

Approved 9/2/2014



Town of Duxbury

Conservation Commission

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DUXBURY, MASS.

Minutes of July 29, 2014

The Conservation Commission met on Tuesday, July 15, 2014 at 7:00 PM in the Mural Room at the Duxbury Town Hall.

Members Present: Chairman Joe Messina; Sam Butcher; Dianne Hearn; Barbara Kelley; Holly Morris; Corey Wisneski

Members Absent: Tom Gill

Staff Present: Joe Grady, Conservation Administrator; Susan Ossoff, Administrative Assistant

The meeting was called to order by Chairman Joe Messina at 7:00 PM.

CONTINUANCE OF PUBLIC HEARING, MCLAUGHLIN, 685 WASHINGTON ST, PIER, 7:15 PM SE18-1653

Chairman Joe Messina opened the continued hearing at 7:15. He commented that at the last hearing there was only time to allow one public comment, and that this evening his plan is to allow a continuation of the presentation by the applicant for about an hour or so, then allow time for the commissioners to ask questions, and then allow 45 minutes to an hour for public comment.

Paul Brogna, engineer for the Applicant, introduced Mr. McLaughlin and his son Gavin, Paul Driscoll, legal counsel for the applicant, Bob Gray from Sabatia, Jim O'Connell from Coastal Advisory Services, and George Hampson, shellfish expert. Mr. Brogna reviewed that he had almost completed his presentation at the last hearing and would now continue. There had been questions from the Commissioners about the various piers he had been discussing and he had submitted a matrix of the various pier projects and their similarities to the McLaughlin pier. He reviewed the design parameters of the pier; 190 feet long with an 8 foot platform, so 198 feet long overall, 3 feet wide, with a 3 foot by 16 foot ramp and a float. There are 2 sets of plans that have been submitted. The pier will have a single handrail and light penetrating decking. The single handrail will have 1.5 inch anodized posts and ¼ inch vinyl coated wires.

A new bound handout was provided which according to Mr. Brogna contains the same information that had been included in previous submittals particularly the matrix of piers, but to make comparisons easier this new documents compares the piers to the proposed McLaughlin pier one at a time and aerial photos are provided.

Joe Grady objected to having new materials submitted on the day of the hearing, without the Commissioners having had any time to review them which can lead to confusion. It has been consistently requested that any materials to be presented at the hearing be provided to the Conservation Commission weeks ahead of time.

878 Tremont Street, Duxbury, MA 02332; Telephone: 781-934-1100 x 5471; Fax: 781-934-1137

The mission of the Town of Duxbury is to deliver excellent services to the community in the most fiscally responsible and innovative manner while endeavoring to broaden our sense of community and preserve the unique character of our town.

Mr. Brogna provided the Commission with 4 mason jars containing what he termed 'muck.' He explained that these were sampled at the sites of 4 piers: McLaughlin, 90 Marshall Street, 2 Ingalls Grove, and 55 Hicks Point Road. He also brought in large buckets of muck from these sites and offered for those attending the hearing as guests to come look at the muck if they would like.

Chairman Messina commented that he had explicitly asked for measurements of the distance from the float to the salt marsh but that he did not see that information on the matrix. Paul Brogna confirmed that information is not included on the matrix.

Joe Messina commented that in the matrix, included on the list of piers are many that were permitted under prior bylaws and regulations or were grandfathered. His concern is the distance of the edge of the float to the opposite bank, and he had asked for that measurement for comparable piers. Mr. Brogna responded that the information Mr. Messina was looking for was to be provided verbally during the hearing, and that pictures will show floats 2-3 feet from the resource area.

Jim O'Connell, consultant for the applicant, agreed that Joe Messina did ask for that information, but wanted to know why Mr. Messina was asking for it – if it is to minimize adverse impacts, he wants to know what distance to the edge of the salt marsh will have adverse impacts.

Joe Messina replied that he can ask for whatever he wants to; the applicant can choose to provide or not provide the information. What may be unique to this pier is where the float is, its use in that environment, and the resource areas. This is why he asked for the measurements of other piers and distances to other banks.

Bob Gray from Sabatia, representing the applicant, said he had lots of photographs to address the concerns about distances. This information can be added to the matrix. He added that examples of piers in town that were permitted long ago are living proof in that you can look to see if they have had any adverse impacts on the salt marsh.

Joe Grady said that what they are providing is a 'snapshot of today.' Twenty to thirty years ago the salt marsh extended to the end of some of the piers, and now today the salt marsh has eroded 10, 20, even 30 feet due to activity near the piers.

