

Town of Lakeville  
Board of Health  
February 3, 2021 6pm

Present were: Chairman Maxim, Member Spratt, Member Poillucci, and Agent Ed Cullen. Chairman Maxim called the meeting to order at 6:00pm. This was a remote meeting and was recorded by LakeCam.

**Bountiful Farms, Inc.** - 200 Kenneth Welch Drive, New Food Establishment. Jared Morris from Bountiful Farms was present for discussion. Agent Cullen said all the paperwork is in and a pre-operation inspection has been done and everything is in order. Member Poillucci asked what they would be serving. Agent Cullen explained they were a marijuana growing facility, but would also have a food service where they will be making edibles. The edibles are not consumed on the property and no sampling is allowed. There is no storefront on the property, the storefront is in Natick and production is in Lakeville.

Upon a motion made by Member Spratt, seconded by Member Poillucci, it was:

Voted: to approve the permit to operate a food establishment kitchen at 200 Kenneth Welch Drive, Lakeville for Bountiful Farms, Inc.  
Unanimous approval.

**4 Old Powder House Rd** – continued discussion from December 16, 2020 meeting, with Zenith Consulting Engineers LLC to discuss requested variances for their revised septic design. Present for discussion were: Jamie Bissonnette from Zenith Consulting Engineers, Ray Willis from Onsite Engineering, Michael O'Shaughnessy counsel for the applicant, and Murray Wachtenheim the applicant. They are seeking two state style variances and one local upgrade approval or waiver from Lakeville Board of Health regulations. At the previous meeting the Board asked for an engineered certification that this system would be no more detrimental or meet the level of environmental protection as a conventional system. The proposed septic plan has been revised to a conventional two-compartment tank, d-box with stone trenches. If they receive approval, they would be happy to incorporate an advanced treatment system that has denitrification ability. Mr. Willis has provided a stamped letter and will explain how he came to his conclusion. Also, Bob Gray, a wetland scientist who is a registered sanitarian and who did the wetland delineation on site has a letter of what the effects would be on the wetland itself. Member Poillucci said he was the one at the last meeting that said with a stamped letter he would be okay with it. He understood from Department of Environmental Protection (DEP) that you had to say 'we are going to do x, y, and z and we can meet that same level'. When he looked at the letter it didn't say 'we've done x, y, and z, we now meet it', he read it as they just don't agree with DEPs regulation and don't think there's much of a difference between 65' and 100'. In the email Agent Cullen got from DEP, the answer they gave was the setback requirements listed in Title 5 are minimum setback distances, and anything less than the required 100' setback would be less protective. Member Poillucci said they gave a pretty black and white answer, it just doesn't meet it. Why is there a 100' setback if you don't need it, if 65' gets you the same level of protection, why is there a 100' setback. Mr. Bissonnette said in Agent Cullen's email he specifically asked if they could give an opinion for the reason DEP requires 100' setback to a wetland that borders a surface water supply or a tributary thereto, or does it not make any difference. Mr. Bissonnette said the response was the

