

PROVINCETOWN CONSERVATION COMMISSION
JUDGE WELSH ROOM
December 18, 2018
5:30 P.M.

Members Present: Alfred Famiglietti, Nathaniel Mayo (arrived at 5:52 P.M.), Robert Brock and Carolyn Clough.

Members Absent: Kiah Coble (excused) and Joseph Cooper (excused).

Others Present: Attorney Gregg Corbo, Town Counsel, Tim Famulare, Conservation Agent, and Ellen C. Battaglini, Permit Coordinator.

1) **Executive Session:**

The Conservation Commission will convene in Open Session and then vote to enter into Executive Session pursuant to G.L. c. 30A, §21(a) (3), to discuss litigation strategy in the following matters: Conservation Commission v. Stellwagen Bank Fisheries Corp., Barnstable Superior Court, C.A. No. 2015-00387; Conservation Commission v. Patricio Palacios, Barnstable Superior Court, C.A. 2015-00386; and the Request for Superseding Determination of Applicability filed with the Massachusetts Dept. of Environmental Protection by David Kelley regarding commercial fishing operations for surf clams utilizing hydraulic fishing gear off Herring Cove; if discussing the matters in open session will have a detrimental effect on the Town's litigating position and the chair so declares.

Chair Alfred Famiglietti called the open session to order at 5:34 P.M. and called for a vote to enter into Executive Session pursuant to G.L. c. 30A, §21(a) (3), to discuss litigation strategy in the following matters: Conservation Commission v. Stellwagen Bank Fisheries Corp., Barnstable Superior Court, C.A. No. 2015-00387; Conservation Commission v. Patricio Palacios, Barnstable Superior Court, C.A. 2015-00386; and the Request for Superseding Determination of Applicability filed with the Massachusetts Dept. of Environmental Protection by David Kelley regarding commercial fishing operations for surf clams utilizing hydraulic fishing gear off Herring Cove; as discussing the matters in Open Session will have a detrimental effect on the Town's litigating position.

Robert Brock moved to enter Executive Session for the reason stated above by the Chair after which the Commission will return to Open Session, Carolyn Clough seconded and it was so voted by roll call: Alfred Famiglietti: Yes, Robert Brock: Yes, Nathaniel Mayo: yes and Carolyn Clough: Yes, unanimously.

Chair Alfred Famiglietti called the Work Session to order at 6:23 P.M.

2) **Work Session:**

Discussion and possible vote on amendments to the Commission's January 6, 2015 Enforcement Order issued to Patricio Palacios, David Kelly and Mark Smith, as co-owners of the F/V Aimee Marie, relative to the practice of hydraulic dredging within the wetlands resource of the Town of Provincetown in violation of the Massachusetts Wetlands Protection Act (M.G.L. c. 131 s. 40). The purpose of this discussion is to determine whether any remediation measures must be conducted as a result of the violations found and a timeline for their implementation, as set forth

in the June 16, 2017 decision of the Massachusetts Appeals Court in the case of Aqua King Fishery, LLC v. Conservation Commission of Provincetown, 91 Mass. App. Ct. 712 (2017). Attorney Corbo reviewed the issue of an Enforcement Order that was issued to the F/V Aimee Marie in 2015 for a finding that the owners had violated the WPA by conducting hydraulic dredging in Provincetown waters without first obtaining an Order of Conditions from the Commission. As part of the Order, a restoration plan was required, but no date for its completion or for the contents of the plan was specified. Since that time and through the litigating process, the resource area jurisdiction has been determined. Currently, the National Seashore is conducting a study of the area to determine the impact of hydraulic dredging and how the resource can be remediated if damage has been caused. Attorney Corbo recommended that the original Enforcement Order be amended until the results of the study are known. He suggested that the Commission vote to delete the requirement for the restoration plan submission and replace it with a requirement that no hydraulic dredging take place in the resource area until a Notice of Intent is filed, approved and an Order of Conditions issued by the Commission.

Nathaniel Mayo moved to amend the January 6, 2015 Enforcement Order as recommended by Town Counsel, Robert Brock seconded and it was so voted, 4-0.

Attorney Corbo will revise the Order for Commission approval in the future.

3) **Public Comments** on any item not on the agenda below: None.

The Chair reminded those present that the purview of the Commission is to uphold the state Wetlands Protection Act and the Town's Wetlands Protection By-Law, Chapter 12.

4) **Public Hearings:**

a) CON-18-094 **Herring Cove Beach, Province Lands Road**

Request to Amend Order of Condition (DEP File No. SE 058-0598) filed by the **National Park Service**, pursuant to Massachusetts Wetlands Protection Act (M.G.L. c. 131, §40) and Provincetown General By-Laws, Chapter 12, Wetlands Protection By-Law to revise the project design to relocate the proposed new parking lot and a section of Province Lands Road further inland to address acceleration erosion. Work to take place within Land Subject to Coastal Storm Flowage, a Coastal Beach and a Coastal Dune and a Buffer Zone to a Coastal Dune and a Coastal Beach.

