

MINUTES: AGRICULTURAL LANDS PRESERVATION COMMITTEE

Thursday February 4, 2021 10:00 AM to 12:30 PM

Informal Hearing: In the Matter of Keith Boyle COA Dwelling Denial

This hearing was held remotely via Zoom will full remote participation by all parties.

MEMBERS PRESENT:

John Lebeaux, Commissioner, Department of Agricultural Resources
Clem Clay, UMass, Center for Agriculture, Food and Environment
Robert O'Connor, Designee of Kathleen Theoharides, Executive Office of Energy & Environmental Affairs
Rita Thibodeau, Natural Resources Conservation Service, Non-Voting Member
Laura Abrams, Board of Agriculture
Warren Shaw, Jr., Public Member
Fred Dabney, Public Member
Susan Flaccus, Public Member
Kathy Orlando, Sheffield Land Trust
Karen Schwalbe, SEMAP
Phil De Martino, DHCD

MEMBERS ABSENT: NONE

ALSO PRESENT:

Gerard Kennedy, Department of Agricultural Resources
David Viale, Department of Agricultural Resources
Delia Delongchamp, Department of Agricultural Resources
Taylor Arsenault, Department of Agricultural Resources
Christine Smith, Department of Agricultural Resources
Julie Weiss, Department of Agricultural Resources
Jill Ward, Department of Agricultural Resources
Alisha Bouchard, Chief of Staff, Department of Agricultural Resources
Margaret Callanan, Department of Agricultural Resources

Public: Keith Boyle, Appellant

Warren Shaw, Hearing Officer, read the procedures for an appeal of the denial of a request for a Certificate of Approval for a dwelling. The Hearing is being conducted under the informal rules of adjudicatory procedure: 801 CMR 1.02.

The parties introduced themselves:

- Christine Smith, MDAR Legal Counsel representing MDAR
- Witnesses:
 - Gerard Kennedy, Director, Division of Agricultural Conservation and Technical Assistance
 - David Viale, Agricultural Lands Program Supervisor
 - Delia Delongchamp, APR Stewardship Planner

The Hearing Officer stated that pursuant to 310 CMR Ch. 639, the Rules of Evidence would not be observed. He further stated that an official record would be assembled and advised those present that

the Hearing was being recorded.

Parties involved identified themselves, as follows:

Gerard Kennedy, David Viale, Christine Smith, and Delia Delongchamp on behalf of MDAR.

Keith Boyle, appellant.

The Hearing Officer swore in all of those who are who were providing testimony.

Warren Shaw stated that the Appellant would have the right to ask the Department witnesses questions. He further stated that the appellant would present first, followed by MDAR. ALPC members should address questions to Warren Shaw. Warren Shaw stated that a decision would be made that day.

Keith Boyle provided testimony.

Mr. Boyle stated that he had sent Gerard Kennedy documents to use during his statements. He gave his background, providing information on where he lived, his educational background and experience working on this and other farms.

He further stated that he purchased the Spivack cranberry farm with help of USDA in December 2019. He would like to expand and diversify the farm and is looking to raise a family on the farm and leave it to his future children.

The ALPC was provided with copies of the following documents submitted by Mr. Boyle:

1. Description of property listing at time of his purchase, including documents showing that the APR had a buildable lot, with an asking price of \$495,000.
2. Part of the appraisal from USDA which states that there was a \$106,000 buildable parcel on the APR that he bought for \$435,000.
3. Documents from NRCS, with whom Mr. Boyle has been working due to a lack of water storage. He provided background on water storage issues and diseases such as Phytophthora.
4. Photos showing a wet area where a local farmer grows corn, as well as photos showing issues with disease and phytophthora.
5. Letter from Brian Wick, Executive Director of Cape Cod Cranberry Growers Association in support of his dwelling application.

Mr. Boyle further testified that in 2020 he experienced two hard frosts which resulted in fruit damage. He said that they are trying to site the house to be as close to the main road as possible, and as close to the abutting lot as possible, while not making any negative impacts to the farm. He provided further information regarding frost, crop damage and how living on the property would assist with addressing these issues.

