

**MINUTES- 23 January 2006
Hopkinton Town Hall, Room 216**

**Called to Order: 7:30 PM
Adjourned: 10:10 PM**

Members Present: Brian Morrison, Robert Murphy, Jack Speranza, David Teitelman, Steven Radel, Jeffrey Barnes, Ellen Chagnon: Conservation Scientist, Don MacAdam: Conservation Administrator

7:30 PM Commission Business

- The Commission signed the following documents:
 - Brogioli, 302 West Main St. – Order of Conditions (188-1336)
 - Bogart, 35 Woody Island Rd. – Order of Conditions (188-1339)
 - Tedstone, 45 Pleasant St. – Order of Resource Area Delineation (188-1341)
 - Belle Contracting/Cody, 110 Hayward St.- Enforcement Order (188-1198)
 - Belle Contracting, 31 Downey St.- Enforcement Order
- Mr. Murphy made a motion to approve the minutes for 28 November 2005. The motion was seconded by Mr. Teitelman and it was passed by everyone except Mr. Speranza who abstained.
- Mr. Murphy made a motion to approve the minutes for 09 January 2006. The motion was seconded by Mr. Teitelman and it was passed by everyone except Mr. Radel who abstained.
- Mr. Murphy made a motion to approve the minute for 10 May 2004. The motion was seconded by Mr. Speranza and it passed unanimously.
- Mr. Murphy made a motion to approve the minutes for 17 May 2004. The motion was seconded by Mr. Speranza and it passed unanimously.
- Mr. Murphy made a motion to approve the minutes for 24 May 2004. The motion was seconded by Mr. Speranza and it passed unanimously.

**7:45 PM Bernard, 6 Barbara Road
Request for Determination of Applicability**

RDA 2006-1

Keith Bernard, applicant/owner

Mr. Bernard presented proposed plans to enlarge his side yard. Mr. Bernard stated that he proposes to construct the retaining wall first and then to add and grade the fill

material. Mr. Morrison stated that the retaining wall must incorporate areas for water to weep through in order to decrease hydraulic pressure. Ms. Chagnon stated that the wetland delineation, located at the existing break in slope, is 21 years old but is still accurate. Ms. Chagnon stated that the proposed work area is lightly wooded with a leaf litter floor and areas where it appears that brush has been cleared. Mr. Bernard stated that he is proposing to remove eight trees and that all work will be outside the 50-foot setback from the wetland. Mr. Morrison stated that an erosion control barrier must be installed outside the 50-foot setback prior to the installation of the retaining wall. Mr. Morrison stated that an amended plan identifying the location of the erosion control barrier and the trees that are to be removed is required.

Mr. Murphy made a motion to close the hearing and issue a negative Determination of Applicability with the standard and noted special conditions subject to the submittal of an amended plan showing the required erosion control. The motion was seconded by Mr. Radel and it passed unanimously.

7:58 PM Commission Business

- A discussion was held regarding the request for comments from the Planning Board relative to the Umina/Equestrian Trust preliminary subdivision plan off Chestnut Street. Mr. Speranza made a motion to send a comment letter, to be prepared by Ms. Chagnon, to the Planning Board regarding the proposed subdivision. The motion was seconded by Mr. Murphy and it passed unanimously.
- A discussion was held regarding the Fruit Street Master Plan Second Supplemental Single EIR (SSSEIR). Mr. Murphy made a motion to have Ms. Chagnon review the SSSEIR and prepare a draft comment letter by 06 February 2006 for the Commission's review. The motion was seconded by Mr. Speranza and it passed unanimously.
- A discussion was held regarding the proposed grading changes at the E. L. Harvey (ELH), Old Westborough Sanitary Landfill as presented in the ELH "Application for Landfill Minor Modification" submitted to DEP. The Commission decided to request an informal meeting with Gerry Cushing, ELH engineer, to discuss the proposed change and determine whether it can be handled as an insignificant project change.
- A discussion was held regarding the proposed changes by the MA Department of Conservation and Recreation to the 401 Water Quality Certification relative to Areas of Critical Environmental Concern.

Mr. Morrison recused himself from the Commission (8:15 PM).

