

CONSERVATION COMMISSION MINUTES

Thursday, December 3, 2015 ~ 7 pm ~ Lower Conference Room, Bourne Town Hall

Chm. Gray called meeting to order at 7:00 pm and explained the Commission's procedure pursuant to the Wetland Protection Act M.G.L. c. 131, s. 40 and the Bourne Wetland Protection Bylaw Article 3.7.

Note: Chm. Gray addresses the audience in regards to recording a public hearing. If anyone wishes to record a public meeting, they are free to do so, however, it must be known by the Board and the public. All cell phones are to be placed on vibrate or turned off during the meeting.

Members present: Chm. Gray, V. Chm., Martha Craig Rheinhardt, Peter Holmes, Betsy Kiebala, Rob Palumbo, Susan Weston, Thomas Ligor, and Associate Member Paul Szwed

Request for Determination of Applicability:

1) Bruce Benner

File Number: CC15-56

23 Emmons Road, Monument Beach

Hearing Under State Act Only

Mr. Benner representing – seeks to construct a carport, garage, and shed within an AE Flood Zone.

Brendan Mullaney – existing developed lot, basic construction which will require some excavation for the project. No concerns with the project.

No board comments. No public comments.

Kiebala moved and seconded by Palumbo for a Negative Two Determination. Unanimous vote.

2) Scott Zeien, Trustee

File Number: CC15-57

1090 Shore Road, Cataumet

Paul Lelito, representing Rycon Group, Inc. – applicant seeks to remove trees and conduct vista pruning within 100 feet of a Coastal Bank. Mr. Lelito explains that all the tags have been marked in the field and they will also need to seek approval from the railroad for some of the work. Goal is to enhance the vista and all stumps will be left in place.

Brendan Mullaney – this is a part of a project from Kingman Yacht Club and further vegetation needed to be removed to continue the project. Letter submitted by Scott Zeien submitted read

into the record by Mullaney. The trees are on a vegetated slope and asking to cut 12 trees in total. Relatively minor project. The trees are marked. No concerns with the project.

No board comments.

Mr. Thomas Rogers – requested to see the proposed plans.

No further public comments.

Kiebala moved and seconded by Holmes for a Negative Two Determination. Motion passes. One abstention by Thomas Ligor.

3) Pauline Townsend
File Number: CC15-58
37 Circuit Avenue, Pocasset

Shawn MacInnes representing – applicant seeks to upgrade to new Title V septic system within an AE Flood Zone and within 100 feet of a Wetland Resource Area. New system will be within the property line.

Brendan Mullaney – there are lot constraints with this project. Difficult location, system will be moved as far away from resource as property allows. This will be an improvement over what is there and no concerns with the project.

No board comments. No public comments.

Ligor moved and seconded by Kiebala for a Negative Two Determination. Unanimous vote.

4) Joseph & Elaine Desorcy
File Number: CC15-59
144 Jefferson Road, Gray Gables

Ms. Barbara Frappier representing – applicant seeks to construct an addition to a single family dwelling within an AE Flood Zone and within 100 feet of a Wetland Resource Area. No additional bedrooms. Applicant will be going before the Board of Health next week.

Brendan Mullaney – simple addition, existing developed lot. No erosion concerns. No other concerns with the project.

No board comments. No public comments.

Holmes moved and seconded by Weston for a Negative Two Determination. Unanimous vote.

Issuance of Order of Conditions:

Chm. Gray recused himself from discussion and vote at this time and turned the meeting over to Mr. Rob Palumbo.

1) Pinnacle Site Contractors, LLC

DEP File Number: SE7-1915

0 Crab Rock Way, Sagamore Beach ("The Strand" below Indian Trail)

(Continued from November 19, 2015)

NOTE: The public hearing is closed for this matter.

Brendan Mullaney – the hearing is closed. Draft order of Conditions is as follows:

The project is denied because:

b. the proposed work cannot be conditioned to meet the performance standards set forth in the wetland regulations. Therefore, work on this project may not go forward unless and until a new Notice of Intent is submitted which provides measures which are adequate to protect the interests of the Act, and a final Order of Conditions is issued. **A description of the performance standards which the proposed work cannot meet is attached to this Order.**

c. the information submitted by the applicant is not sufficient to describe the site, the work, or the effect of the work on the interests identified in the Wetlands Protection Act. Therefore, work on this project may not go forward unless and until a revised Notice of Intent is submitted which provides sufficient information and includes measures which are adequate to protect the Act's interests, and a final Order of Conditions is issued. **A description of the specific information which is lacking and why it is necessary is attached to this Order as per 310 CMR 10.05(6)(c).**

Statement of Facts and the Record

MA DEP File SE7-1915

1) The Notice of Intent was filed on February 4, 2015 and lists the property owner as the Town of Bourne and the applicant as Pinnacle Site Contractors, LLC representing the following private property owners: 2 Indian Trail (Lot 15-Jones), 8 Indian Trail (Lot 13-Cummings), 10 Indian Trail (Lot 11-Bosco), 12 Indian Trail (Lot 10-Richards), 18 Indian Trail (Lot 6-Galovic) and 22 Indian Trail (Lot 5-Stoll).

