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Peter L. Freeman  
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Meredith K. West  
Stephanie A. Kiefer  
Matthew J. Dunn  
Albert E. Todino

September 25, 2007

Via Certified Mail  
Return Receipt Requested

Elizabeth Kouleheras  
Department of Environmental Protection  
Wetlands Section  
Southeast Regional Office  
20 Riverside Drive  
Lakeville, MA 02347

RECEIVED  
SEP 26 2007  
TOWN OF SCITUATE  
CONSERVATION COMMISSION

Re: Herring Brook Meadow LLC  
132 Chief Justice Cushing Highway  
Scituate MA  
Request for Superseding Determination of Applicability

Dear Ms. Kouleheras:

Enclosed for filing, please find a Request for a Superseding Determination of Applicability regarding the above-referenced matter. Please note that the filing fee of \$200.00 has been sent today to the DEP Lock Box at your Boston office.

The enclosed Request for Superseding Determination involves property at 132 Chief Justice Cushing Highway in Scituate. At the present time, the Department is likewise reviewing a Request for a Superseding Order of Conditions, involving this property and an abutting parcel, at 126 Chief Justice Cushing Highway. The Request for a Superseding Order is being reviewed by Chris Ross. For clarification, the enclosed appeal involves the Applicant's request for a determination solely related to maintenance and mowing of the historic field on the property. In contrast, the Request for a Superseding Order involves the proposed residential project at both 126 and 132 Chief Justice Cushing Highway.

Thank you for your attention to this filing.

Sincerely yours,

  
Stephanie A. Kiefer

Enclosures

cc: Scituate Conservation Commission (via certified mail, w/encl.)  
James Motzkin (via first class mail, w/encl.)  
Roderick Gaskell, SITEC (via first class mail, w/encl.)

September 25, 2007

Via Certified Mail  
Return-Receipt Requested

Department of Environmental Protection  
Lock Box  
Box 4062  
Boston, MA 02211

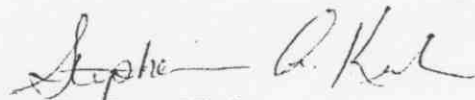
Re: Herring Brook Meadow LLC  
Request for a Superseding Determination of Applicability

Dear Sir or Madam:

Enclosed, please find a check payable to the Commonwealth of Massachusetts for \$200.00, to cover the filing fee for the Request for a Superseding Determination of Applicability filed by Herring Brook Meadow LLC. For your reference, a copy of the Request for a Superseding Determination of Applicability (without attachments) is enclosed.

Thank you for your attention to this matter. Please do not hesitate to contact our office if you have any questions or require additional information

Sincerely yours,



Stephanie A. Kiefer

Enclosures

cc: DEP, SERO  
Scituate Conservation Commission  
James Motzkin  
Roderick Gaskell, SITEC



**Massachusetts Department of Environmental Protection**  
 Bureau of Resource Protection - Wetlands  
**Request for Departmental Action Fee**  
**Transmittal Form**

DEP File Number: \_\_\_\_\_

Provided by DEP \_\_\_\_\_

Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

**A. Request Information**

**Important:**  
 When filling out forms on the computer, use only the tab key to move your cursor - do not use the return key.



1. Person or party making request (if appropriate, name the citizen group's representative):

Stephanie Kiefer, counsel for Herring Brook Meadow LLC  
 Name  
Freeman Davis & Stearns LLC, 236 Lewis Wharf  
 Mailing Address  
Boston MA 02110  
 City/Town State Zip Code  
617.227.5070 617.227.5001  
 Phone Number Fax Number (if applicable)

Project Location

132 Chief Justice Cushing Highway  
 Mailing Address  
Scituate MA 02066  
 City/Town State Zip Code

2. Applicant (as shown on Notice of Intent (Form 3), Abbreviated Notice of Resource Area Delineation (Form 4A); or Request for Determination of Applicability (Form 1)):

Herring Brook Meadow LLC  
 Name  
265 Newbury Street  
 Mailing Address  
Peabody, MA 01960  
 City/Town State Zip Code  
 Phone Number Fax Number (if applicable)

3. DEP File Number: \_\_\_\_\_

**B. Instructions**

1. When the Departmental action request is for (check one):

- Superseding Order of Conditions  
 Superseding Determination of Applicability  
 Superseding Order of Resource Area Delineation

Send this form and check or money order for \$100.00 (single family house projects) or \$200 (all other projects), payable to the *Commonwealth of Massachusetts* to:

Department of Environmental Protection  
 Box 4062  
 Boston, MA 02211



Massachusetts Department of Environmental Protection  
Bureau of Resource Protection - Wetlands