Brian Morrison, Susan Erdman, applicants; Jonathan White, White, Freeman & Winter, LLP

Mr. Murphy stated that the Commission received a letter from Mr. White dated 23 January 2006 requesting that Mr. Speranza recuse himself from the Request for Determination of Applicability (RDA) hearing for Mr. Morrison and Ms. Erdman. Mr. Speranza stated that he will not vote, but that he will not recuse himself from the hearing and intends to participate. Mr. Speranza stated the current filing has no bearing on the complaint that Mr. Morrison filed with the District Attorney's Office regarding his e-mail correspondence. Mr. Speranza indicated he contacted the State Ethics Commission for guidance on the issue of recusal, and spoke with Peter Sturgis, its Executive Director. Based on his consultation with attorney Sturgis, Mr. Speranza filed written disclosures with the Selectmen and the Conservation Commission offices on December 23 substantially satisfying the legal requirements associated with participating in this matter. Mr. Speranza stated that he does not want to set a precedent for any future applicants to pressure any members of the Commission into recusing themselves in order to influence the voting for a particular filing. Mr. White provided an overview of his letter to Mr. Murphy. Mr. Murphy stated that he has concerns with Mr. Speranza's comments, but that it is the decision of the individual Commission member as to whether to recuse himself.

Mr. White asked the Commission to consider the distinction between a negative Determination and a negative Determination with conditions. He stated that he has discovered that there have been no filings with the Commission during in the past ten years for this type of maintenance work on gravel roads. Mr. White stated that the Commission's issuance of a negative Determination with conditions for this work will set a precedent for other ongoing maintenance work on gravel roads within town that currently do not have permits.

Mr. White stated that he is concerned with a quote attributed to Mr. Murphy in the Boston Globe, but that he is not asking Mr. Murphy to recuse himself. Mr. Murphy stated that what is reported in the paper may be quite different from what actually was said.

Mr. White stated that on 28 October 2005 two large potholes, approximately 30 feet long by entire width of Piazza Lane and 14 to 15 inches deep, were filled with 92 tons of gravel (32 cubic yards). Mr. White stated that a front end loader placed the gravel in the roadway and a grading machine spread out the gravel. Mr. White stated that the remainder of the work, which was outside the wetland buffer zone, was completed on 31 October. Mr. Murphy asked if the gravel was stockpiled. Mr. White stated that the work was completed by the end of the day.

Mr. White stated that he believed no filing was required for the work but that an after-the-fact filing was submitted to allow for a formal explanation. Mr. White provided an overview of his reasons why a filing was not required for the work based on an interpretation of the Massachusetts Wetlands Protection Act regulations and the Commission's history of not issuing permits for similar work. Mr. White submitted a document that identified 32 gravel roads in Hopkinton and noted that 24 of the gravel roads lie within the buffer zone of a wetland resource area. Mr. Morrison submitted photographs of three roads (Aikens Road, Lumber Street, and Mechanic Street) that he says indicate recent maintenance work. Mr. White stated that the town's Determination of Applicability for roadway maintenance is for asphalt roadways only and does not include gravel roads. Mr. White stated that he has contacted 15 surrounding towns and that eight have returned his calls to report that none have had a filing for gravel road maintenance. Mr. White stated that he contacted a law firm that practices on Cape Cod and they reported that they are not aware of any wetland permits issued for the maintenance of gravel roads.

Mr. White stated that the applicants have lived on the historic roadway since 1993 and that there have been three instances of maintenance on Piazza Lane since then that were conducted by other parties. Mr. Murphy asked for a clarification on whether the town's Determination of Applicability for roadway maintenance covers gravel roadways as well as asphalt. Mr. MacAdam stated that the Request for Determination of Applicability and the public hearing both identified that the application was for asphalt roadways. Mr. Murphy stated that he believes Mr. White's comments on past occurrences of work are well taken but are irrelevant to the filing before the Commission. Mr. Radel asked if there had been any Notices of Intent or Request for Determination of Applicability filed with the Commission in the past ten years for gravel roadway maintenance. Mr. MacAdam stated that he was not aware of any after a previous search of the records. Mr. Barnes asked if the town has submitted any requests to perform maintenance of gravel roads under the active Determination of Applicability. Ms. Chagnon stated that the Commission has not been notified of any gravel road maintenance. Mr. White stated that Aikens Road shows signs of very recent maintenance.

Mr. Speranza read aloud a quote he attributed to Brian Morrison, made during the enforcement hearing for Betty Wyckoff, 284 Hayden Rowe Street in 2002, relative to the need for filing prior to the conduct of work adjacent to a wetland. Mr. White stated that his applicant does not take issue with the quote. Mr. Speranza stated that a similar occurrence to Mr. Morrison's occurred on a horse trail owned by Ms. Wyckoff that required an Enforcement and Restoration Order. Mr. Morrison stated that he believed in that case fill was not placed on the trail for maintenance but was dumped alongside the trail within the buffer zone. Mr. Speranza stated that guidance from DEP is that the Commission should look at things on a case-by-case basis and to require a filing in any situation where there is potential for adverse impact to a resource area.

Mr. Murphy stated that all the Commission members have been to the site and believe the work is complete and the roadway is stable. Mr. Murphy asked for Ms. Chagnon's

opinion. Ms. Chagnon stated that gravel roads typically lose material from stormwater runoff and as traffic erodes material from potholes.

