened the public hearing with reading of the public notice. Additional information from the file was also read into the record, including excerpts from the Conservation Commission letter of 11/4/1998 to the Board of Appeals suggesting additional wording be added to the pond monitoring condition proposed in the 11/2/1998 letter of the developer's attorney, Robert L. Devin, in which he confirmed the proponent had "repeatedly promised the Town to contribute \$5,000 per year." Mr. Devin's letter further provided the pond maintenance amount would be tied to the Cost of Living Index. Excerpts from the Comprehensive Permit findings state, "The applicant, through negotiations with the ZBA, agreed to mitigate all questionable project impacts," including transfer of a land parcel and \$5,000 each year for maintenance of Jacobs Pond. The Comprehensive Permit Condition 10 was also read into the record in its entirety.

Attorney Guard then presented the application request to remove Condition 10 from the Comprehensive Permit and provided background history of the 2009 action by the Conservation Commission that resulted in removal of Condition 14 from the 1998 Order of Conditions.

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Members of the public were invited to comment. **Eugene Hickey of 33 Assinippi Avenue**, a resident for over thirty years, expressed concerns about chemical cleaning of Jacobs Pond, which was frequently overgrown prior to development of the property, dating back at least until the 1970's. He also incidentally noted that there were two previous efforts to develop the subject property prior to the successful 40B application. During the application process, Mr. Hickey stated that George Williams approached abutters, including him, about possible mitigation measures, such as cleaning of the pond, and assured them in writing about proposed mitigation measures. Mr. Hickey stated he had been satisfied with the proposed mitigation and conditions to benefit the community included in the Comprehensive Permit issued in 1999. He stated residents should be able to rely on town boards to adjudicate matters and further stated his belief that board and commission decisions should be binding and treated as such. Conditions of the Conservation Commission and Board of Appeals decisions are part of the chain of title for unit deeds.

Janet Hickey of 33 Assinippi Avenue stated the potential project pollution of the pond was never part of the original issue relating to the pond maintenance condition.

Patricia Crumley of 48 Green Street is a frequent walker of the conservation land adjacent to Jacobs Pond. As a taxpayer and resident, she stated her expectation that the Comprehensive Permit conditions would be adhered to.

Mary Cole of 221 Forest Street agreed with what others had stated. She expressed her belief that legally the matter is already tied up, and that the \$5,000 pond maintenance contribution was agreed as part of the project development plan. As a resident taxpayer, she would like the legal clause that provides for on-going pond maintenance to be enforced.

Attorney Guard stated the Conservation Commission could not continue to impose Condition 14 of the 1998 Order of Conditions, because recent consultant findings did not prove the project is a source of pollution. He stated environmental impact studies should have been completed in 1999. He acknowledged he has not made the argument that unit owners are unaware of the pond maintenance provisions and will not do so, but he believes this requirement is unfair.

Member Brown asked if the contribution amount has been paid every year. Attorney Guard responded it has not been nor has any payment been adjusted for CPI. It was claimed that as no annual invoice was submitted, unit-owners did not make payments to the Town, as required.

William Dolan of 7 Assinippi Avenue #305 indicated the first two \$5,000 payments were made to the Town by the developer.

The **Chair** observed there are two separate and distinct jurisdictions. The Board of Appeals cannot speak to the actions of the Conservation Commission and vice versa, although the Conservation Commission was designated to be the administering authority.

Member Turner entered into the discussion, stating that an annual \$5,000 contribution is required to maintain the pond. He also observed 10-11 years have gone by since the original permitting during which time some \$50,000 should have been contributed for pond maintenance to fulfill permit requirements. However, the Town has received only \$20,000.

Member Brown observed that one of the Comprehensive Permit negotiation points was for pond maintenance and upkeep as a benefit to the Town, as memorialized in the Board's Findings in the Comprehensive Permit. He also asked when the first unit was sold. The Chair confirmed there was no appeal and that she believed the project was built expeditiously.

Conservation Agent Abigail Hardy and former Conservation Member and sometime Conservation chair **Gregg McBride of 351 Mount Blue Street**, and recently elected selectman,

stated the pond should be cleaned on a cycle of every 3-4 years with recent costs running between \$20-25,000 and increasing about \$2,000 per year.

Member Turner indicated a second component should be considered; Jacobs Pond flows into the Third Herring Brook and has a direct impact on the water quality of the Town's shallow wells and the public water supply.

Mr. McBride stated he was the Conservation Commission chair when the first and second \$5,000 payments were made. He further admitted no mechanism was set up by the Conservation Commission to monitor the contribution requirement.

Member Turner asked whether the annual \$5,000 pond maintenance contribution requirements are in the chain of title, which Attorney Guard acknowledged and reluctantly confirmed.

