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April 2, 2007

Via Email and In Hand at the Hearing

Scituate Conservation Commission
Scituate Town Hall
600 Chief Justice Cushing Highway
Scituate, MA 02066
Attn: Michael Clark, Chair

RE: 126 & 132 Chief Justice Cushing Highway
DEP#: SE 068-1988

Dear Chairman Clark and Commission Members:

This firm represents the Citizens for the Protection of First Herring Brook (“Citizens”) in their opposition to the above-referenced project. Citizens is a coordinated group of abutters to the project and other citizens concerned about the resulting impacts to property and resources threatened by the project. Based on information that has recently come to light, Citizens below notify the Commission and DEP of unlawful resource alteration at the above property and request responsive enforcement.

Report of Unlawful Alteration

As the Commission is aware, the Notice of Intent (“NOI”) filed in relation to the above-referenced property relies on a resource delineation performed by SITEC and approved by the Commission on November 16, 2004 (the “ORAD”). It has recently come to light through **two enclosed sworn affidavits** and other testimony that, starting at least a year prior to the issuance of the ORAD, contractors for the applicant/property owner unlawfully altered then-existing critical resources at the property by mowing, plowing and harrowing the property, then planting winter rye seed.

Winter rye is known to be used to “retard” growth of neighboring “weeds” and to dry out an area (see the **enclosed article**). It is typically planted in September to provide “strong competition to spring-germinating weeds”. In this case, the “weeds” that grow in the Spring are plant species that are indicative of protected resource areas (federal, state and local) and which serve as habitat for protection species (e.g. vernal pools).

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The first affidavit is from Anthony Giacomozzi, who states that he was hired by Ron Simon in September 2003 to mow most if not the entirety of the property which is the subject of the NOI.¹ He recalls that the area mowed was so large that it took him two full days. Mr. Giacomozzi confirms that he returned to the property approximately a week later (again, at the direction of Ron Simon) to plow and harrow the area and plant winter rye seed.

The second enclosed affidavit is from Shawn Harris (Scituate Selectman), who states that he delivered fuel to the property in September 2003 for Mr. Giacomozzi's use in operating the tractor. Mr. Harris specifically recalls that he was told at that time that the purpose of the fuel delivery was to operate the tractor for mowing, plowing, harrowing and planting of winter rye. Mr. Harris did not understand the significance of planting winter rye at a resource-rich location such as the property until the recent publicity surrounding the NOI. Both Mr. Giacomozzi and Mr. Harris confirm the other's presence at the property in the same timeframe.

In addition during the March 14 ZBA site walk and the March 22 ZBA meeting, Rod Gaskell (SITEC) for the applicant acknowledged that the property had been plowed and seeded with winter rye. The obvious implication is that the alteration was ordered with the purpose to destroy and/or mask vegetated wetland in order to increase the area of "developable" property for the 2004 ANRAD filing. The planting has had its intended effect, as the property is abnormally dry compared to immediately adjacent properties, as discernable from aerial photographs.

The property has no demonstrated history of corn or other commodity production for the five years prior to the 2003 unlawful alteration, as required under 310 CMR 10.04 to qualify as "Agriculture" use. Abutter and town officer observations support the fact that the field lay fallow for at least 10-15 years prior to the winter rye planting. Corn planting has occurred only within the last two years, *after* the unlawful alteration and planting at the property, and for the purpose of distorting the resource delineation. The owner/applicant has the burden of establishing predated continuous agricultural use. "The issuing authority may require appropriate documentation, such as a USDA Farm Plan or aerial photography, to demonstrate agricultural use." 310 CMR 10.04. The owner/applicant has made no such showing.

Resources Impacted

M.G.L. c. 131, §40 provides that "No person shall remove, fill, dredge or alter any bank, riverfront area, fresh water wetland, coastal wetland, beach, dune, flat, marsh, meadow or swamp bordering on the ocean or on any estuary, creek, river, stream, pond, or lake, or any land under said waters subject to tidal action, coastal storm flowage, or flooding" without *in advance* filing

¹ Ron Simons recently stated to one of the Citizens that "Gary" had paid him \$6,000 by check to mow, plow and harrow the property and plant the winter rye. Gary Wyrosdic is the contractor for the developer. If paid by check, there may be a paper trail to confirm the transaction.

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a NOI and receiving approval, except for limited exceptions not applicable here. In the event of a violation, “Any person who purchases, inherits or otherwise acquires real estate upon which work has been done in violation of the provisions of this section ... shall forthwith ... restore such real estate to its condition prior to such violation.” M.G.L. c. 131, §40.

Section 30710 of the Scituate General Bylaws reads almost identical to the State prohibition, but adds an additional 100’ protective buffer to certain resources as follows: “No person shall remove, fill, dredge or alter ... in or within one hundred (100) feet of any freshwater wetland, coastal wetland, marsh, wet meadow, bog or swamp; in or within one hundred (100) feet of any bank, beach, dune or flat; in or within one hundred (100) feet of any lake, river, pond, stream, or creek or estuary; or any land under said waters; or on any land subject to tidal action, coastal storm flowage, or flooding”. The protection of these resources is also specifically provided for in the Town of Scituate Wetlands Protection Rules and Regulations (e.g. see SWR 10.01 and 10.02).