Mr. Murphy stated that the Commission must decide whether they believe a positive Determination, a negative Determination with conditions, or a negative Determination is required. Mr. White stated that if the Commission issues a positive Determination or a negative Determination with conditions then a precedent will be set requiring permits for similar work throughout town. Mr. Murphy stated that each case is unique and is subject to the burden it imposes. Mr. Radel stated that he has not seen the Commission issue a Determination without conditions during his tenure and stated that it was hard for him to believe that the Commission wouldn't place conditions in this case. Mr. Radel asked for Ms. Chagnon's opinion. Ms. Chagnon stated that conditions should probably be placed in this case, as there should be on other gravel roads in town. Mr. Radel stated that he is not seeking to create a burden to homeowners in the area but if maintenance work is close to wetlands than a Determination with conditions may be required. Mr. White stated that the opinion has been forwarded by others that Mr. Morrison sought special treatment by not filing an application prior to having the work performed. Mr. White stated that Mr. Morrison's actions were equal to past practice in the town and that he has now gone beyond what others have done in similar circumstances.

Mr. Robert Falcione, 12 Claflin Place, stated that Selectman Eric Sonnett said that DPW Director JT Gaucher was told by Ms. Chagnon that work on Piazza Lane would require mitigation with erosion control measures if the town were to maintain Piazza Lane by filling and grading. Ms. Chagnon stated that she met with Mr. Gaucher in November of 2004 and he discussed repairs that included significant regrading of the road.

Ms. Betty Wyckoff, 284 Hayden Rowe Street, stated that there was no precedent for the work she performed on the remnants of a historic railroad bed and she believes that she was treated as a criminal by the Commission.

Mr. Ron Nation, 43 Smith Road, stated that he believes that the Conservation Staff have been placed in an uncomfortable position and that he has hired Mr. David Burke, a professional wetland scientist, to review the work and asked for Mr. Burke to speak on his behalf. Mr. Burke stated that he reviewed the site on 18 January 2006 during a mild rain event and observed silt running into the lake and silt plumes in the lake. Mr. Burke stated that the deposited gravel material was not washed or clean gravel, that the wetland resources have not been delineated in the field or identified on a plan, and that the plan on file does not show pre and post conditions for the fill and grading. Mr. Burke presented photos that he believes show negative impact to a resource area. Mr. Burke stated that it is his opinion that a positive Determination should be issued with a requirement that a Notice of Intent be filed. A discussion was held regarding the origin of water on Piazza Lane in a photo taken by Mr. Burke.

Mr. John Craycroft, Cedar Swamp Conservation Trust, stated that he monitors water bodies such as Whitehall Brook and that the rain event of 18 January 2006 was a substantial event resulting in much runoff and very high stream levels.

Mr. Paul Harvey, Winter Street, stated that he is concerned with a precedent being set because his gravel driveway is within 25 feet of a wetland and requires constant maintenance. Mr. Harvey state that he believes it will be an unfair burden to require a permit to perform the work.

Ms. Maureen Dwinell, Town Treasurer, stated that the focus must be on the protection of the lake and that run-off should be mitigated with proper erosion controls and that a precedent-setting policy may be required to protect precious resources.

Mr. Andre Griben, 6 Winter Street, stated that the best way to protect the lake is to stop using the road altogether, but since that is not realistic the roadway will continue to erode during the type of rain storms identified in the photographs.

Ms. Bernadette Markey, 39 Ash Street, stated that maybe the best way to protect the lake is not to develop the land adjacent to it.

Ms. Nancy Peters, 258 Wood Street, provided an overview of the letter she submitted dated 23 January 2006. Ms. Peters stated that she walks Piazza Lane frequently, she was there the day the work was done, and has seen no damage to the lake during her walks on subsequent days.

Mr. Nation stated that he is in the construction business and that the current erosion into the lake is worse now than before and that it is irresponsible for the Commission not to require the installation of erosion controls.

Mr. Griben stated that the installation of erosion controls and the decay of haybales may create more of a disturbance than would occur naturally.

Mr. Falcione stated that he has listened to everybody and wants to reiterate that every situation is unique and that he wishes the Commission will take that into consideration.

