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Orleans Conservation Commission
Town Hall, Nauset Room
Hearing Meeting, Tuesday, December 3, 2013

PRESENT: Judith Bruce, Chairwoman; Steve Phillips, Vice-Chairman; Bob Royce; James Trainor; Judy Brainerd; Jim O'Brien; Rich Nadler, Associate; Jane Hussey; Associate; Kevin Galligan, Associate; John Jannell, Conservation Administrator.

8:30 a.m. Call to Order

For the purpose of this hearing, Rich Nadler will be a voting member.

Request for Determination of Applicability

Richard Cuda, Inlet Road, from Callanan's Path south to Aspinet Road. by Wetland Strategies, Inc. The applicant is seeking a Determination that use of the roadway by vehicular traffic constitutes an alteration & therefore requires a valid Order of Conditions. Lenore White of Wetland Strategies, Inc., Michael O'Neill of McGregor & Associates, and Mike Ford, Town Council for the Town of Orleans, were present. Lenore White explained that this was a two-part request: the applicants were seeking determination that the area described was subject to jurisdiction under the local by-law. The second request that if Off-Road Vehicle (ORV) use results in alteration, if it was significant enough for a Notice of Intent (NOI). Lenore White passed around photos of the site during storm events, and went over the existing site conditions. Lenore White pointed out that there was an Order of Conditions (OOC) issued in 1991 which regulated ORV driving on the beach, SE 54-723¹. Michael O'Neill pointed out in the WPA regulations where it stated that an OOC was only valid for 3 years, or in certain circumstances, up to 5 years. Michael O'Neill's position was that SE 54-723 only applied to Callanan's Pass north, and did not apply to the area south to Aspinet Road. Michael O'Neill stated that if this OOC was still valid, any modification required a new NOI, including abutter notification and the formal process associated with a new NOI. Michael O'Neill commented that circumstances had changed for Aspinet Road since 1991, including the road improvement work which was done in 2006. Michael O'Neill stated that prior to this, the road was only used for emergency use, and as Lenore White had pointed out, the road flooded regularly, and the Dunes needed to be protected. John Jannell interjected that before they continue their presentation, it was to be noted that an RDA filing required the Commission to act within 21 days of receipt of its filing. John Jannell explained that what was before them were three questions: 1, whether or not the area is subject to the Wetlands Protection Act (WPA); 2, whether the work was subject to the WPA, and therefore a discussion of what constituted work; and 3, if it was subject to the municipal by-law. Judith Bruce felt that in going over these issues, that it was clear that this was within jurisdiction, but whether or not it constituted work was troublesome. Judith Bruce pointed out that there were a number of roads which were up against resource areas, and that no one filed to drive on said roads. Judith Bruce felt that if the road was to be altered that a filing may occur, but that to drive on it did not constitute work, as that traversing on it would be something which could be considered grandfathered. Judith Bruce noted that the timeframe of the 1991

¹The OOC referenced throughout this discussion will be referenced as both the 1991 OOC and by its DEP #, SE 54-723.

