



# Meeting Agenda

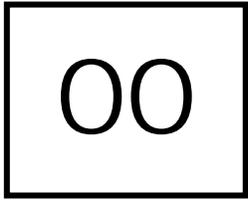
**The Provincetown Board of Selectmen will hold a public meeting on Tuesday, October 11, 2016, at 6:00 p.m. in Judge Welsh Room, Town Hall, 260 Commercial Street, Provincetown, MA 02657.**

*Consent Agenda – Approval without objection required for the following items:*

- A. *Treasurer's Transfer – Library Gift Fund – to pay for invoices from Blackstone Audio, Inc., in the amount of \$359.97.*
  - B. *Appoint Steven Baker as a regular member of the Planning Board with a term to expire December 31, 2016. He is currently an alternate member of the Planning Board.*
  - C. *Appoint Stephen Wisbauer as Provincetown's Representative to the Barnstable County Coastal Resources Committee.*
  - D. *Appoint Andrea Levenets as Provincetown's Representative to the Community Action Committee of Cape Cod & Islands, Inc. (CACCI).*
1. Public Hearings - Votes may be taken on the following items:
    - A. Public Forum to Solicit Feedback regarding Street Performers and the Noise Bylaw – Town Manager David B. Panagore, Police Chief James Golden and John Thomas, Esq.
  2. Public Statements – Three (3) minutes maximum. Selectmen do not respond to Public Statements.
  3. Selectmen's Statements – Initial comments from the Selectmen. Discussion dependent-votes may be taken.
  4. Joint meeting / Presentations - Votes may be taken on the following items:
    - A. Presentation to provide updates on Barnstable County and the Cape Cod Commission - CCC Executive Director Paul Niedzwiecki, Barnstable County Administrator Jack Yunits & Provincetown's Assembly Delegate Dr. Brian O'Malley.
    - B. PowerPoint Presentation by US Army Corp of Engineers on the Long Point Dike Modification Project – Lawrence Oliver and Michael Riccio.
    - C. Presentation of the Urban Land Institute (ULI) Report – Town Manager David B. Panagore.
  5. Appointments - Votes may be taken on the following items:
    - A. Appoint Breton Alberti as an Alternate member to the Licensing Board with a term to expire December 31, 2017.
    - B. Appoint Paul Kelly as an Alternate member to the Building Committee with a term to expire December 31, 2018.
  6. Requests - Votes may be taken on the following items:
    - A. Approve Contract Amendment #14-1 with AECOM in the amount of \$45,000 to install sewer stubs – Commercial Street Phase 3 – DPW Director Rich Waldo.

- B. Review and discussion of House Bill No. 4216 regarding Provincetown's Home Rule Petition on expanding the residential property exemption – Town Manager David B. Panagore.
- 7. Town Manager / Assistant Town Manager - Votes may be taken on the following items:
  - A. Town Manager's Report – Administrative Updates.
    - i. Discussion on possible Joint Meeting topics with VSB, and
    - ii. Fall Town Forum.
  - B. Others – Other matters that may legally come before the Board not reasonably anticipated by the Chair 48 hours before the meeting. Votes may be taken.
- 8. Minutes – Approve minutes of previous meetings. Votes may be taken.
- 9. Closing Statements/Administrative Updates - Closing comments from the Selectmen. Discussion dependent; motions may be made; votes may be taken.

Posted by the Assistant Town Clerk: [www.provincetown-ma.gov](http://www.provincetown-ma.gov), 10/6/16 4:35 pm dv



## CONSENT AGENDA

Approval required for the following items:

Requested by: BOS Chair Raphael W. Richter

Action Sought: Approval

### Proposed Motion(s)

**MOVE that the Board of Selectmen vote to approve items listed on the consent agenda as submitted.**

*Consent Agenda – Approval without objection required for the following items:*

- A. *Treasurer’s Transfer – Library Gift Fund – to pay for invoices from Blackstone Audio, Inc., in the amount of \$359.97.*
- B. *Appoint Steven Baker as a regular member of the Planning Board with a term to expire December 31, 2016. He is currently an alternate member of the Planning Board.*
- C. *Appoint Stephen Wisbauer as Provincetown’s Representative to the Barnstable County Coastal Resources Committee (CRC).*
- D. *Appoint Andrea Lavenets as Provincetown’s Representative to the Community Action Committee of Cape Cod & Islands, Inc. (CACCI).*

### Additional Information

See attached documents.

### Board Action

<i>Motion</i>	<i>Second</i>	<i>Yea</i>	<i>Nay</i>	<i>Abstain</i>	<i>Disposition</i>



Provincetown Board of Selectmen  
**AGENDA ACTION REQUEST**

Tuesday, October 11, 2016

00A

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## TREASURER'S TRANSFERS

### Library Gift Fund

Requested by: John O'Buck, Treasurer

Action Sought: **Approval**

#### Proposed Motion(s)

**MOVE that the Board of Selectmen vote, as Commissioners of the Library Gift Fund – (#1107), pursuant to MGL C44 § 53A, to approve the use of the funds in the Library Gift Fund(#1107) to pay \$359.97 for the attached invoice from Blackstone Audio, Inc.**

#### Additional Information

This Motion will allow the Town Treasurer to transfer money from the Library Gift Fund – (#1107) to pay for Audiobook purchases on 09/22/2016 . The Library Gift Fund will have a balance of \$62,387.81 in the expendable account after this invoice is paid.