In light of the recent revelation of the unlawful Fall 2003 resource alteration, the Commission has no reasonable basis to continue to rely on the delineation provided as part of the NOI. Citizens anticipate that investigation will reveal further evidence of protected resources that were either significantly reduced or destroyed altogether by the unlawful alteration. However, even accepting the current fraudulent delineation at face value, and recognizing that Mr. Giacomozzi’s sworn testimony is that the *entire* undeveloped portion of the property was impacted by the mowing, plowing, harrowing and planting, the following *resources acknowledged by the owner/applicant* were at a minimum impacted:

- 200’ Riverfront Area
- Established and Suspected Critical habitat located on the property
- ILSF, freshwater wetland, wet meadow and/or IVW, plus 100’ local buffer
- land subject to tidal action
- land subject to flooding

In addition, it is likely that vernal pools (protected under the local bylaw) and other critical resources and habitat were altered or destroyed during the initial and subsequent mowing, plowing, harrowing and planting. During a site walk with the owner/applicant’s environmental consultant on Friday 3/30, a botanist working with Citizens observed “many cut stems of loosestrife and phragmites, both wetland species, outside of the 7’ contour.” There is a serious question whether the delineation provided with the NOI is even accurate *post*-alteration.

Request for Enforcement Order and Revocation/Modification of ORAD

“[A] conservation commission and its agents, officers, and employees; the commissioner, his agents and employees; environmental officers, and any officer with police powers may issue

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enforcement orders directing compliance with this section and may undertake any other enforcement action authorized by law. Any person who violates the provisions of this section may be ordered to restore property to its original condition and take other actions deemed necessary to remedy such violations.” M.G.L. c. 131, §40. A valid basis for enforcement includes the making of any “*false, inaccurate, or misleading statements* in any certification filed under 310 CMR 10.00”. 310 CMR 10.08 (emphasis added).

Citizens request that the Commission investigate the alteration and planting of winter rye seed at the property. At a minimum, that investigation should include questioning the applicant, its consultants and contractors (including SITEC), the above-named individuals and any others who may have knowledge regarding the admitted plowing, harrowing, mowing and planting. “Others” to be questioned should include the Conservation Agent, Vinny Kalishes and a former Conservation Commission member, Thomas J. Doherty, each of which has/had a direct financial interest in the property and the project, in direct conflict with their obligations as Town agents.

Presuming that there is no basis to dispute Mr. Giacomozzi’s and Mr. Harris’ sworn testimony following such investigation, Citizens request that the Commission enforce all applicable state and local laws and regulations against the owner/applicant, including assessing penalties and requiring restoration of altered resources. Given that the sworn testimony describes alteration of resource areas that was not only unlawful but likely ordered in *fraudulent support of the ANRAD*, Citizens request that the Commission take the following actions:

- Order the property owner/applicant, its consultants and agents to immediately cease and desist from conducting any further activity at the property, pending the conclusion of an enforcement investigation. This should include at a minimum imposing an absolute prohibition on mowing, harrowing, plowing or planting (winter rye, corn or otherwise);
- Halt proceedings related to the NOI, unless and until an appropriate and thorough enforcement investigation is conducted and the results publicly provided. The NOI is wholly dependent on the veracity of the information provided with the ANRAD. The facts stated in the affidavit go to the heart of the ANRAD/ORAD and place great doubt on the reliability of the information provided therein (in fact, indicating actual fraud for the specific purpose of affecting the ANRAD outcome);
- Because of the Conservation Agent’s financial interest in the property/project, the financial interest of a recent Commission member, and the Chair’s direct advocacy for the rail trail to which the project offers to provide access, Citizens request that the Commission appoint a neutral investigator. Citizens recommend that an appropriate person might be the Zoning Enforcement Officer or other qualified individual (local and/or DEP) with experience in investigating violations;

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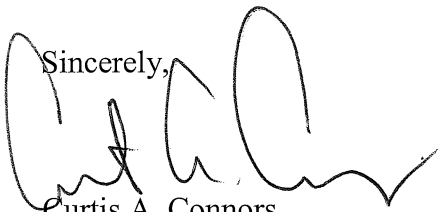
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- Require the owner/applicant to grant the Commission, its agents and consultants (including Horsley Whitten for the Commission and Woodard & Curran for the ZBA) and any invitees of the Commission access to the property to conduct appropriate sampling and investigation;
- Revoke the ORAD (or amend) and require a new submission that reflects the best evidence of conditions existing at the property prior to the unlawful 2003 alteration. The Commission fully has this authority. See *In the Matter of Kenwood Development Corp.*, 1998 MA.ENV.LEXIS 952, at *23 (January 23, 1998) (“**It is patently obvious that where an individual has procured an action from a conservation commission or the Department through a fraudulent representation, that misrepresentation provides a basis for modification of the agency’s action.**”). A copy of the decision is **enclosed**. The decision specifically states that a modification may be made within three years of the date of the original approval.
- Require the owner/applicant to conduct a Restoration Plan to restore impacted resources at and near the property to their condition prior to the unlawful 2003 alteration. The property is hydrologically connected to neighboring properties and resources, and the unnatural drying of the property poses/evidences a serious risk of detrimental impact on water dispersion to neighboring properties in this flood-prone area.

Conclusion

Citizens are very concerned about the sworn statements which have recently come to light of unlawful, fraudulent alteration by the property owner/applicant, and they hope and anticipate that the Commission similarly will take these concerns seriously. Please contact me with any questions.

Sincerely,

Curtis A. Connors

cc: Scituate Zoning Board of Appeals, John Danehy, Chair (via email)
Neil Duggan, Zoning Enforcement Officer (via email)
Scituate Board of Selectmen (via email)
Alexandra Dawson, Massachusetts Association of Conservation Commissions (via email)
Christine Odiaga, DEP (via email)

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Mario DiGregorio (via email)

Janet Stearns, Esq. (via email)