

**Conservation Meeting Minutes**  
**March 28, 2007**

Members present: Chair Horace Aikman, Peter McGlynn, Will Schulz, Rick Weden, Ed Dennison, John Sullivan, and associate member John Rossetti

Members absent: Tim Holiner  
Consultants: George Giunta

1. 36 PEGAN LANE - Thompson

Notice having been duly published, the hearing for the applicant's Request for Determination of Applicability, filed under the Wetlands Protection Act only, was opened. The applicant, Walter Thompson, was present with his counsel Frank DiLuna, and forester Leo Garneau from Northeastern Consulting Forestry Services. Dover Town Counsel Kevin Batt, Anderson & Kreiger, was also present. Location of the subject work on the pathway within a wetland buffer zone was discussed and was also identified on a copy of an "ANR" plan. Leo Garneau submitted photos of the work that was the subject of the Commission's cease and desist order. The applicant's attorney stated that there is an exemption for that work under 30 CMR part 10.04 (a), since he stated that Mr. Thompson has always sold shrubs, hay and wood for commercial purposes and the work on the pathway was "normal maintenance" on agricultural land. The case of Cape American Cranberry Corp. v. Bourne Conservation Commission, 2000WL was discussed and Attorney DiLuna agreed that even if the Cape American case is valid precedent (the Commission did not decide if it was or was not) for the proposition that local by-laws restricting an applicant's agricultural exemption are preempted by the Wetlands Protection Act, the Commission can utilize the local by-laws as an aid to interpreting and applying the Act. Under questioning Mr. Thompson admitted that he did not plant the shrubs that he sold, and that wood and hay grown on his land was sold to his friends and acquaintances; he does no advertising and Goat Hollow Farm - Mr. Thompson's farm name - has not been registered with the Town Clerk as a DBA entity. Mr. Thompson also admitted he has planted lilies but, to date, has not sold any. Under further questioning, Mr. Thompson also admitted that he made no profit from these sales and that, in the future, he would like to grow nursery stock, grow herbs, and expand an orchard near Pegan Lane.

Commission member Peter McGlynn questioned Mr. Thompson about a "Covenant and Driveway Easement Agreement," dated September 12, 2001, that he entered into with the Planning Board as part of an approval process for his current driveway. This agreement permanently limits use of an area, which fronts Pegan Lane and which currently contains a meadow and orchard, "to the extent that no dwelling or other structures shall be constructed in said northerly portion, and said northerly portion remain in its natural and rural state to the greatest extent possible." Mr. Thompson's attorney stated that he is seeking clarification of that order from the Planning Board.

Details of the work performed on the pathway were discussed, with attorney DiLuna stating it was exempt as "normal maintenance" of "land in agricultural use" under part

10.04 (b)(3). The Commission's agent, however, stated that he observed dredging of the pathway to a depth of approximately 1 foot, with excess material pushed within the buffer zone to the top of the bank of the brook and to the edge of the wetlands, with no erosion controls in place. He questioned whether that type of work would not be considered construction rather than maintenance, whether reasonable or adequate safeguards for protection of the wetlands were established and whether such work constituted "normal maintenance."

Before the Commission determined whether to close the hearing, the Applicant's attorney, Attorney DiLuna, was asked by the Commission if he had anything further to submit or to argue. In response, Attorney DiLuna stated he had nothing further to submit and that he believed that he had given sufficient information for the Commission to make its decision under the RDA as to whether or not the work on the pathway is under Conservation jurisdiction under the Wetlands Protection Act based on the applicant's claim of an agricultural exemption.

The Commission discussed the various factors that must be considered to determine whether Mr. Thompson's claimed exemption under 310 C.M.R. part 10.04(b)(3) is valid. The applicant bears the burden of proof on the exemption. To be valid under a "land in agricultural use" exemption, the land must either be producing crops or animals "for commercial purposes." The Guide to Agriculture and the Massachusetts Wetlands Protection Act, published by the MDEP, enumerates the factors to be considered: (1) the activity of selling and (2) the goal "as a chief aim" of making a profit. By the applicant's own admission, no such profit making has existed here and he did not demonstrate that he had any future plans to do so. He testified that his expenses of roughly \$1,000 per year exceeded the income on the sale of plants and hay; he sells only to friends and acquaintances; he does no advertising; the applicant has not even registered Goat Hollow Farm as a d/b/a; the land area in question is not presently and primarily engaged in the production of crops and plants. This latter point was further evidenced by the fact that Mr. Thompson's testimony at the hearing conflicted with the statements contained in a memo his attorney submitted in early September 2006 to the Dover Zoning Board of Appeals. In that memo, Mr. Thompson's attorney represented to the ZBA that Mr. Thompson was (then) "presently producing hay, lilies and iris for commercial purposes," while at the hearing, Mr. Thompson testified that he had not as yet begun selling lilies and iris.

Upon motion duly made and seconded the Commission voted to close the hearing.

Upon motion duly made and seconded the Commission voted 5 - 1 to issue a Positive Determination of Applicability.

## 2. 21 PLEASANT STREET - Charles River Contracting

Notice having been duly published the hearing on this Request for Determination of Applicability was opened. The applicant was present with Scott Goddard from Carr Research Lab. The site has already been cleared for demolition and construction of a new house. He stated that in his opinion there is no jurisdiction as the ditch is for off-site runoff and is connected to a drainage line. Discussion of the erosion controls that are in place.

Upon motion duly made and seconded the Commission voted to close the hearing.

Upon motion duly made and seconded the Commission voted to issue a negative Determination indicating no jurisdiction, with the condition that if turf cannot be reestablished due to overland flow, an alternative restoration plan will be required.

### 3. FARM STREET - Algonquin Gas

Frank Bailey from Algonquin Gas and John Zimmer from ENSR were present for a discussion regarding their plans for installation of a 3 sided box culvert in a stream at the rear of 26 Farm Street. Photos were submitted showing the problem with the existing crossing. Stream crossing guidelines will be followed. Discussion. An Abbreviated Notice of Intent will be filed shortly.

### MISCELLANEOUS

1. 133 Centre Street - Upon motion duly made and seconded the Commission voted to close the hearing. Upon motion duly made and seconded the Commission voted to issue an Order of Conditions.
2. Minutes for 3/14/07 were approved.

Respectfully submitted,

Julie Brantley  
Administrative Assistant