## Request for Departmental Action Fee Transmittal Form

Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

DEP File Number:

\_\_\_\_\_  
Provided by DEP

### **B. Instructions (cont.)**

2. On a separate sheet attached to this form, state clearly and concisely the objections to the Determination or Order which is being appealed. To the extent that the Determination or Order is based on a municipal bylaw, and not on the Massachusetts Wetlands Protection Act or regulations, the Department has no appellate jurisdiction.
3. Send a **copy** of this form and a **copy** of the check or money order with the Request for a Superseding Determination or Order by certified mail or hand delivery to the appropriate DEP Regional Office.
4. A copy of the request shall at the same time be sent by certified mail or hand delivery to the Conservation Commission and to the applicant, if he/she is not the appellant.

FREEMAN DAVIS & STEARNS LLC

1597 FALMOUTH RD. STE 3  
CENTERVILLE, MA 02632

CAPE COD CO-OPERATIVE BANK  
YARMOUTH PORT, MA 02875  
53-7164/2113

3553

9-25-07

PAY TO THE  
ORDER OF

Commonwealth of Massachusetts

\$200.00

Two Hundred Dollars no/100-----

DOLLARS 

MEMO

Herring Brook  
Superceding Determination

*PALEW*

MP

⑈003553⑈ ⑆21137164⑆ 9065002181⑈

FREEMAN DAVIS & STEARNS LLC

3553

FREEMAN DAVIS & STEARNS LLC

3553

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

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**IN THE MATTER OF:** )  
 )  
 )  
**Herring Brook Meadow, LLC** )  
**132 Chief Justice Cushing Highway** )  
 )  
**Scituate, MA** )  
 )  
**DEP FILE NO: SE** )  
 )  
 )  

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**REQUEST FOR A SUPERSEDING  
DETERMINATION OF APPLICABILITY**

**I. INTRODUCTION**

1. Herring Brook Meadow, LLC (the "Applicant") hereby requests a Superseding Determination of Applicability ("Superseding Determination") from the Department of Environmental Protection/Southeast Region (the "Department" or "DEP") in the above-captioned matter. This appeal is taken of a positive Determination of Applicability ("Determination") issued by the Scituate Conservation Commission (the "Commission") on September 11, 2007 and served upon the Applicant by mail. A copy of the Determination is attached at Tab 1.
2. Herring Brook Meadow, LLC, of 265 Newbury Street, Peabody, Massachusetts, is the applicant, who seeks a determination of applicability of jurisdiction under the Wetlands Protection Act, M.G.L. c.131, §40 (the "Act") and its Regulations, at 310 CMR 10.00 *et seq.*, as it relates to mowing and maintenance work of a historically maintained field located at 132 Chief Justice Cushing Highway, Scituate, Massachusetts (the "Property"). The Applicant has

standing to request superseding review by the Department pursuant to 310 CMR 10.05(3)(c) and 10.05(7)(c).

3. This Request for a Superseding Determination is timely filed in accordance with 310 CMR 10.05(3)(c).

## **II. BACKGROUND/STATEMENT OF FACTS**

4. On or about August 23, 2007, the Applicant filed a Request for Determination of Applicability (the "RDA") with the Commission seeking a determination, pursuant to 310 CMR 10.05(3)(a)(1), that maintenance mowing and limited maintenance of the field located upon a portion of the property at 132 Chief Justice Cushing Highway would not be subject to the Act and its Regulations<sup>1</sup>. Further, to the extent that a portion of the field is within Riverfront area, the Applicant sought a determination that the work is exempt under 310 CMR 10.58(6)(a)/(b).
5. The Application submitted to the Commission consisted of the following:
  - a) WPA Form 1 – Request for Determination of Applicability;
  - b) Narrative report entitled, "Proposed Restoration Plan, 132 Chief Justice Cushing Highway Assessor's Map 58, Lot 1-5 (Former Watson Farm property," by SITEC Environment, dated August 20, 2007;
  - c) Sheet of aerial photographs compiled, captioned "Fifty-Three Yeas of Continuous Land Use in Agricultural, Scituate, Massachusetts;"
  - d) Historical aerial photo interpretation report entitled, "Agricultural Use on the Herring Brook Meadow Land, Scituate, Massachusetts," prepared by Lester Garvin, Resource Management Systems, Inc., dated April 11, 2007;