statement "the minimum setbacks and anything less would be less protective". He did not think they answered the question because he's not sure they specifically know how to answer it. Mr. Willis stated that with subsurface sewage disposal systems, the most critical aspect is the vertical separation underneath the effluent disposal system. Besides the treatment that you achieve in the septic tank, through screening the soil media, that unsaturated zone is the last treatment step before the effluent from the septic system meets the ground water. The further you go out, the less concentrated it becomes. The overall contribution of nitrogen or any contaminant to that area, is going to be the same regardless of what distance you're at. Mr. Bissonnette said instead of saying they disagree with DEP, what they're saying is they understand the setback distances and what they stand for. But in this case, the variance tells us, if you can prove a hardship and you can prove that you're meeting the environmental equivalence, which we admit and DEP states is not an easy thing to do, then you can be granted a variance. Mr. Bissonnette said they need to prove to the Board that they are meeting that threshold. Member Poillucci said Agent Cullen sent an email to DEP and he should read the whole thing so they're all on the same page. Agent Cullen sent an email to Mary Beth, "sorry to bother you with questions, I think you're familiar with the site at 4 Old Powder House Rd. I have attached an email that I believe is from you that the applicant sent us. The applicant is trying to claim that there is no benefit in having a leach field 100' from a wetland that borders a tributary to a surface water supply and that a field 65' away would provide the same protection. I disagree and believe the horizontal distance provides dilution of the nitrates which is beneficial. When I stated this to my Board they asked that it be confirmed with DEP. Can you give your opinion on the reason DEP has 100' setback to a wetland that borders the surface water tributary or does it not make a difference? So, the question is that the tributary, is there no benefit in having a leach field 100' from a wetland that borders a tributary to a surface water supply and that a field 65' away would provide the same level of protection?" The answer was "the setback requirement listed in Title 5 are minimum setbacks, and anything less than the required 100' would be less protective". Member Poillucci said the question was answered directly. Mr. Bissonnette said he didn't take Brett Rowe's answer to be to that part of the question because what he's saying is the applicant is claiming there is no benefit. But he doesn't ask the question, he ends it with a period. The answer continues that he disagrees and he says that he believes it's the horizontal distance that provides dilution of the nitrates, which is beneficial. He continued from Agent Cullen's email 'I stated this with my Board members, and they asked me to confirm with DEP'. Mr. Bissonnette said the question is the last two sentences, he has question marks on. Can you give me an opinion as to the required 100' setback to wetlands that border, or does it not make a difference? He continued, 'whereas two questions and the way that I'm reading it, and based on Ed's question marks, when I look up at it, I get the fact he's just telling us the setback requirements or minimum setback distances, which we agree and anything less than 100' would be less protective'. Mr. Bissonnette said what he is not stating is, not stating less protective of what. What we're talking about is level of environmental protection. There was continued discussion on the email. Mr. Bissonnette said the 100' is very convenient. Did the science come back and really say 60, or 70, or 50 and they rounded it to 100? As far as showing x, y, and z as to why, the only thing they are able to do to help with this treatment and the cause for treatment is they are only able to increase the vertical separation, which they have done by an additional foot on the septic, for the leaching field. The reason being, is the Title 5 code itself tells us that we can't use advanced treatment in the design, we can't use IA systems in the design, we have to use a very simple stone and pipe septic tank method to prove this. He didn't think it made sense that DEP would give you instructions on how to gain a variance and then tell you there's absolutely no way to obtain a variance by saying you can't get a waiver from the setbacks distance wise. If DEP says the