Bob Gray said if there are adverse impacts, the piers should be removed. Joe Messina clarified that they are permitted structures, and so there is nothing that can be done even if the salt marsh is eroding. Joe Grady clarified that because a pier is in existence does not mean there are no adverse impacts.

Mr. Driscoll pointed out that the concept of having a matrix was suggested by the Conservation Commission.

Mr. Messina said that there are arguments being made that the pier is not unique and that it is typical. The float for this pier is located in a narrow area, and therefore his specific question had been about the location of the float. He is asking for this information because the applicant is saying this is the same as 21 other piers in the matrix.

Mr. Driscoll again stated that the request for the information in the matrix came from the Conservation Commission. Putting the matrix together was a lot of work. Tonight the focus is being placed on one fact that is not in the matrix, but there is lots of other information there. The

additional matrix information will be provided. It is the applicant's position that he doesn't have to prove this proposed pier is identical to other piers, he has to show the adverse impacts are minimal. He wants the Commission to apply its Rules and Regulations the same way to this application as they have to others. For instance, for a pier on Powder Point Road there were no questions raised about shellfish. It is necessary to treat every applicant fairly and apply the same standards to everyone. The piers are not identical, but they meet the regulations and the same standards have been applied 20 other times. Some of the piers have marshes, some have shellfish, etc.

Mr. O'Connell said this new PowerPoint handout has separate slides for the piers they want to talk about. There is no new information; it is just rearranged for ease of presentation, even though it was not presented 2 weeks in advance to the Conservation Office.

Joe Messina said he specifically asked for the distance information, though at the last hearing the applicant's team indicated it was not relevant. He believes it is relevant. The matrix doesn't present an important piece of information that the Commission asked for.

Mr. Driscoll said they have the information but it is not on the matrix. They have floats shown in pictures. He apologized for not having it on the matrix but said it was inaccurate to say they haven't provided it and disregarded the request. It is important for the Commission to let the applicant know what is important, and he concedes the information is not there. He said the Commission is obligated to understand the practical limitations of the applicant.

Joe Messina said that this was the second substantive hearing. At the first one, the applicant's presentation began and there was 1 substantive question about the distance to the marsh from the Commission. This is a unique site and he is not trying to burden the applicant, but the Commission needs relevant information.

Paul Driscoll said they will meet the burden. At the last hearing Mr. Brogna put up a slide of a pier on Powder Point, and Joe Grady said it was very different because of the substrate. However both have land containing shellfish, and the same regulations and performance standards apply. So they brought muck samples to show there are other piers with the same muck characteristics. Mr. McLaughlin's pier is not identical but there are similarities to some other projects, so approval here should not be prevented and it is a Constitutional issue.

Bob Gray asked regarding the additional information being sought for the matrix, if the Commission is seeking the distance to the salt marsh in 4 directions. Mr. Messina replied that he wants 3 directions – the landward side is standard and will be consistent for the piers, it is the 3 other sides of the float that he wants to know the distance to the salt marsh.

Paul Driscoll asked if there was any other information that the Commissioners wanted. Mr. Messina said he also wants to have indicated in the matrix whether or not the piers were grandfathered, and whether they were permitted under the current regulations.

Joe Grady reminded everyone that if something is going to be presented, it has to be provided to the Conservation Office 2 weeks prior to the meeting, though he would prefer 3 weeks. At the last hearing, he did not know there was going to be a PowerPoint presentation until just before the meeting, and the copies came into the office weeks after the hearing. Tonight there are additional slides for the PowerPoint, and sediment coming in, and materials need to be in ahead of time to allow time for it to be distributed to the Commissioners.

Jim O'Connell asked about the distance measurement to the marsh. He wanted to know whether the Commission knows at what distance there is an adverse impact.

Sam Butcher said the applicant is free not to provide the information the Commission is requesting. Mr. O'Connell said there is a time burden in providing the information. Mr. Messina suggested that if they don't provide the information, they should not use the argument that the piers are the same. Mr. Messina said there are no permitted piers in an area as narrow as the proposed McLaughlin pier. Bob Gray said that there are.

Mr. Messina suggested that they only are looking for these measurements for similarly located piers, not for every pier in the matrix.

Mr. Driscoll said that it is clear that the Chairman thinks this information is important. In order to help them, he asked that the Commission tell them about anything else that is a unique characteristic of this pier that may come up later.

Joe Grady said that would be premature. They are choosing to compare this pier to 21 other piers, and the Commission can't identify what unique characteristics are relevant at this point. For example, regarding the buckets of muck that the applicant brought in, what is being compared?