OOC had been brought up, and explained that DEP had accepted it as governing document for ORV travel which included language that it could continue forever. Judith Bruce said that it references the entire barrier beach system, and that the Town had always applied that the OOC applied from the Eastham Town Line to the Chatham Town line. Mike Ford concurred with the Chair's analysis, and thought that the real questions was the area where Aspinet Road intersected with Inlet Road to Callanan's Pass, where the Town had treated the sand road through the Dune in front of their house as part of the barrier beach covered under the 1991 OOC. Mike Ford provided background on a similar request made by a resident of Nauset Heights who filed an RDA which the Commission took no action, which resulted in an appeal. After an on-site was made, the Commission worked with DEP to put together an OOC, a blueprint for operating the ORV system. Historically an ORV program has been conducted, and language was put into the OOC which Mike Ford felt that the OOC was in full force. Mike Ford stated that the questions before the Commission were whether the 2 sections of Inlet Road were subject to the RDA for home and vehicle traffic, something which did not rise to the level of work. The second issue would be whether or not it was covered in the OOC, that the OOC did not need to be Amended as this has been applied as one system. Michael O'Neill pointed out that since it had been determined in 1991 that ORV use of the Beach required an OOC, that there must be an OOC from Callanan's Pass to Aspinet Road. A new NOI was needed, and the OOC should be reviewed to determine what changes needed to be made. Michael O'Neill pointed out that since 2006 when Aspinet Road was improved upon, traffic increased significantly. Lastly, Michael O'Neill commented that an OOC did not last in perpetuity, and that an OOC was needed for their subject area to determine how it was going to be managed. Mike Ford did not feel that the issue in front of the Commission today was whether or not the 1991 OOC was in effect but rather an RDA application for Inlet Road. Mike Ford pointed out that while Michael O'Neill could talk about this Order, the public was not notified that this would be an issue, and therefore was not something which was in play. Secondly, the Commission was aware that the 3 years an OOC is valid is the time for the work to be done, and Judith Bruce pointed out that you don't apply to live in a house built under an OOC every 3 years. Lenore White felt that driving constituted work because the driving resulted in ruts, packing of sediment, and prevention of growth. Lenore White pointed out that she worked at DEP in the Wetlands Program while this OOC was drafted, and that DEP's silence over the OOC was not an approval, and there was no evidence that DEP had approved this continued use. Judith Bruce did not feel that DEP was shy in providing opinions to the Commission. Kevin Galligan inquired why the applicants were requesting this. Kevin Galligan asked for the applicants to describe the work better, explain to the Commission what the applicants were concerned about, and pointed out that they had reminded the Commission that the OOC from 1991 had a schedule, including limits of activities, boundaries, and signs. Lenore White stated that it was their position that the 1991 Order did not cover their area of interest but rather the area to the north. Judith Bruce pointed out that this was not something which the applicants had put in their filing, and that Mike Ford explained that the 1991 OOC was not in this discussion. Kevin Galligan said that they would be having a different discussion should they have indicated this, and Lenore White stated that driving of ORV over the resource area constituted an OOC. Kevin Galligan asked if they thought this activity was work, and for clarification of the time and limitations. Lenore White noted that there was no way to manage and protect the resource areas as a result of this traffic, and Kevin

Galligan inquired if the applicants had evidence that the present vehicle use was not routinely managed. Lenore White reiterated that SE 54-723 did not cover this area, and Judy Brainerd asked why driving was considered work or alteration. Lenore White reiterated that it created ruts, destroyed vegetation, and compacted gravel, and those were the reasons why the 1991 OOC came out. Judy Brainerd said that the applicant did not say driving, but used work, and stated that Orleans was filled with roads within wetlands. Judy Brainerd was concerned that this thought process which the applicants suggested to be applied to Aspinet Road be applied to all roads. Michael O'Neill felt that this activity needed to be regulated, and that this area is already managed and controlled by the existing 1991 OOC. John Jannell stated that in photo records, symbolic fencing was erected in 2009, and felt that the Commission had witnessed it being routinely managed. Lenore White pointed out that there was no other way that it was being managed, and that there should be other conditions to protect the Dune, vegetation, and all other functions. Judith Bruce reiterated that SE 54-723 stated the barrier beach systems, and that it had been managed. Lenore White felt that this subject area was off of the barrier beach, and Judith Bruce pointed out that the barrier beach ran to Chatham. Lenore White commented that a barrier beach was defines as having water on both sides, and Michael O'Neill felt that the residents needed to be notified of how this management was taking place. Judith Bruce inquired if the 2009 roadwork to Aspinet Road had an OOC, and John Jannell was not aware of any such filing or approvals for this work. Rich Nadler inquired about the increase in volume on Aspinet Road, and Michael O'Neill stated that the prior use of this road had been just for emergency vehicles, but that the increase in traffic had been significant. James Trainor asked if they felt that the use of the road by the abutters had been detrimental to the wetland, and Lenore White said that they did not use it since it was impassible, that there were only 3 houses on it, and it was difficult to say how much of an adverse effect there was by the abutters. James Trainor asked if their use had been detrimental since it was normally not used and it was not normally flooded. Lenore White hoped that this discussion could be opened up to determine how much it was being used and how it was being impacted, and Jim O'Brien was not sure that the applicant had demonstrated impact due to driving. Lenore White stated that in 1991 DEP said that driving required an OOC. Jane Hussey commented that in addition to symbolic signage, ORV drivers were required to watch an educational video, a certain amount of equipment was required for an ORV, and that many townspeople had used the road for years. Jane Hussey was concerned that page 4 of SE 54-723 was in opposition of what the applicants were saying, and Lenore White agreed that while the OOC was well crafted, it either needed to be Amended to include the subject area, or a new NOI needed to be filed for this area. Jane Hussey felt that it was clear to the majority of the townspeople that this area was part of SE 54-723, and Lenore White felt that it became a legal issue. Michael O'Neill explained that SE 54-723 was supposed to be reviewed every year, and that it should be opened up to a public hearing. Mike Ford said that SE 54-723 was a well-crafted OOC, and the Conservation Agent went out on site every year. Mike Ford suggested that those who wanted to be notified about this annual review could submit their name and the Town could try to give notice. It was Mike Ford's understanding that the beach manager traveled the whole barrier beach system annually, and reported any changes which needed to be done, and Judith Bruce pointed out that John Jannell had gone out with Dawson Farber, Parks & Beaches Manager for the Town of Orleans. Michael O'Neill requested that the Commission decide that the use of Inlet Road