2) All work and construction proposed in the NOI is to occur at 0 Crab Rock Way (AKA-"The Strand"), Assessors Map 2.0, Lot 2. The entire project is to be constructed on this parcel owned by the Town of Bourne and managed by the Bourne Conservation Commission. No work is proposed on the private property of the six land owners referenced above.

3) The NOI was filed pursuant to MGL Chapter 131, Section 40 and its regulations at 310 CMR 10.00 et. Seq. and the Town of Bourne Wetland and Natural Resources Protection Bylaw, Article

3.7. Public hearings were held on the following dates: February 19, May 7, July 16, August 6, September 17, October 15, and November 19, 2015.

4) The access to 0 Crab Rock Way from off-site areas was never fully determined during the public hearing process. Access will involve passage over coastal beach and within land subject to coastal storm flowage (flood zone). This access may also involve passage over private property. The applicant never provided the Commission with documentation that access over private property had been granted by the private property owners involved.

5) The work described in the NOI will occur within the following wetland resource areas: Land Subject to Coastal Storm Flowage (Flood Zone VE E1-17), as shown on FEMA FIRM Panel 25001C0316J dated July 16, 2014, Coastal Bank (310 CMR 10.30) and Coastal Beach (310 CMR 10.27). The entire coastal beach is also “restricted” pursuant to the Wetlands Restriction Act, MGL Chapter 131, Section 105.

6) The Restriction Order for the Town of Bourne was adopted on July 10, 1980 based upon plans entitled “Commonwealth of Massachusetts, Department of Environmental Management, Wetlands Restriction Program, Plan of Wetlands,” plans H136-142 and J1-J7 inclusive, K178 & 179, L228 & 229. This particular beach, “The Strand”, was identified on map K-179, as wetland # 293R and the Order of Restriction was placed upon the deed of Peninsula Enterprises, Inc. in the Barnstable County Registry of Deeds in Book 2045, Page 178.

7) The Plan of Record filed with the NOI is titled “Proposed Coastal Bank Stabilization & Restoration Plan”, sheets 1-3, prepared by JC Engineering, Inc., dated February 4, 2015 (last revised 11/9/15), and stamped by John L. Churchill, Jr., PE, PLS. The last survey of the bottom of the coastal bank is noted on the plan as 10-15-15.

8) Based upon the latest revised plan, it is proposed to construct a 540’ long stone revetment with a 150’ long cobble berm at the southern end and a 15’ long cobble berm at the northern end. The top of the revetment will be at elevation 22’, elevations based upon NAVD 88 Datum. The revetment & cobble berm are proposed on and within the coastal bank and the cobble berm partially on the coastal beach. The Commission has determined that the coastal bank acts as both a sediment source as well as a vertical buffer to elevated storm waters. It is thus important to storm damage prevention and flood control.

9) Based upon sheet #2, a portion of the proposed cobble berm extends into and over the restricted coastal beach which is not allowed pursuant to the Restriction Order. This is shown at southern end of the proposed revetment. The Restriction Order for Bourne states; “The following activities and uses are prohibited on land and waters affected by this Order, except those activities and uses needed to accomplish the above permitted uses: A. Filling, placing or dumping on said coastal wetland any soil, loam, peat, sand, gravel, rock or other mineral or chemical substance, refuse, trash, rubbish, debris or dredged material.”

10) The applicant aside from the Plan of Record cited above presented the Commission with supplemental written material (three pages) from Pinnacle dated 11-2-15 titled “Revisions and

Supplemental Information” and an undated sheet (one page) titled “Construction Means & Methods for 0 Crab Rock Way Sagamore Beach, MA.”

11) On behalf of the applicant reports were submitted by Mr. Stanley M. Humphries, Senior Coastal Geologist, LEC Environmental Consultants, Inc., dated August 4, 2015 (6 pages including pictures), September 9, 2015 (2 pages) and October 2, 2015 (2 pages).

