

v 18 Austin Pasture
v Chilmark MA 02535

January 4 2013

Chilmark Board of Selectmen

PO Box 119
Chilmark MA 02535

Dear Chilmark Board of Selectmen:

This is a request to the Board of Selectmen.

Yesterday in a Squibnocket Pond District Advisory Meeting, 6 of our 8 voting members voted to ask Town counsel the following question:

Is the Chilmark Zoning By-Law, Article 12, section H, item 1, valid in the light of the objections raised in the current application of Mr. Charles Parker to the Chilmark Conservation Commission?

Article 12, H. Prohibited Uses

1. Use of chemical fertilizers, herbicides, fungicides, pesticides, chemical septic system cleaners and such other substances as may be determined by the Board of Health.

THANKS VERY MUCH.

Sincerely yours,



Wendy Weldon

Co-Chair of the Squibnocket Pond District Advisory
Committee

Pages 11-12, of Mr. Parkers' application to
the Chilmark Conservation Commission

Review of Chilmark's Herbicide Prohibition Zoning By-Law

In the 1980's, through Town Meeting, Chilmark established an overlay zoning district (Zoning By-Law) for the Squibnocket Pond watershed as a District of Critical Planning Concern (DCPC). One of the Zoning By-Laws for the Squibnocket DCPC prohibits the use of chemical herbicides in that district. However, this is a Zoning By-Law and should not have an effect on the review of this application which should be considered under the Chilmark Wetlands By-Law and under the Massachusetts Wetlands Protection Act.

To determine the relevance of this Zoning By-Law to this application, we called both Lee Corte-Real, Director of the Commonwealth's Pesticide Bureau, and Bill Clark, a Pesticide Board Member. The Commonwealth's Pesticide Bureau is chartered with regulating herbicides and pesticides for the Commonwealth. Both of these individuals referred us to the Commonwealth's Town of Wendell case where it was determined that towns do not have the independent authority to regulate pesticides and herbicides. Following-up with Margaret Hurley, the Director of the Commonwealth's Municipal Division for the Attorney General's office, we obtained the AGO's specific comments to another Town (Ashland) that was attempting to regulate pesticides & herbicides in 2009. These comments illustrate the AGO's application of the principles from the Town of Wendell case to explain their disapproval to Ashland of their proposed new by-law (before proposed by-laws become official Town laws, the AGO reviews these by-laws for consistency with existing Commonwealth laws).

The text from AGO's to Ashland is as follows:

Subsection 8.2.8 (2) is disapproved and deleted [Disapproval #1 of 1]. We disapprove and delete Subsection 8.2.8 (2) because it is inconsistent with G. L. c. 132B, captioned, the "Massachusetts Pesticide Control Act." General Laws Chapter 132B, Section 1, provides in pertinent part as follows (with emphasis added):

The purpose of this chapter is to conform the laws of the commonwealth to the Federal Insecticide, Fungicide, and Rodenticide Act, Public Law 92-516, as amended, and the regulations promulgated thereunder and to establish a regulatory process in the commonwealth. The exclusive authority in regulating the labeling, distribution, sale, storage, transportation, use and application, and disposal of pesticides in the commonwealth shall be determined by this chapter. The intent of G.L. c. 132B is to have a uniform set of regulations throughout the Commonwealth administered by the Department of Food and Agriculture. In the case of Town of Wendell v. Attorney General, 394 Mass. 518, 529 (1985), the Court found that the G.L. c. 132B was a state-wide "comprehensive" act that preempted further regulation by municipalities within that area of concern, i.e., the use and application of pesticides. Requiring a special permit for application of pesticides, herbicides, and fungicides frustrates the achievement of centralized regulation of pesticide, herbicide, and fungicide use, and is inconsistent with the laws of the Commonwealth and must be disapproved and deleted.

Based on the comments from the Pesticide Bureau and the AGO's letter to Ashland, we believe the Chilmark herbicide prohibition by-law is inconsistent with the laws of the Commonwealth and that a challenge of the Chilmark by-law has a reasonable chance of success. We are aware that this by-law was passed by 2/3rds of Chilmark's voters at Town Meeting and that the Conservation Commission may not be in a position to allow our permit. If there's a timely way to accomplish our objective without a challenge of the by-law, we would favor that strategy.

Additionally, we asked the AGO's office (Margaret Hurley, Chief of the Municipal Division) whether the by-laws status as a component of a DCPC made any difference to their review process. They indicated that DCPC was not a consideration in their process. By-laws that are part of a DCPC are considered in the same light as others that are not DCPC.