Board can grant a variance then there has to be a mechanism to do that. Chairman Maxim said he reviewed the entire file and it just goes in circles. He still comes to the same point. DEP clearly said back in 2019 that the Board can approve variances for new construction, which before then, he didn't think they could. From day one, he thought this location needs a treatment system. When a treatment system was permitted, Agent Cullen and Town Council found out you can't have a treatment system for new construction because its not allowed with variances. It went back to DEP and they said if you approve a conventional system, by approving that, you can require a treatment system. He said that he didn't think anyone present would deny that a treatment system on this property would be less of an environmental harm than a system at 100'. If a treatment system does go here with nitrogen removal, it negates this whole argument we're fighting over. Chairman Maxim continued by saying DEP said we could approve this system that was presented to us. Member Poillucci stated that DEP said they could approve it if it met the same level of protection. Which they just said today, would be less protective. Chairman Maxim said if you go back to 2004, the meeting minutes when this was denied, it was denied improperly in 2001 when it first came to the Board. Bill Garvey made a motion to approve, there was no second, the motion was killed. Peter Panettieri made a motion to deny because it didn't have 70,000sf and 20,000sf of upland. Both those decisions were wrong, it was grandfathered, and our local by-law from 1987 does not say "upland". It may have been their intention, but the word "upland" isn't there. In 2009, they rescinded all previous adopted Board of Health regulations pertaining only to subsurface sewage disposal systems and water from October 1956 to June 2009. As of 2009, the words '20,000sf of upland acreage' was added. The applicant came back in 2002 to ask the Board to reconsider. They reconsidered their motion and denied it again and had Town Council write the opinion of the denial. They denied it in that opinion on manifest unjust. They said it was not manifest unjust because the applicant took the property from his parents for \$1.00. Chairman Maxim said he didn't agree, the applicant's parents bought it as a buildable lot at fair market value at the time for \$2,500.00. Because he acquired it from his family for \$1.00 doesn't make this lot worth \$1.00. The opinion also said they failed to prove it meets the environmental protection. In 2004, they came in again with a two-bedroom house instead of a three-bedroom. It was denied because they don't approve variances to a tributary on new construction within 100'. That decision was appealed and came back with a court decision that read "this matter is remanded to the defendant Board of Health as a decision as it appears in these submissions is arbitrary and that no variances are permitted within a hundred feet of wetlands. This remand requires the Board to reconsider the plaintiff's application. The Board may either grant or deny the permit, although any denial must be based on more solid ground than the decision now before me". Chairman Maxim said his main decision is also that this was approved in 1986 by this Board. It was in the property folder and needed \$25.00 to be picked up and there would be a house there right now. There was an approved well, permit pulled, drilled and tested and passed on this lot in 1986. There's been a lot of discussion on setting a precedent. Town Council has said a determination must be made on a case-by-case basis due to the broad nature of the Board's discretion, each application of variance must be considered based on specific facts and circumstances presented. Member Spratt said you have the neighborhood with all septic systems and you have a golf course which is fertilized, which have nitrates in it, so the combination of the surface stuff being picked up, the nitrates sent down into the water table from the septic systems, the number can get pretty high. The further away, the better you are. An argument could be made that the reason they want to stay away from discussing or going too in-depth with that 100' number is there's more and more stuff being built and more and more stuff being used that if they really go in depth, it may not be shorter than 100', they may start talking about it needs to be 150' or 200'. What does that do in a housing crisis where there's a shortage of homes and

you're trying to build. Developers are not going to like that. There's an argument that there's too much going down into the water table already. We have tons of repairs in town, and we want to fix them, but it's more detrimental to us as a Board in town to start saying no to all these things and then condemning houses. And then that becomes more manifestly unjust to start shutting houses down. But where this is brand new, the regulations are there and should we vary to something brand new just because of what happened in the past, it's all expired. We're trying to protect resources and those nitrates hit that wetland and we can go into invasive explosion. You think of invasive plants, but there's algae and cyanobacteria that can feed off that nitrate too. And that becomes a public health thing. Cyanobacteria can be detrimental to the health of people or animals, or anyone that touches it. Member Spratt continued, that as far as manifestly unjust with this situation, I'm sure there's a neighbor out there that would buy a lot in a second for probably way more than he paid for it. There's monetary value in the lot still, even without a house. Member Poillucci said he didn't care about the argument about the money that much. He did think the time expired, and it does matter that we have 100 other lots in town that the time expired on and we don't let them build. Town Council has told us that it's not manifest unjust if we don't approve this. What he is most concerned with is that the next time someone comes in and says I want to build on this lot and I can only make it 65' to a wetland and you ruled that DEP is wrong and you have on record that 65' is just as good as 100', without doing treatment, without doing anything you have accepted an engineer's word that without making any changes, any modifications, any improvements, that DEP is wrong and 65' is as good as 100'. And then to get a straight answer, and DEP never gives a straight answer, this is the most direct answer he's ever gotten from them. Less than 100' would be less protective. They said we could give the variance if they could prove that whatever they were doing met the same level of protection, and DEP is saying that it doesn't. Mr. Bissonnette said the definition for manifestly unjust in the statute is actually depriving the use of the land, it's not about selling it. To make something manifestly unjust would be to make it so Mr. Wachtenheim cannot use his land for the intended uses that it's for. He's in a residential zone, very limited uses in Lakeville for what you can do in a residential zone besides a single-family house. Mr. Bissonnette had some reservation about Brett Rowe or anybody at DEP making a call on this and telling you it's less environmentally protective without having seen the plan, seen the report, or seen anything. He believes Mr. Willis looked into the nitrogen levels with the drinking water supply. Mr. Willis said as part of this exercise he did look at water quality reports put out by the water supplier and he believed their average nitrate concentrations in the drinking water was less than 1 milligram per liter. Nitrates do not seem to be an issue with the water supply. Mr. Bissonnette said he wouldn't have taken this on as a job if he didn't believe it met the hardship. He had never tried permitting a new construction variance before. He didn't feel there was one more deserving of one than this. The only thing that is keeping this lot from being a buildable lot is actually the septic. In a lot of cases that's not necessarily the case. The difference in a variance case like this as opposed to everybody else's is they have done hydrogeologic testing to prove the impact on the tributary and the pond. They have done environmental analysis and wetland scientist analysis on the adjacent wetland line itself. On top of all that, they are willing to make a condition of approval the fact that we'll put in a denitrification advanced treatment system to ensure long-term stability. Agent Cullen said as far as the horizontal distances, he agreed that the majority of treatment is done in the vertical but to ignore the horizontal distance completely, he disagreed with. It's not just DEP that also believes that, obviously they put that 100' there for a reason and it is more protective around reservoirs. It's not just DEP, it's most states in the country, they will have setback distances. Horizontal setback distances to both reservoirs and wetlands. To say you could put a leaching system 10' off a reservoir and it's not going to make a