12) At the request of the Commission, reports were submitted by Mr. Greg Berman, Coastal Processes Specialist, Woods Hole Sea Grant, Cape Cod Cooperative Extension, dated July 1, 2015 (14 pages including pictures) and September 16, 2015 (3 pages).

13) The Bourne Conservation Commission and the Town of Bourne hired Mr. James O’Connell, Coastal Geologist, Coastal Advisory Services, to assist the Commission in this review. Mr. O’Connell was hired under the provisions of MGL Chapter 44, Section 53G. Mr. O’Connell provided the Commission with reports dated April 6, 2015 (19 pages including pictures), April 24, 2015 (11 pages including pictures), September 16, 2015 (6 pages including pictures), and October 13, 2015 (3 pages). Mr. O’Connell attended hearings on September 17, October 15, and November 19, 2015 and provided verbal testimony.

14) The following additional materials were submitted to the Commission by interested parties and abutters:

- a) “Final Highlands Letter to the ConCom”, dated February 17, 2015 and submitted on behalf of 43 residents of the Sagamore Highlands.
- b) “July 15 2015 Highlands letter to the Con”, dated July 19, 2015 and submitted on behalf of 41 residents of the Sagamore Highlands
- c) “Sept. Letter to Bourne Conservaton 9.15”, dated September 13, 2015, and submitted on behalf of 46 residents of the Sagamore Highlands
- d) Letter from Dr. Richard M. Regnante of 16 Sheppard Road, undated
- e) Letter from Walter J. Tonaszuck, PE, dated February 16, 2015
- f) Letter from Laura Richards, Untitled, received via e-mail on September 28, 2015

15) The public hearing was closed to further testimony on November 19, 2015 with a “straw vote” of 4-1 to DENY the project. This “straw vote” was taken to give direction in drafting the Order of Conditions and associated findings. The issuance of the Order of Conditions (OOC) occurred at a public meeting on December 3, 2015 after discussion and a formal vote. The vote was 5-1 in favor of issuing the OOC denying the project. The OOC was sent by certified mail to the project applicant on December 7, 2015.

Reasons for Denial, MGL c. 131 s. 40

1) As will be more fully detailed below, this decision is based upon the failure of the applicant to provide sufficient information pursuant to 310 CMR 10.05 (6) {c} and 310 CMR 10.05 (6) {b} for the inability to meet specific Performance Standards as outlined further below.

2) Lack of information pursuant to 310 CMR 10.05 (6) {c}. The applicant failed to provide the Commission with a plan that actually depicted the “access route” to the area of the planned work. The applicant discussed both a “southern route” from an area in Bourne as well as a “northern route” from Plymouth. The “southern route” would require passage along the coastal beach and over seven private properties along the coastal beach. The Commission had asked the applicant to provide written documentation from each property owner demonstrating that permission had been granted. None was provided.

Access, whether the “southern route” or the “northern route” would be over the coastal beach which is a restricted coastal beach. The failure to provide a definitive route prevented the Commission from determining whether or not compliance with 310 CMR 10.27 (3) could be met. It was not clearly described what measures the applicant would employ to obtain compliance with 310 CMR 10.27 (3), “Any project on a coastal beach, -----, shall not have an adverse effect by increasing erosion, decreasing the volume or changing the form of any such beach or an adjacent or downdrift coastal beach.” The Commission realizes that “impacts” from this passage may be considered “temporary” during the construction phase, however the yearly beach nourishment and maintenance of the revetment and cobble berm would necessitate yearly impacts.

The following equipment was mentioned for the construction phase: “2-3 40 ton excavators, 1 articulated end dump 25-30 yard capacity, 2-3 20 ton excavators, 1 CTL loader, 1 3-5 cubic yard wheel loader, 2 rock boxes, sweepers and trench boxes.” It was not described in the NOI, plans or narratives how this equipment would be used and at the same time how the coastal beach would be protected. This construction equipment would be working on a coastal beach (restricted under the Wetlands Restriction Act) and under the care and custody of the Bourne Conservation Commission and owned by the Town of Bourne.

A coastal beach is significant to storm damage prevention, flood control, protection of wildlife habitat, protection of marine fisheries and land containing shellfish. Without a defined access route depicted on the Plan and without depicting the “construction area” the Commission was unable to determine to what extent if any these interests of the Act would be impacted and what measures would be necessary to eliminate or minimize the impacts.

