



**Provincetown Public Pier Corporation (PPPC)
Judge Welsh Room - Town Hall
Meeting Minutes of Thursday, February 28, 2013**

Members Present: Lee Ash (LA), Carlos Verde (CV),
Scott Fraser (SF) and Rich Wood (RW) (via remote
participation)
Members Absent: Ginny Binder
Other Attendees: Rex McKinsey (RM), Pier Manager/Harbor Master
and Doug Allen, Administrative Asst.

Chair Lee Ash called the Public Meeting to order at 4:05 P.M. She then read a letter forwarded by PPPC Board member Rich Wood, to be included in the record. (See attached.)

AGENDA

Public Statements

No public statements.

Special Agenda

RM presented two requests for Warrant Articles to be included at the annual Town Meeting, scheduled for April 1, 2013. The first warrant was written by town Counsel for the PPPC to be used at Town Meeting regarding the repair and remediation of the floating docks. The second warrant is an annual article put forth by the PPPC, which merely changes the dates of Town's General By-Laws 2-3-1-1 and 2-3-2-1 so the Town can continue to enforce Harbor regulations.

A motion was made to include Article XXX into the April 1, 2013 Town Meeting Warrant as written.

Motion: Scott Fraser ***2nd:*** Carlos Verde

CV, in referring to the first article, asked RM how far the PPPC was from putting a number figure on the costs associated with the floating dock repairs.

RM said that issue would be discussed more in-depth later on in this meeting, but that it would be difficult to gather enough information in the next 30 days for the public to vote on. The figures being used now are intended to be used as placeholder figures only.

LA suggested that the placeholder numbers under discussion might apply to the short-term seasonal repairs and replacement costs that are underway, and that long-term solutions might be deferred until the Fall months based upon the results of the work group's findings.

RM suggested letting the work group get started to see what recommendations they might make to the PPPC Board.

CV asked about the materials that have already been ordered and if some of the money has already been spent.

RM said some money has been spent, and that he anticipated spending about 50% of the capital reserve funds that are currently available.

LA asked if a dollar figure was going to be submitted with the warrant article, or if this was just intended to be a vote of confidence to allow the PPPC Board to come to the Board of Selectmen (BOS) to appropriate funds?

RM said he didn't think the BOS could vote on the Article without a dollar figure.

(Town Manager Sharon Lynn (SL) was invited to speak on the Article under discussion.)

SL said the warrant article currently does not have a dollar figure but that it is required to have one in the Town Meeting motion, which will be read and configured in such a way as to include a (dollar amount) the working group comes up with in the next 30 days, as well as any grants or emergency funding.

RM said the article was a placeholder until the working group can come up with a plan with which the PPPC wants to proceed.

(Finance Committee Chair Mike Canizales (MC) was invited to speak on the Article under discussion.)

MC asked SL if the Town considered putting a 'not to exceed' clause in the warrant article, an estimate which would allow the Town to fine-tune the floating docks repair budget without having to appropriate the entire amount.

SL said any dollar amount to come up in the motion would be up to a certain amount. The appropriation would be up to \$3,000,000.00 (for example), and if that amount is not used, then it's not borrowed.

MC suggested that the 'up to' language would allow the Town to come up with a high-end number to set the money aside. Although he spoke unofficially, MC said the sense of the Finance Committee was that it wants to give the Town a sense of its top priorities, and if there was any way to get a 'stake in the ground' here it would be useful.

LA said she didn't want to float a number that once people hear spoken, will stick in their heads.

SF said there would be more discussion during the work group segment of this meeting.

Role call vote: Scott Fraser: **Yes**; Carlos Verde: **Yes**;
Rich Wood: **Abstain**; Lee Ash: **Yes**

A motion was made to include Article XX into the April 1, 2013 Town Meeting Warrant as written.

Motion: Carlos Verde **2nd:** Scott Fraser

Role call vote: Scott Fraser: **Yes**; Carlos Verde: **Yes**;
Rich Wood: **Yes**; Lee Ash: **Yes**

Motion passes.

Review of Minutes

LA referred to the January 31, 2013 meeting minutes.

A motion was made to approve the minutes of the Public Meeting on 1/31/13 as written.