#### Board Action

<i>Motion</i>	<i>Second</i>	<i>Yea</i>	<i>Nay</i>	<i>Abstain</i>	<i>Disposition</i>

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# TOWN OF PROVINCETOWN

## REQUEST OF TRANSFER OF FUNDS

Date: October 11, 2016  
To: Provincetown Treasurer  
From: Board of Selectmen

As Commissioners of the Library Gift Fund – (#1107), permission is hereby granted to you, the Treasurer of the Town of Provincetown, to approve the use of the Library Gift Fund (#1107), for the payment of the \$359.97 for audiobook purchases on 09/22/2016.

The Honorable Board of Selectmen:

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Raphael Richter, Chair

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Erik Yingling, Vice Chair

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Cheryl Andrews, Selectman

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Tom Donegan, Selectman

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Robert Anthony, Selectman





# PACKING SLIP

**Customer:** #43500

**Date:** 08/25/2016

**Email:**

**Questions?**

1-800-621-0182

libraryservices@blackstoneaudio.com

**Ship To** Provincetown Public Library  
356 Commercial St  
Provincetown, Massachusetts 02657

**Bill To** Provincetown, MA

*OK 9-6-16*  
*(PN)*

## Order #100028829 — 08/19/2016

**FREE Shipping**

Product	Title	Price	Ordered	Shipped	Invoice	PO	Ship Date	Location
60COCE	American Heiress	\$45.00	1	1	853551		8/30/2016	26-C1A 60COCE
ZPBVH0	Christodora	\$45.00	1	1	853551		8/30/2016	06-f3c zp bvho
31BOSB	Home by Nightfall	\$37.49	1	1	853551		8/30/2016	
ZPBtNI	The Kingdom of Speech	\$37.49	1	1	853551		8/30/2016	26-a6b zp btni
30BVVY	The Naked and the Dead, 50th Anniversary Edition	\$45.00	1	1	853551		8/30/2016	
60C2GN	The Underground Railroad	\$45.00	1	1	853551		8/30/2016	26-C2C 60C2GN
ZPC1BF	Trout Fishing in America	\$22.50	1	1	853551		8/30/2016	

## Order #100028841 — 08/19/2016

**FREE Shipping**

Product	Title	Price	Ordered	Shipped	Invoice	PO	Ship Date	Location
ZPBtBF	The Queen of the Night	\$45.00	1	1	853551		8/30/2016	14-f2b zp btbf
ZPBtMY	Tribe	\$37.49	1	1	853551		8/30/2016	19-C6B ZPBtMY

**Amt** \$359.97  
**Units** 9

**BLACKSTONE**  
AUDIO, INC.31 Mistletoe Rd. Ashland OR, 97520  
P: (800) 729-2665 / F: (541) 482-9294

Page	Customer ID	Invoice ID
1	123607	853551
Ref Date	Invoice Date	Ship Date
	8/22/2016	00/00/00

Ship To ID: 123607

**INVOICE**

**Sold To:** Provincetown Public Library \*  
356 Commercial St  
Provincetown, MA 02657

**Ship To:** Provincetown Public Library  
356 Commercial St  
Provincetown, Massachusetts 02657

Customer PO #	Payment By	Rep	Shipped Via	Terms	Ordered By
			Media Mail-FREE	Net 30 Days	

ProdCode	Title	List Price	Ordered	Shipped	BO	Disc	Net Price	Extension
60c2gn	Underground Railroad	86.99	1	1		48.27%	45.00	45.00
9781504729215	[SS] Christodora	118.00	1	1		61.86%	45.00	45.00
9781478965831	Kingdom of Speech, The	49.99	1	1		25.00%	37.49	37.49
60c0ce	American Heiress	103.99	1	1		56.72%	45.00	45.00
31bosb	Home by Nightfall	49.99	1	1		25.00%	37.49	37.49
30bvvy	Naked and the Dead, 50th Anniversar	74.99	1	1		39.99%	45.00	45.00
9781504759489	Trout Fishing in America	30.00	1	1		25.00%	22.50	22.50
9781504701563	Queen of the Night, The	123.00	1	1		63.41%	45.00	45.00
9781478939641	Tribe	49.99	1	1		25.00%	37.49	37.49

Product Total	Sales Tax	Shipping	Invoice Total	Pre-Paid	Paid With Order	Balance Due
\$359.97	\$0.00	\$0.00	\$359.97	\$0.00	\$0.00	\$359.97



Provincetown Board of Selectmen  
**AGENDA ACTION REQUEST**

Tuesday, October 11, 2016

00B

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## BOARD OF SELECTMEN APPOINTMENT

Planning Board Member – Steven W. Baker

Requested by: Town Clerk Doug Johnstone

Action Sought: **Approval**

### Proposed Motion(s)

**Move that the Board of Selectmen vote to appoint Steven W. Baker, as a regular member to the Planning Board with a term to expire on December 31, 2016.**

### Additional Information

See attached application. Steven is currently an Alternate member of the Planning Board.