The **Chair** then read all of the prior Board's findings and again read the section of Attorney Devin's letter of 11/2/1998 that promises that the \$5,000 pond maintenance contribution to the Town would be tied to the Consumer Price Index, as detailed therein.

An **unidentified unit-owner** stated he had attended the 2009 Conservation Commission hearings, where he heard the \$5,000 annual contribution was agreed upon in lieu of extensive impact studies, which the developer was unwilling to fund. Although he was not present at the original permitting hearings, he feels this requirement is unfair as he pays taxes. Further, he stated two years ago, Town Meeting voted to pay for pond cleanup.

Jill Tolman of 375 River Street stated unit-owners have paid some \$9,500 for studies and a \$10,000 arrearage for a total of almost \$21,000 to prove to the Conservation Commission that unit-owners are not responsible for polluting the pond.

Patricia Crumley of 48 Green Street confirmed, as a taxpayer, she wants the pond maintenance and upkeep obligations met by unit-owners and funded as required.

In response to a member question, **Town Counsel** advised the Conservation Commission settlement does not affect the Board of Appeals proceedings.

To place the amount of the contribution in perspective, **Member Brown** calculated unit-owners would be assessed approximately \$113 per unit to meet the \$5,000 annual obligation.

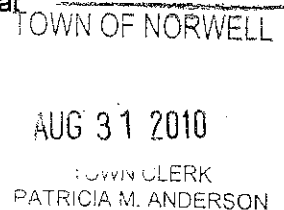
Member Turner expressed his shock, amazement, and disgust that only four years of contributions have been collected because there appears to be no mechanism set up by the Town to do so. Mr. Turner stated if the pond were not regularly cleaned, unit-owners would likely be the first to complain.

The **Chair** called for a motion to either close or continue the public hearing, but seeing additional hands in the audience, allowed two additional comments.

Michael Mahar of 269 Prospect Street stated it "appears there was assiduous avoidance to implicate the project" in potential environmental damage to the pond within the communications and decisions at the time of the original proceedings.

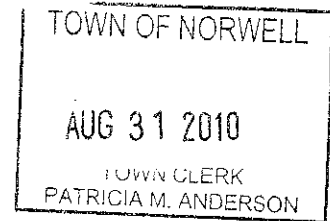
Mary Cole of 221 Forest Street inquired whether the Master Deed was impacted by the latest action of the Conservation Commission. **Attorney Guard** responded that the Master Deed has not been modified, but the Conservation Commission Certificate of Compliance was recorded in July 2010.

As there was no further discussion, the Board proceeded to vote on the matter.



FILE DOCUMENTATION

The Board received the following information into its files:



1. Copy of the legal notice
2. Abutters List
3. Assessors Card Print-out for the lot
4. Letter from the applicant's attorney, dated 7/26/10, date-stamped 7/28/10 by the Board of Appeals, submitting the application
5. Letter signed by the Conservation Agent, dated August 17, 2010, confirming a vote by the Conservation Commission on July 6, 2010, "... for the removal of a condition similar to Special Condition #14 of the November 10, 1998, Order of Conditions (SE52-519) and the August 25, 2009 Order of Conditions (SE52-929) from the Comprehensive Permit for JPE."
6. Certificate of Compliance for 7 Assinippi Ave. (SE52-929;NCC# 12 09), date-stamped by the Board of Appeals on 7/28/10
7. Original decision of the Board of Appeals, date-stamped by the Town Clerk on February 4, 1999
8. Conservation Commission's Settlement Agreement and Release, dated March 8, 2010, by and between David Camara, Trustee of the Jacobs Pond Estate Condominium Trust and the Norwell Conservation Commission Chair.
9. 1998 Order of Conditions
10. Letter of 11/4/1998 from the Norwell Conservation Commission to the Board of Appeals relative to additional wording to be added to the condition drafted by Robert L. Devin, attorney for the proponent.
11. Letter of 11/2/1998 from Robert L. Devin, attorney for the proponent, to the Chair of the Board of Appeals stating: "... my client has repeatedly promised the Town that it would contribute the sum of \$5,000.00 per year to the Town for the maintenance of Jacobs Pond." The letter further provides draft wording for that maintenance condition, tying the contribution amount to the Consumer Price Index.
12. Letter of 10/23/1998 from Robert L. Devin to the Chair of the Board of Appeals enclosing an agreement to convey a separate parcel to the Town for environmental reasons
13. Letter of 10/22/1998 from Robert L. Devin to the Chair of the Planning Board relative to the conveyance of the separate parcel referenced in his 10/23/1998 letter to the Board of Appeals
14. Minutes of the 10/7/1998 public hearing
15. Norwell Historical Society comments, dated 10/13/1998

