

November 22, 2022

**VIA EMAIL AND HAND DELIVERY**

Mr. Michael Main, Chair  
Zoning Board of Appeals  
Town of Plymouth  
26 Court Street  
Plymouth, MA 02630

Re: ZBA Case No. 4072

Dear Chairman Main and Honorable Members of the Plymouth Zoning Board of Appeals,

I write on behalf of the A.D. Makepeace Company and ADM Cranberry Company LLC (collectively, "Makepeace") regarding the above-referenced case.

This case is an appeal of the Building Commissioner's January 31, 2022 decision ("Decision"), declining enforcement of certain conditions of Special Permit No. 3728 ("Special Permit"). The Special Permit was issued in March 2014 in connection with a cranberry bog construction project ("Farm of the Future") to be undertaken on Makepeace land located off Federal Road. In January 2022, Save the Pine Barrens, Inc. ("STPB") requested that the Building Commissioner enforce Condition Nos. 3, 5, and 16 of the Special Permit, based on alleged violations of these conditions. In his Decision, the Building Commissioner declined pursuing enforcement action, concluding that Makepeace is in compliance with the Special Permit.

**A. Standing**

Before even addressing the merits of STPB's appeal, this case should be dismissed for lack of standing because STPB is not a "person aggrieved" within the meaning of G.L. c. 40A, § 8. This is addressed more fully in Makepeace's June 8, 2022 and September 7, 2022 letters to the Board, which are incorporated herein by reference.<sup>1</sup>

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<sup>1</sup> See June 8, 2022 Letter from Andrew Yost, Re: ZBA Case No. 4054, at pg. 1-2; September 7, 2022 Letter from Andrew Yost, Re: ZBA Case No. 4054, at pg. 2.

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**B. Special Permit Conditions**

Putting aside STPB's lack of standing, the Building Commissioner's Decision should be upheld. STPB has withdrawn its appeal as to Condition No. 16.<sup>2</sup> And the Building Commissioner has engaged Environmental Partners Group, LLC ("EP") to conduct quarterly inspections of the Farm of the Future project, addressing any concerns related to Condition No. 5. In its September 22, 2022 quarterly inspection report, EP found that Makepeace is in compliance with the Special Permit.

The only Special Permit condition that remains at issue in this case is Condition No. 3, which concerns the placement of certain land into conservation. In the section entitled "Rare Species," the Special Permit explains that "[m]easures to minimize and mitigate state-listed species impacts associated with the [Farm of the Future] project will include permanent protection through a Conservation Restriction of 300 acres in the eastern portion of the site. A conservation restriction will be placed on the land to ensure protection in perpetuity." Special Permit at pg. 4 (Rare Species). Condition No. 3 of the Special Permit, in turn, provides:

The petitioner shall record with the Plymouth County Registry of Deeds the Conservation Restriction and documentation establishing the 300 acre parcel to be permanently protected from further development . . . .

Special Permit Condition at pg. 6 (Condition No. 3).<sup>3</sup>

**C. Makepeace's Compliance with Condition No. 3**

In June 2014 and December 2014, Makepeace recorded the placement of approximately 436 acres of land into permanent conservation. The lands placed into conservation are identified as parcels CR-1 through CR-5 and M1 through M8A. As the Building Commissioner noted in his Decision, these conservation restrictions are memorialized in orders of taking recorded at Book 44463, Page 31, and Book 45039, Page 115. Copies of the underlying conservation restrictions, which were also recorded, are included as exhibits to the September 7, 2022 letter from Beals and Thomas, Inc. ("Beals and Thomas"), which was submitted with Makepeace's September 7, 2022

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<sup>2</sup> See April 13, 2022 Letter from Jonathan M. Polloni, Re: Zoning Appeal pursuant to M.G.L. c. 40A, § 7, Off Federal Road, Plymouth, ADM Cranberry Co., Inc., owner, at pg. 3.

<sup>3</sup> A summary of the relevant Special Permit conditions, the Building Commissioner's Decision, and Makepeace's compliance with these conditions is attached hereto as **Exhibit 3**.

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letter to this Board.<sup>4</sup> With the recording of these documents, Condition No. 3 of the Special Permit was satisfied.

STPB has argued that Makepeace is “double counting” or impermissibly using this land to satisfy other permits. This argument is based on a misreading of the Special Permit.

