

# TOWN OF PROVINCETOWN - BOARD OF SELECTMEN

## JOINT MEETING W/ CHAPTER 91 AMNESTY COMMITTEE

TUESDAY - JUNE 11, 2002

### JUDGE WELSH HEARING ROOM

Chairman Mary-Jo Avellar, opened the meeting 7:00 PM noting the following attendees:

Board of Selectmen members: Mary-Jo Avellar, Cheryl Andrews, Michele Couture, Sarah Peake, Richard Olson.

Other attendees: Town Manager Keith Bergman, Assistant Town Manager Mark Latour, Town Counsel John Giorgio  
Harbor Committee Members - Rex McKenzie, Al Davis, Melville Cote, Sheila LaMontagne. Representing Chapter 91 Committee – Bob Seaver.

Recorder: Secretary to Board of Selectmen Vernon Porter

The following are meeting minutes, in brief.

#### 1 CHAPTER 91 LICENSING – Workshop Discussion

Meeting with Residents' Amnesty Committee, Town Counsel

Mark Latour – I received a call from Beverly Dwyer from the Chapter 91 Amnesty Committee asking to set up a date to meet with the Selectmen to discuss issues and to work out some issues. The Committee is not here to complain. They have suggestions to make and just want to have a chance to have a dialogue with the Selectmen.

Rex McKenzie gave a brief overview of the Provincetown Harbor Plan.

#### COMMENTS and CONCERNS FROM THE PUBLIC

Bob Seaver representing the Chapter 91 Residents' Amnesty Committee read into the record a prepared statement dated June 11, 2002, listing ten points. (See attachment #1)

Lenny Enos – just to paraphrase; the town provides horizontal access to the beach and our contention is that this horizontal access is more than adequate and we should not have to provide the same – it's only a duplication.

Fees – it is our contention that this is within the structure of taxes.

Bob O'Malley – I feel that the Harbor Plan was not fully understood by the voters of Provincetown. They did not know what they were voting for. Members of the Harbor Committee thought it was a guideline but DEP is using it as a strict rule of enforcement when we go before them for review of our licenses.

Schofield Line – is inaccurate by 10 to 20 feet, as admitted by Scholfied. Engineers cannot scale this line on a plan - it is not accurate. Serious flaws in the process.

Fees have changed drastically – in come cases \$25 to \$35 – \$40K. It continues to change at every meeting we have with DEP. Everybody is nice to us but nothing is happening – that is why we are here.

Beverly Dwyer - I'm the one who called Dean Schofield and I asked him how this mean high water mark was determined. Provincetown is the only town in the Commonwealth that had a new mean high water line created. No one can give me an answer why. We asked at the DEP and they could not give us an answer.

Per Mr. Schofield they made a bid on the job. Did an aerial flight of Provincetown to determine the high water mark – one hour before low tide on a particular day (April 15, 1997 ?) All these people here have hired engineers – and not one engineer can come up the same thing that Schofield came up with. There is a big

discrepancy – and they know it – and unfortunately it is the taxpayers and the waterfront property owners are paying for it.

Keith Bergman – We cannot answer the question as to what extent the Schofield survey is accurate or not – it was commissioned by the State. Its purpose, to my understanding, was to approximate the historic mean high water line, which is set in statute as defining the location of Provinceland, which is unique to Provincetown. To my understanding, the survey should not have been to determine where mean high water is – it should have been to reconstruct where historic mean high water was in 1854 or whatever year is sited in the statute. Where is the line – something called the 1939 line – was an approximation. The purpose of the study was to determine accurately where that historic line was – if it hasn't done that, then that is a mistake.

Bob O'Malley – That is exactly what they did not do and Schofield admits it.

Bob Seaver – We don't want to get bogged down on this specific issue. We're here to appeal to you to assist us in undoing something that has been done and redoing it properly. We understand from the State that it is only the Town that has the power to do that. It is the Selectmen that we need help from in achieving a better result for the whole community.

Judith Cicero – I want to underscore the points that other speakers have made. What I want to underscore is the positive aspects of working together. The Harbor Plan is not engraved in stone – it has to be amended and it will be amended. I hope that members of our committee will be appointed to the Harbor Committee or any other committee that will enable a group of us to be heard. Betterment fees are quite heavy. With the Board's help I think we can do it in a fair and equitable way.

Al Davis – I was on the original Harbor Committee. This plan was never intended to be anything other than just a general guideline. The appendix at the end was never made by the Harbor Planning Committee it was made by the students who came down and did it.

