Minutes
Committee on Planning and Regulation
May 17, 2018
Cape Cod Commission Office, Ocean Room
3225 Main Street, Barnstable, MA

Committee Members Present: Elizabeth Taylor (Chair), John (Jack) McCormack Jr. (Vice Chair), Harold Mitchell, Roger Putnam

Commission Staff Present: Patty Daley (Deputy Director), Jessica Wielgus (Commission Counsel), Sharon Rooney (Chief Planner), Erin Perry (Special Projects Manager), Jonathon Idman (Chief Regulatory Officer), Michele White (Regulatory Officer)

Minutes Summary
The Cape Cod Commission (Commission) Committee on Planning and Regulation (CPR) reviewed and discussed historical changes to Development of Regional Impact (DRI) review thresholds appearing in the Enabling Regulations Governing Review of Developments of Regional Impact, Chapter A of the Code of Cape Cod Commission Regulations of General Application (Enabling Regulations).

Minutes
Elizabeth Taylor called the meeting to order at 2:00PM and read the notice for discussion on the existing DRI review thresholds appearing in the Commission’s Enabling Regulations and asked for comments from Commission staff.

Jonathon Idman continued discussion on the Commission’s DRI review thresholds in the Enabling Regulations and briefly reviewed the CPR meeting of May 3, 2018. He stated that discussion on the thresholds would continue today with a look at the history of changes to the thresholds from the Cape Cod Commission Act (Act) through the Commission’s current Enabling Regulations.

Ms. Taylor asked why the Commission does not have jurisdiction of national register properties in local historic districts. Mr. Idman stated presumably to reserve jurisdiction for the municipality, but the Commission could discuss broader jurisdiction. Sharon Rooney noted that the Commission’s Historic Preservation Specialist Sarah Korjeff is working with some towns (that don’t have them already) on developing demolition delay bylaws. Ms. Taylor asked how this threshold might relate to a survey given to towns on cultural districts. Mr. Idman stated that the threshold deals with buildings, structures, or sites listed on the National Register or State Register of Historic Places, not sites, properties or districts listed exclusively in town historic inventories.

Ms. Taylor asked if threshold 3(b) would apply to the expansion of a bridge to Long Pond in Brewster. Mr. Idman said yes, but the language of the threshold can be interpreted so broadly or narrowly that a building commissioner may not know when to refer a project to the Commission as a DRI. Harold Mitchell asked how many projects have been referred to the Commission under this threshold. Mr. Idman said it applied once to his knowledge, but the project was abandoned and thus never referred, and otherwise arguably met the residential exception set out in the threshold; a project that was proposing to construct a bridge to a private island with one (1) residential dwelling, but the island may have been able to support more dwellings. Patty Daley noted the threshold was adopted due to concern over providing access to environmentally sensitive land. Ms. Rooney noted that a proposed beach parking lot project in Eastham triggered this threshold as a DRI; Mr. Idman stated that project was also subject to MA Environmental Policy Act (MEPA) Environmental Impact Report (EIR) review. Jack McCormack asked how many projects may not trigger MEPA review; Mr. Idman stated he is unsure. Ms. Rooney stated there may be beneficial work along the coast an applicant is proposing that might promote the mission of the Commission. Mr. Idman stated that Commission jurisdiction over DRIs should be value neutral.

Mr. Idman noted that a 2005 change in the Enabling Regulations of the definition of “Residential Dwelling Unit”, as used in threshold 3(g), changed “living facilities” to “facilities”. He said that the definition includes bedrooms in nursing homes and congregate care facilities; that these uses have been required (treated as residential uses) to provide beds or rooms as inclusionary affordable housing mitigation; that such mitigation can be difficult to manage and administer over time; and that these senior care uses appear to be more commercial or institutional in nature than residential. Ms. Rooney stated that the treatment of units in senior care facilities can lead to confusion, but the Commission was reacting to development trends of that time. Mr. McCormack said it can be difficult to define the spectrum of senior housing options from apartments to assisted living facilities as residential verses commercial. Mr. Idman stated those types of facilities are priced by the services, not based on the broad housing market, so to require affordable housing options of this type may not make sense as affordable housing mitigation.
Mr. Idman stated that threshold 3(i) related to wireless communications towers was newly adopted into the Enabling Regulations in 1996 and modified in 2002 and 2005. He stated Commission staff is currently working with David Maxson of Isotrope, LLC on updating the Commission “Wireless Technical Bulletin” [Technical Bulletin 97-001 – Guidelines for DRI Review of Wireless Communication Towers (Revised 9/30/10)]; the Commission’s initial regulations were a reaction to that new, growing industry and as time has passed, as regulations and the industry has changed and matured, the Commission may want to consider tower height relative to the threshold. Ms. Rooney noted that in the early 2000s the Commission discussed creating a ‘wireless master plan’ for Cape Cod, which was prohibitively expensive, so the Commission tried to incentivize towers of lower height instead. Mr. Idman discussed how legal cases since the adoption of this threshold can influence siting of wireless communications towers and wireless overlay zones. Mr. Mitchell stated the Commission needs to consider that many people no longer have home phones and rely solely on cell phones. Mr. Idman said that the widespread use of ‘smartphones’ after 2007 changed the form, need and demand for wireless communications towers; smartphone use developed after the most recent update to the existing DRI wireless threshold.