### Board Action

<i>Motion</i>	<i>Second</i>	<i>Yea</i>	<i>Nay</i>	<i>Abstain</i>	<i>Disposition</i>

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# TOWN OF PROVINCETOWN

## Application for Town Board Membership

Name: Steven W. Baker  
Please type or print

Resident Address: 15 Somerset Road Provincetown, MA 02657

Mailing Address (if different): \_\_\_\_\_

Telephone #: 508 417 9955 Work # (508) 487 9550 x115

Email address: swellsbaker@gmail.com

Please consider this as my application for  membership  reappointment on the following Town Board(s).  
(Please list order of preference.)

1. Planning Board
2. \_\_\_\_\_
3. \_\_\_\_\_

Listed below are the applicant's skills, experience, background, or other factors which would contribute to these committees:

\* Currently an alternate & would like to become a permanent member

I hereby certify that I am a resident of the Town of Provincetown.

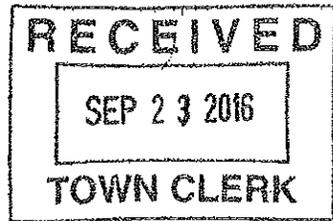
[Signature] 08/23/16  
Signature of Applicant Date

### TO THE APPLICANT: FILE COMPLETED FORM WITH THE TOWN CLERK

Town Clerk Certification: Applicant is a registered voter: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <u>[Signature]</u> Name of Town Clerk	This application will remain on file in the Town Clerk's Office for 364 days from the date received. Application Termination Date: <u>9/23/17</u>
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Date Received by Board of Selectmen

Date Received by Town Clerk



## Planning Board

First	Last	Position	Term End
Grace	Ryder-O'Malley		12/31/18
John	Golden	Chair	12/31/18
JW			12/31/16 (Regular)
8/25/16			
Brandon	Quesnell		12/31/17
Ryan	Campbell		12/31/16
Steven	Baker		12/31/18 (Alternate)
David	Abramson		12/31/18

10/11/16

**Loretta Dougherty**

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**From:** Doug Johnstone  
**Sent:** Friday, September 23, 2016 11:43 AM  
**To:** David Panagore  
**Cc:** Loretta Dougherty  
**Subject:** Membership Application to Planning board  
**Attachments:** Baker Application.pdf; pb.xls

FYI – Current Planning Board alternate member Steven Baker is requesting to move to the regular member vacancy created by the recent resignation of member James Woods. The Selectmen have the authority to appoint this regular member vacancy should they choose to do so. Please consider adding his application of the Selectmen’s consideration at their next available meeting.

Steven’s application is attached, along with a current Beautification Committee roster for reference, if needed.

Thank you.  
dj



Provincetown Board of Selectmen

**AGENDA ACTION REQUEST**

Tuesday, October 11, 2016

OOC

## BOARD OF SELECTMEN APPOINTMENT

Provincetown Representative to the Barnstable County Coastal Resources Committee (CRC)

Requested by: Town Manager David B. Panagore

Action Sought: **Approval**

### Proposed Motion(s)

**Move that the Board of Selectmen vote to approve the appointment of Stephen Wisbauer, as Provincetown's Representative to the Barnstable County Coastal Resources Committee (CRC).**

### Additional Information

See attached materials.

### Board Action

<i>Motion</i>	<i>Second</i>	<i>Yea</i>	<i>Nay</i>	<i>Abstain</i>	<i>Disposition</i>

## **Barnstable County Coastal Resources Committee**

### **I. Mission Statement**

The mission of the Barnstable County Coastal Resources Committee (CRC) is to:

1. Promote regional awareness of coastal issues by serving as conduit or liaison for the exchange of information between Cape Cod communities; and between these communities and the Barnstable County Commissioners, the Cape Cod Commission, the Massachusetts Coastal Zone Management program, and the Massachusetts Bays Program where the CRC serves as the Local Governance Committee.
2. Enhance coastal resource protection by undertaking special projects designed to provide specific information, guide policy-making, or help to resolve Cape Cod coastal zone problems.
3. Provide technical advice and recommendations on coastal issues of regional significance to the county and to towns on Cape Cod.

### **II. Membership Composition**

**Voting Members:** Provide liaison between the CRC and towns and consist of a representative from each town (preferably a town employee) nominated by the Selectmen (or Town Council in Barnstable), and two members at large to be appointed by the County Commissioners. Voting Members should have technical expertise in coastal issues.

**Ad Hoc Members:** Provide coastal expertise and liaison with agencies and organizations and consist of a representative nominated by each of the following:

- Barnstable County Assembly of Delegates;
- Barnstable County Selectmen's Association;
- Barnstable County Department of Health and the Environment;
- Barnstable County's Cape Cod Cooperative Extension;
- Barnstable County Water Protection Collaborative;
- Barnstable County Shellfish Advisory Committee;
- Cape Cod Commission, Coastal and Marine Resources;
- Host organization / agency for the Massachusetts Bays Program, Cape Cod region;
- MA Coastal Zone Management, Cape & Islands Region;
- Natural Resources Conservation Service / Cape Cod Conservation District;
- Cape Cod National Seashore;
- A representative of the Business Community, nominated and appointed by the County Commissioners; and
- A representative from each of the following, appointed by the County Commissioners:
  - WHOI SeaGrant Program;
  - Association to Preserve Cape Cod; and
  - Compact of Cape Cod Conservation Trusts.

