

February 25, 2005

Show Cause Hearings - Special Meeting

MEMBERS PRESENT: Mrs. Gray, Mrs. D. Hill, Mr. LaMuniere,
Mr. Picton, Ms. Purnell

ALTERNATES PRESENT: Ms. Coe

ALTERNATES ABSENT: Mr. Bedini, Mrs. Korzenko

STAFF PRESENT: Mr. Ajello, Mrs. J. Hill

ALSO PRESENT: Atty. Kelly, Mr. Osterlund, Mrs. Reinhardt,
Mr. Charles

Cremona/8 Perkins Road

Mr. Picton called the Show Cause Hearing to order at 4:05 p.m. and seated Members Gray, Hill, LaMuniere, Picton, and Purnell. It was noted the purpose for the hearing was to provide Mr. Cremona an opportunity to present reasons why the enforcement order issued on 2/15/05 should not remain in effect. Mr. Picton briefly stated Mr. Ajello, WEO, had issued the cease and desist order after observing trees had been clear cut without a permit in an area under the Commission's jurisdiction due to its proximity to a watercourse and possible wetlands soils. It was noted no one was present to represent Mr. Cremona.

Atty. Kelly, representing Mrs. Reinhardt, adjoining property owner at 10 Perkins Road, who had also been issued an enforcement order, submitted a petition dated 2/25/05 requesting intervener status for his client. He stated for the record that he was not authorized to represent Mr. Cremona. He explained he was requesting intervener status so that he could establish a record and raise questions regarding the Commission's jurisdiction in this matter.

Atty. Kelly referred to the Uniform Administration Procedures Act, and stated the show cause hearing had to be conducted according to the provisions of that statute. Mrs. D. Hill asked if the Act specifically included show cause hearings and Atty. Kelly said it did. Atty. Kelly said the Act tells what the record should include and that the Commission must rely on the record when making its decision.

Atty. Kelly suggested the Reinhardt/10 Perkins Road and Cremona/8 Perkins Road show cause hearings be held simultaneously. It was the consensus to conduct the hearings separately.

Ms. Purnell thought the Commission should not take for granted that Atty. Kelly was correct about the hearing process and Mr. Ajello questioned whether it was proper for an intervener to speak at a show cause hearing. Mr. Picton conditionally granted intervener status until the Commission consulted with its attorney to find out whether Atty. Kelly had the right to petition for it. It was the consensus to continue the show cause hearing until a legal opinion on these matters of law could be obtained.

MOTION: To continue the Cremona/8 Perkins Road

Show cause hearing to March 9, 2005 at

6:30 p.m. in the Land Use Meeting Room,

Bryan Memorial Town Hall, Washington

Depot. By Mrs. Hill, seconded by Ms.

Purnell, and passed 5-0.

At 4:25 p.m. Mr. Picton continued the show cause hearing.

Atty. Kelly said he would agree to a continuance of the Reinhardt show cause hearing also so that the Commission could consult with its attorney regarding whether the hearings could be held simultaneously. Mr. Picton pointed out, however, the Commission did not have the same legal questions concerning both hearings.

Reinhardt/10 Perkins Road

Mr. Picton called the show cause hearing to order at 4:28 p.m. and seated Members Gray, Hill, LaMuniere, Picton, and Purnell. He briefly stated the basis for the 2/15/05 cease and desist order. The WEO had observed clear cutting in an area he was sure was under the Commission's jurisdiction and no permit had been issued for this work.

Mr. Ajello read his 12/8/04 Enforcement Report. He noted he had inspected the site and found an intermittent stream in the area, but said the soil types have yet to be determined.

Atty. Kelly, representing Mrs. Reinhardt, stated Section 4-178 of the state statues governs evidence presented in a contested case and 4-180 pertains to the basis for making a decision in a contested case. He said he could conduct cross examinations to get complete disclosure of the facts.

Atty. Kelly said it was important to note exactly what was in the record. He asked that the following be included: 1) the 2/23/05 notice of the show cause hearing sent to Mrs. Reinhardt, 2) the 2/15/05 enforcement order, 3) the minutes and recording of the 12/8/04 Inland Wetlands meeting, 4) the recording of the 2/23/05 Inland Wetlands meeting, 5) the 12/8/04 and 2/23/05 Enforcement Reports, and all the photos, labeled, numbered, and dated, in the file. Mr. Picton asked that all the documents in the enforcement file, generally and specifically, be included in the record. Mr. Ajello said he had more undeveloped photos for the record, but Atty. Kelly objected, saying they had to be available in the file so he could review them. The following documents in the file were also noted for the record: 1) the portion of the Assessor's Map reviewed at the 2/23/05 meeting, 2) the two 2/15/05 enforcement orders with attached sewage disposal system information from the Health Department, 3) the WEO's 2/23/05 report, 4) the two 2/15/05 cease and desist orders, 5) the 2/24/05 Special Meeting Notice, 6) 20 photos, and 7) the map, "Map-Plan Prepared for John Cavallaro," dated 10/67, by Mr. Howland. Atty. Kelly also asked that his 2/24/05 letter to the Commission requesting copies of all documents in the file and the inland wetlands inventory map be included in the record.

Atty. Kelly then submitted a copy of the 2/21/05 faxed letter Mrs. Reinhardt received from Mr. Temple, soil scientist, which stated he had reviewed the inventory map and had found no wetland soils or watercourses in this area. Mr. Picton asked if Mr. Temple had inspected the site. Atty. Kelly said he had not. He also submitted four photos taken by Mrs. Reinhardt on 2/20/05.

