

December 15, 2020

# MEMORANDUM



From: Isaac Slavitt, Chair  
Malden Conservation Commission

To: Malden City Council

Subj: CONSERVATION COMMISSION'S OFFICIAL RESPONSE TO "2019 DRAFT" OF A  
WETLANDS PROTECTION BYLAW

Refs: (a) "2019 Draft" of a City of Malden Wetlands Protection Bylaw  
(b) Environmental Handbook for Massachusetts Conservation Commissioners, 9th Ed.  
(c) The Massachusetts Public Waterfront Act, MGL Chapter 91

## **I. Executive overview**

We write in strong support of the draft bylaw provided to the Conservation Commission ("the Commission" or "ConCom") as reference (a), with last redlines made on or about December 30, 2018.

Adopting a local bylaw places additional duties and administrative responsibilities on the City. In order to keep up with its new administrative and procedural responsibilities, the Conservation Commission requests that additional resources be considered to make the new bylaw as successful as possible.

## **II. The draft bylaw provides clear and definitive restatement of jurisdiction and definitions**

Although this Commission could continue to operate pursuant only to its statutory and regulatory authority, we concur with the sense of the Massachusetts Association of Conservation Commissions ("MACC") as expressed in reference (b) that it is beneficial for municipalities to adopt clear and, in some cases, more stringent rules tailored to local geography and conditions.

As an urban city which industrialized early, the City of Malden receives fewer permits regarding undeveloped land than many suburban and rural communities in the Commonwealth of

Massachusetts. At the same time, we act as stewards of the historically neglected Malden River which carries with it an important duty of care for environmental protection and public access under reference (c). Malden therefore has certain unique concerns which bear specific explication.

Currently, a citizen who wanted to know which areas were specifically subject to ConCom oversight would have to piece together numerous sources in Massachusetts General Laws, Code of Massachusetts Regulations, Department of Environmental Protection publications, and a significant body of pertinent and shifting case law decided in other communities. The draft bylaw would make our rules and regulations more legible and actionable for concerned parties by clearly stating relevant areas of jurisdiction (Section II) and definitions (Section XII) relevant to the City of Malden. Similarly, it would help minimize the sort of “plausible deniability” often invoked by parties who run afoul of applicable laws and regulations.

### **III. Residents deserve clear and timely enforcement of their conservation decisions**

When the ConCom rejects an application, imposes conditions on applicants, or issues a notice of violation, it does so in the public interest and on behalf of all City residents. The people of Malden deserve to have their lawfully issued conservation directions followed in a complete and timely fashion.

There are numerous ways that a potential violation can be discovered, e.g. (1) when a party that should have applied for a permit failed to do so, (2) when a party was denied a permit but carried out the work anyway, (3) when a party who was granted a permit with conditions fails to abide by those conditions, or (4) when a party is violating generally applicable rules or regulations that are in effect at all times. Often, the Commission is only notified of these violations after the fact by an abutter, concerned citizen, city employee, or other agency.

In each of these cases the Commission would ordinarily attempt to engage the concerned party in a reasonable resolution process, for example by notifying them of present deficiencies and requiring a retroactive Notice of Intent. But what happens when the concerned party either ignores outreach attempts or fails to engage in good faith? According to reference (b), in the absence of a local bylaw the only recourse would be either:

1. Attempting to pass the matter off to MassDEP, the Attorney General or District Attorney, or other cognizant office or agency with its own enforcement authority; or
2. Initiating a full proceeding in District Court or Superior Court.

In the former case, the City is at the mercy of the relevant agency's timeline, caseload, and operational priorities. In the latter case, the City faces the difficult choice of spending scarce public resources on a court proceeding or deciding that the matter is not important enough to prosecute and thus setting the dangerous precedent that only the most egregious cases could realistically face enforcement.

Establishing a rational, reasonable, and publicly posted system of fines and enforcement procedures (Section XIII) gives the City a much more comprehensive set of self-help tools for dealing with parties who have apparently run afoul of conservation laws and regulations. It may also allow some of the physical inspections, case file management, and communication overhead to be delegated to professional code enforcement officers duly appointed by the City for such matters, which is especially relevant in Malden given that our ConCom meets relatively infrequently.

