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April 10, 2007

Conservation Commission
Scituate Town Hall
600 Chief Justice Cushing Highway
Scituate, MA 02066

Re: Herring Brook Meadow Wetlands Issues: Delineation and Enforcement

Dear Members of the Conservation Commission:

At the request of the Board of Selectmen, I am providing the Commission with comments on two issues that have been raised in a matter now pending before the Commission, a Notice of Intent ("NOI") for a project identified as Herring Brook Meadows ("HBM"). I have been provided with two letters to the Commission from Attorney Curtis A. Connors on behalf of a group of individuals identified as "Citizens for the Protection of First Herring Brook," one dated April 2, 2007 and another dated April 10, 2007, both attaching affidavits. In his correspondence, Attorney Connors asserts on behalf of his clients that there has been unlawful alteration of land and resources under the jurisdiction of the Commission, and requests that the Commission take enforcement action. The Board of Selectmen asked me, as Town Counsel to the Town, and the Commission, to provide a legal opinion to the Commission as to the options open to the Commission in response to this request for enforcement, as a means of providing support and assistance in this novel situation.

For reasons more fully set out below, it is my opinion that the Commission may in fact modify or ignore the 2004 Order of Resource Area Delineation ("ORAD"), as Attorney Connors suggests, if the Commission finds that the ORAD was the product of misrepresentations or other wrongdoing that substantially affected the Commission's decision in that matter.

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1. Enforcement request

The letters by Attorney Connors and their attached affidavits assert that misrepresentations and/or unpermitted alterations of land subject to the jurisdiction of the Commission are sufficient grounds for the Commission to take such action, regardless of its apparent conflict with wetlands delineation of the property in its November 16, 2004 ORAD for the HMB property. In the NOI now before the Commission, there has been submitted to the Commission testimony in the form of affidavits that, in my opinion, collectively gives evidence of prior alteration of wetland resources sufficient to support a finding by the Commission that the applicant made misrepresentations in connection with the 2004 ORAD. The question then becomes whether the Commission is bound by the 2004 ORAD, because three years have not yet expired since the date of its issuance. As will be outlined below, the Commission may modify or refuse to apply an otherwise valid ORAD or other determination of wetlands boundary in cases where the decision was the result of substantial misrepresentation ("fraud") by the applicant, or where it was based upon mutual mistake as to significant and relevant facts.

2. Validity of 2004 Order of Resource Area Delineation (ORAD)

It may be anticipated the owner of the HBM property may raise in its defense to any enforcement action by the Commission the 2004 ORAD that conflicts with factual assertions in the various affidavits and analysis presented to the Commission. For that reason, this letter will address the force and application of the 2004 ORAD under current law that allows for the modification of determinations as to wetland boundaries within the three-year period following the Commission's determination.

As you are aware, the regulations issued by DEP pursuant to the Act provide that a determination of the Commission as to the delineation of a wetland is "valid" for a period of three years from issuance. 310 CMR 10.05 (6) (d). The purpose and effect of this period is to provide certainty for a limited period of time, as well as to protect a landowner, by freezing the wetlands delineation as found by the Commission as of the date of its Determination, and for a period of three years thereafter. This period does not provide protection from re-examination of the basis of the determination, however, where there are grounds to suggest that the original determination may have been the product of either fraud in the application or presentation of evidence to the Commission, or what is characterized "mutual mistake." Such exceptions allow a Commission to revisit, and, if necessary, to modify or reject a Determination that it made within the previous three years, in cases where there has been "mutual mistake" or fraud in the presentation to the Commission on which the Determination was based.

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The 1998 decision in a case brought to the Commission's attention by Attorney Connors in his April 2, 2007 letter, In the Matter of Kenwood Development, did in fact decide that the three-year period for which a determination is valid is not without exception, namely, in cases where there has been "wrongdoing" by the applicant. In that case, the Reading Conservation Commission modified a one-year old Determination of Applicability, on discovery of an error in materials submitted to it, alleging that an "applicant should not be permitted to benefit from a knowing misrepresentation of facts." This modification was eventually upheld by the Administrative Law Judge who sat on the adjudicatory hearing pursuant to the Act.

It is therefore my opinion that, if an Request for a Determination were to be made to the Commission, as to property for which a Determination had been made within the previous three years, in my opinion, the Commission would not be bound by that Determination if it were to find that the Determination had been the product of "mutual mistake" or fraudulent representations to the Commission. Similarly, the Commission is not necessarily bound by its 2004 decision, if it finds that the ORAD in question was influenced by unlawful actions by the applicant, whether withholding information, unpermitted prior alterations of the land or other significant misrepresentations as to matters upon which the ORAD decision would necessarily have been based.

3. Enforcement options

As the Commission is aware, there is no legal obligation for it to take enforcement action, solely on the basis of complaints or requests submitted by any person to the Commission. This is in contrast to the statutory scheme applicable to other regulatory boards or officers of the Town, most notably in the area of zoning enforcement. Since the time of the so-called "Grant Amendment" to the Wetlands Protection Act, G. L. c. 131, §40 ("the Act"), however, it has been indisputable that the Commission has the authority, should it choose to exercise it, to enforce the Act. A similar authority, without obligation in any particular case, is recognized in Section 30730 of the Wetlands Protection By-law. In either case, the Commission has recognized authority to enter and inspect privately-owned lands for the purpose of discharging its enforcement and other duties.

The reasonable exercise of the Commission's enforcement authority and discretion to determine when and how to take enforcement action requires that the Commission consider any request for enforcement, screening out those it determines to be frivolous, and assessing the relative seriousness of the more substantial allegations of violation brought to its attention. In my opinion, the volume and detail of the material already brought to the Commission's attention provide sufficient grounds for it to initiate enforcement action to require restoration of the property to its natural state, regardless of the facts found as a basis for the 2004 ORAD.

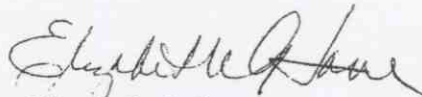
KOPELMAN AND PAIGE, P.C.

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In summary, the Commission's charge, under the By-law and the Act, to enforce the provisions of each for the protection of wetland resources, empowers it to take enforcement action in the appropriate case. In my opinion, the 2004 decision as to the extent and location of wetlands on the site of the property which is subject to the Notice of Intent now before the Commission for its consideration does not necessarily control the Commission's review the project. The Commission is required to assess the weight of the evidence of wrongdoing in connection with the 2004 ORAD proceedings, and to determine whether to investigate the actual status of the site, prior to any unauthorized alteration, as part of its examination of the facts presented as part of the NOI submitted by the applicant for the Herring Brook Meadows project.

If you have additional questions concerning any matter raised in this letter, I would be pleased to address them.

Very truly yours,



Elizabeth A. Lane.

cc: Town Administrator

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