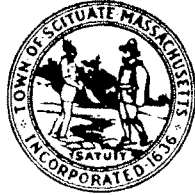


Town of Scituate

TOWN HALL
600 Chief Justice Cushing Highway
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Conservation Commission

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October 30, 2007

Elizabeth Kouleharas
Massachusetts Department of Environmental Protection
Southeast Regional Office
20 Riverside Drive
Lakeville, MA 02347

Re: Herring Brook Meadow, LLC (the "Applicant")
132 Chief Justice Cushing Highway, Scituate, MA (the "Property")
Request for Superseding Determination of Applicability

Dear Ms. Kouleharas:

I am writing to provide a preliminary response to the Applicant's Request for Superseding Determination of Applicability ("RSDA"). As you and Chris Ross may be aware, the RSDA represents another facet of a fairly complex housing project that is the subject of a certain amount of local controversy. Despite the superficially narrow nature of the RSDA, this matter cannot be divorced from the other proceedings involving the Property.

Given the environmentally significant nature of the Property, the Scituate Conservation Commission continues to take an active role in all of these interrelated proceedings. The Commission respectfully requests that you examine this matter closely and, ultimately, uphold the underlying "positive" determination of applicability. While the Commission can provide more information as your inquiry unfolds, please consider the following preliminary comments:

Plainly stated, the Applicant has failed to provide adequate information. Under 310 CMR 10.05(3), an applicant must submit sufficient information to enable the presiding commission to evaluate an RDA. If an applicant presents insufficient information, the presiding commission may *deny* the application (i.e. issue a positive determination). 310 CMR 10.05(6)(c). When such a *denial* is issued, any proceedings on request for a superseding determination are limited, as a threshold matter, to whether sufficient information was provided. 310 CMR 10.05(7)(h). If the DEP agrees that insufficient formation was provided, the presiding commission's *denial* must be upheld. *Id.*

In this proceeding, the Applicant has utterly failed to provide sufficient information. The Applicant has attempted, via illogical and circular reasoning, to assert that a negative determination should issue. Within its RDA, the Applicant provided a number of documents that set forth, in conclusory fashion, that the site of the proposed work may have been historically disturbed. Thus, concludes the Applicant, future disturbances should be permitted. In making these statements, the Applicant took great pains to assert that it was not relying upon a purported agricultural exemption, a prior claim that has been soundly rejected by the Commission. However, while the Applicant avoided any direct invocation of the agricultural exemption, it paradoxically relied on a series of documents that cited to prior (and disputed) agricultural uses. More troubling is that, through a series of footnotes and other assertions in its RSDA, the Applicant appears to be reviving its claims in this regard, despite its assertions to the contrary before the Commission. This “bait and switch” should not be countenanced. In any event, even if these prior activities were relevant (which they are not), the Commission raised concerns with respect to the veracity of the same. The Applicant, however, refused to allow any inquiry into the subject matter of these claims and demanded immediate closure of the hearing on the RDA.

Notwithstanding issues regarding the inapplicability of the agricultural exemption, the Applicant also failed to assert to the Commission, with any specificity, the existence of any other statutory or regulatory exemptions for the proposed work. Rather, the Applicant simply stated that historical and continuous field clearing (a fact disputed by the Commission) should be the basis for future disturbances in this area. Although the Applicant expressed, in vague terms, the applicability of exemptions under 310 CMR 10.58(6), the Applicant plainly misinterprets such exemption, which is inapplicable where other resource areas are present. As plainly stated in the Commission’s positive determination, open issues remain with respect to the delineation of bordering vegetated wetland (“BVW”) and other related issues. While the Applicant relies on a previously issued ORAD (that is set to expire within the next month), it must be stated that: (a) the ORAD does not delineate BVW; and (2) based on new information, the Commission is concerned that BVW may exist on the portion of the Property that is the subject of this matter.

Because the Commission did not have adequate information to conclude whether or not there is BVW in the proposed area of work, it requested additional information and peer review. However, the Applicant stalwartly refused to allow further inquiry or peer review on this important subject. In the same manner, the Applicant felt no need to allow further analysis with respect to the newly delineated ILSF on the Property. **On this subject, the Applicant has, until recently, steadfastly maintained that the Property supports approximately 12,000 square feet of ILSF but, just recently, revised its position and now concedes that over 70,000 square feet of ILSF exists on the Property (a 600+% increase).** With such a drastic increase, it is certainly reasonable, on the part of the Commission, to request further peer review.

It is also disingenuous for the Applicant to characterize the proposed work as “mowing.” This mischaracterization is clearly designed to support a premise that the

proposed disturbance is *de minimis*. However, closer examination of the Applicant's RDA reveals that the proposal calls for disturbance (in the form of "disking") of the soil to a depth of 12 inches. Given this level of disturbance, your office should conclude that the Commission was acting well within its discretion to require more information from the applicant. Furthermore this disturbance is proposed under the guise of phragmites removal. However, whether by chemical or manual (*cut and cover*) means, there are far less intrusive means of controlling phragmites.

The Applicant's failure to provide adequate information cannot be divorced from the expiration of the ORAD which presently governs this property. It is entirely likely that the ORAD will expire before a decision is rendered on the RSDA. Furthermore, as evidenced by the Applicant's own revisions to the ILSF, the accuracy of the ORAD (which, again, does not delineate BVW), is uncertain.

Finally, it is worthy of mention that the Applicant's RDA was submitted only under the Wetlands Protection Act – the Applicant has not, in any manner, sought a negative determination for the proposed work under the Scituate Wetlands Protection By-law, which is significantly more stringent than the Act. Without an accompanying negative determination under the local By-law, the RDA and RSDA are, at best, *unripe* and, at worst, moot.

The Commission has endorsed the contents of this letter and looks forward to working with the Department on this matter. Please do not hesitate to contact the Commission through me as acting agent (781.545.8716) or our counsel Jason Talerman (508.376.8400 or jay@bbmatlaw.com) with any further questions that you may have.

Sincerely,



Neil Duggan
Acting Conservation Agent

cc Conservation Commission
Zoning Board of Appeals
Atty. Jay Talerman
Atty. Janet Stearns