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<sup>1</sup> The Applicant's RDA filing is separate from a prior Notice of Intent ("NOI") submitted by the same Applicant, encompassing both the 132 Chief Justice Cushing Highway property as well as an abutting parcel, at 126 Chief Justice Cushing Highway. The proposed work under that NOI relates to a proposed affordable housing project advanced by the Applicant under the provisions of M.G.L. c.40B. In May 2007, the Commission issued an Order of Conditions ("OOC") approving the proposed project set forth in the NOI under the Act, but subject to extensive conditioning. In accordance with 310 CMR 10.05(7), the Applicant filed an appeal of the conditions imposed thereunder, which request for a Superseding Order remains pending at the Department. In contrast, the subject RDA filing involves only the field portion of the 132 Chief Justice Cushing Highway, and no portion of the remainder of that lot nor any activity on the abutting lot. Further, the RDA does not seek approval directly related to the affordable housing project. Rather, through the RDA, the Applicant sought a negative determination relative to the cutting of the field, which has become overgrown due to the Commission's Enforcement Order issued in April 2007, broadly prohibiting any activity at 132 Chief Justice Cushing Highway and 126 Chief Justice Cushing Highway. While the Applicant has taken an appeal of the Enforcement Order, under protest, the RDA includes the Applicant's proposed restoration plan as requested though the Enforcement Order.

- e) "Watson Farm Time Line" summary prepared by Michael Bleakie, former Scituate Conservation Commissioner, dated April 29, 2007, reporting his investigations of farming activity at the Watson Farm during the time he sat on the Commission;
- f) Letter dated December 8, 2006 to Herring Brook Meadow LLC; and
- g) Plan captioned, "Proposed Open Space Mitigation Plan," prepared by SITEC Environmental and dated August 17, 2007.

A copy of the complete Application is enclosed at Tab 2. The RDA, as submitted, was sufficiently detailed and likewise supported by the appropriate level of documentation.

6. As detailed in the Application, the Applicant sought only a determination as to whether the work depicted on the referenced plans would be subject to the Act. *See* Application - WPA Form 1, Part B, in which the only Determination requested by the Applicant is Box 1(c). Likewise, the described work is as follows: "Applicant proposed to re-establish the open meadow habitat (agricultural field) to prior conditions by removing invasive plant species, seeding the removal area and mowing" *See* WPA Form 1, Part C, (2)(a), Section B(1)(c). Through the narrative report accompanying Form 1, the Applicant's consultant detailed that the proposed activity involved the hand-raking removal of that portion of the field within which the invasive *pragmatism communis* species had been able to flourish in the recent past, reseeding (by hand or knapsack seeder) of the disturbed area together with mowing of the entire field area to no less than six inches, consistent with the historic field maintenance operations. *See* "Proposed Restoration Plan" narrative report, pp. 3, 4. The Applicant's consultant at SITEC Environmental clearly detailed the management objectives: maintaining the field to its open meadow habitate, to not alter existing topography and to preserve the Ap soil horizon so as to preserve the soil suitability for planting and harvesting as historically has occurred.

7. The RDA did not seek a determination of whether jurisdiction resource areas under the Act existed on the 132 Chief Justice Cushing Highway Property nor did it seek to confirm the delineation of such resource areas<sup>2</sup>.
8. Instead, through the RDA, the Applicant sought only a determination that the proposed activity (limited removal of invasive phragmites, reseeding and mowing) would not be subject to review under the Act's Regulations for the reasons detailed within the filing and further explained to the Commission within the public meeting on September 10, 2007. In summary, the Applicant's request for a negative determination is based upon the following:
- a) The historic maintenance of the field predates the Act and its Regulations: The Applicant conclusively demonstrated to the Commission that since at least 1952 the field on the Property has been a maintained field through a series of aerial photographs together with the interpretative report prepared by an aerial photography expert, Lester Garvin. The Garvin report concludes that the "aerial photographs showed the land to be in continuous agricultural use from 1952 to 2005." Likewise, the historic maintenance of the field is confirmed by the reported findings of former Commissioner Michael Bleakie, who documented mowing, maintenance and work on the field since at least 1946<sup>3</sup>.

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<sup>2</sup> The Property remains subject to an Order of Resource Area Delineation (ORAD), dated November 2004 and in effect for three years. The approved ORAD plan, titled "Existing Conditions – Wetland Resource Areas," depicts the approved boundaries of the following resource areas under the Act: Riverfront, Land Subject to Coastal Storm Flowage, Isolated Land Subject to Flooding, and additional areas under the Bylaw (300' Scenic River Corridor and Isolated Vegetated Wetland, which are not relevant to the RDA submitted by the Applicant sought a determination under the Act alone.