Motion: Carlos Verde **2nd:** Scott Fraser

Role call vote: Scott Fraser: **Yes**; Carlos Verde: **Yes**;
Rich Wood: **Yes**; Lee Ash: **Yes**

Motion passes.

Directors' Statements

Scott Fraser: Reported on the Army Corps of Engineers meeting he attended on Friday, February 22, 2013 with Town Manager Lynn, Harbormaster McKinsey, BOS Chair Austin Knight (and PPPC Board member Carlos Verde), where various issues of 'technical non-compliance' were discussed, such as paperwork that was missing from Army Corps files to be provided for by the Harbormaster, as well as discussion of the mooring issues and the Army Corp of Engineers' role in issuing permits for the mooring fields. RM to provide more meeting details in the Pier Manager's Report.

SF said he went through the CIP maintenance plan presented at the last public meeting, made some adaptations and referred it back to RM and RW for finalization.

Carlos Verde: Said he thought that both joint meetings held last week with the Finance Committee and BOS went well and that presentations were on point.

CV said he was in Boston recently and noted dock damage there as well from the February storm. He took photos to share with the work group and suggested that, based on the fact that the damage occurred in a somewhat protected area of Boston Harbor, much thought and deliberation would be needed for the process now being undertaken by the work group.

Rich Wood: Said he would be back in town next week to finalize the document referred to by SF.

Lee Ash: Said she got a phone call from a James King about a Dewey Avenue resident who attempted to block-off beach access. Although the concern pertains more to the Harbor Committee, she told Mr. King she would pass on the information to the Harbormaster.

RM said he spoke with Mr. King and the Chair of the Harbor Committee regarding Mr. King's concern. The beach access is a traditional pathway to the beach at the far East End of town, which crosses onto the property of the new owner. He has been given permission by the Conservation Commission to construct a split rail fence roughly 100' long to block access on that trail. RM said it is his understanding that the Conservation Commission can only issue the permit for a three-year period until beach grass can overtake the traditional path. The Harbor Committee will discuss the topic but is not sure what it can do. Town Counsel may get involved.

In referencing CV's observation, LA suggested other harbors be considered as a resource for dock remediation research and wave attenuation issues, as well as former studies that already have been done. Doing so may save time and money in having to compile a new and separate study.

Working Group Reports

LA introduced discussion regarding the framework for dock remediation and the work group now being formed.

RM said an e-mail was sent to the tenants to inform them of what has happened and how the PPPC will proceed. Several individuals have volunteered to participate in the work group, which will convene next week to review dock and wave attenuation options, and to study engineer reports. Until then, he expressed concern about putting out exact cost estimates related to the floating dock repairs.

LA asked if any quotes or estimates had been considered for removing the entire dock and attenuation system seasonal during the winter months.

RM said two out of three options potentially could be considered removable and is another issue the work group needs to address. Once the results of the first meeting are in, RM anticipated that within a week's time the group would be prepared to reconvene to make some initial decisions.

RM said he contacted Bourne Consulting Engineering to ask if they knew of an appropriate contact to conduct a wave study, as well as how much money it would cost and how long the process might take. He also spoke to Ben Lynch at the Department of Environmental Protection (DEP) to notify him of the dock damage and the remediation and reconstruction process to occur. Lynch told RM that the permitting process for floating attenuation could take 6-8 months.

RM said he also spoke to Andrea Langhouser, Senior Planner at the DEP, regarding last week's meeting with the Army Corps of Engineers on the disconnect that occurred with the instructions on the DEP website regarding the PPC's applications to notify abutters of public hearings, and try to mesh it with the Army Corps need for not just a public hearing notice, but potentially for a full Chapter 91 application. This issue will not affect what is being done now, but will hopefully prevent others in the future from being caught in such a confusing situation.

CV suggested reaching out to the Center for Coastal Studies, Mass Marine and possibly other colleges to conduct a wind and wave study.

RM said besides Bourne Engineering, there are other recommendations and contacts to be considered.

LA suggested that RM delegate the query process for a wind and wave study.

RM said it might be appropriate to refer the study to another Town department.

SF expressed his hope that there be reasonable assurance that anyone who is going to bid on the project will conduct their own studies as well.

LA asked RM if he was prepared to set a date and time to convene the work group.