required a new filing, and Steve Phillips pointed out that this area had been used since ORV's were on the beach. Michael O'Neill stated that before 2006, Aspinet Road was used only for emergency use. Judith Bruce opened up the hearing to public comment, asking that comments be limited to whether or not this area was under Conservation Commission jurisdiction, or if the use of this road constituted work. Carl Trevison of 25 Doane Road felt that the use of Inlet Road, also known as Cliff Road, had been done for many years, and that the use of Aspinet Road was to create a safer route for vehicles to leave the beach. Carl Trevison noted that vehicle numbers had not increased but in some cases had decreased because of nesting birds, and Judith Bruce pointed out that the OOC did call for decreased usage. Sandra Davison of 9 Carver Road said that Inlet Road had been used by her family her entire life, from vehicle use to pedestrian access. Richard Cuda, applicant at 15 Cullum Road, said that there were two different issues with beach driving. Richard Cuda explained that while they did not stop their neighbors from using the road, they felt that the town directing 200 vehicles off of the beach via Inlet Road was different. Richard Cuda brought up the 1998 Woods Hole Group study which recommended that sand be brought in to do work in this area and fences to be installed. Richard Cuda pointed out that the Town of Orleans purchased the hotel behind Nauset Beach to protect the ability to use Nauset Beach, but had not done anything to maintain Inlet Road. Richard Cuda brought up the sand from Nauset Beach parking lot which was to be used to nourish Skaket Beach, and explained that the homeowners along Inlet Road wanted to protect their homes from the ocean. Judith Bruce understood the applicant's frustration, stating that municipalities protected municipal property, and Richard Cuda explained that it was being made worse by putting a road there. Judith Bruce asked if anyone else wished to comment on the hearing.

MOTION: A motion to close the hearing was made by James Trainor and seconded by Judy Brainerd.

VOTE: Unanimous.

MOTION: A motion to make a positive determination that the area described was subject to protection under the WPA was made by Steve Phillips and seconded by Bob Royce.

VOTE: Unanimous.

MOTION: A motion to issue a Negative Determination that the work is subject to protection under the Act was made by Steve Phillips and seconded by Jim O'Brien.

VOTE: Unanimous.

MOTION: A motion to issue a Positive Determination that the area is subject to the Local By-Law was made by Steve Phillips and seconded by Judy Brainerd.

VOTE: Unanimous.

MOTION: A motion to issue the RDA with the findings was made by Steve Phillips and seconded by Judy Brainerd.

VOTE: Unanimous.

