

The meeting of the Cape Cod Commission was called to order on Thursday, April 2, 2009 at 3:00 p.m. in the Assembly of Delegates Chambers in Barnstable, MA. Roll was called and a quorum established.

#### ■ EXECUTIVE DIRECTOR'S REPORT

Executive Director Paul Niedzwiecki said he and other Commission staff had been before the Falmouth Board of Selectmen on Monday, March 30, 2009. He said the discussion with the Board covered a wide range of issues, and was productive.

Mr. Niedzwiecki noted the Commission had held a meeting on Monday, March 30, 2009 to review a draft comment letter on the Cape Wind project to Massachusetts Coastal Zone Management (CZM) agency. He said the letter on CZM consistency had been sent to the agency in a timely fashion.

#### ■ MINUTES

The minutes of the February 5, 2009 Commission meeting were reviewed. Roy Richardson moved to approve the minutes. Florence Seldin seconded the motion. The motion passed with one abstention.

The minutes of the February 19, 2009 Commission meeting were reviewed. Roy Richardson moved to approve the minutes. Joy Brookshire seconded the motion. The motion passed with three abstentions.

#### ■ BREWSTER WATER PROTECTION DCPC IMPLEMENTING REGULATION TIME EXTENSION

Marisa Mejia, Regulatory Officer, said the Brewster Board of Selectmen had submitted a request to the Commission for an extension of the time allotted to adopt and incorporate implementing regulations for the previously approved Brewster Water Protection District of Critical Planning Concern (DCPC). She noted that section 11(f) of the Commission Act allows the Commission to grant an additional ninety (90) days to adopt and incorporate DCPC implementing regulations. Ms. Mejia noted the Brewster Water Protection DCPC Ordinance became effective on July 18, 2008. The twelve-month deadline to adopt and incorporate implementing regulations is July 17, 2009. Ms. Mejia said that should a 90-day extension be granted, the Town will be allowed until October 14, 2009 to adopt and incorporate implementing regulations for the Brewster Water Protection DCPC. She noted that Commission staff is working with the Town of Brewster and providing technical assistance in developing ongoing water resources protection and resource management strategies. Based on this, Ms. Mejia said staff supported the 90-day timeframe extension and recommends that the full Commission approve the extension.

Florence Seldin asked if there were any articles on this year's Brewster Town Meeting warrant that dealt with the DCPC?

Susan Leven, Brewster Town Planner, responded that there were housekeeping items on the warrant. She said the state Attorney General's office was still reviewing the two articles passed by the November 2008 Town Meeting, which dealt with the DCPC. She said the two articles were a Water Protection Bylaw and a Sand/Gravel Mining Bylaw. Ms. Leven said it was the Town's intent to continue to work on and refine these bylaws, and add some additional parameters for the DCPC area.

Roger Putnam moved to grant the 90-day extension of the timeframe to adopt and incorporate DCPC implementing regulations to October 14, 2009. Elizabeth Taylor seconded the motion. The motion passed with a unanimous vote.

#### ■ CHAPTER A—ENABLING REGULATIONS GOVERNING REVIEW OF DEVELOPMENTS OF REGIONAL IMPACT

Florence Seldin read the hearing notice and opened the hearing at 3:15 p.m.

Sharon Rooney, Chief Planner, gave a PowerPoint presentation, showing an overview of proposed changes to Chapter A, the Commission's Enabling Regulations. She acknowledged the work of Andrea Adams, Senior Regulatory Planner, on the draft Enabling Regulations. She also noted that National Grid had submitted a letter concerning some of the proposed