Presentation: Mark Adams appeared to present the application. He said that the plans were being revised because of a rapid and high level of erosion activity at Herring Cove Beach wherein the shoreline is reinstating its natural alignment after the hardened, paved revetment was removed. A change is needed to address this temporary increase in erosion, as the activity will most likely last for several years until shoreline conditions are reestablished and a more predictable rate of erosion is restored. He said that the design of the project will remain the same, but will be moved 50' further inland and then pivoted inland an additional 150' at the north end of the project to accommodate the erosion and result in a facility that is parallel to the mean high water line. A similar amount of Province Lands Road will be moved inland the same distance to maintain the same configuration as the original design. The north end of the parking lot has been adjusted to accommodate the incoming bike path and the south end adjusted to transition to the Herring Cove

bathhouse facilities. The additional 200' setback at the north end will extend the life of the parking lot and road by about 20 years, based upon historical rates of erosion in the area.

Public Comment: Cliff Schorer asked a question about the scope of the project.

Commission Discussion: The Commission questioned Mr. Adams. Mr. Famulare said that the construction-based activity has not changed so the original Order of Conditions would not change and that the Commission has a limited jurisdiction because of the federal ownership of the land. The Commission discussed the project. Mr. Adams said that debris and asphalt is still being removed from the site and no new fill will be brought onto the site.

Nathaniel Mayo moved to approve Amended Order of Condition (DEP File No. SE 058-0598), CON-18-094, pursuant to Massachusetts Wetlands Protection Act (M.G.L. c. 131, §40) and Provincetown General By-Laws, Chapter 12, Wetlands Protection By-Law to revise the project design to relocate the proposed new parking lot and a section of Province Lands Road further inland to address acceleration erosion at the property located at Herring Cove Beach, Province Lands Road, with the amended Order of Conditions and Special Conditions as drafted by staff, Robert Brock seconded and it was so voted, 4-0.

b) CON-18-084 **1 High Pole Hill Road**

Request for Amend Order of Conditions (DEP File No. SE 058-0593), filed by **Cape Cod Pilgrim Memorial Association**, pursuant to Massachusetts Wetlands Protection Act (M.G.L. c. 131, §40) and Provincetown General By-Laws, Chapter 12, Wetlands Protection By-Law for minor modifications to hardscape and landscape in the bottom pavilion area of the proposed funicular (inclined elevator). Work to take place within Land Subject to Coastal Storm Flowage.

Presentation: Attorney Lester J. Murphy and Jay Norton, of Coastal Engineering Co., appeared to present the application. Attorney Murphy said that minor modifications to the hardscape and landscape in the lower pavilion are proposed. Since the last hearing, some changes were required in order to obtain the approval of the Historic District Commission. He said that the changes resulted in a reduction in the building area and hardscape of the project. Mr. Norton briefly reviewed the revisions. He said the design is now more of an open, meandering park-like plan on the lower portion of the site, rather than a more formal English garden design. The pavilion will decrease in size and the total hardscape reduction would be 81 sq. ft. There will be no changes in the fill or drainage patterns on the site. He reminded the Commission that the entrance to the pavilion will be on the west side, away from the abutting residential property. The pallet of the vegetation has not been changed, but the planting configuration has been redesigned. Attorney Murphy added that the engineers working on the project have determined that the funicular will not de-stabilize the slope of the hill, but rather stabilize it due to the installation of the helical piles. This was his response to a concern of the abutter who wrote a letter to the Commission regarding the issue.

Public Comment: None. There was 1 letter in opposition to the application.

Commission Discussion: The Commission questioned Attorney Murphy and Mr. Norton.

Nathaniel Mayo moved to approve the Amended Order of Conditions (DEP File No. SE 058-0593), CON-18-084, pursuant to Massachusetts Wetlands Protection Act (M.G.L. c. 131, §40) and Provincetown General By-Laws, Chapter 12, Wetlands Protection By-Law for minor modifications to hardscape and landscape in the bottom pavilion area of the proposed funicular (inclined elevator) at the property located at 1 High Pole Hill Road with the amended Order of

Conditions as prepared by staff and a revised landscape plan, Robert Brock seconded and it was so voted, 4-0.

c) CON-18-063 **1 Commercial Street**

Request for Amend Order of Conditions (DEP File No. SE 058-0593), filed by the **Provincetown Inn Limited Partnership**, pursuant to Massachusetts Wetlands Protection Act (M.G.L. c. 131, §40) and Provincetown General By-Laws, Chapter 12, Wetlands Protection By-Law to replace decks, deck foundation and supports and to remove pavement between decks and revetment and replace with native stone. Work to take place within Land Subject to Coastal Storm Flowage and a Buffer Zone to a Coastal Bank.