Chairman Messina said there will be ongoing questions as the hearing progresses. The issue of comparable piers is difficult because it's been argued by the applicant that the other piers are comparable. The Commission must decide whether to write Orders of Conditions or not, so in order to see what the Orders of Conditions might be, they are asking for information about the pier. At this point, 6 months and 1.5 hours into the applicant's presentation, they can't predict what future questions are going to be.

Bob Gray said the comments at the last hearing were about substrate, and Mr. Grady had said the Powder Point pier substrate was hard and the McLaughlin substrate is mucky. So they looked at other recently approved piers and brought in buckets of muck. To tell if the substrate is muck, he suggested taking a 5 pound rock and throwing it off a float, and if it disappears into the substrate it is muck. The purpose of bringing in the muck is to prove that there are countless approved floats sitting in the same substrate as the proposed McLaughlin pier; not 100 percent the same, but the same substrate – which is why they brought in the buckets of muck. The labelled jars containing muck are being submitted as part of the official record.

Joe Messina said the pier they had talked about at the last hearing was on a mineral substrate. Bob Gray said both are land containing shellfish, and they have added piers to the matrix that are also sitting in muck.

Mr. Brogna said there are 3 sets of Town Rules and Regulations; December 1997, March 2006, and October 2013. He will provide the salt marsh dimensions as requested. There are no performance standards in terms of 5 foot or 500 foot separation in the State or Federal regulations. It is useful information but wondered how to evaluate the threshold. The floats are designed to assume the homeowner can use 3 sides of the float. One to two sides are ample space for boats and kayaks. He asked for guidance as to how many sides Mr. McLaughlin needs.

Joe Messina said it has to be designed so people can navigate around it.

Paul Brogna asked how the information will get evaluated fairly and equitably. Mr. Messina suggested they use their judgment; they don't need to give dimensions for all 21 piers, just ones in similar areas, but they can do whatever they choose in terms of what they provide.

Paul Brogna began discussion of the 2 Ingalls Road pier using the new PowerPoint handout. Corey Wisneski asked if it can be shown on the satellite pictures where the dock is because as it is they are not shown. Joe Grady added that he wants to see how the float and pier sit in relation to the salt marsh.

Mr. Brogna began discussion the pier at 48 Hicks Point for comparison. Mr. Bobrowski, Counsel for the Commission, asked if there is a mud sample for this pier and was told no.

Mr. Brogna began showing information about the pier at 90 Marshall Street, which is in a Waterfront Scenic Area like the McLaughlin pier and was designed accordingly. Photos were shown and Mr. Brogna said it is a similar project with a float close to the salt marsh. Joe Messina clarified it was close to the salt marsh on the landward side.

Mr. Brogna showed the pier at 27 Elderberry. This pier was grandfathered and is 300 feet in length.

Bob Gray asked if the performance standards change if the structure is grandfathered or if the standards are the same. Joe Grady said that there are many grandfathered piers. Paul Brogna said the regulations haven't changed. Joe Grady said that the Commission only addresses the State Wetlands Act and the local bylaw.

Mr. Brogna said he could continue showing the other piers and it would take 15-20 minutes, and that many are the same, some are older, and some are in the Bluefish area. Mr. Messina said that if they provide photos or aerial shots to make sure they are submitted appropriately to be in the record.

Mr. Brogna put up a slide about the pier at 89 Hornbeam and provided a photo. This pier has a float that ends in an inlet and has salt marsh on 2.5 sides. He will submit 12 copies of the photo to the Commission so it can be included the record. He then showed the pier at 2 King Caesar; it was pointed out by the Commission that this pier was also grandfathered.

Mr. Brogna said he will provide the distance to the salt marshes on 3 sides of the piers and identify what is grandfathered in the matrix. He stated that grandfathered structures have the same design standards as the proposed McLaughlin pier meets Town, State, Federal, and Army Corps of Engineers standards.

Joe Messina said that grandfathering does change what is allowed. Mr. Brogna said the design parameters are the same. Joe Grady reiterated that the Army Corps and Federal Regulations are not relevant to the Conservation Commission.

Corey Wisneski said some of the piers that are grandfathered would not be permitted today. Mr. Brogna said they are designed to the standards at the date of application and meet current standards for that application date.

Joe Grady said that Paul Brogna is using a grandfathered pier as an example, but this is a pier that would not be allowed to be built today (2 King Caesar).

Bob Gray began his presentation by recapping the various wetland resource areas, referring to some PowerPoint slides in the previously submitted PowerPoint handout (not the one submitted at this hearing). The pages are not numbered and Commissioners asked for assistance in locating the slides he was referring to. In terms of 'land containing shellfish; the shellfish surveys show that the area around the pier are not quality habitat. The Commission's consultant is calling the area around the float a Tidal Flat.