Jim McGowan - Read excerpts from December 10, 2001 letter from Kopelman & Paige to Keith Bergman. I would have thought by now the town would have moved forward towards getting the Commonwealth to release its right to the Commonwealth Tidelands, by legislation.

Keith Bergman – The line that the previous speaker did not read is: “As described below, however, such legislation would serve to reduce the general public's access over the land seaward of the historic high water mark.” It is because the Board of Selectmen represents all of the citizens of Provincetown and not just those that own waterfront property – that the town did not move forward with that amendment to Chapter 91.

John Giorgio – There are provision in the regulations for amending the Harbor Plan. In order for that to be affective it would have to be approved by the Secretary of Environmental affairs. If the town is not happy with the plan there is a procedure and process for amending it. In my opinion, that would require approval of town meeting.

Mary-Jo Avellar - Question about the fees – double taxation issue. How do we address that? John Giorgio – The requirement in Chapter 91 you have to demonstrate that the public benefits out ways the detriment. Harbor fund established to maintain public improvements.

Mary-Jo Avellar - Have we used those funds. Keith - No. There is \$3K. Chapter 91 remedy is access to the water. They are not asking for the money as much as they are asking for harbor fund access across the property. If someone doesn't want to provide access across their property for the public benefit then the alternative of the Harbor Access Gift Fund is so that the town can use that money to make the public improvements. MJA – so you are saying that if somebody doesn't want to have an access over their property, they have to pay into a fund.

Rex McKenzie – We can modify this plan. This plan expires on May 5, 2004. We have to, if we are going to continue to have a harbor plan, give the State a set of recommendations/changes to the Harbor Plan in order for

it to continue to be in effect. The Harbor Plans deals with a lot more than just Chapter 91. It deals an overview of the entire harbor. It is our only tool of dealing with the State where they would have us default; apply a set of waterways licensing requirements to us, just like they do Boston. Our Harbor Plan allows us to have input into that if we become at default. This is a way to get the State to see our way and to accept our recommendations.

The Harbor Access Gift Fund is for trying a way to provide public benefit where none can be provided. If a property owner can provide public access on site, that's required by State law. If they cannot provide that public benefit then another options is to tie into the Harbor Access Gift Fund. It has \$3,000 in it at this time. We expect to be paying into that fund within the next year or so. Property owners have the option of paying a one-time fee or pay it over the term of the thirty-year license at 4.5% interest. This money can only be used by the Harbor Committee for Harbor improvements. The Harbor Committee makes recommendations to the Board of Selectmen and the Board of Selectmen make the final decision as to where the money is spent.

I keep in close contact with Sharon Pelosie and I have not heard that the beach walk is something that they are willing to put on the table as something that can be removed. A beach walk is not a boardwalk – we've had some problems with the understanding of that. It is a dry sand 10ft. wide area above the mean high water mark – the current high water mark. In areas that have bulkheads or other obstructions, it's just not there.

Would welcome any members to the Harbor Committee as we have other projects to work on as well. Other than Chapter 91 we are working on saltwater remediation projects, beach clean up, Chapter 91 town landing signag project, harbor regulations, mooring fees, etc.

Also, the Harbor Committee encourages property owners to come to the Harbor Committee so that the Committee may mediate and act as an ombudsman as it works to find reasonable solutions to public access for private property owners.

We need your help (Board of Selectmen's), in getting the DEP to follow our recommendations. Recommendations are being made by DEP that are not part of the Harbor Plan thereby imposing a hardship on the residents of Provincetown. Harbor Committee is concerned that the DEP officials in Boston are sometimes not familiar enough with specific Provincetown properties to be making the best decision about public access. One of our goals for this year, in addition to what has been forwarded to you, is trying to track license compliance and how DEP uses our recommendations. It is the only way we are going to get town-wide public benefit through their state process.

Cheryl Andrews – Fees in general. Has there been a significant change in the amount of dollars being handed out by property owners – and if so, can we have that on paper so we can see what types of properties your were talking about in the mid 90's and what type you are talking about now.

Sheila LaMontagne - Many people in the town are now aware of - after the fees are calculated according to the formula in the Harbor Plan there is another fee that has to be paid directly to the State in a lump sum prior to the issuance of the license. Plus a maintenance fee that you pay every year to make sure you are in compliance. Fees to the State can be greater than the assessment to the Harbor Fund.