Presentation: Brad Malo, of Coastal Engineering Co., appeared to present the application. He said the project involved deck and deck foundation replacement and removal of existing pavement for an area along the easterly-facing portion of the existing building. This portion of the structure had experienced significant damage in a winter storm of 2018. The Commission had approved an Order of Conditions in March of 2018 for the replacement of a portion of the ground level deck, footings and building foundation wall. The emergency repairs have been completed and the applicant would like to continue a similar restoration and replace the existing deck and deck foundation for the southerly portion of the seaward-facing motel. Also proposed is the removal of pavement between the deck and top of a revetment and replacing it with a ¾” native stone. No new foundation work is proposed on the existing motel, only the wooden deck and footings/support. He added that the applicant requests approval of the additional scope of work as an amendment to the original Order of Conditions.

Public Comment: Cliff Schorer had a comment suggesting that removing eroded material and replacing it with cleaner fill may be an option where failing revetments are being undermined.

Commission Discussion: The Commission questioned Mr. Malo. Mr. Famulare said that the previous project proposed that the voids in the revetment be filled with a ‘flowable’ fill that would not wash out through the revetment during storm events. However, the applicant subsequently decided to use crushed stone instead and to extend the treatment beyond the original limit of work. He thought that this material would perform better than asphalt, which would continue to crumble and degrade. However, he is concerned about the structural safety of the crushed native stone and whether the walkway will continue to lose material from washout. Mr. Malo described the materials to be used under the deck construction. Mr. Famulare questioned Mr. Malo about the probability of continued erosion and loss of material beneath the walkway and through the revetment during the winter storm season and about how that would be monitored and the walkway maintained over time. He suggested that the Commission approve the amended Order, but request that Mr. Malo return to the Commission at its next meeting with a proposed on-going monitoring and maintenance plan for the surface of the walkway and information about the configuration of materials, such as gravel, sand and stone. He said there is a concern as to whether the eroding material from the revetment is compatible with that on the abutting beach below the revetment. Mr. Malo said that he would return with a formal response to the Commission’s concerns regarding the surface of the walkway.

Robert Brock moved to approve the amended Order of Conditions (DEP File No. SE 058-0593), CON-18-063, pursuant to Massachusetts Wetlands Protection Act (M.G.L. c. 131, §40) and Provincetown General By-Laws, Chapter 12, Wetlands Protection By-Law to replace decks, deck foundation and supports and to remove pavement between decks and revetment and

replace with native stone at the property located at 1 Commercial Street with an additional condition that the applicant do further research and consult with the Shellfish Constable to create a monitoring and maintenance plan as proposed by staff, Nathaniel Mayo seconded and it was so voted, 4-0. Mr. Malo will appear at the January 15, 2019 Public Hearing at 6:30 P.M.

d) CON-19-040 **51 Commercial Street**

Notice of Intent filed by **Jay Anderson/53 Commercial Provincetown, LLC**, pursuant to Massachusetts Wetlands Protection Act (M.G.L. c. 131, §40) and Provincetown General By-Laws, Chapter 12, Wetlands Protection By-Law for proposed bulkhead reconstruction and associated site improvements. Work to take place within Land Subject to Coastal Storm Flowage, a Coastal Beach and a Buffer Zone to a Coastal Beach. There was a request to postpone CON-19-040 to the January 15, 2019 Public Hearing. *Nathaniel Mayo moved to grant the request to postpone CON-19-040 to the January 15, 2019 Public Hearing at 6:30 P.M., Alfred Famiglietti seconded and it was so voted, 4-0.*

e) CON-19-041 **53 Commercial Street**

Notice of Intent filed by **Jay Anderson/53 Commercial Provincetown, LLC**, pursuant to Massachusetts Wetlands Protection Act (M.G.L. c. 131, §40) and Provincetown General By-Laws, Chapter 12, Wetlands Protection By-Law for proposed bulkhead reconstruction and associated site improvements. Work to take place within Land Subject to Coastal Storm Flowage, a Coastal Beach and a Buffer Zone to a Coastal Beach. There was a request to postpone CON-19-041 to the January 15, 2019 Public Hearing. *Nathaniel Mayo moved to grant the request to postpone CON-19-041 to the January 15, 2019 Public Hearing at 6:30 P.M., Alfred Famiglietti seconded and it was so voted, 4-0.*