(SL was invited to join the discussion.)

SL asked if she needed to be at the meeting and, if so, suggested Tuesday, March 5th as a possible date.

LA said March 5th looked like a good time to meet; the Board agreed and the work group meeting was set for 2:00 p.m. on Tuesday, March 5, 2013.

RM continued with the dock damage progress report to say the first part of the process is to send a damage report to Massachusetts Emergency Management Agency (MEMA) to determine if they will be able to assist in the cost of reconstruction.

LA asked RM to speak on the short-term plan and cost estimates reflected in the Initial Damage Report (IDA) submitted to MEMA on pier/floating dock damages incurred during the February 8-9, 2013 winter storm.

RM said the IDA is compiled by MEMA then sent to FEMA to see if they will assist in reconstruction costs. Some information such as salaries, are estimated. RM took a prior cost of \$25,000.00 for dredging and inserted it into the spreadsheet estimate for debris removal for shoaling which inhibits some charter businesses from being able to operate in the bulkhead area. The 'Emergency Protective Measures' column directs the applicant to do what is necessary so the docks don't deteriorate any further as a result of storm damage. RM said salary estimates were based on a work crew of three individuals led by Asst. Harbormaster Luis Ribas (LR), working eight weeks to complete the necessary immediate repairs. Tools and supplies are all on order and reflected costs are accurate. Welding rods, gas, crane rental and the AGM contractor costs all are estimated.

CV asked if the salary estimates included LR, who is already a full-time employee.

RM said salary costs did include LR, but only by way of potential MEMA reimbursement and not as an actual cost incurred. Labor and time is currently being taken up to shore the floating docks but other damage also needs to be addressed, including fencing and fender piles that failed outside the fencing area, the 'Tee' and the area across from the Harbormaster's Office. AGM is to provide estimates for various types of fender piles that are currently available on the market.

CV inquired about rubber-coated composites pilings which had been considered in times past.

RW said the availability of those particular pilings from San Diego and shipping costs made the purchase not cost-effective.

CV said they may be more expensive but would not deteriorate once installed.

RW said he would do more research on that particular type of pile.

LA said the MEMA spreadsheet estimates are intended to be viewed only as preliminary costs which are being submitted through the DPW to MEMA, who is compiling the data to determine eligibility for FEMA reimbursement and assistance.

SF asked if the \$25,000.00 dredging estimate could be directly attributed to the storm.

RM said it could. Dredging was done a couple of years ago, but he has photo documentation to verify the need for dredging as a direct result of the storm.

SF expressed concern that the estimates accurately reflect the repair and replacement of items directly related to storm damage.

Continuing his report, RM said LR and his crew were bracing the floating docks. Six pilings have been requested to redo the area by the loading dock, and LR will provide a complete count of pilings that will be needed. Estimates could be as high as \$100,000.00.

SF said that without a guarantee, current cost estimates of \$175,000.00 could come out of the \$200,000.00 reserve account if the state did not provide reimbursement for the damage.

LA said \$175,000.00 is an estimate of the repair and replacement costs of property that has been damaged, but that it has yet to be determined if that amount actually will be spent.

SF said the assessment should reflect actual costs of repair and replacement.

RM said the IDA under discussion is not a request for reimbursement, but a preliminary snapshot of information being collected so as to be able to gauge estimated costs.

SF said he would like to know what it would cost to put the fishing industry back in operation, which is the responsibility of the PPPC.

CV asked about some of the 'softer' numbers included in the estimate.

RM said that the pilings replacement costs are estimated until it can be determined what type will be ordered and how many.

SF asked if any boats were tied to the pier during the storm.

RM said there were.

SF said the pilings 'did their job' but sustained damage as a result.

Pier Manager Report

In speaking on the meeting with the Army Corps of Engineers and supervisor, Crystal Gardner, RM said the work being done on MacMillan Pier was well-received. There was some confusion regarding the impression the Army Corps had that public parking was being allowed on the pier, an issue that was addressed and resolved.

LA asked about a former Army Corps staff member who may have left some files incomplete.

RM said the Army Corps files reports by date, not necessarily by geographical area, so sometimes they can't find certain files unless they have a date to go with it.