changes. She said the draft Regulations now included 16 sections, which includes two new sections. She noted changes in the Definitions sections, included amendments to “Gross Floor Area,” adding a definition for “credits,” and “Scoping Checklist”, which are terms used in the proposed new Limited Development of Regional Impact (DRI) review process. Ms. Rooney noted the new Section 2A, which was taken from the Commission’s existing Technical Bulletin on Historic structures. She said the language shown incorporates the process the Commission currently uses relative to the review of Historic structures. She noted changes to the Commission’s Change of Use process. She said the process was being clarified, where one part encompassed the Chief Regulatory Officer first making a determination about whether a project was eligible to undergo a Change of Use review. She noted this was the case in the current Enabling Regulations. She said the second part encompassed a Change of Use review by the Commission members. Ms. Rooney noted clarifications to Section 3, dealing with DRI thresholds. She noted the Change of Use threshold was being clarified, to take account of demolition and replacement. Ms. Rooney also noted the clarification to the 3(e) threshold, to make it clear that the Commission would not review municipal offices. She also noted the incorporation of the Barnstable and Yarmouth Growth Incentive Zone (GIZ) language, taken from the GIZ ordinances as approved by the Assembly of Delegates (Assembly). She noted changes to Section 7 was being amended to incorporate language previously adopted by the Commission and Assembly for projects undergoing review by the Energy Facility Siting Board (EFSB). She noted the new Section 14, which dealt with developments for locations subject to prior DRI approval. She said it dealt with modifications below DRI threshold level. Ms. Rooney covered the proposed new Section 5, Limited DRI Review. She said the Commission previously approved this language. She said any project could apply for Limited DRI review. Ms. Rooney said the process would use two review checklists, as a way to scope and limit the review. She provided an illustration of how Limited DRI review might work. She said the draft Enabling Regulations had been vetted thoroughly without Limited Review being included in the draft. She said there had been numerous public meetings, including at least three stakeholder meetings, and at least four public hearings over the past year on the draft Enabling Regulations and Limited Review.

Florence Seldin asked Commission staff to comment on the National Grid letter.

Jessica Wielgus, Commission Counsel, said the concerns raised in National Grid’s letter from Patricia Crowe were raised before, during the Commission’s review and approval of a process for projects going before the EFSB. She noted the language shown in the draft Enabling Regulations had been raised before the draft language had been sent to the Assembly for its review and approval. Ms. Wielgus said the process had been created in response to the EFSB’s ruling, to conduct an adjudicatory hearing, and eliminate a need for duplicity at the EFSB. She said the Commission Act and County ordinances enable the Commission to create new proceedings. She noted the language in the draft Enabling Regulations had already been fully vetted.

Jay Zavala noted National Grid’s letter spoke to an undue burden. He asked if the language proposed created such a burden and whether the Commission was within its ability to create new regulations.

Jessica Wielgus said the Commission was within its ability to create new regulations. She suggested the new process envisioned in the draft Enabling Regulations would result in judicial economy, eliminating a need for a second hearing at the EFSB.

Attorney Eliza Cox, Nutter, McClennen & Fish, commented on Chapter A of the Enabling Regulations. She noted Nutter, McClennen & Fish had been part of the meetings, hearings and stakeholder sessions on the draft regulations. On the Definitions section, Attorney Cox said “change of use” was too vague, to provide sufficient guidance to the Chief Regulatory Officer. She said “credit” should include existing impervious areas in a redevelopment context. Attorney Cox said the changes to “gross floor area” were positive. She said the language in Section 2 should more closely follow the language in the Technical Bulletin noting that the Commission’s review was limited to the architectural features, and did not touch on other issues, such as traffic or wastewater. Attorney Cox said the language regarding the Barnstable GIZ in Section 3 should not refer to Cape Cod Hospital. She said it was inappropriate to refer to any single project in a DRI threshold. Attorney Cox said she understood that it came from the GIZ ordinance, but that the DRI thresholds should not

refer to any particular property or property owner. On the Change of Use section, Attorney Cox noted that language should be added so that if a Town or municipal agency makes a written request to the Chief Regulatory Officer concerning a property, that a letter should be sent to an applicant seeking a Change of Use, alerting them to the Change of Use determination request from a Town or municipal agency. She said this would allow an applicant to meet with the Chief Regulatory Officer to discuss the situation before a Change of Use determination is made. On Section 5, Limited DRI review, she said Section (a) and Section (e)(v) seem to be inconsistent. She said subsection (e)(iii) concerning development being “discontinued” for three years should be changed. Attorney Cox suggested a building under lease, but empty, was not “discontinued.” She said an allowance for more than three years was warranted. She said individuals should still be able to file for a Hardship Exemption for areas targeted for further Commission review in a Limited DRI review context. Attorney Cox said Section 14 had problematic language in terms of what “substantial compliance” was. She suggested that the DRI thresholds in Section 3 would guide whether or not the development would be reviewed as a DRI. She said the Scoping Checklists needed a “not applicable” box, for example, some Towns do not have a Land Use Vision Map. She also said “substantial improvement” in terms of stormwater management needed to be defined. Attorney Cox said development on disturbed areas should be entitled to open space credits. She also expressed concern about the public/municipal input in the scoping session might be inappropriate, or too soon in the review.