f) CON-19-042 **6 Commercial Street**

Notice of Intent filed by **Tom Tannariello/TGT Realty Trust**, pursuant to Massachusetts Wetlands Protection Act (M.G.L. c. 131, §40) and Provincetown General By-Laws, Chapter 12, Wetlands Protection By-Law for the construction of a proposed single family home with decks, a driveway and a parking area. Work to take place within Land Subject to Coastal Storm Flowage. **Presentation:** Gordon Peabody appeared to present the application. He reviewed the proposal, which is for a 1,073 sq. ft. structure to be built above a crawl space with breakaway flood vents in the foundation wall. There will be 128 sq. ft. of outdoor living space on a rear deck and 174 sq. ft. of front porch and steps. He said that invasive vegetation will be removed and native species will be planted on the site. There are no proposed changes in grade and the project will be controlled by a Safe Harbor Management Plan, which will include excavation protocols, concrete management, erosion control systems, storm water management, invasives management and a native vegetation planting plan.

Public Comment: None.

Commission Discussion: The Commission questioned Mr. Peabody. Mr. Famulare reviewed his draft conditions.

Robert Brock moved to approve the Notice of Intent, CON-19-042, pursuant to Massachusetts Wetlands Protection Act (M.G.L. c. 131, §40) and Provincetown General By-Laws, Chapter 12, Wetlands Protection By-Law for the construction of a proposed single family home with decks,

a driveway and a parking area at the property located at 6 Commercial Street with the conditions proposed by staff, Nathaniel Mayo seconded and it was so voted, 4-0.

g) CON-19-043 **0 Foot Washington Avenue (Town Landing)** (*to be continued to the meeting of January 15, 2019*)

Request for a Determination of Applicability by the **Town of Provincetown**, pursuant to Massachusetts Wetlands Protection Act (M.G.L. c. 131, §40) and Provincetown General By-Laws, Chapter 12, Wetlands Protection By-Law, for vegetation management to accommodate access to the beach at the Town Landing. Work to take place within Land Subject to Coastal Storm Flowage, a Coastal Beach, a Coastal Dune and a Buffer Zone. *Nathaniel Mayo moved to continue CON-19-043 to the Public Hearing of January 15, 2019 at 6:30 P.M., Alfred Famiglietti seconded and it was so voted, 4-0.*

5) **Requests for Certificates of Compliance**

a) CON-19-044 – **487 Commercial Street** (bulkhead replacement)

b) CON-19-045 – **487 Commercial Street** (house renovations & site improvements): Jay Norton appeared to review the projects, which required some revisions in the hardscape plans and a requested vegetation plan was not submitted. Mr. Famulare reviewed the issues and requested that the requests be continued until the Commission receives more information. Mr. Norton will submit a letter explaining the deviations from the original plans. *Nathaniel Mayo moved to continue CON-19-044 and CON-19-045, 487 Commercial Street, to the January 15, 2019 Public Hearing at 6:30 P.M., Alfred Famiglietti seconded and it was so voted, 4-0.*

c) CON-19-046 – **58 & 60 Bradford Street** (elevation & renovation of structures). Mr. Famulare briefly reviewed the project. *Nathaniel Mayo moved to grant the Certificate of Compliance, CON-19-046, for 58-60 Bradford Street, Alfred Famiglietti seconded and it was so voted, 4-0.*

6) **Request for an Extension of Order of Conditions**

a) CONLGY-17-003 **7 Commercial Street**

Request to Extend Order of Conditions (DEP File No. 058-0539), issued December 30, 2015, amended December 30, 2016, filed by **Delft Haven II Condominium Association** for sand management. Mr. Famulare reviewed project. Jay Norton explained why the extension was needed. *Nathaniel Mayo moved to approve the request for an extension of an Order of Conditions, CONLGY-17-003, for 7 Commercial Street, for 3 years from the expiration date, Carolyn Clough seconded and it was so voted, 4-0.*

b) CONLGY-19-003 **242 Bradford Street**

Request to Extend Order of Conditions (DEP File No. 058-0542), issued January 22, 2016, filed by **Cynthia Binder** for site improvements. Mr. Famulare reviewed the project. *Nathaniel Mayo moved to grant the extension of an Order of Conditions, CONLGY-19-003, for 242 Bradford Street, for three years from the expiration date, Alfred Famiglietti seconded and it was so voted, 4-0.*

7) **Conservation Agent Update:** None.

8) **Approval of Minutes of December 4, 2018:**

Robert Brock moved to approve the minutes as written, Alfred Famiglietti seconded and it was so voted, 3-0-1 (Nathaniel Mayo abstaining).

9) **Any other business that shall properly come before the Commission:** None.

ADJOURNMENT: *Nathaniel Mayo moved to adjourn the Public Hearing at 8:15 P.M., Robert Brock seconded and it was so voted unanimously.*

Respectfully submitted,

Ellen C. Battaglini

Approved by _____ on _____, 2019
Alfred Famiglietti, Chair