RM said the Army Corps would like the Town to apply for one overarching permit, which would allow them to suspend all other permits. Competing users would only need to come to the Town for permission or mediation for grievances.

SF said this would allow the Town to control the permitting process within the harbor for both recreational and commercial mooring fields. He also said that the Army Corps only recently became aware of mooring field issues after they received a letter from Barry Clifford in November/December, 2012, in which he assumed responsibility for Joe McNeil's mooring fields 27 years after the transaction took place (in 1997). Army Corps policy is if a permit is not acted upon within five years it then becomes null and void.

LA asked if a permit was ever issued?

RM said a permit was issued to Joe McNeil.

CV asked what the Army Corps meant by 'acting' on a permit?

SF said it meant installing a mooring field within that five-year period and using it on an ongoing basis.

LA said this has been an ongoing question she has had of the existence of an actual document that transferred ownership through the sale of 16 MacMillan, or in some other way, from one entity to another. She has come to assume that the document does not exist.

RM said he did not view the document the Army Corps received from Barry Clifford.

RM said the Town Manager expressed interest in the single-permit idea. The Harbor Committee has already gone through a beach management resource allocation planning process and the single-permit process could dovetail nicely with their plans. He said he would advise the Harbor Committee of the Town Manager's interest. Their recommendations could then be forwarded to the BOS for consideration along with PPPC input, if needed.

RM said he had a good and fruitful discussion with independent audit investigator Robert Pomeroy, who has pared down the list of documents initially requested, from what he has already reviewed. RM anticipates that the audit process will end soon. Mr. Pomeroy will make recommendations including software program issues, equipment inventory and training. RM has asked that the recommendations be as specific as possible.

CV asked if the anticipated recommendations will be suggestions or mandates.

RM said the PPPC takes under advisement how it runs its office and that the Town Manager would have input as well, but the recommendations put forth by Mr. Pomeroy would most likely take the form of suggestions. RM stressed that the intent of this exercise is to give people more confidence in what the department is doing and did not feel that the recommendations would give people less confidence.

LA asked if RM had the impression Mr. Pomeroy understood some of the differences between a police department and a Harbormaster's office?

RM said that after the conversation he felt Mr. Pomeroy had more a sense of the differences.

SF asked RM if Mr. Pomeroy took away an understanding that in serving in the capacity of Pier Manager and Harbormaster, he understood the trade-off between the priorities that arise between the two jobs?

RM said he does feel Mr. Pomeroy does have the understanding that Harbormasters can differ from town-to-town and Provincetown is unique in that way.

SF asked RM if he sensed that he got a fair hearing at the meeting?

RM said he did.

RM advised the PPPC Board members of a public records request received by a sitting member on the Finance Committee, for audits from 2009 to the present and Quickbooks reports from the present year.

LA said Finance Committee Chair Tom Donegan assured her that the request did not come from the Finance Committee.

SF recommended sending the documents with the proviso that they are in draft form and the numbers could be changed by the auditor based on discussions with the Town's Finance Director. As to the Quickbooks request, SF felt they were working papers and asked RM if there had ever been requests for print-outs from the Quickbooks system?

RM said there have been prior requests.

SF suggested that the Quickbooks reports be issued with the appropriate caveats that they are working documents that have not been reviewed by the Town's auditor.

LA questioned whether or not Quickbooks reports were considered public documents. It was her impression that the Town's MUNIS reports were considered to be public documents.

CV expressed reservations about issuing Quickbooks reports to the public if they contained individual names.

SF suggested seeking advice of Town Counsel on the Quickbooks report request and the level of detail the public has a right to in requesting such reports.

LA said she didn't see any reason for the PPPC to issue Quickbooks reports to the public.

CV said he received the impression in reading the request, that the letter had been issued by the Finance Committee. He recommended that the requestor rewrite the request as an individual without alluding to the fact that the Finance Committee wants the information.

LA said she would follow-up with Town Clerk Doug Johnstone regarding the matter.

SF said he thought the PPPC should always err on the side of being open and transparent, but that the Board could go back to the individual to ask for clarification so as to avoid any potential confusion in the matter.

New Business

(RW recused himself from the following discussion and concluded remote participation.)