Atty. Kelly noted it was important for the record to identify all Commissioners who had visited the site prior to the show cause hearing, when they had made each inspection, and who they were with. Mrs. Hill stated she had been to the site in 2003 regarding a previous matter. Mr. LaMuniere said he had inspected the site on 2/19/05. Mr. Ajello noted he had inspected the site several times. No one else had inspected the site on his own. Atty. Kelly asked that Commissioners recuse themselves if they had inspected the site outside of an officially noticed site inspection and would rely on observations not in the record when making their determinations in this matter.

Mr. Picton asked Atty. Kelly if he understood the only purpose of the show cause hearing was to hear reasons why the 2/15/05 enforcement order should not remain in effect. Atty. Kelly responded that he and the Commission had a fundamental difference regarding the scope of the hearing. He asked for a continuance until he was sent copies of all the items in the file for his review. Ms. Purnell asked for proof of whether or not there were wetlands or watercourses on the property, saying if no, the order was

issued in error and if yes, it was issued correctly. She noted the SCS inventory map did not provide a definitive level of detail to be used to make the determination. Mr. Picton added in addition to wetlands or watercourses actually being located on the property, if the work done caused a risk of damage to any wetlands or watercourse, the order had been issued correctly. Atty. Kelly stated there are statutory requirements as to how wetlands and watercourses must be identified and how it is determined whether the Commission has jurisdiction. He said the Commission was wrong to think it had jurisdiction until proven otherwise. Ms. Purnell stated the Commission was relying on the knowledge and experience of its Enforcement Officer. Mr. Picton stated the Commission has jurisdiction within 100 feet of wetlands and watercourses and Mr. Ajello presented photo #18, which showed evidence of a stream within 100 feet of the work done.

Atty. Kelly proceeded to ask Mr. Ajello many, many detailed questions regarding his site inspections to the property, his exact instructions to the contractor, differences in wording between his field notes, 12/8/04 and 2/23/05 enforcement reports, and the 12/8/04 minutes, his knowledge of the property lines, his evidence that tree cutting occurred on the Reinhardt property, whether he agreed with Mr. Temple's 2/21/05 fax, whether he had checked the wetlands map, whether he had spoken on site only of potential wetlands or had he mentioned the watercourse, whether he still suspected there were wetlands soils on site, etc. He asked that Mr. Ajello's field notes of the 12/7/04 inspection be made part of the record.

Atty. Kelly questioned the Commission about the proper designation of wetlands on the property prior to the issuance of the order. He asked if the Commission stipulated it had never voted to designate wetlands or watercourses within 100 feet of the Reinhardt property. Mr. Picton stated the Commission had not had a vote, that it relied on the judgement of its Enforcement Officer, and per the Regulations, the burden was on Mrs. Reinhardt to show there were no wetlands in the area. Mr. LaMunier remembered previously when Mrs. Reinhardt had work done on Tinker Hill Road there had been drainage problems due to the amount and velocity of water in the stream. Atty. Kelly objected because Mr. LaMunier was relying on observations that were outside the record. Mr. Picton asked that they be incorporated into the record. Atty. Kelly asked why the Commission had not hired a soil scientist to confirm there were wetland soils in the area and stated he was trying to establish a record of information on which it could be determined whether the Commission ever actually had the jurisdiction to issue the enforcement order.

Atty. Kelly objected that the Commission had not acted according to mandated statutory procedures. He said it first must officially establish on the record that a regulated area exists and then show it has jurisdiction in the matter. Once that has been done, it may then issue an enforcement order. In the Reinhardt case, he maintained that since the wetlands and watercourses were not shown on the inventory map, the Commission had to first hold a public hearing and vote to amend the official wetlands map before it had the jurisdiction to issue the order.

The Commission briefly discussed whether to close the hearing. Mr. Picton advised Atty. Kelly the show cause hearing was not the proper venue to discuss Commission procedure. He thought there was no reason to continue the hearing as it was clear from the evidence on the record that the work done caused substantial risk of damage to wetlands and watercourses. Atty. Kelly noted Mr. Ajello had stated he would add photos to the record and if the hearing was closed, he would not have an opportunity to review them. Mr. Picton thought there was already ample evidence in the file on which to base a decision. It was the consensus to close the hearing.

MOTION: To close the Show Cause Hearing to consider whether the 2/15/05 enforcement order issued for the Reinhardt property at 10

Perkins should remain in effect. By Mr.
Picton, seconded by Mrs. Hill, and passed
5-0.

Whether to uphold the 2/15/05 cease and desist order was briefly discussed. Mrs. Gray noted Atty. Kelly's arguments had been entirely based on procedural issues.

MOTION: To keep the 2/15/05 enforcement order in
place for the Reinhardt property, 10
Perkins Lane. By Mr. Picton, seconded
by Mrs. Gray, and passed 5-0.

The Commission thought it should next conduct a site inspection of the disturbed properties, but noted it would not make much sense to do so while the ground was covered with snow. Possible scheduling of an inspection will be discussed at the next regular meeting. There was some confusion about whether new information could be included in Reinhardt's current enforcement file or whether Atty. Kelly was correct when he stated no additional materials could be added to this file. It was noted Atty. Kelly would be sent a letter to notify him that the order had been upheld.

MOTION: To adjourn the meeting. By Mrs. Hill.

Mr. Picton adjourned the meeting at 6:05 p.m.

FILED SUBJECT TO APPROVAL

Respectfully submitted,

Janet M. Hill

Land Use Coordinator