3) Inability to meet Performance Standards pursuant to 310 CMR 10.05 (6) {b}. The revised Plan dated 11-9-15 shows portions of the “proposed cobble berm” seaward of the “bottom of the coastal bank” and thus on the “coastal beach”. The Commission believes this will have an “adverse effect” (310 CMR 10.23) and would not comply with 310 CMR 10.27 (3). Also as mentioned above this seems contrary to the Restriction Order pursuant to Chapter 130, section 105. Compliance with the Wetland Restriction Order is required pursuant to 310 CMR 10.24 (4) {a} and {b}.

4) Inability to meet Performance Standards pursuant to 310 CMR 10.30 (3) and (4). Section 10.30 (3) provides, in part, that a coastal engineering structure (the proposed revetment) “shall be permitted” when required to protect buildings constructed prior to August 10, 1978 “provided the following requirement are met: {a} a coastal engineering structure or modification thereto shall

be designed and constructed to minimize, using best available measures, adverse effects on adjacent or nearby coastal beaches due to changes in wave action, and {b} the applicant demonstrates that no method of protecting the building other than the proposed coastal engineering structure is feasible.”

The applicant’s NOI did not clearly demonstrate that there were no feasible alternatives to the proposed coastal engineering structure (revetment).

Both O’Connell and Berman felt compliance with this Performance Standard required that the proposed revetment and cobble berm be covered yearly with a minimum of 780 cubic yards of beach sand which would be distributed during the year off the revetment and cobble berm and onto the adjacent and nearby coastal beaches.

However, the NOI, plans and narratives provided by the applicant and team failed to provide the exact volume of replacement sand, where it is proposed to be placed, and how often it is to be placed. A monitoring plan for nourishment was submitted; however, this plan called for nourishment only if necessary and an obligation of “no more than 780 cubic yards per year”. The Commission determined that a minimum of 780 cubic yards per year would be required to avoid adverse impacts to resource areas, specifically the “restricted” coastal beach. The applicants were not willing to adhere to this condition. Based on weather patterns and rates of erosion, some years would likely require a greater volume of replacement sand.

Berman’s letter of September 16, 2015 states the following, “Mandatory nourishment should address both the beach adjacent to the proposed structures (i.e. trigger volume) as well as the reduction in sediment available for downdrift beaches (i.e. annual volume).”

Berman’s letter of July 1, 2015 states the following, “The applicant should provide an alternatives analysis for this area. As this is a large project with high potential for impacts, the analysis should consider many various options, including those that do not include a Coastal Engineering Structure (e.g. coir envelopes, drift fence, nourishment, etc.).”

The only “Alternative Analysis” provided by the applicant team was from Mr. Humphries in a letter dated August 4, 2015 and consists of a single paragraph response found on page 3. Burman further stated, “A good alternatives analysis should discuss each method in terms of feasibility, environmental effect, and impact on adjacent and downdrift properties.” The “Alternative Analysis” submitted in the August 4, 2015 letter fails to accomplish this.

5) Inability to require the applicant (and 6 private property owners) to comply with an Order of Conditions approving the proposed project.

This NOI and proposed project presented the Commission with a dilemma relative to enforcement of the Order of Conditions due to the fact that the Order would not be recordable on the Deed of any of the six private property owners but rather on the Deed of the property owned by the Town of Bourne. As such any Enforcement Action to require compliance with the OOC would be issued against the Town of Bourne and in essence against the Commission since the

property is under the management and control of the Commission. This inability to require the private property owners to comply with an Order of Conditions (of approval) was bothersome to many commissioners and was repeatedly raised during the public hearing process. While Special Condition TC would allow the Town to require various actions the Commission would not have clear legal authority to enforce the conditions within an Order of Conditions issued pursuant to MGL 131.40 or Town of Bourne Bylaw Article 3.7.

Special Condition TC:

Since the Town of Bourne is the property owner of the land upon which the proposed structures will be constructed the following condition **MUST** be incorporated into any Superseding Order of Conditions (SOC) issued by the Department (DEP):

“This Order of Conditions is subject to the approval by the Board of Selectmen of an agreement between the “private property owners” of 2, 8, 10, 12, 18 and 22 Indian Trail, Sagamore Beach and the Town of Bourne providing for and requiring maintenance, repair, and if deemed necessary by the Town, removal of the work authorized by the Order of Conditions, to be undertaken at the sole expense of the “private property owners” along with providing for the indemnification of the Town of Bourne, along with requisite financial security guaranteed by bonds, covenants and liens on the “private property,” as required by the Board of Selectmen, said liens to encumber the properties at 2, 8, 10, 12, 18 and 22 Indian Trail, Sagamore Beach, and binding on the owners , their heirs, assigns and transferees. This Order of Conditions is also contingent upon the Grant of an Easement by the Town of Bourne, acting through its Board of Selectmen pursuant to the authority of the Bourne Town Meeting, to permit authorized work on property owned by the Town of Bourne on terms and conditions deemed to be in the best interest of the Town by the Board of Selectmen. No work shall commence under this Order of Conditions until all of the acts required by the Town of Bourne have been accomplished.”