Chair John Harris asked if Attorney Cox had discussed her comments with Commission staff.

Attorney Cox said she had not discussed her comments previously with Ms. Rooney but she had spoken to Ms. Rooney and Ms. Wielgus this afternoon about her comments.

Sharon Rooney said Commission staff and the Regulatory Committee had vetted the language on Change of Use, both the process itself and the related definitions. She noted the first step in the Change of Use process was a determination by the Chief Regulatory Officer whether there was a change in the nature and purpose of the use. Ms. Rooney noted this definition had been amended, and narrowed, to make it clearer that the first step, which would continue to be done by the Chief Regulatory Officer, is very narrow in scope: is there a change in the nature and purpose of the use on a site? It is intended to be a very simple determination.

Elizabeth Taylor asked whether the Enabling Regulations were something that could be approved on a rolling basis.

Sharon Rooney suggested staff would recommend a single package, ready for the Assembly’s approval. She suggested several comments made by Attorney Cox would be relatively simple to address. Ms. Rooney noted the differences in text in Sections 5(a) and 5(e)(v) were intended, in that in the case where there is a determination that no further Commission review is warranted, the full Commission, and not a Subcommittee, should render a decision to this effect. Ms. Rooney said the three years with respect to a “discontinued use” had been discussed at length.

Jessica Wielgus commented on the language of the Barnstable GIZ. She noted this language had been taken from the Assembly’s approved ordinance. At the same time, she suggested there were other ways to address the issue raised.

Paul Niedzwiecki said it has been a long process, but it was also appropriate to bring a few things back for further review. He suggested they be delayed for two weeks, for additional staff and Commission review.

Jay Zavala asked if there were other stakeholders that might want to comment.

Eliza Cox suggested it might be possible other stakeholders might want to comment, too.

Jessica Wielgus said the staff and Commission review of the draft Enabling Regulations has been an open process. She said the draft has been vetted at public meetings, which were open to the stakeholders.

Florence Seldin commented on the intent of a “discontinued use” relative to a three-year period. She noted the language related to Economic Centers. Ms. Seldin said the rationale for the three-year limit was to incentivize and direct growth to Economic Centers.

Sharon Rooney agreed, noting that inside areas mapped as Economic Centers, the three-year limit on a “discontinued use” was removed. Ms. Rooney noted the Scoping Checklists would become part of an application form, which could be updated more rapidly and easily.

Roy Richardson moved to continue the hearing and the record on the proposed changes to Chapter A, Enabling Regulations, until the April 16, 2009 Commission meeting. Mr. Blanton seconded the motion. The motion passed with a unanimous vote.

## ■ CHAPTER D—DEVELOPMENT AGREEMENT REGULATIONS GOVERNING THE PROVISIONS FOR DEVELOPMENT AGREEMENTS

Florence Seldin read the hearing notice and opened the hearing at 3:55 p.m.

Jessica Wielgus presented the proposed changes to the Development Agreement (DA) regulations using a PowerPoint presentation. She described the current DA process using a colored chart showing the steps in the current and proposed new DA process. Ms. Wielgus noted the Commission Act enables the Commission to enter into a DA, which is a voluntary binding contract. She said it’s a way to develop phased projects and provide needed infrastructure as part of that development. Ms. Wielgus said the proposed new process is designed to encompass a Development of Regional Impact (DRI) review as part of the DA process, as opposed to the current two-step process. She said the first step in the new DA process is for the Commission’s Regulatory Committee to determine that a project is qualified to participate in a DA. She said the proposed new regulations set out criteria for the Regulatory Committee when making a suitability determination. Ms. Wielgus said the Commission would then vote to allow the DA negotiations to proceed. She said the regulations provide an applicant a year to file an application.