FINDINGS:

1. The Conservation Commission and the Board of Appeals are bound by applicable laws and regulations within their respective jurisdictions.
2. In accordance with testimony during the public hearing, there is a history of pond maintenance, dating back at least to the 1970's, for which the Town paid expenses until the developer and Applicant assumed liability under the 1999 Comprehensive Permit and the 1998 Order of Conditions.
3. Condition 10 of the Comprehensive Permit was offered by the project's developers to mitigate opposition to the project, as emphatically stated by its attorney in his letter of 11/2/1998 to the Board of Appeals that included proposed condition wording, which was adopted in the final decisions of the Board of Appeals and the Conservation Commission at the time of the original applications, as Conditions 10 and 14, respectively.

4. By testimony during the public hearing, the developer and condominium unit-owners have paid a total of \$20,000 toward Condition 10, since occupancy commenced.
5. Various actions have occurred since the Conservation Commission became aware the annual obligation was not being consistently met, with subsequent agreements reached among various parties outside of the Comprehensive Permit, leading to the current application to remove the Condition 10 requirement.
6. For reasons unknown to the Board of Appeals and outside of its control, the agreed-upon \$5,000 annual contribution has not been paid by the Applicant or collected by the Town for a number of years.
7. Examination of the official files and documents listed above, leads to the finding that the original annual contribution agreement relating to Condition 10 has little to do with concern about the project's environmental impact to Jacobs Pond.
8. The Board heard concerns of abutters who trusted the Town would continue to abide by decisions and commitments of its officials during the original permitting of the project.
9. Clearly, official records show the developers were anxious to address concerns of abutters and Town officials, and, therefore, made a commitment to convey a parcel of land to maintain open space, as well as to provide for the continuing maintenance of Jacobs Pond.
10. Condition 14 of the 1998 Order of Conditions included the CPI requirement offered by the proponent in the suggested wording contained in the 11/2/1998 letter from Attorney Robert L. Devin, tying the annual pond maintenance contribution to the Consumer Price Index.
11. The Board calculates the per unit annual cost to be approximately \$113.
12. The Board finds that Jacobs Pond flows into the Third Herring Brook and has a direct impact on the water quality of Town's shallow wells and the public water supply.
13. The Board finds the written record is clear that the developer did not object to the pond maintenance contribution, but in fact, provided precise draft wording for the condition adopted by both the Conservation Commission and Board of Appeals in their respective decisions, to accept the \$5,000 annual contribution amount and adjust the base to a consumer price index.
14. Unit-owners should have been aware of the annual contribution at the time of purchase, an argument the unit-owners' attorney stated he has not and will not make.
15. That Jacobs Pond is the headwater of the Third Herring Brook. The Third Herring Brook flows in a generally Southerly direction, along and through the aquifer that is an important source of water for the public water supply for the town of Norwell. The Brook discharges into the North River, a tidal estuary that flows to and from Cape Cod Bay, so-called. The referenced aquifer is impacted by the water quality in the Third Herring Brook.¹
16. That prior to the issuance of the Permit, which was issued by this Board and is now the subject of the Applicant's request for modification to remove Condition 10, an agreement was reached, between the applicant for the Permit and certain of the home owners living in a contiguous neighborhood known generally as Jacobs Lake Shores, that in exchange for an agreement and condition in the Comprehensive Permit and Master Deed, that requires the developer and successor condominium association to make an annual contribution of \$5,000.00 to the town of Norwell for the maintenance of Jacobs Pond, the home owners would not object to the proposed development. Two prior attempts to develop the property were unsuccessful due, in part, to neighborhood opposition.

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¹ The Board takes judicial notice of the fact that historical data shows that surface water discharge into Jacobs Pond and the Third Herring Brook, and the introduction of pollutants into that surface water has a direct impact upon the water quality of the referenced aquifer. An example was the storage of salt and salt/sand piles at the Massachusetts Public Works facility on Route 53 and Mill Street in the town of Hanover. Until those piles were covered and properly contained, the salt content of the water in the referenced aquifer was elevated.