LA asked RM to update the Board members on the February 25, 2013 BOS meeting regarding the issue of 'per passenger fees'.

RM said Town Counsel John Giorgio attended the meeting and the substance of his report spoke to an argument that has already been seen and heard, and which the PPPC has won. The PPPC can pursue a 'per passenger fee' request but must go through a public process and show that it is not just a revenue-generating idea but does actually fund a core mission of the pier.

LA said it was suggested that the fee be tied to the Harbormaster's line item in the Town Budget and although Harbormaster function is a service the PPPC currently supplies, it may not do so forever.

SF said it was his understanding that pier maintenance was not a function of the Harbormaster's office.

LA confirmed that was correct.

SF said that since the PPPC was responsible for pier maintenance, any revenue raised for its maintenance should go to the PPPC.

LA said the idea was predicated on being able to tie the fee to a service.

SF said the 'service' is provided by anyone who walks onto the pier and gets on a boat. The pier exists for that purpose and to maintain it in a safe and well-functioning state, revenue is needed.

LA said the fee cannot just be a revenue generator.

SF said there were other ways maintenance monies could be raised, such as tripling rates for excursion floats, as a convoluted way to get to the money that is needed to maintain the pier.

CV said he had a problem with the whole concept. Like Town Hall, the pier is a town facility which does not charge a fee for the use of public bathrooms to help toward maintaining it. The pier should have its own maintenance budget and it was unfair to place the burden of the cost of pier maintenance on the people who already rent or use it. The burden should be placed on Town government to come up with a realistic budget the PPPC can work with rather than to come up with a way to charge people for using a public facility.

SF agreed with CV about getting a maintenance budget in order. As to the fee proposal, he suggested that parking lots are public facilities and there is a charge for using them. Revenues can come from the people who use the pier (ie. tenants or fishermen), general tax revenues or from user fees. It seems fairer to ask people who use the pier to pay the fee then to spread the cost throughout the Town's general tax bills.

CV said many arguments can be made, but the burden of maintaining the pier falls on a small group who rent or use the pier, which he thought it should be a Town concern, not just the pier.

SF said if the Town does not want to charge taxpayers for the extra cost of maintaining the pier, then the choices are to have the fishing or excursion and ferry industries pay. Given the PPPC's charter to support economic development, he did not want to create barriers or drive-up costs for those groups, but to ask a tourist to pay an extra dollar (is a possible remedy).

CV reiterated his concern about the fee being limited to a small group, and that the core problem was in not having a budget to maintain the pier which is the Town's problem and not the PPPC's, which is charged to manage the money.

LA referred to the embarkation fee currently being imposed by the Town whose funds are supposed to go towards the Waterways Fund.

SF said there is a precedent already established with the 50-cent embarkation fee imposed by the ferries.

RM said the Waterways Fund monies derived from boat excise taxes, mooring fees and embarkation fees usually go towards offsetting the Harbormaster's '295' budget.

CV suggested raising the embarkation fee amount instead, which is already in place.

RM said it can't be done as the ferry embarkation fee is a State statute that was accepted as a local option tax. One would have to go back to the State legislature in order to raise that fee. The 'per passenger fee' opinion put forth by Town Counsel is simply a function of the PPPC following its regulations to raise a fee.

In the balance between raising fees and the Town appropriating monies in order to run its pier, RM said the logical discussion for all stakeholders should take place in the coming fiscal year as it negotiates the next 5-year management (ie. Harbormaster) contract. This discussion will not only deal with Harbormaster services but also rent issues (according to Section 23 of the PPPC's 20-year lease). Having this discussion before Town Meeting is a little too rushed, but having it in concert with the Town, the CIP and what it all means in terms of maintenance and other future agreements for rent, is where the PPPC needs to prepare all the necessary tools, put them all on the table and then ask the Town what it would like to do as property owner and lessor.

LA agreed and said this was a necessary discussion that will continue, and other options may emerge as well.

CV asked RM for a status on the flagpole damage and life rings installation.

RM said the life rings have been delivered but that he is not going to pull LR from the floating dock repairs to install them at this time.

A motion was made to adjourn at this time.

Motion: Carlos Verde **2nd:** Scott Fraser

Vote:

Yes: 3 **No:** 0 **Abstain:** 0

Motion passes.