Jay Zavala asked if there was a way for a potential DA applicant to appeal the Commission or Regulatory Committee’s suitability determination.

Jessica Wielgus said no. She said this is because the DA process is voluntary. She said the Commission could choose not to voluntarily enter into a DA, which is a contract. She continued to describe the proposed new DA approval process. She noted the full Commission would vote on the final version of the negotiated DA agreement. She said there could be either a two-party or three-party DA with or without a Town as a party. Ms. Wielgus said the Applicant would meet with both a Commission subcommittee and Town staff to resolve issues. Ms. Wielgus noted that DAs provide some flexibility in the Commission’s review. She said the standard of review was taken from the original DA regulations. She said the new regulations also included the Flexibility Clause as articulated in the 2009 Regional Policy Plan. She noted the sections in the new regulations dealing with the length of a DA and discussed the way that DAs would become effective. Ms. Wielgus noted that since a DA is voluntary, there is a process by which any party can withdraw.

Joy Brookshire noted the Regulatory Committee had discussed the section that can represent different parties in a DA negotiation. She noted the Regulatory Committee had discussed the fact that Barnstable has a Town Council and Town Manager. Based on this, she asked if in the case of Barnstable, a decision had been made with respect to the Town Council or Town Manager being the participating party?

Jessica Wielgus said she had discussed the matter with Barnstable’s local Counsel and suggested it would most likely be the Town Manager. Ms. Wielgus discussed the appeal period language. She noted the two Certificates that the Commission’s Clerk would put on record at the Registry of Deeds, which would cause the DA to be in effect.

Chair John Harris said he had to leave the Commission meeting to attend another meeting and asked Mr. Zavala to continue the meeting as Vice Chair.

Elizabeth Taylor asked about page 10 of the draft DA regulations. She said the single paragraph that mentions the two Certificates should be separated into two paragraphs to make it clear that two Certificates were needed.

Suzanne McAuliffe, Chair of the Yarmouth Board of Selectman, noted that the Development Agreement flow chart shown by Ms. Wielgus indicated Town actions would be put on hold during the DA process. She asked based on this if a Town would be contacted concerning a possible DA, whether or not it ultimately chose to participate as a formal party to a Development Agreement.

Jessica Wielgus noted the diagram that Ms. McAuliffe was referring to illustrated the DA process as it currently exists. She noted the current process envisioned a DRI review as the first step, which puts the local review process on hold. Ms. Wielgus said the revised process has an element regarding input from Towns in the scoping process.

Paul Niedzwiecki said the intent was to reformulate the Development Agreement process so as to learn from past practice, and create more of a way for Towns to participate. He noted the revised Development Agreement regulations were intended to try to expedite the review. Mr. Niedzwiecki said that in cases where a developer approached the Commission to enter into a DA, the Town would be notified. He said he hoped the new regulations would increase the number of three-party Development Agreements, but emphasized that Town input was a critical factor in a Development Agreement, whether or not a Town was a formal party.

Suzanne McAuliffe said Yarmouth would object to a Development Agreement being pursued if the Town was not aware of it. She said local involvement was important, particularly large ones, which are the type that might be suited to a Development Agreement.

Paul Niedzwiecki noted that Development Agreements were voluntary contracts. He emphasized that the intent was to keep the Towns involved and informed about what was contemplated, even if the Development Agreement might be between the Commission and a developer.

Suzanne McAuliffe said local involvement was very important. She said the Town should be contacted first.

Jessica Wielgus noted that if for any reason a Town was not a formal party to a Development Agreement, the DA did not vest any rights with the developer with regard to Town bylaws or ordinances. She said a developer would still have to go through all the zoning requirements.

Joy Brookshire noted some Towns did not have Commission certified Local Comprehensive Plans,

Jessica Wielgus said it was a prerequisite that a Town have a Commission certified LCP for that Town to participate in a three-party (Town/Commission/developer) Development Agreement.