<sup>3</sup> While the RDA did not specifically seek a determination that the field maintenance is exempt under the Land in Agricultural Use exemption of 310 CMR 10.04, the records before the Commission more than sufficiently document that applicability of the exemption. The exemption itself is for "work performed for normal maintenance and improvement of land in agricultural or aquacultural use." Under the Regulations, land may lie inactive for up to five years. The DEP's farming manual clarifies that a fallow field, one that is plowed but unseeded is not considered to be inactive. Thus, while the Applicant did not press that the proposed disc-raking, seeding and mowing of the historic field were consistent with the exempt maintenance of the field under 310 CMR 10.04, the documented facts of record before the Commission, as recognized proof of land in agricultural use (i.e., aerial photographic evidence) demonstrate that the exemption would

b) The proposed mowing of the northerly half of the field is further exempted by 310 CMR 10.58(6)(a) and 10.58(6)(b), either as a “grandfathered activity” and/or as a “minor activity” and therefore not subject to the requirements for the Riverfront area. As shown on the plan submitted with the RDA filing, the northern half of the field lies within otherwise the Riverfront area. In accordance with 310 CMR 10.58(6), an additional exemption or grandfathering exists for “certain activities or areas” from the requirements of the riverfront area. Pursuant to 10.58(6)(a), “any excavation, ... clearing, ... landscaping” within the Riverfront area in existence on August 7, 1996 is exempt. Also, under 10.58(6)(b), incorporating 310 CMR 10.02(2)(b)(1), the proposed temporary mowing of vegetation constitutes an exempt “minor activity.” Indeed, even if the Commission disregards the historic field maintenance operations, it must be recognized that mowing of lawns are not jurisdictional, as set out in 310 CMR 10.02(2)(b)(1).

c) To the extent that field area includes Land Subject to Coastal Storm Flowage (“LSCSF”), the same is not subject to any performance standards under the Act’s Regulations. Similarly, the proposed restoration of the field as open meadow does not alter the topography or vegetative cover effecting coastal flood flowage and thereby not impacting the existing function of LSCSF.

d) Lastly, while a small portion of the lower field includes Isolated Land Subject to Flooding (“ILSF”), per the ORAD, the Applicant seeks a negative determination for the limited activity within a portion of ILSF as the described activity results in no change in topography or underlying soil conditions and, in fact, improves wildlife habitat by removing invasive species.

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apply. Instead, given the Commission’s apparent misunderstanding of the agricultural exemption, the Applicant documented that the proposed maintenance of the field, as has occurred since prior to the effective date of the Act and its Regulations, are otherwise exempt from the Act’s provisions.

### III. ALLEGATIONS OF ERROR

9. The Applicant's proposed field maintenance is nothing more than maintaining the field/meadow that has existed at the 132 Chief Justice Cushing Property for more than sixty (60) years. The continuation of field maintenance is either exempt generally from the Act and its Regulations or, in the alternative, comports with specific exemptions/grandfathering provisions and minor activity exemptions contemplated by the Act's Regulations.

10. The Positive Determination issued by the Commission is flawed in multiple respects.

11. First, the Regulations at 310 CMR 10.05(3) provide for a very limited and focused review and determination by the Commission upon its receipt of an RDA. As stated in 310 CMR 10.05(3) (b)(1), "[w]ithin 21 days after the date of receipt of the Request for a Determination of Applicability, the conservation shall issue a Determination of Application, Form 2." Further, upon its receipt of an RDA, the Commission holds a public meeting, not a public hearing. The Determination as issued by the Commission fails to adhere to the limited powers provided to it within the Act's Regulations and further, it inappropriately seeks to make determinations well beyond the purview of the RDA application.

12. Second, the RDA as submitted by the Applicant did not seek a negative Determination on the basis of the proposed field maintenance as work exempted under 10.04 (Agriculture), instead relying upon other exemptions and/or grandfathering status of the work. Notwithstanding the fact that the Applicant clearly reiterated that its RDA was premised upon a) a broader claim of exemption under the Act and b) specific exemptions under 10.58(6) and 10.02(2), the Commission arbitrarily claimed that the agricultural exemption for the property has expired. In contrast, the Applicant did not raise

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the agricultural exemption, as that issue is subsumed within an existing civil action, *Motzkin et al. v. Scituate Conservation Commission*, pending in Plymouth Superior Court as it relates to an appeal of an enforcement order issued by the Commission against the Applicant<sup>4</sup>.