Mr. Gray then pointed out that in the Horsley Witten report (the Commission's consultant), they recommend using the float stop design. However the Commission has not approved that type of design in over a decade. He felt it would be helpful for the Commission to tell them whether they agree with their consultant that the area is a Tidal Flat and whether they agree with the design recommendation.

Joe Messina said the Commission will not be making any decisions before the hearing is done and so won't be recommending a design. Mr. Gray said they need guidance regarding the float design from the Commission. Joe Messina said no decisions will be made in the middle of the process, the hearing needs to finish then the determinations can be made.

Mr. Gray said in two reviews, at Powder Point and King Caesar Road piers, there was an issue of length and suggested design changes were made in order for the piers to be approved (it was recommended that the piers be shortened). The shellfish issue 'went away' and they got Orders of Conditions.

Mr. Messina said at the end of the hearing process, in those cases, the Commission recommended shortening the pier in order for Orders of Conditions to be written. Given the pace of the current hearing, they are not yet at the point where they can make recommendations.

Bob Gray said the Commission should advise their consultant about the history of approved float designs. The float stop design that they are recommending is not one that the Commission has recommended.

Mr. Messina said that the consultant reviews are coming in from multiple sources. The Conservation Commission will consider the complete record when it makes its decision. The Commissioners can agree or disagree with their consultant; they will not be recommending a float design during the hearing.

Mr. Gray said that if that is the case, they will keep two float designs in play, and look at the area that the float is located in as a tidal flat. He then referred to a PowerPoint slide that shows that the proposed McLaughlin pier is in compliance and meets the constraints of the bylaws.

Chairman Messina suggested it might be a good time to allow comments; Mr. Driscoll concurred and said that Mr. Messina is the chair, and procedurally there is nothing objectionable.

Mr. Messina then asked the audience if there was anyone who would like to comment or ask questions.

Heidi Pape Laird spoke. She said people did not foresee any pier in the area of the McLaughlin pier; it was given to the Historical Society with the intent of keeping an open view of the historical area. She said it is precious area. She also said she would prefer the pier, if it is allowed, be low and narrow.

Robert Fawcett of Crescent Street asked how the length is determined, whether it starts being measured on the mainland or at the edge of the marsh. Joe Messina said that the design is based on an engineered plan.

Frank Holden asked about the aerial photos of the various piers that were shown as slides, and whether they are taken at the same elevation so that the size of the inlets is to the same scale. He also asked about the list of piers, and whether that was enough for the Conservation Commission to say it is compliant. Corey Wisneski said the list is not adequate for the Commission to make a determination about compliance.

David Corey, President of the Board of Trustees of the Duxbury Rural and Historical Society, said the property was purchased from the Historical Society. In a 2010 letter from the Society to members, there was one line that is quoted in the application for the pier that says the Board doesn't see a historical basis for prohibition of a pier. He said that quote was taken out of context, that the letter says they defer that determination to authorities; they don't oppose a pier from a historical standpoint but it must meet every other regulation. The deed says the land outside the yard should remain substantially as it is, but nothing prohibits the construction of a pier if it is done in accordance with all rules and regulations. The Board is not opposing the project, but nothing in its statement is an endorsement either.

Paul Driscoll said that there have been repeated assertions that the land was supposed to be open space, and cited Documents #174, 175, 176, 172, 173, and 175. He said that in reading these documents from 1951 until today there are 4 or 5 documents that specifically and expressly say piers are permitted. In 2004 the site was made a Scenic View Area which the opposition says means the property was to remain without piers, but this is not the case.

Mr. Balsbaugh read the Mission Statement for the Town which emphasizes excellent services in fiscally responsible manner, and mentions the preservation of the unique character of the Town. He said this area is part of the uniqueness.

Sarah McCormick said the Bluefish River Marsh is untouched by manmade constructions. In the 19th century the Rural and Historical Society was established and is the forerunner of the Open Space, Conservation, and Community Preservation Committees. There was a cleanup of the Bluefish area, and the parcels of the Bluefish were to be kept in perpetuity. Of the piers in the area, 95% of them cover little marsh and are tight to the shore along King Caesar. The exceptions are grandfathered piers. There was never a pier over the area being discussed, just some planks. It is open marsh and it should be kept unspoiled, and 'once lost, gone forever.'

Kathy Palmer, representing the Friends of the Bluefish, asked if they will have time do a presentation. Joe Messina said after the applicant's presentation is complete, there will be time for more detailed presentations by others. For the record he wanted to remind people that one protected interest is aesthetics, though wetlands resource interests are of primary importance. Zoning is more focused on how things look and appear.