Meeting adjourned at 5:52 p.m.

Respectfully submitted,

Doug Allen
PPPC Administrative Asst.

Lee Ash, Chair

ATTACHMENTS

From: Richard Wood [<mailto:rich@nelsonsbaitandtackle.com>]
Sent: Thursday, February 28, 2013 2:00 PM
To: 'Lee Ash, Broker'
Subject: Topic's

Could you please read the following into the record for tonight's PPPC meeting – thanks.

Per public knowledge, I operate a charter boat/excursion vessel from McMillan Pier, which is berthed within the floating docks. To avoid any perception or real conflict of interest concerns, I submit the following:

1. In the last two years I consulted with the Mass. Dept. of Ethics relative to me participating in PPPC discussions regarding potential repair/expansion work on the floating docks and possibly a wave attenuation system. I was informed as long as I did not gain any financial benefit from doing so, it would be acceptable for me to participate in said discussions. Therefore, I will participate in discussions, meetings, etc. to provide any technical or marine viewpoints which may be beneficial for the PPPC. That being said, just to be on the totally safe side, I will not participate in any votes of the PPPC relative to making actual decisions about the floating docks and/or wave attenuation system.
2. Relative to PPPC discussions about a possible "excursion fee" being implemented, I will refrain from both any discussions or votes relative to that topic, as it very clearly overlaps into the financial realm of my charter boat business.

Thank you,

Captain Rich Wood
www.BethAnnCharters.com
www.NelsonsBaitandTackle.com
508-487-0034 shop
860-716-0202 cell



PROVINCETOWN PUBLIC PIER CORPORATION

OFFICE OF THE HARBORMASTER

Move to submit for inclusion into the Special or Annual Town Meeting Warrant April 1, 2013 the following article:

Article XXX:

To see if the Town will vote to raise and appropriate, transfer from available funds, or borrow a sum of money to be expended under the direction of the Town Manager for the purpose of making repairs and capital improvements to the floating dock system and other related facilities on MacMillan Pier which recently sustained damage as the result of a coastal storm, and for the construction of a wave attenuator, including design costs and all other costs incidental and related thereto; and to authorize the Board of Selectmen and the Town Manager to apply for and accept any grant funds that may be available for this purpose and to take all other actions necessary to carry out the project, including, without limitation, entering into an agreement with the Provincetown Public Pier Corporation in connection with the project; or to take any other action relative thereto.

February 28, 2013

By a vote of 3 in favor, none opposed, 1 abstain (RW)

Respectfully submitted,
Lee Ash, chair
Provincetown Public Pier Corporation

Move to submit for inclusion into the Annual Town Meeting Warrant April 1, 2013 the following article:

Article XX:

2-3-1-1. Any rule or regulation of the Provincetown Public Pier Corporation duly enacted as of ~~April 2, 2012~~ April 1, 2013 shall be deemed a regulation of the Board of Selectmen. Violation of such rules or regulations may be enforced by any available means in law or equity, including but not limited to non-criminal disposition pursuant to G.L. c.40, §21D, and Sections 2-3-1 through 2-3-3 of the General By-laws. For the purposes of this by-law, the following officials shall be enforcing persons: the Harbormaster and his designees and any police officer of the Town of Provincetown.

2-3-2-1. Violations of the Provincetown Public Pier Corporation Regulations in Effect on ~~April 2, 2012~~ April 1, 2013 (attached as Appendix 1 to Schedule A): 1st offense, \$100.00; 2nd offense, \$200.00; 3rd and subsequent offenses, \$300.00;

February 28, 2013, Voted 4 in favor, none opposed.