In closing, Mr. Boyle stated that the APR was signed in the 1980's and that the property is very different today from the dairy farm that went under the APR. Consequently, the needs of the farm have changed necessitating a dwelling on the APR

Warren Shaw asked for Department questions. The Department had none.

The Department then provided testimony.

Attorney Christine Smith proceeded with MDAR's case.

Attorney Smith stated that the Spivack APR document does allow the farmer to petition for permission to build a house as long as the dwelling "will not defeat or derogate from the intent and purposes of retaining the land for agricultural use" and that the Department adopted APR Program Guidelines for Requests for a Certificate of Approval to Construct or Place a Dwelling dated January 5, 2015, to evaluate dwelling requests. Ms. Smith went through the criteria used in the Department's decision to deny the COA.

Attorney Smith shared an aerial image of the APR which showed the condition of the property in 1990 and asked David Viale to give a brief history of the Spivack APR.

David Viale provided a historical background of the farm and the APR. He noted that while the appraisal excluded the existing house, the recorded APR included the existing house. At a later date, a Confirmatory APR removed the house lot from the legal description, as outlined in the Department's decision

Mr. Viale further stated that while the Confirmatory APR included the right to request a dwelling, the granting of the request was not guaranteed. The request must be consistent with APR guidelines.

Mr. Viale also provided the history of the APR and the various COAs that were given from 2005 through 2013. COAs over the years approved several cranberry bogs which transformed the property from a dairy farm to a cranberry farm. There was a COA application for labor housing in 2013 that was denied.

Christine Smith then shared her screen and showed the soils map. While the map was up, she asked Delia DeLongchamp a couple of questions.

Delia DeLongchamp stated that she made a site visit to the property on July 16, 2020 and generally described property conditions at the time of her visit. Delia stated that the Landowner gave her a hard copy of the application and that they discussed application procedures.

Christine Smith asked David Viale to walk those present through an analysis of the decision:

David Viale stated that the dwelling guidelines state that ALL criteria have to be met. If any one of them is not met there would be cause for a denial. There were 3 deficient areas:

- **Use of property necessitates an onsite dwelling.** While the application listed the benefits of a dwelling it did not list necessities. Furthermore, the Department was aware of automated irrigation equipment which can be operated remotely.
- **Dwelling will not negatively impact the viability of farm.** Mr. Boyle wants to build a house on Prime soils, thereby removing some of the last remaining open tillable farmland. The rest of the farm is cranberry bogs and marginal wetlands. Converting the bogs back to farmland is unlikely.
- **No available alternative land available to build on.** Mr. Keith Boyle owns a house 10 minutes away, which in MDAR opinion was close enough to allow for management of the farm.

Christine Smith asked Gerard Kennedy to speak. He provided details about automated irrigation systems noting that the Department's grant programs work with a lot of cranberry growers on water

management. The most popular request among cranberry growers is for automated pumps, allowing pumps and sprinkler systems to be remotely monitored, started and stopped via computers. The prior owner upgraded the sprinkler systems in 2012 and 2019 to this automated system.

Christine Smith provided a closing summary.

It is clear from evidence that protecting the entire acreage was a priority. The Department has been consistent that it is unlikely that a house would ever be approved. The guidelines were provided to Mr. Boyle when he bought property and he should have known that labor housing was denied because he worked there at the time. The Department treats all applications the same and has to use the same guidelines.

Warren Shaw gave Mr. Boyle a chance to ask questions.

Mr. Boyle added to his testimony that there is no margin for error on frost nights and provided further information regarding other owners who live on the property. \There were no further questions

At 11:35 am, there was a break in the hearing.

Warren Shaw called the meeting back to order at 11:44 AM. He opened the floor for questions from ALPC members.

Fred Dabney asked Mr. Boyle, given the extraordinary difficulties he faces, what would he do if this was not sustainable Mr. Boyle stated if he did not have another job, he could not have afforded the farm and provided more background information on his history working on the farm.