Because certain Makepeace projects in Carver, Wareham, and Plymouth are located within habitat for species protected under the Massachusetts Endangered Species Act, Makepeace has applied for and obtained various Conservation and Management Permits from the Massachusetts Division of Fisheries and Wildlife’s Natural Heritage and Endangered Species Program (“NHESP”). These Conservation and Management Permits require Makepeace to implement a conservation and management plan that, among other things, calls for land to be placed into permanent conservation to mitigate the impacts of a proposed project on protected species by providing a net benefit to those species.<sup>5</sup> As part of such commitments to NHESP, CR-1 through CR-5 and M1 through M8A, totaling approximately 436 acres, were put into permanent conservation in June and December 2014 and the corresponding documents were recorded with the Plymouth County Registry of Deeds. The map provided with the September 7, 2022 letter from Beals and Thomas shows the recorded land that has been placed into conservation as well as additional Makepeace land that will be permanently placed into conservation once the Department of Fish and Game completes its review of the relevant conservation restrictions. All told, the recorded conservation land totals approximately 436 acres, and the additional land being placed into conservation totals approximately 392 acres. The map included with this letter as **Exhibit 1** shows, in particular, the 436 acres of presently recorded conservation land.

With its claim of “double counting,” STPB appears to be arguing that the 300 acres referenced in the Special Permit must be totally separate and distinct from any land placed into conservation pursuant to the Endangered Species Act or any Conservation and Management Permits issued thereunder. This is incorrect. The 300 acres referenced in the Special Permit *is*, in fact, land that Makepeace agreed to put into permanent conservation pursuant to commitments to NHESP under Conservation and Management Permits. The Special Permit simply required such conservation land to be recorded.

As the Special Permit explains, the 300 acres of land was being placed into conservation to mitigate impacts to state-protected species. At the time of the Special Permit, the 300 acres of land

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<sup>4</sup> See September 7, 2022 Letter from Stacy H. Minihane, PWS, ADM TMUD Conservation Outcome Farm of the Future, Plymouth, Massachusetts, B+T Project No. 1833.122.

<sup>5</sup> See M.G.L. 131A, § 3; 321 CMR 10.23.

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represented an estimate of what would be required for NHESP mitigation.<sup>6</sup> This commitment was referenced in Makepeace's 2013 application for the Special Permit and corresponding environmental review documents submitted to the Commonwealth.<sup>7</sup> The Special Permit never required additional conservation restrictions beyond those made pursuant to the NHESP required commitment. *See* Special Permit pg. 4 (Rare Species). Indeed, NHESP has allowed and continues to allow conservation lands placed to satisfy its Conservation and Management Permits to also act as mitigation for other local permits. Condition No. 3 simply required Makepeace to "record . . . the Conservation Restriction and documentation establishing the 300 acre parcel to be permanently protected from further development," as that had not been done at the time Makepeace applied for the Special Permit or when the Special Permit was issued. Special Permit at pg. 6 (Condition No. 3).

While Makepeace's broader discussions with NHESP go beyond the purview of the Special Permit, enclosed with this letter as **Exhibit 2** is a map providing information relating to NHESP mitigation commitments. This map identifies the area of recorded conservation land (CR-1 through CR-5 and M1 through M8A) and shows how Makepeace and NHESP have allocated the land Makepeace has placed into conservation among the various Makepeace projects (sorted by town) that impact state-protected species. The map also depicts parcels of land that will be placed into conservation once the Commonwealth completes its review of the relevant conservation restriction language (M8B through M13a). Exhibit 2 shows that Makepeace and NHESP have allocated approximately 351 acres to mitigate impacts to state-protected species associated with the Farm of the Future project. Of this land, approximately 100 acres have been recorded. Recorded conservation restrictions are attributed to projects on an impact-incurred basis. Therefore, certain of the recorded conservation restriction acreage has been attributed to various projects other than Farm of the Future, based on actual impacts to date for NHESP mitigation purposes, because only a small portion of the Farm of the Future project site has been disturbed currently. Ultimately, Special Permit Condition No. 3 was satisfied when Makepeace recorded documentation placing approximately 436 acres into permanent conservation in June and December 2014; Makepeace provides this additional information simply to show how mitigation is allocated across various projects for NHESP purposes.