Attorney Peter Freeman, Freeman Law Group, offered comments on the draft Development Agreement regulations. He noted he had met with Commission staff earlier in the day, and also submitted written comments. He noted a concern with appeals process and the effective date when the Commission Clerk issues a Certificate. Attorney Freeman suggested this needed adjustment, to hold the Commission's regulations, such as the Regional Policy Plan, in place for the developer while the appeal period was underway. He recommended changes to the definition of Participating Parties, based on the choice of the developer and a Town, as Qualified Applicants. Attorney Freeman suggested changes to the vesting provisions and additional cross-references. Attorney Freeman suggested a timeframe be inserted into the regulations, so as to describe the substantive steps in the DA review. He suggested the factors to be considered by the Regulatory Committee should be expanded, and expressed concern about the one factor being a 25-acre parcel. Attorney Freeman

suggested that requiring completion of an Environmental Impact Report process before a DA could be started would be a burden on a potential DA applicant. Attorney Freeman said he recognized that the intent of updating and revising the DA regulations was to streamline the process. He suggested the criteria for entering into a DA process should be more quantitative, and should include redevelopment. Attorney Freeman said the standard by which a DA includes mitigation should be changed. He suggested the vote to approve a DA for a term longer than 12 years should be a majority vote rather than a 2/3rds vote of the Commission. Attorney Freeman suggested the language that allowed the Commission to open up a DA to rescind it should be stricken.

Jay Zavala asked Attorney Freeman if he had submitted his comments in writing to Ms. Wielgus.

Attorney Freeman said he had submitted written comments today.

Jessica Wielgus said she had met with Attorney Freeman at 2:00 PM today. She said she was able to address the majority of his suggested changes, but also recommended that this item be continued to the next Commission meeting, to allow Commission staff and the Regulatory Committee to review the suggested changes in more detail.

Paul Niedzwiecki said it was his goal to deliver both Chapter A and Chapter D to the Assembly at the same time. Based on this, he suggested the Commission continue discussion of the Development Agreement regulations to the next meeting on April 16, 2009.

Jay Zavala asked for comments or questions from Commission members.

Joy Brookshire asked Ms. Wielgus to discuss the rationale for the amendments to the Development Agreement regulations.

Jessica Wielgus said the proposed amendments are to enable an Applicant to go through a Development Agreement negotiation in one step, rather than the current two-step process. She said the existing Development Agreement regulations require an Applicant to complete a DRI review first and then to complete a Development Agreement review. Attorney Wielgus said the proposed draft regulations merge these two processes into one review. She noted the proposed 2/3rds Commission vote for DA with a length of longer than 12 years would vest rights beyond two or more Regional Policy Plans. She noted the 2/3rds vote was in the current DA regulations.

Eliza Cox said Attorney Freeman had covered many of her concerns. She suggested that additional time would allow the concerns to be addressed.

Paul Rumul, Davenport Companies, said his company was in the process of working towards a Development Agreement in Yarmouth. He asked for clarification on the next step in the process of amending the Development Agreement regulations.

Jessica Wielgus recommended the best way for the Commission members to better understand the concerns and to allow for more public input, would be to have the Regulatory Committee take up both the Enabling Regulations and Development Agreement regulations at its next meeting on April 13, 2009.

Florence Seldin moved to continue the hearing and the record on the proposed changes to Chapter D, Development Agreement Regulations, until the April 16, 2009 Commission meeting. Mr. Hogan seconded the motion. The motion passed with a unanimous vote.

■ **OTHER BUSINESS**

Paul Niedzwiecki noted that today was Florence Seldin's last Commission meeting as the Chatham Representative to the Commission. He thanked Ms. Seldin for her service to the Commission. He said it was a pleasure to have her be part of the Cape Cod Commission.

Florence Seldin said it was her great pleasure to work with the Commission members and staff. She said she had learned a great deal from her experience as the Chatham Representative.

A motion was made to adjourn at 4:45 p.m. The motion was seconded and voted unanimously.

Respectfully submitted,

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Florence Seldin, Secretary