Fred Dabney asked what happens when Mr. Boyle cannot be on the farm.

Mr. Boyle said he and his wife work different schedules, and the education calendar lends itself to his being on the farm when needed.

Fred Dabney asked Mr. Boyle about his plans to diversify.

He replied that he would like to have farm animals and be a roadside farm, raise animals and sell them.

Fred Dabney asked how do the chemicals used to fight the fungus effect the watershed.

Mr. Boyle replied that the chemicals are tailored for aquifer and watershed use.

David Viale reminded the ALPC that a lot of what was presented today was not part of the application that was submitted. The program can make an assessment based on information we have today and has to manage the land in perpetuity.

Laura Abrams stated that she does not like the 2015 guidelines and that she feels that you can run a better operation when you live on the farm.

Kathy Orlando stated that it sounded like a lot of new information was provided today and wanted to know what the process would be to incorporate the new information. It might be helpful to incorporate a process to avoid this in the future.

Christine Smith responded that the Department needs transparent procedure and guidelines, and that the Department cannot change the guidelines in mid-process.

Kathy Orlando stated she was not suggesting we change the process but that it would be well within the process to have some kind of interim contact with the applicant.

David Viale stated that the Department was open to suggestions about process changes, noting that prior to the hearing there were conversations with Keith Boyle about what his options were.

Karen Schwalbe stated that new information might need to be re-assessed. How was it decided that a ten minute drive is reasonable for a cranberry grower and wondered if it was related to insurance claims.

David Viale answered that not all growers live on their properties.

Clem Clay asked what their decision options were.

There was a general discussion of whether Mr. Keith Boyle could re-apply for a dwelling.

Clem Clay said that if it was bought with the understanding that a house could be built on the lot, that's not our responsibility but we can understand his thought process.

Kathy Orlando asked if there is any ability to move the house off the important soils ?

Keith Boyle stated that the site was chosen to have the least impact. The rest of the property is wet and hilly.

Bob O'Connor asked Mr. Boyle if he was concerned about moving ten minutes away from his current dwelling which also has a cranberry bog.

Keith Boyle answered that his current location is much more stable and automated with hardier types of cranberries.

Phil DeMartino asked Mr. Boyle what he is going to do with current house.

Mr. Boyle stated that he would sell it to his brother.

There were further discussions about the next procedural steps.

Gerard Kennedy asked what specific information do we have now, that we didn't have when we made the original decision. Keith is welcome to re-apply, but he hasn't seen anything that would change the outcome.

Warren Shaw states that he has not heard anything that would make him overturn the current decision. He feels that the department has followed their own regulations and needs to be consistent in their decision making to protect the integrity of the Commonwealth.

Laura Abrams made a motion to overturn the MDAR decision.

Second: Fred Dabney

There was further discussion regarding procedural steps, as well as discussion regarding precedent in previous situations.

Vote on motion made by Laura Abrams:

John Lebeaux: No

Warren Shaw No

Clem Clay: No

Fred Dabney: Yes

Robert O'Connor: No

Kathy Orlando: Abstain

Laura Abrams: Yes

Susan Flaccus: No

Karen Schwalbe: No

Phil DeMartino: No

Vote count: 7 opposed, 2 in favor and 1 abstention.

There was further discussion regarding having Mr. Boyle reapply for a COA for a dwelling. Christine Smith then recommended that an affirmative motion is needed to support the decision of the Department. Especially since the first motion did not pass.

Susan Flaccus moved that the ALPC accept the recommendations of the staff and uphold the Department's Decision.

Second: Karen Schwalbe

Vote on Motion made by Susan Flaccus:

John Lebeaux: Yes

Clem Clay: Yes

Robert O'Connor: Yes

Laura Abrams: No

Warren Shaw: Yes

Fred Dabney: No

Susan Flaccus: Yes

Kathy Orlando: No

Karen Schwalbe Yes

Phil DeMartino: Yes

Vote Count 7 in favor; 3 opposed

Motion to adjourn at 12:53AM made by Warren Shade and seconded by Karen Schwalbe. Vote was unanimous in favor.