**Executive Committee:** The CRC will establish an Executive Committee consisting of the Chair, Co-Chair, Vice-Chair, and 3 to 5 members of the CRC.

**Voting:** All Voting Members cast one vote per person.

**Attendance:** All members are expected to attend quarterly committee meetings. The Executive Committee is expected to meet once a month.

### **III. Responsibilities**

1. Provide liaison on coastal issues between towns, county and state by:
  - a. Establishing and maintaining good communication with relevant town boards and committees,
  - b. Representing town or county interests,
  - c. Ensuring information exchange between towns and the county, and
  - d. Interacting with towns or county regarding specific implementation measures.
2. Provide a forum to address and implement measures to enhance and/or preserve the beneficial functions of coastal resources.
3. Advise the County Commissioners, the Cape Cod Commission, the towns, the MA CZM program, and Massachusetts Bays Program Management Committee concerning coastal issues, coastal policy, regulations or projects of local and regional importance.
4. Discuss and assist in the prioritization of marine and fresh surface water issues of regional importance in Cape Cod towns and watersheds.
5. Initiate actions to improve coastal zone decision-making via the identification and implementation of special projects.
6. Identify the outreach and education needs of the public and of the coastal management community, and implement actions to meet those needs.
7. Help identify and expedite sound environmental regulations, bylaws and other appropriate mechanisms and initiatives consistent with the Massachusetts Bays Action Plan, and help to implement Massachusetts Bays Program Comprehensive Conservation and Management Plan.
8. Provide timely briefings to the County Commissioners, the Assembly of Delegates and the Cape Cod Commission on current and future Committee activities.

### **IV. Functions**

Meetings will focus on predetermined topics, sometimes with invited speakers, but also include short updates from town representatives and representatives of other agencies. Meetings will be publicized to encourage broad participation from the public.

The CRC will select specific projects with input from members and others to accomplish via the appointment of sub-committee working groups. Upon project completion and Committee approval, the CRC will identify a new project(s) to work on.

The Executive Committee will meet regularly, at a minimum of once per month, to review issues from the towns, county, state, and Massachusetts Bays Program that need immediate attention, and those to bring to the full Committee's attention. The purpose of the Executive Committee is to keep current on important issues, generate agendas, and help ensure that the Committee is timely in its actions.



# BARNSTABLE COUNTY COMMISSIONERS

P.O. BOX 427  
BARNSTABLE, MASSACHUSETTS  
02630  
(508) 375-6648  
FAX (508) 362-4136

**RECEIVED**  
COUNTY COMMISSIONERS  
LEO G. CAKOUNES  
Harwich  
MARY PAT FLYNN  
Falmouth  
SHEILA R. LYONS  
Wellfleet

**RECEIVED**  
BOS  
✓  
OCT 04 2016

**TOWN MGR OFFICE**

HOME RULED CHARTERED  
IN 1989

CC: BOS/TM/ATM

August 31, 2016

Mr. David Panagore  
Town Manager  
Provincetown Town Hall  
260 Commercial Street  
Provincetown, MA 02657

Re: Request for Nomination of Provincetown Representative to  
Barnstable County Coastal Resources Committee

Dear Mr. Panagore:

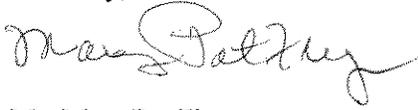
Since the 1990's, the **Barnstable County Coastal Resources Committee (CRC)** has provided assistance on coastal issues to the County and towns on Cape Cod. The CRC is the County's advisory committee on coastal issues and serves as a liaison between towns and the County on coastal issues. The CRC is also the local governance committee for the Massachusetts Bays National Estuary Program whose mission is to protect and restore the coastal ecosystems of Cape Cod Bay and Massachusetts Bay. The CRC's charge is attached.

We wish to acknowledge and thank your former CRC representative and voting member, Austin Brandt, for his dedicated service and contributions to the CRC and the County. We are now seeking a new CRC voting member to represent Provincetown. CRC voting members provide a liaison between their towns and the County, have technical expertise in the areas listed below, and attend regular CRC meetings. CRC members will serve for two years following appointment by the County Commissioners. Please nominate a staff member from your town with expertise in one or more of these areas:

- Management, protection and restoration of coastal resources (e.g., salt marshes, shellfish habitat, shellfish, fisheries, fish runs, estuaries);
- Coastal water quality;
- Stormwater management and/or financing;
- Wastewater management;
- Coastal planning;
- Coastal erosion, coastal hazards and coastal adaptation.