In its request for enforcement to the Building Commissioner, STPB also argued that certain land purportedly "intended as satisfying" the Special Permit was already subject to conservation restrictions before the Special Permit was issued in March 2014. STPB's assertion is incorrect. To

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<sup>6</sup> During subsequent permitting with NHESP, the actual mitigation acreage was calculated to be 351 acres pursuant to ratios for land mitigation and funding in accordance with NHESP requirements.

<sup>7</sup> A copy of Makepeace's 2013 special permit application is attached hereto as **Exhibit 4**. The conservation land is addressed at Item 10 of the Narrative to Accompany Environmental Impact Statement. Attached hereto as **Exhibit 5** is a copy of the Certificate of the Secretary of Energy and Environmental Affairs on the Expanded Environmental Notification Form ("Certificate") for the Farm of the Future project. The conservation land is addressed on pages 5 and 9 of the Certificate.



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facilitate its discussions with Commonwealth authorities, including NHESP, Makepeace prepared a plan for CR-1 through CR-5 totaling 185 acres. This plan—a map included at the end of CR-1 and CR-5—is dated May 19, 2011.<sup>8</sup> The plan itself did not create any conservation restrictions. Instead, the conservation restrictions were only enacted when this plan was approved by the relevant Massachusetts authorities and the plan and associated conservation restriction documentation was recorded, which occurred in June 2014—several months after the Special Permit was issued. Subsequently, conservation restriction documentation for parcels M1 through M8A was recorded in December 2014, again months after the Special Permit was issued.

In short, Makepeace has complied with Condition No. 3 of the Special Permit.

Thank you for your consideration and attention to this matter.

Sincerely,

*/s/ Michael K. Crossen*

Michael K. Crossen

Enclosures: Recorded ADM Tihonet Mixed-Use Development Conservation Lands  
ADM Tihonet Mixed-Use Development Conservation Lands  
Summary of Compliance with Relevant Special Permit Conditions  
Special Permit Application (Nov. 1, 2013)  
Certificate of the Secretary of Energy and Environmental Affairs on the Expanded  
Environmental Notification Form (Dec. 28, 2012)

cc: Jonathan M. Polloni, Esq. (via email and FedEx)  
Amy Kwesell, Esq. (via email and FedEx)  
Nicholas Mayo, Director of Inspectional Services (via email)  
James Kane (via email)  
Stacy Minihane, PWS (via email)  
William Madden, P.E. (via email)

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<sup>8</sup> See September 7, 2022 Letter from Stacy H. Minihane, PWS, ADM TMUD Conservation Outcome Farm of the Future, Plymouth, Massachusetts, B+T Project No. 1833.122.

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**ENCLOSURES:**

**Exhibit 1:** *Recorded ADM Tihonet Mixed-Use Development Conservation Lands.* This exhibit shows the recorded 436 acres of land placed into conservation. The Special Permit required Makepeace “to record . . . the Conservation Restriction and documentation establishing the 300 acre parcel” to the east of the project site “to be permanently protected from further development.” Special Permit at pg. 6. This condition was addressed by these recorded conservation lands.

**Exhibit 2:** *ADM Tihonet Mixed-Use Development Conservation Lands.* This exhibit shows how mitigation land is attributed to various Makepeace projects (sorted by town) for NHESP purposes. In Makepeace’s coordination with NHESP, recorded Conservation Restrictions are attributed to projects on an impact-incurred basis. Therefore, certain of the recorded Conservation Restriction acreage has been attributed to various projects other than Farm of the Future, based on actual impacts to date, because only a small portion of the Farm of the Future project site has been disturbed currently.

**Exhibit 3:** *Summary of Compliance with Relevant Special Permit Conditions.* This exhibit summarizes the three Special Permit conditions addressed in STPB’s request for enforcement; the Building Commissioner’s responses thereto; and Makepeace’s compliance with the Special Permit conditions.

**Exhibit 4:** *Special Permit Application (Nov. 1, 2013).* This exhibit is a copy of Makepeace’s 2013 application for the Special Permit, which includes an Environmental Impact Statement and Narrative. Conservation land is addressed in Item 10 of the Environmental Impact Statement and Narrative.

**Exhibit 5:** *Certificate of the Secretary of Energy and Environmental Affairs on the Expanded Environmental Notification Form (Dec. 28, 2012).* This exhibit is a copy of the Certificate issued by the Secretary of Energy and Environmental Affairs on the Expanded Environmental Notification Form for the Farm of the Future Project.