Bob O'Malley – Even if we provide public access from Commercial Street to the water, we are still subject to the fees. I am hearing here that our public officials don't understand how the fees are calculated and why we are so frustrated. You pay \$2 per square yard and an annual inspection fee to the State. It changes every time. I filed my application in 1995/96 and every time I deal with them the rules change. They changed it from a 10 ft. wide boardwalk, which is part of Harbor Plan formula to a 4 ft wide boardwalk. We've always assumed if you provided public access you would not have to pay a fee. That was the operating theory when we reviewed the Chapter 91 licenses, when I was Chairman of the Harbor Committee. But there is still a fee – and it is a very high fee even if you provide public access.

Sarah Peake - when you talk about 'they' are you referring to DEP? Answer: Yes.

Sarah Peake – what I am hearing from the members of the community is the level of frustration as they go

through the licensing process thing change from time to time. The frustration goes beyond the harbor plan – it goes how DEP as a beau racy is dealing with you as individual waterfront property owners.

Mr. Enos – The town provides horizontal access. The State does not say that they own this land they only say they have a right to license this land. We say we own the land. None-the-less it is a licensing process. How many times do you have to pay for a license? The fees should be in relationship to the type of business you do.

John Giorgio - I think there is a miss-match in the Harbor Plan and as some are describing the way that DEP is implementing it through the licensing process. It think it is clear in the Harbor Plan the underlying premise of Chapter 91, which all these property owners are subject to, whether or not you have a harbor plan, they are expected to provide public open space and regular physical improvements. I agree with Mr. McKenzie's interpretation of the Harbor Plan that if you can provide the onsite public improvements to the satisfaction of DEP, again they are the ones that make that decision, I think that is in lieu of paying into the plan. If DEP is interpreting that differently, that is a different issue.

Greg Russell - Applied for the license two years ago and have run into nothing but problems. They keep changing. They wanted credits to be issued to be if I do the things; if I don't do them they will charge me a fee. The first number they came up with two years ago was \$130,000.00 – it is in writing. After that we went back and forth. I hired Coastal Engineering to survey all the properties, then had a meeting up in Boston with DEP and we talked about this – at that time there was a woman there that said if we have access to the beach and put in kayak racks that we would get our license. Without the license I cannot get a building permit. I explained what we were going to do to the buildings. We've gone two years – with different people – and every time we get to an agreement (and we had one just a month ago) – we were issued a permit then Magda went on maternity leave – a new guy comes in and he doesn't like her new ideas. Now, I'm starting all over again. This is ridiculous! The people that are up there are deciding on their own personal way what they want to do. The last meeting I had, ended up today, where, and I have to read this: “10ft. access from Commercial Street (which I cannot give them on the front) down to the beachfront to border the town landing.” This is what they are demanding before they issue me a Chapter 91 license. I have gone to them with John and called them now they say, “give us 5 ft.” That's telling me that there are no rules here.

Warren Alexander - Would like to address the '1939 Mean High Water Mark (MHW) '. Provincetown is unique and the only town in Massachusetts that does not own to the MHW. The reason for this is that our forefathers were a bunch of property jumpers and built on property owned by the State of MA. Around 1854, the State gave the land demarcation point, which is now the boundary of the National Seashore on the North to the water on the South. Not to the mean low water but to the water – which meant the MHW. This is your demarcation of jurisdiction today. Technically its really demarcation point of private property to public property – but the state is not saying that. The Schofield Line is the historic high water mark and I must agree that it is approximate but I don't agree that it is 30 ft. off. If you do own property along Commercial Street you don't have a problem because nobody knows where Commercial Street is or how big your lot is. Again, this is another approximate line. They surveyed it property by property over the years and come to agree, between surveyors, that there is a south side of Commercial Street although it has never been laid out. We are dealing with approximate marks.

The 1867 Map – Barnstable County Commissioners – is quite accurate and is the map we use for the Historic High Water Mark.

#### Board of Selectmen Comments

Michele Couture - My thoughts are that we could have a meeting with DEP officials that are responsible for doing the Chapter 91 licensing.

Sarah Peake – I agree. I think it is really broken down into two components. There are certain issues within our control whether we stand with the membership of the Harbor Committee; whether the current harbor plan is reviewed and revised; what we're going to do about the Schofield Line; what the cost of payments are going to be, if anything; where is the public access going to happen – own town landing. The big problem is DEP and their fickleness.

Cheryl Andrews - I am hearing the request, as Selectmen, that we pay a little more attention to the upgrading of