Please provide the name of your nominee to me as soon as possible. The next scheduled meeting of the CRC is September 22, 2016 and we hope to have all new voting members appointed by then. If you have any questions, please call me at (508) 375-6648. Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script, appearing to read "Mary Pat Flynn".

Ms. Mary Pat Flynn  
Chairman, Barnstable County Commissioners

Attachment: Coastal Resources Committee Charge

cc: Raphael W. Richter, Chairman, Board of Selectmen  
Jack Yunits, County Administrator



Provincetown Board of Selectmen

**AGENDA ACTION REQUEST**

Tuesday, October 11, 2016

OOD

## BOARD OF SELECTMEN APPOINTMENT

Provincetown Representative to the Community Action Committee of Cape Cod & Islands, Inc. (CACCI)

Requested by: Town Manager David B. Panagore

Action Sought: **Approval**

### Proposed Motion(s)

**Move that the Board of Selectmen vote to approve the appointment of Andrea Lavenets, as Provincetown's Representative to the Community Action Committee of Cape Cod & Islands, Inc. (CACCI).**

### Additional Information

See attached materials.

### Board Action

<i>Motion</i>	<i>Second</i>	<i>Yea</i>	<i>Nay</i>	<i>Abstain</i>	<i>Disposition</i>

## **Recommendation for Provincetown Representative to CACCCI**

### Andrea Lavenets

Andrea has been at the COA for three years working with older adults and their families through home and office visits. She has a Bachelor's Degree in Social Work and worked in foster care management with families and children after graduation.

Andrea is extremely dedicated to serving Town residents, is very connected to community service providers and knowledgeable regarding residents' needs and gaps in services. She currently is active in the Cape COA Outreach Coordinators Working Group and the Cape Cod Hoarding Task Force and would be an excellent representative for the Town of Provincetown and advocate for increasing the CACCCI's presence on the Outer Cape.



## Board of Selectmen

# Public Notice

### **Community Action Committee of Cape Cod & Islands, Inc. (CACCI) Representative on the CACCI Board of Directors**

The Provincetown Board of Selectmen is seeking applicants to serve as the Representative for the Town of Provincetown to the Community Action Committee of Cape Cod & Islands, Inc. (CACCI) Board of Directors. The CACCI is a not for profit agency dedicated to helping low income individuals and families living on the Cape and Islands. Their mission is to provide services to help empower and improve the lives of low income residents of Barnstable, Dukes and Nantucket counties by providing resources and self-advocacy skills to attain and support self-sufficiency. The Board of Directors meets on the fourth Wednesday of the month at 8:00 a.m. at 372 North Street, Hyannis, MA 02601. You may go to the CACCI web page at [www.caccci.cc](http://www.caccci.cc) for a detailed overview of their work.

Applications can be obtained in the Town Clerk's office, 260 Commercial Street, Provincetown, MA 02657, and should be returned to that office no later than 12 noon on Tuesday, September 20, 2016.

*Raphael W. Richter  
Chairman, Board of Selectmen*

**Administration**  
88 North Street  
Hyannis, MA 02601  
508-790-0400  
Fax: 508-790-0969



Community Action Committee of  
Cape Cod & Islands, Inc.  
[www.caccl.cc](http://www.caccl.cc)

**Operations**  
372 North Street  
Hyannis, MA 02601  
Tel: 508-771-1727  
Fax: 508-775-7488

**RECEIVED**  
BOS

**AUG 15 2016**

**CC: BOS/TM/ATM**

August 8, 2016

Chairman Raphael W. Richter  
Town of Provincetown  
Board of Selectmen  
260 Commercial Street  
Provincetown, MA 02657

Dear Mr. Richter

Community Action Committee of Cape Cod and Islands, Inc. (CACCI) is an anti-poverty agency, committed to helping low-income individuals and families become stabilized and move towards self-sufficiency. Some of the programs/services we provide are: Access to Care (assistance in navigating the Health Connector; consumer education; assistance in applying for and enrolling in health insurance; and assistance in accessing a primary care provider); SNAP (information about and assistance in enrolling in the Supplemental Nutrition Assistance Program); Child Care Network (assistance with applying for child care vouchers, receiving information about accessing childcare, and obtaining referrals to childcare providers); and Safe Harbor (our domestic violence shelter).

As we implement our mission through existing and new programs, we are seeking input from all areas of the Cape and Islands. Our current Board of Directors includes Directors primarily from the mid-Cape, Falmouth and Martha's Vineyard. We would like to ensure that all people who need our assistance and support are represented on our Board. Therefore we are requesting that you, as Chairman of the Provincetown Board of Selectmen, speak with your fellow Board members and develop a recommendation for an individual to represent the interest of your constituents on the CACCI Board of Directors. If you or one of your fellow Selectmen are unable to participate on our Board, we would like you to consider recommending someone that you could suggest that would represent you, your town and its people. The interests of all Cape and Islands low income residents are important to us as we move our organization and its programs forward.