Respectfully submitted,
Lee Ash, chair
Provincetown Public Pier Corporation

Provincetown, Massachusetts, Town of Provincetow

Barnstable

Rex McKinsey, Harbormaster (508) 487-7030

(508) 487-7030

(508) 487-7005

rmckinsey@p

PART A: PUBLIC DAMAGES

(12) LOCATION/SITE	(13) ESTIMATE OF COSTS					
	Snow Removal Costs	A Debris Removal	B Emergency Protective Measures	C Roads/ Bridges	D Water Control Facilities	E Building & Equipme
Shore up floating docks with bracing and other pier damage						
Salaries			27,051.38			
Tools & Supplies			3,000.00			
Steel			5,300.00			
Hardware			2,419.00			
Timbers			1,088.00			
Welding Rods & Gas			1,000.00			
Winkler Construction			4,000.00			
Remove Shoaling Weed and Sand from Dredged Area		25,000.00				
AGM Contractors			75,000.00			
Replace Floating Docks, type to be determined						
Dock Disposal						
Concrete debris removal from harbor floor						
SUBTOTAL CATEGORIES OF WORK:	\$0.00	\$25,000.00	\$118,858.38	\$0.00	\$0.00	\$0.00
GRAND TOTAL ALL CATEGORIES OF WORK:	\$1,763,858.38					

Floating dock replacement cost estimates yet to be confirmed.

PLEASE REPORT RESIDENTIAL/BUSINESS DAMAGE BY SELECTING "Residential/Business Damage" TAB ON BOT

From: John Giorgio
Sent: Sunday, February 24, 2013 1:03 PM
To: Sharon Lynn (slynn@provincetown-ma.gov)
Cc: cambgiorgio@comcast.net
Subject: Establishing Fees for the Use of MacMillan Pier

Dear Sharon;

You have asked me whether the Town may establish fees for the use of MacMillan Pier by individuals who access various commercial services from the pier such as ferry passengers, patrons of whale watch excursions, deep sea fishing trips, and other similar services, which I will refer to as a “Harbor Facilities Fee” throughout this opinion.

First, I would point out that the Town already collects a per passenger embarkation fee from ferry passengers in the amount of 50 cents per passenger. This fee is specifically authorized by Section 11 of Chapter 55 of the Acts of 2003, which the Town accepted by ballot question in 2003. I understand that this fee generates approximately \$32,000 in revenue to the Town each year. Under the statute, this revenue may only be appropriated “for services including, but not limited to, providing harbor services, public safety protection, emergency services or infrastructure improvements within and around the harbor of any city or town. The fee is collected by the Department of Revenue from the ferry operator and remitted to the Town. Notably, this fee can be collected from a ferry operator using any harbor facility located in the Town and not just facilities owned by the Town of Provincetown. In addition, the Town receives a portion of the boat excise tax collected by the Commonwealth which I assume the Town deposits into a special fund known as the Waterways Improvement and Maintenance Fund which is appropriated each year to defray the cost of harbor related expenses pursuant to G.L. c. 40, s. 5G. Finally, the Town through the Provincetown Public Pier Corporation, charges fees in the form of boat slip and mooring fees and lease payments in connection with pier-related services. To the extent, however, that the Town and/or the Pier Corporation incurs costs associated with the operation and maintenance of the harbor and Town facilities that provide access to the harbor which are not recouped through the various fees and special taxes received by the Town and the Pier Corporation, in my opinion, the Town may under certain circumstances assess additional fees for access to such facilities.

In my opinion, the Town could assess an additional Harbor Facilities Fee for commercial activities as long as those services are provided by the Town at Town-owned facilities. In 1997 the Town accepted G.L. c. 44, s. 22F, which authorizes the Town generally to assess fees for services provided by the Town. I would, however, point out the following two salient points:

First, as with any fee charged by the Town, a Harbor Facilities Fee would have to meet the following three-prong test established by the Massachusetts Supreme Judicial Court for determining whether a charge assessed is a valid fee or an impermissible tax:

1. The fee must be charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of the community.

2. The service must not be compulsory, meaning that the person paying the fee must utilize the service as a matter of choice.
3. The fee must not be used to raise revenue, but instead to offset the cost of governmental services.

See Emerson College v. City of Boston, 391 Mass. 415 (1984) (hereinafter referred to as the “Emerson College test”). In Commonwealth v. Caldwell, 25 Mass.App.Ct. 91 (1987), the Appeals Court applied the Emerson College test to a waterways fee charged by the City of Beverly and determined that such a fee met the Emerson College test.