Reasons for Denial -Article 3.7 Town of Bourne Wetland and Natural Resources Protection Bylaw

All the reasons cited above are incorporated by reference in the decision issued pursuant to Article 3.7. This is in accordance with Section 3.7.4 of the Bylaw, which states the following:

Section 3.7.4 Definitions; Regulations:

The Definitions contained within the Act (Chapter 131, section 40 MGL) and the Regulations at 310 CMR 10.00 et. seq., are incorporated herein by reference and made a part of this by-law, except where the language in this by-law is more definitive, in which event the language in this by-law shall prevail.

Special Condition TC as written above **MUST** be incorporated into any Order of Conditions issued pursuant to the Bylaw.

Weston moved and seconded by Kiebala to move Draft Order of Conditions to Final Order of Conditions. Vote is 5-1 in favor. Ligor opposed.

Request to Amend Order of Conditions:

1) John Black & Ann Taylor
DEP File Number: SE7-1914
388 Scraggy Neck Road, Cataumet

Ms. Barbara Frappier representing – applicant seeks to amend existing Order of Conditions for changes in landscaping. Here to explain is Nancy Parmentier.

Nancy Parmentier, Landscape Architect - the owners felt they needed a little more lawn space. Drawings of proposed landscaping was briefly explained to the board. Restoration plantings have been shifted slightly. A path is shown and what planting was described. Owners are requesting to take out 5 trees and add 6 new trees.

Brendan Mullaney – the changes were moved closer to the water and some unauthorized grading done closer to the water and were made aware it is not allowed. This seems like a good plan for the site.

No board comment. No public comment.

Holmes moved and seconded by Palumbo to grant Amend Order of Conditions. Unanimous vote.

Notice of Intent:

1) Tobey Island Homeowners Assoc.
DEP File Number: SE7-1932
Emmons Road Causeway, Tobey Island, Monument Beach

Ms. Barbara Frappier representing – applicant seeks to repair and extend stone armoring along causeway, including associated grading and landscaping within a VE Flood Zone and within 100 feet of a Wetland Resource Area.

Jim O'Connell – conducted a site analysis per the applicant. He briefly explained how Emmons Road is broken out into three sections and reviewed Section 3 of the site analysis, being the area of interest; extend the stone armoring. He explained the winter high tide mark and the spring high tide marks which show there is very little beach left at this time. Erosion rate and the roadway storm conditions are factors for the causeway armoring. Sediment is not staying

at the beach. The proposed boulders are different size than in Section 1 for Section 3 at the present time. Applicants seek new armoring for the 70 foot section where there isn't any.

Brendan Mullaney – this is a unique situation. The first revetment was approved and didn't work. This proposed will be a little smaller. There is no specific provision in the regulations for armoring a roadway, but it is Mr. O'Connell's interpretation this is not a coastal bank. In this situation, much of the area is already protected.

Brendan Mullaney will prepare the Draft Notice of Intent for the next board meeting for discussion and vote. He recommends the board continue the hearing for site visits. No additional information is required of Ms. Frappier and Mr. O'Connell.

Holmes moved and seconded by Weston to continue hearing to December 17, 2015.
Unanimous vote.

Chm. Gray mentioned an email between former DEP employee Ms. Christine Odiaga and Jim Mahala with regard to the definition of a coastal bank. Chm. Gray read into the record.

2) Town of Bourne
DEP File Number: SE7-1931
Barlows Landing, Pocasset Harbor, Pocasset River and Little Bay

BSC Group, Inc. representing – applicant seeks to perform maintenance and improvement dredging with associated beach nourishment at Barlows Landing, Pocasset Harbor, Pocasset River and Little Bay within AE and VE Flood Zones and within Wetland Resource Areas. NOTE: Due to abutter notification requirements, this hearing is being continued until Thursday, December 17, 2015.

Approval of minutes

Kiebala moved and seconded by Palumbo to approve minutes of July 9, 2015 as submitted.
Unanimous vote. Two abstentions by Holmes and Craig Rheinhardt.

Adjourn

Palumbo moved and seconded by Kiebala to adjourn. Meeting adjourned at 8:40 PM.
Unanimous vote.

Respectfully submitted – Lisa Groezinger, sec.