Mr. Idman stated that threshold 3(j) related to site alterations was newly adopted into the Enabling Regulations in 2002 and has been unamended to present. He said this threshold has value in principle but there are practical problems interpreting and applying it, and work that triggers this threshold may not need a local permit, so it may never be referred to the Commission as a DRI. Ms. Daley noted that some towns have site clearing bylaws. Mr. Idman agreed that some do, but said they mostly deal with stormwater management or erosion control, and there may be other ways to regulate site alterations.

Regarding threshold 3(k), Mr. Idman stated this threshold was newly adopted into the Enabling Regulations in 2002 and has been unamended to present, there are terms used in the threshold that are undefined, potentially conflict in meaning, and he has never seen this threshold applied. He added that the threshold may be unnecessary because the Commission already has thresholds that deal with residential and non-residential development, and that he feels that this threshold may discourage the development of mixed residential/non-residential uses. Ms. Rooney stated the intent was to encourage a certain amount of mixed-use development but adoption of the Commission’s Growth Incentive Zone Regulations (Chapter G of the Code of Cape Cod Commission Regulations of General Application) and Chapter H regulations (Chapter H of the Code of Cape Cod Commission Regulations of General Application: Municipal Application for Revisions to Developments of Regional Impact Thresholds) made this threshold unnecessary.

Ms. Daley stated that coupled with updating the RPP now is a good time to think creatively and deeply about possible changes to the Commission’s thresholds.

Mr. Idman discussed that threshold 3(e) is broadly regulated by use and discussed different types of uses. He noted that general commercial uses are regulated but agricultural uses are typically not. He said there are agricultural exemptions under the MA Zoning Act and questioned if the Commission should be regulating commercial agricultural uses based on the
language in the threshold. Ms. Taylor asked for a type of commercial agriculture that would not be exempt from the threshold. Mr. Idman said to get zoning exemptions under M.G.L. Chapter 40A Section 3 one must meet the definition of commercial agriculture, which can be things like aquaculture and silviculture, and has a dollar amount associated with it. He suggested examples of non-commercial agriculture such as someone owning a few horses for their personal use, or someone who may have a few chickens for personal egg-laying.

Mr. Idman suggested that there may be other proxies to regulate building development besides square footage and there may be other uses to regulate. Ms. Taylor asked if each town could have their own building size threshold. Mr. Idman said that mapping similar in nature to the Commission’s current Land Use Vision Map could be used to establish different thresholds in different locations.

CPR and Commission staff discussed changes to the definitions of “outdoor use” and “gross floor area” as used in thresholds 3(e) and 3(f), and the relationship between gross floor area and the MA Building Code (780 CMR). Mr. Mitchell noted that the Commission’s definition is not aligned with changes in the MA Building Code since amendments to the gross floor area definition. Ms. Rooney stated the definition of gross floor areas was changed over time to preserve Commission jurisdiction. Mr. Idman stated the current definitions are complicated and potentially in conflict, particularly with respect to attic and basement areas. Ms. Rooney noted Commission staff used to meet with town building commissioners when revising these definitions. Mr. Idman said that outdoor areas are also difficult to regulate because items can be moved or stored outside at anytime after construction or during operation, and parking or paved areas are not otherwise included in the definition of gross floor area.

Regarding threshold 3(f), Mr. Idman stated that before the Commission’s current DRI Scoping application process projects would go to the Commission’s Regulatory Committee to determine any change in use of a building. Mr. Idman suggested the Commission may want to consider regulating changes in use in terms of redevelopment of an existing site, considering impacts or factors outlined in Section 12(b) of the Act, where that redevelopment may have a greater benefit than detriment to the region. He stated the current threshold can be complicated because the Commission does not define uses like a zoning by-law does. He also mentioned that the current definition of ‘change of use’ is less complicated that in the past but may be overly general at this point.

Mr. Mitchell asked how the discussion on thresholds should proceed. Mr. Idman asked CPR to review the changes to thresholds over time and gather their thoughts. CPR members expressed an interest in hearing more about how updating the RPP may compliment changes to current DRI thresholds. Ms. Rooney offered to highlight progress on the RPP update at the CPR’s next meeting on May 31, 2018 and suggested that she may have some ideas on residential thresholds in “activity centers”. Mr. Idman stated that a map-based concept can help visualize thresholds.

Mr. Mitchell asked if Growth Incentive Zones effect thresholds. Mr. Idman said not those thresholds of general applicability and suggested that reference to GIZs and Chapter H be removed as individual thresholds but referenced in the preface to Section 3.
Ms. Taylor asked for new business. Mr. Idman stated that Mr. Putnam has been appointed a full member of the CPR, and Commission Member Jaqueline Etsten has been appointed an alternate member. Mr. Mitchell noted that the Commission’s Barnstable Representative expressed an interest in joining CPR, but Ms. Etsten had contacted Mr. Mitchell first.

Mr. Mitchell made a motion to adjourn, Mr. McCormack seconded. The motion passed unanimously, and the meeting was adjourned at 3:30pm.

Respectfully submitted,

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Elizabeth Taylor, Chair, Committee on Planning and Regulation   Date