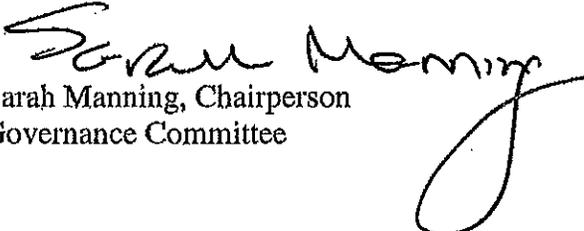
The Board of Directors meets on the fourth Wednesday of the month at 8:00 a.m. at our operations office located at 372 North Street in Hyannis. We have a poly com system that allows

members of the Board of Directors who cannot attend the meeting in person to participate via telephone.

We currently have four (4) vacancies designated for publicly elected officials or their designees. If you would like further information, please feel free to call Kris Dower, our Executive Director, at 508-737-6347 or email her at [jtecKED@aol.com](mailto:jtecKED@aol.com).

We would like to receive your recommendation by Friday, September 16, 2016 so that we can prepare nominations for our September 28<sup>th</sup> Board of Directors Meeting. We look forward to hearing from you.

Sincerely,

  
Sarah Manning, Chairperson  
Governance Committee

c.c. Town Manager/Town Administrator



Provincetown Board of Selectmen  
**AGENDA ACTION REQUEST**  
Tuesday, October 11, 2016

1A

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**PUBLIC FORUM - STREET PERFORMERS & NOISE BYLAW**

**Solicit Feedback from Public**

Requested by: Town Manager David B. Panagore

Action Sought: Discussion

**Proposed Motion(s)**

**Discussion dependent. Votes may be taken.**

**Additional Information**

See attached materials.

**Board Action**

<i>Motion</i>	<i>Second</i>	<i>In favor</i>	<i>Opposed</i>	<i>Disposition</i>

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October 6, 2016

**Gregg J. Corbo**  
gcorbo@k-plaw.com

Mr. David Panagore  
Town Manager  
Provincetown Town Hall  
260 Commercial Street  
Provincetown, MA 02657

Re: Regulation of Street Performers

Dear Mr. Panagore:

I am writing in response to your request for an opinion concerning the scope of the Town's authority to regulate street performers. Town Counsel last opined on this subject by correspondence dated September 30, 2005. As was the case then, there have been complaints by local residents, including business owners, about the frequency, duration and volume of some street performers performing in Town. You have, therefore, asked that I refresh the research relied on at that time and inform you of any significant developments in the law that have occurred since then.

Based on my review of several recent cases, it does not appear that the law with regard to First Amendment protections for street performances and other forms of protected public expression has significantly evolved since we last opined on this subject. In fact, to the extent that the law in this area has changed at all, it appears that it has become more protective of individuals' right to express themselves. Generally, "the government can regulate speech in its public spaces, provided that any restriction on the time, place or manner of speech 'must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest and must leave open ample alternatives for communication.'" Pence v. City of St. Louis, 958 F.Supp.2d 1079, 1083 (D.Mo. 2013) (quoting, United States v. Grace, 461 U.S. 171, 177 (1983)). Although the government may act to protect even public forums such as city streets and parks from excessive noise, to survive legal challenge, the regulation must be narrowly tailored such that it does not burden substantially more speech than is necessary to further the government's legitimate interest. Hassay v. Mayor of Ocean City, 955 F.Supp.2d 505, 521 (D.Md. 2013). "And, 'although the chosen restriction 'need not be the least restrictive or least intrusive means' available to achieve the government's legitimate interests, the existence of obvious, less burdensome alternatives is a 'relevant consideration in determining whether the 'fit' between the ends and means is reasonable.'" Peck v. City of Las Vegas, 2016 U.S. Dist. LEXIS 120603 (D.Nev. 2016) (quoting, Berger v. City of Seattle, 569 F.3d 1029, 1041 (9<sup>th</sup> Cir. 2009)).

Although I have not conducted an exhaustive survey of the law in this area, below please find a few recent examples showing how courts have analyzed regulations concerning the

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activities of street performers and other individuals exercising their First Amendment right of expression in public forums:

- **McCullen v. Coakley, 134 S.Ct. 2518 (2014)**  
The United States Supreme Court ruled that a Massachusetts criminal statute, generally banning speakers from any public way or sidewalk within 35 feet of a reproductive health care facility's entrance, exit or driveway violated the First Amendment. Although the Court recognized that the Commonwealth had a legitimate interest in ensuring public safety outside abortion clinics, preventing harassment and intimidation of patients and staff and combating deliberate obstruction of clinic entrances, the Court found that the statute burdened substantially more speech than necessary to achieve these interests. In support of its holding, the Court observed that the Commonwealth could advance the same interests by enforcing other statutes aimed at punishing the undesirable conduct, such as generic criminal statutes forbidding assault, breach of the peace, vandalism, trespass and the like.
- **Cutting v. City of Portland, Me., 802 F.3d 79 (1<sup>st</sup> Cir. 2015)**  
The First Circuit Court of Appeals ruled that a City of Portland, Maine, ordinance that prohibits standing, sitting, staying, driving, or parking on median strips violated the First Amendment. In so holding, the Court found that the ordinance was not narrowly tailored because it prohibited virtually all speech on median strips, regardless of the size of the median and the extent of the threat of danger on any particular median at any particular time. As one example, the Court observed that the ordinance would prohibit all speech on a wide, raised grassy median with a park bench that was sufficiently wide to keep pedestrians separated from traffic.
- **Peck v. City of Las Vegas, 2016 U.S. Dist. LEXIS 120603 (D.Nev. 2016)**  
In an unpublished opinion, the United States District Court for the District of Nevada, upheld a regulation establishing certain zones in which street performers were and were not allowed because it was narrowly tailored to achieve the government's objective of ensuring public safety and order and the free flow of pedestrian traffic on a congested pedestrian mall consisting of a narrow, five-block street that is often congested with many visitors. In upholding the regulation, the Court distinguished the situation from the situation addressed in McCullen, on the grounds that the performance zones were targeted only at one specific type of speech, street performances, for which there was sufficient evidence that such activity posed a threat to public safety and welfare.
- **Hassay v. Mayor of Ocean City, 955 F.Supp.2d 505 (D.Md. 2013)**  
The United States District Court for the District of Maryland ruled that an Ocean City, Maryland ordinance prohibiting the playing of radios, phonographs and musical instruments at a volume that is "plainly audible" at a distance of 30 feet from the source

