
TOWN OF FALMOUTH
OFFICE OF TOWN COUNSEL
MEMORANDUM

TO: WILLIAM B. OWEN, DIRECTOR OF PUBLIC WORKS
FROM: FRANK K. DUFFY, JR., TOWN COUNSEL *JKD* FEB 6 2003
SUBJECT: ROAD MAINTENANCE NOTICE OF INTENT
DATE: 1/31/2003
CC: ROBERT L. WHRITENOUR, JR., TOWN ADMINISTRATOR, PEGGY EMSLIE, CONSERVATION ADMINISTRATOR, GEORGE CALISE, TOWN ENGINEER

1. You asked to review the Order of Conditions for road maintenance. I am of the opinion that the Order of Conditions is not a recordable document in Barnstable Registry of Deeds because it does identify a locus, plan or other recordable entity under the registration system. It also is applicable to both registered and recorded land.
2. The Conservation Commission has limited authority to control maintenance and repair activities. In Bourne v. Austin, 19 Mass. App. Ct 738 (1985), the Appeals Court noted that the word "repair" is absent from the list of prohibitions in the enabling act. The Wetlands Protection Act and our Bylaw prohibit removing, filling, dredging building upon and altering wetland resource without first obtaining a permit. Repairs, provided they do not create additional removing, dredging, building upon or altering of resource areas, are not subject to review by the Commission.
3. Both the Wetlands Protection Act and the Bylaw provide a mechanism that allows the DPW to delineate repair and maintenance activities to the Commission to insure that none of the prohibited activities are taking place. This is what is called a Request for a Determination of Applicability (RDA). Essentially the DPW spells out what activities it will be carrying out in and around resource areas to repair roads and ways. The Commission can issue a negative determination which means that those activities are not subject to the permitting requirements.
4. I would recommend that in the future, DPW file an RDA instead of a Notice of Intent for all repair work not related to water and sewer projects. RDAs are not recordable so there is no issue at the Registry of Deeds. The RDA should expressly identify the work as repairs. The RDA can incorporate the conditions in the Order of Conditions, e.g. how DPW will dispose of sand from beaches blown onto the road.
5. If a project requires new alterations of resource area, it extends beyond repair and a Notice of Intent would have to be filed.
6. The Water and Sewer Department has an express exemption for repair activities in accordance with the Code of Falmouth § 235-3 A. They must always notify the Commission 10 days prior to commencement of repair work in proximity to a resource area unless it is an emergency.

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