Notice of Intent

Robert A. & Patricia T. Stromsted, 8 Tides End Lane. by Ryder & Wilcox, Inc. Assessor's Map 43, Parcel 24. The proposed removal of invasive plant species, the planting of native species, & the relocation of existing shrubs. Work will occur on a Coastal Bank, in Land Subject to Coastal Storm Flowage, in the Pleasant Bay A.C.E.C. & within 100' of a Salt Marsh. Theresa Sprague and Amy Wolfson of Blue Flax Design were present. Amy Wolfson went over the proposed work, and Kevin Galligan inquired about the cherry tree to be removed, since it did provide good canopy. Amy Wolfson pointed out that this was the homeowners only open area, and would be replanting an amelanchier. Kevin Galligan was disappointed to see the tree removed, and Theresa Sprague explained that it was more of an aesthetic issue for the homeowners, who wanted a more organized feel for the property. Steve Phillips noted that there was not a specified number of English Ivy to be removed, and Theresa Sprague explained that the area between the house and the salt marsh was to be removed at this time. Steve Phillips hoped that the phragmites on site would be part of a long-term removal, and Theresa Sprague replied that it was not part of the original scope of the work. Steve Phillips suggested that it be addressed at this time since the potential treatment area was not large, and Theresa Sprague said there could be a simple cut and drip. Steve Phillips pointed out that there were two drainage issues on site: there was some siltation below the deck that could be captured with crusted stone, and there were no gutters or downspouts on site. James Trainor inquired where the 50', 75', and 100' buffer lines were on the property, and Amy Wolfson explained that the 100' buffer line went almost to the southern edge of the property, with the 50' buffer line cutting through the house. Theresa Sprague clarified that the entire property was within Conservation Commission jurisdiction, and James Trainor asked if all of the proposed work was within the 50' buffer. Theresa Sprague said yes, and Peter Kennedy, abutter at 4 Tides End Lane, spoke on behalf of himself and Dana Eldredge of 12 Tides End Lane, who had reviewed the plans and did not have any concerns about the proposed work. Peter Kennedy pointed out that the phragmites went across to additional properties, and Steve Phillips pointed out that the Commission could only address the application in front of them. John Jannell reported that a DEP number had been issued for this application, and the Commission could act on it.

MOTION: A motion to close the hearing was made by Steve Phillips and seconded by Judy Brainerd.

VOTE: Unanimous.

MOTION: A motion to approve this application with the Commission encouraging the management of the invasive species on the entire site was made by Steve Phillips and seconded by Jim O'Brien.

VOTE: Unanimous.

Continuations

Last Heard 11/5/13

Samuel J. & Nancy H. Scialabba, 32 Harbor View Lane. by Ryder & Wilcox, Inc. Assessor's Map 29, Parcel 11. The after the fact cutting of trees on a Coastal Bank. Work occurred on a Coastal Bank & within 100' of the Edge of a Salt Marsh. John Jannell explained that a request to continue the hearing to January 7th, 2014, had been received by the Conservation Department, and the applicants needed additional time to address the Commission's concerns.

MOTION: A motion to continue this hearing to January 7th, 2014, was made by Bob Royce and seconded by Rich Nadler.

VOTE: Unanimous.

Certificate of Compliance

Robert E. Carter (1997), 72 Pochet Road. The request for a Certificate of Compliance for an Order of Conditions for the construction of a gravel driveway for access to dwelling. John Jannell explained that this was an older Order in substantial compliance, and the Commission could vote to issue this Certificate.

MOTION: A motion to issue this Certificate of Compliance was made by Bob Royce and seconded by Judy Brainerd.

VOTE: Unanimous.

Administrative Reviews

Rachelle Bernachi, 71 Uncle Israels Road. The proposed replacement of a d-box for an existing septic system. Work to be done by Oceanside Septic. John Jannell explained that this application was in response to an Order issued by the Health Department, and felt that the Commission could approve this work without a further filing. Judith Bruce inquired where the work was to be done. John Jannell explained that the entire property was within the buffer zone to the pond, and that a note would be made to put the property back the way it was found.

MOTION: A motion to approve this application was made by James Trainor and seconded by Bob Royce.

VOTE: Unanimous.

Other Member's Business

Chairman's Business

Approval of the minutes from July 2, 2013

Steve Phillips submitted revisions to the clerk, and these changes had since been made for the Commission's review.

MOTION: A motion to approve these minutes was made by Steve Phillips and seconded by Judy Brainerd.

VOTE: Unanimous.

Approval of the minutes from July 9, 2013.

MOTION: A motion to approve these minutes was made by Steve Phillips and seconded by Bob Royce.

VOTE: 5-0-1; motion approved, Rich Nadler abstained.

Administrator's Business

Sea Call Farm Conservation Area

Request vote to authorize spending of \$355.00 from the Conservation Properties Account for the pumping of the septic system.

John Jannell reported that since this was an expenditure greater than \$200, the Commission needed to authorize its payment. The funds for this work were available to pay this expense.

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MOTION: A motion to approve this expenditure was made by James Trainor and seconded by Judy Brainerd.

VOTE: Unanimous.

The meeting was adjourned at 9:56am.

Respectfully submitted,

Erin C. Shupenis, Principal Clerk, Orleans Conservation Department.