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violated the First Amendment. After detailing extensive testimony from both proponents and opponents of the ordinance, the Court found that the ordinance was not narrowly tailored to achieve any significant governmental interest because the volume limitation effectively prohibited musicians from playing at a volume sufficient to reach his or her listeners, and that, in effect, the ordinance was tantamount to a complete ban on the use of musical instruments. The Court specifically observed that the ordinance applied to a boardwalk area that “is a robust, vibrant, bustling place for much of the year, and it caters to all forms – and volumes – of activity and expression. It is full of stores and vendors; it is a venue for street performers and events; . . . It is not a destination for quiet pursuits that require a quiet atmosphere.”

- **Pence v. City of St. Louis, 958 F.Supp.2d 1079, 1083 (D.Mo. 2013)**  
The United States District Court for the Eastern District of Missouri ruled that requirements that street performers obtain a permit and pay a fee before being allowed to perform in public spaces is unconstitutional. In addition to the permit and fee requirements, the ordinance at issue limited the hours during which performances may occur, prohibited the blocking of public passage and the obstruction of private property, mandated compliance with existing noise ordinances, banned amplification devices except those using self-contained batteries, and required a distance of fifty feet between each performer or group of performers. The Court found that the permit and fee requirements were unconstitutional as prior restraints on speech, in part, because the permit administrator exercised discretion in awarding permits. The Court did, however, find that the portions of the ordinance addressing hours of operation, crowds and volume could survive judicial review. The Court also specifically noted that its decision was based on the specific facts of the case, and it was not adopting a *per se* rule that no permitting scheme could ever be considered valid.
- **Berger v. City of Seattle, 569 F.3d 1029 (9<sup>th</sup> Cir. 2009)**  
The Ninth Circuit Court of Appeals addressed the constitutionality of a regulation enacted by the City of Seattle governing the conduct of street performers in an 80-acre park and entertainment complex known as the Seattle Center. The Center is described as “a home to a dizzying array of entertainment venues, sporting events, festivals, educational and community programs, restaurants, museums and, of course, the world-famous Space Needle. . . . In a square a little smaller than 6 blocks on a side, the Center is home to . . . countless attractions.” In a twenty-five page opinion, the Court found several of the City’s street performer rules to be unconstitutional, including: permit and badge requirements, a rule prohibiting solicitation of donations, and a rule prohibiting speech within thirty feet of a captive audience, such as those waiting in line. The Court did, however, uphold a rule specifying certain locations for street performances and a first-come, first-served rule for using those locations. It is also notable that the opinion

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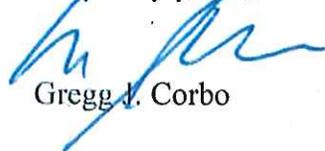
is accompanied by two lengthy dissenting opinions setting forth reasons as to why the regulations could have been upheld.

As you can see from this small sampling of cases, the determination as to whether a particular regulation will satisfy these Constitutional standards requires a fact-specific inquiry, taking into account the characteristics of the place to which the regulations apply, including the nature of the forum and its pattern of normal activity. Hassay, 955 F.Supp. at 521. In each of these cases, however, the courts recognized that public ways and sidewalks occupy a “very special position in terms of First Amendment protection,” and that the government’s ability to restrict speech in such locations is “very limited”. McCullen, 134 S.Ct. at, 2529. Therefore, while the Town may be able to justify additional street performer regulations, it will bear the “heavy burden” of establishing that such regulation is sufficiently tailored to achieve a substantial governmental interest. Berger, 569 F.3d at 1048.

In this regard, one common theme that emerges from the cases is that prior restraints on speech in the form of blanket restrictions on all street performers are disfavored if enforcement of existing noise and nuisance regulations can remedy any problems that may arise. Therefore, as was the case in 2005, we are of the opinion that reasonable enforcement of the Town’s noise bylaw and other anti-nuisance and public safety laws will provide the most effective means of protecting the rights of residents, business owners and visitors from any adverse effects associated with street performances. That being said, we will be happy to work with you to attempt to develop a bylaw that further regulates in this area consistent with Constitutional standards.