Mr. Robert Shepard, 1 Piazza Lane, stated that Mr. White referred to Piazza Lane as private property. Mr. Shepard stated that Piazza Lane is public property. Mr. Murphy stated that the Commission understands that Mr. Morrison has a legal right-of-way across the state property. Mr. Shepard asked the Commission whether they ever issued a stop work order to the applicant. Mr. Murphy stated that the Commission learned of the work after it was completed. Mr. Shepard stated that the applicant installed a berm on the roadway and that the berm is redirecting silt-laden water towards the lake. Mr. Morrison stated that the contractor performed the work and was not directed by him to install any such devices. Mr. Morrison stated that the contractor plows the roadway and installed the device to stop run-off, from Mr. Shepard's property, from traveling down the roadway and directly into the lake. Mr. Morrison stated that the runoff from Mr. Shepard's property is seeping from the septic system and is now diverted and filters overland to the lake instead of traveling down the roadway and entering directly into the lake.

Mr. Ron Nation submitted a document dated 23 January 2006 to the Commission and requested that the Commission answer all of the questions.

Mr. Speranza stated that he is concerned with the sequence of events that has occurred. Mr. Speranza stated that Mr. Morrison told the Board of Selectmen five times that he received permission to perform the roadway maintenance work from the Commission staff and that no permits were required for the work. Mr. Speranza asked Ms. Chagnon and Mr. MacAdam if they gave Mr. Morrison permission to perform the roadway maintenance before the fact. Ms. Chagnon and Mr. MacAdam stated that they did not give permission to Mr. Morrison to perform the work. Mr. Speranza stated that he agrees that there has been no lasting wetland impact, but that Mr. Morrison is not an innocent or ignorant property owner and that his situation is the same as it would be with a sophisticated developer. A discussion was held regarding how the Commission typically treats property owners who are ignorant of the wetland laws and knowledgeable professionals in such matters.

Mr. Speranza read aloud from a portion of the Board of Selectmen meeting minutes of 15 November 2005. A discussion was held regarding the five instances that Mr. Speranza referred to on Mr. Morrison's comments to the Board of Selectmen. Mr. Murphy stated that the past references are not applicable to the filing at hand before the Commission. Mr. Speranza provided an overview to site work performed by a previous Commission member and how the Commission came to the decision to act in a way that could not appear to be favoritism. Mr. Speranza stated that Mr. Morrison made no mention of the road maintenance work to the Commission at the meeting that followed the work. Mr. Speranza stated that he did not want to have the appearance of a double standard of review.

Mr. Radel stated that he was unaware of the berm work on the roadway and wanted clarification on the matter. Ms. Chagnon stated that berm is more correctly called a water bar and that it directs water to the roadside and prevents it from traveling over the road surface where it can erode more fine sediments that would enter the lake. Mr. Nation stated that unlike the other 24 roadways mentioned earlier, a portion of Piazza Lane is actually in the lake and that it is criminal that no erosion controls are in place. Mr. Barnes asked Ms. Chagnon if she believes after-the-fact erosion control measures are warranted in this situation. Ms. Chagnon stated that she identified the inherent characteristics of gravel roads earlier and that asphalt roads are more stable and recommended. Mr. Murphy asked if erosion controls are warranted prior to future maintenance. Ms. Chagnon stated that the entire area does not need erosion controls but that erosion controls in certain locations may be beneficial, however, erosion control are not to be considered permanent. Ms. Chagnon stated that in the future, the Commission can require cleaner material and erosion control in certain locations. Mr. Murphy asked if washed gravel without fine clay material packs as well as gravel with clay. Ms. Chagnon stated that gravel with clay tends to pack more densely than without clay.

Mr. Radel stated that he cannot foresee the Commission issuing a negative Determination without some standard conditions and some minimum erosion control methods. Mr.

Barnes agreed that either a silt fence or haybales in certain areas should be conditioned for any future maintenance work. Mr. Murphy stated that the Commission should discuss the issuance of a negative Determination of Applicability with standard conditions and special conditions such as notification to the Commission prior to the start of any future maintenance, the ability to renew the Determination for an additional three years, and any other similar conditions to those included under the town's roadway maintenance Determination. Mr. Radel made a motion to issue a negative Determination of Applicability with the standard and noted special conditions. The motion was seconded by Mr. Barnes and it was passed by everyone except Mr. Speranza who abstained. Mr. Teitelman made a motion to close the hearing. The motion was seconded by Mr. Barnes and it was passed by everyone except Mr. Speranza who abstained.

Mr. Morrison stated that he currently pays for the plowing and maintenance of the roadway and that Mr. Shepard has no legal recourse or records to use Piazza Lane for vehicle access and that he should be issued a cease and desist order from further use of Piazza Lane to increase the stability of the existing roadway. Mr. Shepard stated that Mr. Gaucher told him that the town pays for the plowing of Piazza Lane. Mr. Murphy stated that those issues are not under the purview of the Commission.

10:05 PM Commission Business

Mr. Speranza requested that the Commission discuss events associated with Mr. Morrison's actions regarding site work at the next Commission meeting.

Minutes Approved: 06 February 2006