#### **IV. Staff time and budget**

There are two reasons that the ConCom may eventually need additional budget and staff support if operating under a bylaw. The first is simply about numbers. If buffer zones are extended and the ConCom is given jurisdiction over additional classes of activities, we anticipate many more matters coming before the Commission. Strictly from a capacity perspective, we are concerned that a collateral duty Clerk will struggle to keep up with the additional docket management, meeting scheduling, minutes drafting, communication overhead, and responsiveness deadlines.

Additionally, the ConCom currently operates under authority stemming from state law and regulations. The situation becomes more complex when operating under a "Home Rule" bylaw. As shown in *Parkview Electronics Trust, LLC v. Conservation Commission of Winchester*, 88 Mass. App. Ct. 833 (2016), the Commission will have to be explicit on every decision about whether authority stems from the local bylaw or the Wetlands Protection Act. This and the assessment of engineering questions arising from the additional matters coming before the ConCom will require a very specific set of skills, most likely a Professional Engineer or a wetlands scientist.

If the City adopts a bylaw, the sense of the ConCom is that it will need the City Engineering Department to agree to designate one of their employees at least 25% time to ConCom duties. Additionally, the ConCom will need a modest budget for ongoing training and such limited materials or services as may be necessary. As we write in the specific recommendations below, this budget can likely be supplied by setting up a revolving account in

which application fees paid under the by-law are deposited solely for ConCom use. This is a common practice in other cities, and is specifically endorsed by reference (b).

## **V. Additional recommendations**

In addition to consideration of the comments provided by Victoria Parsons, we respectfully recommend two additional stipulations in the proposed bylaw:

1. In Section IV (“Applications and Fees”), we recommend mandating that proper applications shall include paper copies **and electronic copies** of all materials submitted. This will help us keep the public informed by allowing us to post materials in the public docket, as appropriate, and will be increasingly important going forward as more City records are archived in electronic format.
2. Also in Section IV, we recommend that the City Staff person shall have five (5) business days to determine completeness instead of two (2) business days.
3. Also in Section IV, we recommend clarifying the sentence “The applicant may withdraw the application or request within five (5) business days of the date notice is given without incurring any costs or expenses” to make clear that the applicant shall not be reimbursed upon cancellation for funds which have already been disbursed or put in deposit.
4. Also in Section IV, as discussed above we recommend clarifying that the City shall maintain two separate accounts: one for “53G” consultant fees (already mentioned) but also one for filing fees paid under the by-law, which shall be deposited into a separate revolving account reserved for use by the Commission for training, supplies, and implementation of the Wetlands Protection Act.
5. In Section V(B) (“Notice”), 2nd paragraph, we recommend that the “at least five business days” make reference to a reasonable timeframe adopted in the Conservation Commission regulation. To the extent practicable, we request that the City Council leave specific timelines (e.g. number of days) to be established in the regulation so that we can tweak these if they become impractical for the Commission or burdensome for the public.
6. In Section VII, 1st paragraph, we recommend that the following sentence shall be appended: “The Commission shall also take into account the applicant’s

responsiveness in providing supporting documentation and answering any questions posed by the Commission.”

7. In Section XIII, we recommend that it be clarified that members of the Commission are specifically among those authorized to issue citations.
8. Also in Section XIII, 6th paragraph, we recommend that the phrase “for each offense” be appended to “[...] shall be punished by a fine of not more than \$500” so that the sentence reads “Any person who violates any provision of this Ordinance, or regulations, permits, or administrative orders issued thereunder, shall be punished by a fine of not more than \$500 for each offense.”
9. Minor typographical errors:
  - a. Section V(E)(2), “state” to “stated”.
  - b. Section XIII, “City hall” to “City shall”.

## **VI. We applaud the City Council for taking up this matter and favor a speedy review**

When it comes to Massachusetts wetlands protection, the MACC is an impartial and definitive source of expertise. Tailoring their thoughtfully drafted model bylaw to the City of Malden’s specific needs and priorities is a necessary and commendable step in professionalizing our community’s stewardship of the environment and the public interest—especially when it comes to our enforcement options.

It is the express hope of this Commission that the draft we have reviewed, or a version substantially similar, will be passed as soon as practicable in this term of the City Council.

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Encl: (1) “2019 Draft” of a City of Malden Wetlands Protection Bylaw

cc: Waterfront Access Committee  
Rules and Ordinance Committee  
Malden River Committee