17. Jacobs Pond is a shallow body of water and increased levels of nitrogen and other substances that promote the growth of plants and aquatic substances in the pond have, over a great number of years, caused problems maintaining the pond. Various methods of controlling these growths have been used, the most current being chemical treatments. The cost of the chemical treatments, every 3 or 4 years, are running between \$20,000 - \$25,000, and are increasing about \$2,000 a year.
18. The maintenance of Jacobs Pond is a direct benefit to neighborhood residents and facilities, including the Applicant.
19. While the pollution of Jacobs Pond by the Applicant's facility is of continuing concern, the only evidence received during the Hearing was that the facility is not presently a source of pollution. But, pollution of Jacobs Pond is one issue. The maintenance of the Pond is another. Both issues are important and neither one should be ignored either on a short term or continuous basis.
20. Condition 10 is primarily directed and was negotiated to contribute to the maintenance of Jacobs Pond. It is a continuous and on-going process that has a direct impact upon the condition and viability of Jacobs Pond, which benefits have been stated.
21. The argument made for the Applicant assumes that present conditions concerning the operation of its subsurface sewage disposal system will continue. The Board takes judicial notice of the fact that the best of such systems require upkeep, maintenance, rebuilding, and constant monitoring. It is obvious that the pollution of Jacobs Pond from any source is unacceptable. On-going checks and balances should and must be maintained by both the Applicant and the Town.
22. Condition 14 of the 1998 Order of Conditions was a companion condition to Condition 10 of the Comprehensive Permit, and was part of the exact wording provided by the developer's attorney as a condition of project approval. That wording was included in the Conservation Commission Order, as it was to be the administering authority for maintenance of Jacobs Pond.

DECISION OF THE BOARD:

Based on testimony and the evidence presented and its findings delineated above, upon a motion duly made by Philip Y. Brown and seconded by David Lee Turner, the Board **VOTED** unanimously to deny the application by unit-owners of Jacobs Pond Estates to delete Condition 10, of the Comprehensive Permit filed with the Town Clerk on February 4, 1999, applicable to the property located at **7 Assinippi Avenue**, but instead to:

1. Modify Condition No. 10, so it will now be identified as Condition 10(a) with existing wording to remain unchanged, except as otherwise detailed in this decision.
2. Add the following new Condition 10(b), formerly known as Condition 14 of the 1998 Order of Conditions, to the Comprehensive Permit:

The Applicant and each successor in interest to the applicant shall, commencing in the year in which the Applicant or its successor in interest receives a Certificate of Occupancy, contribute to the Town of Norwell the sum of \$5,000.00 per year for the express purpose of the maintenance and upkeep of Jacobs Pond. In the event "Consumer Price Index for Urban Wage Earners and Clerical Workers Union U.S. City Average All Items

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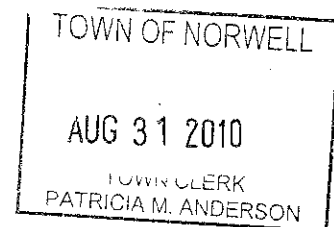
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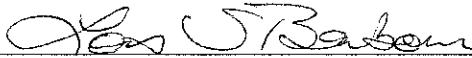
(1967=100)" (hereinafter referred to as the "Price Index"), published by the Bureau of Labor Statistics of the United State Department of Labor, or any comparable for substitute index appropriately adjusted, reflects an increase of the cost of living over and above the cost of living reflected by the Price Index for the month in which the initial \$5,000.00 payment is made (hereinafter the "Base Price Index"), the contribution described in the foregoing sentence shall be adjusted by increasing or decreasing, as the case may be, the amount of said contribution by the same percentage increase or decrease in the Price Index. The yearly contribution shall be placed in a Special Account established under the Town of Norwell Conservation commission to be administered by the Norwell Conservation Commission for the express purpose of the maintenance and upkeep of Jacobs Pond.

3. If necessary, a mechanism shall be established so that the Town can accept the contribution for pond maintenance on an annual basis, and
4. Interest on the contributed funds granted by the unit-owners shall remain with and become part of the fund and may be expended as part of the fund without further appropriation.

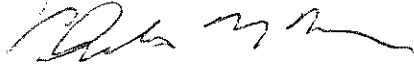
ADDITIONAL CONDITIONS:

1. **RECORDING OF THE DECISION:** After receiving certification from the Town Clerk that no appeal has been taken within twenty days, or if appealed than dismissed or denied, a copy of the Board's decision must be filed with either the Registrar of the Plymouth County Registry of Deeds to be recorded and indexed in the grantor index under the name of the owner of record in the case of unregistered land, or with the Recorder of the Land Court to be registered and noted on the owner's certificate of title in the case of registered land.
2. **RECORDING RECEIPT:** A copy of the recording fee receipt shall be returned to the Board of Appeals.





Lois S. Barbour



Philip Y. Brown



David Lee Turner

*This space reserved for
Date Stamp of Town Clerk*

Date Filed with Office of the Town Clerk

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NOTICE OF APPELLATE RIGHTS: Any decision of the Board of Appeals may be appealed to Superior Court within twenty (20) days after filing of the written decision with the Town Clerk. Any construction or pre-construction activity is undertaken at the applicant's risk during the appeal period.