difference as long as you have the proper vertical separation, he disagreed with. Hundreds have come before this board where they are trying to get away from the reservoir, they are pushing it far away. Mr. Bissonnette has done plenty of lots where he has pushed it as far away as he could because he wanted that maximum protection. Agent Cullen said he believed it is beneficial to abide by the guidance that DEP has. To say that Brett Rowe knows nothing about it, Mr. Bissonnette and former Health Agent Kevin Bernardo went to Brett to talk specifically about this lot, so he is familiar with this lot, they haven't seen the most revised plan, because the Board has only had it since 4 or 5 days ago. He hasn't seen that, but he's aware of what septic systems do, and he's aware of what goes into the ground on a septic system so to say he's not aware of it at all, Agent Cullen disagreed. Mr. Bissonnette said he's not saying that Brett isn't aware of the site, but he has not shared with him septic design plans. He was just stating that he didn't believe Brett has seen plan, or seen any of the studies that have been turned in. He continued that Bob Gray who is an RS and wetland scientist explained that the plants themselves could potentially benefit because the nitrogen acts as food. Knowing the levels of the nitrogen in the water based on Ray's analysis, the nitrogen levels are low, so it's not like we're adding to a problematic area. They are not looking to make it problematic, they're saying they will not be adding any more total to that system whether they're 100' or 65' away, it's going to be the same amount of nitrogen that gets in there. Member Spratt added that where they test for the nitrogen, they're not tested anywhere near the site. He was sure the concentration would be much higher closer to where they were because so much more is being treated by the plants. But at some point, we're going to get to a tipping point where that area is super saturated with too much, and then it's going to get out into the drinking water supply. Mr. Bissonnette asked Mr. Willis if the more concerning thing would be phosphorous and not nitrogen with a freshwater wetland. Mr. Willis replied that for plant growth, yes. It's more phosphorous from an overall impact to the watershed. It's more of an issue with phosphorous. Member Spratt said that was more for sediment transport. Mr. Willis said nitrogen can have a profound effect on salt water environments. Member Spratt added that phosphorous is transported through sediment usually. Mr. Bissonnette said in asking for the 35' reduction in the setback, they believe the nitrogen was the last key thing and he did not know at the last meeting the question to the answer that was posed. If it's 100' away or 65' away, will there be any loss of nitrogen in that extra 35', and the answer is no, it's going to be the same amount. Agent Cullen stated that with the nitrogen, dilution is important, but nitrogen is not the only thing that goes into a septic system. There are a lot of things and that may be one of the reasons why DEP has that regulation. Member Poillucci asked if Mr. Bissonnette if he was saying that the 35' doesn't matter. What if he was only 20' away, would it get the same exact level of protection as 100' at 20' or 25'? Mr. Willis answered that the only main difference is the amount of the contaminants constituents on a volume basis would be exactly the same. The only difference would be the concentration of that contaminant measured from 20' versus 65'. Member Poillucci asked why are there any setbacks then to any of these things. Mr. Willis replied that you would have to ask DEP about that one. Mr. Bissonnette shared his screen and referenced a Title 5 document that talks about setback distances imposed by Title 5 if coupled with soil absorption system design changes. The conclusion at the end is most of the contaminant removal is accomplished in the bio mat clogging layer and in the unsaturated zone of the soil absorption system, which is what Mr. Willis is saying, the majority of the treatment is going to happen in that layer. This was a DEP sanctioned report. Agent Cullen said yes, most of the contaminants are removed in the vertical layer, no one is arguing that, but what you're saying is that no contaminants are removed in the horizontal part and that document even says if you bring that back up, it says little or they say it's not very effective but to say it has no change at all, that's not what it said. Mr. Bissonnette said that was