Joe Messina said there was some discussion of the Commission's consultants attending the hearings. He suggested the idea of a working session with the consultant for the commission, Joe Grady, Special Counsel, and the applicant there but not the Conservation Commission to help with this process.

Paul Driscoll agreed this was a good idea and requested that Horsley Witten attend. He said there is a delay between the hearing and preparation of the transcript, and the consultant may

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spend time on questions that were answered at a hearing, and this is costing the McLaughlin's money. A working session without the Conservation Commission present would avoid any Open Meeting concerns.

Joe Messina suggested that Special Counsel Bobrowski talk to Joe Grady and figure out how to proceed.

Mr. Driscoll requested that instead of continuing the hearing to only one date, that two dates be identified. The date of September 23 was suggested, and also October 21.

Gregor McGregor representing the Friends of the Bluefish asked if they could have 40 minutes to do a presentation. They will submit their PowerPoint 3 weeks ahead of time to the Commkssion. For the working session, it would be more productive if their consultant, Lenore White, be allowed to attend. Mark Bobrowski said this was acceptable to him. Mr. Driscoll objected and said he would get back in touch with Mr. Bobrowski, he wants to consult with his client. Joe Messina said it made sense to have Ms. White there.

Mr. Driscoll said Mr. McLaughlin would be unable to attend a hearing on October 21 and asked if a date in November could be used instead. November 18 was identified.

Joe Messina said they may decide that Lenore White should attend the working session even if the applicant objects.

A site visit for the Committee was also suggested. Holly Morris suggested it be at low tide; Paul Brogna suggested it be at high tide. This will be scheduled with Joe Grady and is for Commission members only. Paul Brogna asked if the Commission wishes to visit more than one pier site, and Joe Messina said they will be visiting 685 Washington Street only which is the focus of this hearing.

Mr. Bobrowski asked how much time is needed for planned presentations. Mr. Gray said he needs about 30 more minutes, Mr. Hanson said he needs about 45 minutes, and Mr. O'Connell said he needs about 45 minutes.

Mr. Messina said at the next meeting he would like to complete the applicant's presentation, have the Commission ask questions, and have the Friends of the Bluefish do their presentation. That should take approximately 3 hours total. Mr. McGregor said he would be ready to do a presentation at the next hearing.

Mr. Driscoll said he was not optimistic they can accomplish all that Mr. Messina wishes to at the next meeting. They will try to complete their presentations but it may not happen.

On a motion by Sam Butcher, seconded by Holly Morris, the Commission voted 6-0-0 to continue the hearing for SE 18-1653 until September 23 at 7:00 PM.

ADMINISTRATIVE MATTERS:

Certificates of Compliance

SE18-1290, 226 Harrison Street: This project was an addition done in 2004; Joe Grady reported he had inspected it and it conforms to the Orders of Conditions and all required documentation for this project has been received. On a motion by Joe Messina, seconded by Barbara Kelley, it was voted 6-0-0 to approve the Certificates of Compliance for SE18-1290.

SE18-1393, 226 Harrison Street: Joe Grady reported that all required documentation for this project has been received, the grading has been inspected and conforms to the Orders of Conditions and recommends issuing the Certificates of Compliance. On a motion by Joe Messina, seconded by Dianne Hearne, it was voted 6-0-0 to issue Certificates of Compliance for SE 18-1393.

SE18-352, 724 Franklin Street: Joe Grady reported that all required documentation for this project has been received, the site has been inspected and conforms to the Orders of Conditions, and he recommends issuing the Certificates of Compliance. On a motion by Barbara Kelley, seconded by Joe Messina, it was voted 6-0-0 to issue Certificates of Compliance for SE 18-352.

SE18-1269, 230 Chandler Street: Joe Grady reported that all required documentation for this project, an addition and driveway, has been received, it has been inspected and it conforms to the Orders of Conditions. He recommends issuance of Certificates of Compliance. On a motion by Holly Morris, seconded by Barbara Kelley, it was voted 6-0-0 to issue Certificates of Compliance for SE18-1269.

SE18-1627, 160 Powder Point Road: Joe Grady reported the as-built plans have been received, the site has been inspected and conforms to the Orders of Conditions, and he recommends issuance of Certificates of Compliance for this project. On a motion by Barbara Kelley, seconded by Dianne Hearn, it was voted 6-0-0 to issue Certificates of Compliance for SE18-1627.

Adjournment: On a motion by Joe Messina, seconded by Sam Butcher, it was unanimously voted 6-0-0 to adjourn the meeting at 9:25 PM.

MATERIALS REVIEWED AT THE MEETING

SE18-1653 685 Washington Street application and related materials