In my opinion, a Harbor Facilities Fee would satisfy all three prongs of the Emerson College test as long as the fee was established in accordance with the guidelines set forth in Caldwell and this opinion. The Town of Provincetown owns MacMillan Pier, which it leases to the Pier Corporation. As a Town-owned facility, the Town has expended considerable resources on the construction and operation of the pier. In addition, the Town provides Harbormaster services for the operation of Provincetown harbor generally. The Harbormaster is responsible for the performance of duties as set forth in the G.L. c.88, 91, 91A, and 102, the Town Charter and Bylaws, applicable regulations, and other orders. Such responsibilities include: issuance of permits for temporary mooring of floats or rafts and docking of commercial vessels pursuant to G.L. c.91, §§10A and 10C; regulating the movement and anchorage of vessels within the harbor pursuant to G.L. c.102, §21; ordering the removal of any vessel lying within the harbor or at a public wharf, pursuant to G.L. c.102, §§24 and 25; and regulating and stationing all vessels in the channels of the harbor pursuant to G.L. c.102, §26. See Caldwell, 25 Mass. App.Ct. at 94. The Harbor Facilities Fee would be, as I understand it, intended to partially reimburse the Town for costs of operating the harbor and Town-owned harbor facilities such as MacMillan Pier generally. While payment of boat excise taxes and mooring and dockage fees also reimburse the Town for some of those costs, the remainder of the funds necessary to operate these facilities could be collected from those individuals who utilize the harbor and Town-owned facilities including individuals who access the harbor through commercial activities such as whale watch vessels and commercial sport fishing excursions. Since the owners of boats moored or docked in the Town are the primary beneficiaries of the services provided by the Town, such services are sufficiently particularized to meet the first element of the Emerson College test. It is my further opinion that, similar to the ferry embarkation fee already collected from ferry operators, the Town could charge and collect from, for example, the operator of a whale watch excursion a per passenger fee.

Second, boat owners and other users of the harbor and Town-owned harbor facilities have a meaningful choice as to whether to pay a Harbor Facilities Fee and take advantage of the services offered by the Town, or to keep their boats in a different town. Therefore, the second prong of the Emerson College test is also met.

Finally, the fee must be calculated to reimburse the Town for the services provided, rather than to raise revenues. “In order for a monetary exaction to be a fee, however, the

equivalence between the cost of providing the services and the revenue collected need not be exact. It is sufficient that the revenue collected is not significantly and consistently in excess of the cost of providing the services.” Caldwell, 25 Mass. App. Ct at 97. It is my understanding that the intent of a Harbor Facilities Fee would be to off-set the additional costs associated with the Town’s harbor operations and that are not recovered through the ferry embarkation fee, and the mooring, slip, and berthing fees already collected by the Town. As long as the total amount of revenue collected by the Town is not used to generally raise revenue for the Town beyond its expenses associated with providing these facilities, a Harbor Facilities Fee would likely meet the third prong of the Emerson College test.

Second, as you know, although the Town is the owner of MacMillan Pier, the pier is leased to the Pier Corporation, which is a special purpose body politic and corporate established by Chapter 13 of the Acts of 2000. Section 5(q) of Chapter 13 expressly authorizes the Pier Corporation to establish and collect fees for the use of facilities owned or leased by the Pier Corporation. Furthermore, Section 1(c) of the lease between the Town and the Pier Corporation, which was entered into in 2005, provides the Pier Corporation has the right to establish fees for use of MacMillan Pier, and contains the following express provision: “[The Pier Corporation] shall have the right to establish market rates for all fees, rentals, and other payments to be charged to any person or entity in connection with docking or berthing at, utilization of slippage, dockage and berthage right or any other utilization of [the Pier] to the extent such fees, rentals, or other payments would otherwise have been permitted to be established by [the Town.]” To the extent, therefore, that any part of a Harbor Facilities Fee was related to recovery of costs associated with the operation of MacMillan Pier, I would interpret Section 1(c) of the lease as reserving to the Pier Corporation the exclusive authority to set fees for usage. To the extent, however, that the Town intends to assess fees for other costs incurred by the Town for the operation of the harbor, the recovery of costs incurred by the Town for Harbormaster services procured by contract from the Pier Corporation, or any other costs incurred directly by the Town such as debt service costs associated with the pier, if any, such a fee could be assessed and collected by the Town even though the fee might be collected from persons accessing the harbor from MacMillan Pier.

Please let me know if you have any questions.

John

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