not what they were saying, he was saying that they were meeting the level of environmental protection. Mr. Bissonnette shared his screen again with the Technical Evaluation that was done by Defeo, Wait, and Associates for DEP. Agent Cullen said, so it says most contaminant removal is accomplished in bio mat clogging layer, we all agree with that, but to say all of it, you would have to say all of it is done in that layer or that where it says little removal of contaminants occur in the saturated zone and the set back distance. Little, not none. So, there's a difference between little and none. He continued by saying they were not arguing that most of it does occur in the vertical part, but some does occur in the horizontal part. Maybe it's only a little, but some does occur. Mr. Bissonnette said that in their analysis, it's not a measurable amount. It's not an amount that would stop the equal level of environmental protection. Mr. Willis explained that what he believes would occur is the fact that the concentration gets diluted, as far as nitrate removal, you might see as it goes out further, that the concentration gets reduced. It doesn't change the amount of nitrogen that is introduced or the contaminants that are introduced into the wetland or watershed, you might be able to see an achievement with lower concentrations along that path, but the total load, is the load. The amount of contaminants going into the aquifer are the same regardless, unless you have some type of treatment aspect that occurs, it's not going to happen. Agent Cullen said Defeo and Wait says something is occurring. Mr. Willis stated that he believed that it said as it went on that they find very inconsistent results with respect to the horizontal separation. The last sentence of the report actually says that using horizontal separation isn't a good measure of environmental protection. Agent Cullen agreed that there are better methods like increasing vertical is better. Mr. Bissonnette said they have increased it by an extra foot. He said responsible outlook in design and engineering is important. Their intention the whole time is to put in an advanced treatment system. Chairman Maxim had made a point at a previous meeting that with the Fast system, there were concerns about the blower fans being turned off. He stated they were completely amenable to going with something like an Orenco AX20. To be able to use the system at all, there are pumps that have to be on for the treatment to work, but also for you to flush the toilet. Member Poillucci asked if Mr. Bissonnette believed that Brett Rowe wrote that because he hadn't seen the plan, if you sent him the plan, he would change his opinion of it? Mr. Bissonnette responded that he didn't know. That regulatory people don't want to put their necks out far. He added that he could ask three different people at DEP and get three different answers a lot of the time. The applicant spoke about the science presented and advanced treatment. Member Poillucci stated that the Board had said to bring them a letter that said the design meets the same level of protection. And when they had it confirmed from DEP, they say it does not. The Board is not arbitrarily changing rules, making rules, and moving the goal post, they have DEP saying that they don't agree with what was provided. DEP was who told the Board they could only give the variance if it was proven it meets the same level of protection. What the applicant provided, DEP says if it's less than 100' would be less protective. Member Poillucci told the applicant that to say the Board hasn't for eight months, bent over backwards to try to help you even though you've threatened to sue us more than once. If you think we haven't gone out of our way by continuing this thing all these times, and giving you the off ramp that said if you get a guy to write the letter and that it has to meet the same level of protection, but DEP doesn't agree with you, and they know more than I do and they're our governing body over the board of health people. So, to summarize it the way you did, that we're moving the goal post and just arbitrarily not working with you, I just think that's total disrespect. If you want to show them the plan and see if they change their mind, fine, but it's their reg that it has to meet the same level of protection. They're the ones who said it didn't meet the same level of protection. Mr. Wachtenheim responded by stating the he wasn't saying that the Board didn't give them an opportunity to explain