13. Third, the positive Determination issued by the Commission exceeds the scope of the Applicant's RDA request. In particular, the Applicant sought only a determination that the described work was not subject to review under the Act. Instead, the Determination that issued states that the boundaries of resource areas are not confirmed by the Detraction and that "more information is required."<sup>5</sup> Here, the Applicant did not seek, nor did it need to seek, a determination as to boundaries of resource areas. The property remains subject to the November 2004 ORAD and the delineations confirmed therein.

14. Lastly, the Commission's Determination – within Part B(5) and Part (B)(6)- wholly disregards the limits of the request for Determination. While it is clear that the RDA was filed solely under the Act, the Commission's Determination claims that jurisdiction exists under the local Bylaw relative to the existence of isolated wetlands and buffer zones which are more stringently regulated at the local

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<sup>4</sup> Further, as addressed in Footnote 3, *supra*, the Applicant has continued to provide the Commission with documentation that has been historically within the Commission's own files, as to the ongoing nature of the agricultural use of the field on the subject property. Without belaboring the point, since April 2007, the Applicant has submitted to the Commission aerial photography as well as a professional analysis of the aerial photography of this very field during a 53-year period, from 1952 through 2005, evidencing the continuous use of the field as land in agricultural use. Further, the Applicant identified for the Commission that one of its own Commissioners had conducted a review of the history of the use of the field, which written findings confirm that the so-called Watson Farm field has consistently and continuously been utilized as land in agricultural use.

<sup>5</sup> The Commission's claim of insufficient information is more than disingenuous. The Commission's files on this property within the past three years have included its review of an Abbreviated Notice of Resource Area Delineation, in Fall 2003. Upon review by the Commission's independent consultants at The BSC Group, Inc., the Commission previously issued an Order of Resource Area Delineation in November 2003. More recently, after more than five public hearings, the Commission fully reviewed the Property and the adjacent property at 126 Chief Justice Cushing Highway under a Notice of Intent Application to develop the combined properties as a residential development. Here too, after an extremely long public hearing process, including lengthy review by the Commission's independent consultants at Horsley Witten, the Commission issued an Order of Condition, in May 2007. Likewise, in April 2007, the Commission further held public hearings on an alleged enforcement order matter. In sum, the Commission's claim that it lacks information on the Property is wholly misstated.

level. The Commission has exceeded its limited authority and has acted upon a non-request. Unless and until the Applicant files an RDA application to the Commission relative to the local Bylaw, the Commission is not authorized to *sua sponte* assert allegedly binding Determinations. Recognizing that the Department does not regulate projects under the various local wetland protection bylaws, the Department may, nonetheless, enforce the limited review permitted of a Commission.

#### IV. CONCLUSION

For these reasons detailed herein, we request that the Department issue a Superseding Negative Determination.

Respectfully submitted,  
**HERRING BROOK MEADOW LLC,**  
By its attorney,



Stephanie A. Kiefer, BBO #567341  
**FREEMAN DAVIS & STEARNS LLC**  
236 Lewis Wharf  
Boston, MA 02110  
(617) 227-5070

Date: September 25, 2007

# TAB ONE



Massachusetts Department of Environmental Protection  
Bureau of Resource Protection - Wetlands

**WPA Form 2 – Determination of Applicability**

Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

**A. General Information**

**Important:**  
When filling out forms on the computer, use only the tab key to move your cursor - do not use the return key.



From:

SCITUATE

Conservation Commission

To: Applicant

Herring Brook Meadow LLC

Name

265 Newbury Street

Mailing Address

Peabody

MA

01960

City/Town

State

Zip Code

Property Owner (if different from applicant):

Name

Mailing Address

City/Town

Zip Code

1. Title and Date (or Revised Date if applicable) of Final Plans and Other Documents:

Plan entitled "Proposed Open Space Mitigation Plan"

Title

8/17/2007

Date

Report entitled "Proposed Restoration Plan..."

Title

8/20/07

Date

Title

Date

2. Date Request Filed:

8/23/07

**B. Determination**

Pursuant to the authority of M.G.L. c. 131, § 40, the Conservation Commission considered your Request for Determination of Applicability, with its supporting documentation, and made the following Determination.

Project Description (if applicable):

Applicant seeks a negative determination with respect to proposed work in land formerly and sporadically used for agricultural purposes. Agricultural exemptions have expired and an outstanding enforcement order exists with respect to proscribed activities (plowing, etc) in the land. Applicant seeks approval for mowing and other disturbances including soil alterations in resource areas and other areas of undetermined significance. Applicant claims its work will not alter or adversely affect any resource area.

Project Location:

132 Chief Justice Cushing Highway

Street Address

58

Assessors Map/Plat Number

Scituate

City/Town

1-5

Parcel/Lot Number