themselves, they have. He prefaced his remarks by saying he respected the fact that they have given the time. Each time the applicant has brought everything that was requested of him. He said the last time they were here, the Board said bring us a letter from the scientists to tell us that there is an equal level of protection. He feels they have provided the science. Member Poillucci stated he said that at the beginning, if they could get it, but maybe he didn't say specifically that it needed to be something that DEP agreed with because originally he thought they would get a letter that said we're going to do x, y, and z, so that we can show by doing these things, we can get to that same level of protection that the 100' would have gotten. Instead, we got a plan with 65' and the engineer saying, I believe it meets the same level of protection, so I didn't feel comfortable saying just because an engineer told me this. So, I said let's have DEP make sure it's ok, and if they say it's ok, fine. DEP came back and said it does not. So, you provided us a letter, but provided a letter that wasn't acceptable to what their requirement is of their reg that said we could grant it if it was the same level of protection. They're saying it's not. We're not changing it, we're not moving a goal post. If they want to send a plan to Brett Rowe tomorrow and Brett said after reviewing the plan he agrees it meets the same level of protection, fine. Mr. Bissonnette said he understood and he didn't believe it's moving the goal posts. The Board has new information that has come to light, and you're doing your due diligence to inquire about it. He was hoping not to ask for a continuance, he hoped at least two members would be in favor of granting one more. He wanted to reach out to DEP, he wanted to see what Brett's email was actually addressing, and for somebody at DEP to look at the report and the plan itself. He would feel more comfortable if they got denied after DEP looked at it. He wasn't sure if DEP would even comment. Member Poillucci said he was fine with Agent Cullen having a conference call with Mr. Bissonnette and Brett Rowe. Mr. Bissonnette said he would like to do a Zoom meeting with Agent Cullen and Brett Rowe so they could put the plan up on the screen and maybe the report. There was a brief discussion about a continuance.

Upon a motion made by Member Poillucci, seconded by Member Spratt, it was:

Voted: to continue to February 17<sup>th</sup>.

Unanimous approval.

**43D Committee update** - Member Spratt said the schedule was amended for the public hearings to go over all the revisions to the plans. Member Poillucci asked if the concerns Chairman Maxim had about elevations had been addressed. Member Spratt said he thought so. Agent Cullen said the comments made about the tank and the slope, they were in compliance so they were more recommendations than requests for changes. The other comment was about the light posts that were too close to the field (5' per Lakeville regulations). Chairman Maxim said the tunnel tanks meet Title V so they really don't have the option to deny because it is an approved Title 5 tank. They also checked into the pipe size, they thought 2% was the minimum, but that is on a 4" pipe and they are going with a bigger pipe and it is the velocity per foot of flow. So, the pipe size they have does meet code, the minimum, but it meets code. It's not preferred in Title 5, but it does meet code. There are sewer manholes if they need to clean it or jet it. There was a brief discussion regarding the plan.

**COVID 19 update** - Agent Cullen said the number of cases is decreasing. Lakeville would like to do a vaccine clinic, but right now vaccines are in short supply, we have requested them from the State, but we haven't received any vaccines. When Lakeville does get vaccines, we will set up a clinic, but when we do get it, it will be limited. Right now, the State is only giving 100 to towns, some towns get none.

If we receive 100 per week, we will focus on the people over 85, there are only about 200 in Lakeville. Once they are vaccinated, we will move on to people over 75. People in Lakeville can go to mass vaccination sites. Residents are encouraged to get vaccines in other locations if they can. Member Poillucci said Thursday is the day they release the appointments for the following week at the mass clinics. There was a brief discussion about the registration process. Member Spratt said if you are a veteran and a member of the veteran's healthcare system the VFW in Whitman will be holding a clinic on Saturday for anyone who meets the criteria. Member Poillucci said he heard Hannaford in Middleboro is starting to give vaccines this week.

**Adjournment-**

Upon a motion made by Member Poillucci, seconded by Member Spratt, it was:

Voted: to adjourn

Unanimous approval.