Please do not hesitate to contact me if you would like to discuss this matter.

Very truly yours,



Gregg J. Corbo

GJC/lem  
565403/prov/0001



## Board of Selectmen

# Public Notice

## Public Forum

The **Provincetown Board of Selectmen** will hold a **Public Forum** to solicit feedback from the citizens of Provincetown regarding Street Performers and the Noise Bylaw on **Tuesday, October 11, 2016 at 6:00 p.m.** in the Judge Welsh Room, Provincetown Town Hall, 260 Commercial Street, Provincetown, MA 02657

The public is also encouraged to submit any comments in writing to the office of the Board of Selectmen, Town Hall, 260 Commercial Street, Provincetown, MA 02657 or by email to [selectmen@provincetown-ma.gov](mailto:selectmen@provincetown-ma.gov) no later than Monday 12 noon on October 10, 2016.

*Raphael W. Richter, Chairman  
Board of Selectmen*

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September 30, 2005

BY FACSIMILE - (508)487-9560  
AND BY FIRST CLASS MAIL

Mr. Keith Bergman,  
Town Manager  
Provincetown Town Hall  
260 Commercial Street  
Provincetown, MA 02657

Re: Proposed Amendments to Street Performance and Noise Control Bylaws

Dear Mr. Bergman:

You have asked that we review proposed revisions to the Town's Street Performance Bylaw, Section 9-4 of the General Bylaws, as well as related proposed revisions to the Town's Noise Control Bylaw, Section 13-2-6 of the General Bylaws. In the context of this review, you have also asked that we comment on correspondence from Attorney David E. Cole, dated September 15, 2005, whom I understand represents one of the street performers in Provincetown. In that correspondence, Attorney Cole questions the legitimacy of certain provisions of the current Street Performance Bylaw as well some of the proposed revisions. In this letter, I will provide comments and suggestions with respect to the proposed revisions, as well as address the positions taken by Attorney Cole in his September 15<sup>th</sup> correspondence, as appropriate. I have attached a copy of Attorney Cole's correspondence to this letter, for your ease of reference.<sup>1</sup> For purposes of this analysis, I note that I am commenting on the version of the proposed revisions dated August 31, 2005.

<sup>1</sup> Attorney Cole has enclosed with his September 15<sup>th</sup> correspondence a proposed draft Street Performance Bylaw. In this letter, I do not comment on the provisions of that proposed bylaw.

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General Comments

I begin my analysis with some general principles. As you know, the government's ability to regulate the public's exercise of free speech and free expression in public fora is somewhat limited, due to the protections of the First Amendment. Public streets and sidewalks have traditionally been considered public fora. *See, e.g., Frisby v. Schultz*, 487 U.S. 474 (1988). Furthermore, music and other forms of "expression" are covered by the First Amendment. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); *Casey v. City of Newport, R.I.*, 308 F.3d 106, 110 -111 (1<sup>st</sup> Cir. 2002). Despite the broad constitutional protections afforded to speech activities in public fora, the courts have allowed the government to require licenses or permits for the exercise of speech or other First Amendment protected activities on public fora in order to regulate competing uses of said fora. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). A permit scheme regulating the time, place, and manner of speech is permissible, so long as it (1) does not "delegate overly broad licensing discretion to a government official," (2) is content-neutral, (3) is narrowly tailored to serve a significant government interest, and (4) leaves open ample alternatives for communication. *Id.*; *New Eng. Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 20 (1st Cir. 2002); *see also Ward*, 491 U.S. at 791. In light of these requirements, in my opinion, it would be difficult to justify an outright ban on street performers, demonstrators, political activists and the like, on Town sidewalks and streets, absent some very compelling argument of public safety, such as the threats posed to the public health, welfare, and safety of the citizens of New Orleans in the aftermath of Hurricane Katrina, as an example.

Obviously, the current Street Performance Bylaw does not attempt to ban performances on Town streets and sidewalks, but instead, seeks to "encourage" street performances, as they contribute to the character of the Town, while at the same time balancing the rights of residents to the enjoyment of peace and quiet in their homes and the rights of local business owners to have adequate public access to their businesses. I understand that there have been some complaints by local residents, including business owners, about the frequency and duration of street performances, including the use of sound amplification by street performers. In an effort to maintain the balance identified above, in light of escalating citizen complaints, revisions have been proposed to the Street Performance Bylaw that would permit some restrictions on the time, place, and manner of street performances. Courts have determined that a municipality has "a substantial interest in protecting its citizens from unwelcome noise." *Ward*, 491 U.S. at 796 (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806 (1984)). This interest is not limited to protecting the "well-being, tranquility, and privacy of the home," but also extends to traditionally public fora such as municipal streets and parks. *Id.* Furthermore, the ability of the government to regulate street performances so as to limit annoyance to residents

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and to avoid both pedestrian and motor vehicle traffic congestion has been upheld by various courts. *See, e.g., Friedrich v. City of Chicago*, 619 F. Supp. 1129 (N.D. Ill. 1985) (ordinance which limited street performances to certain streets and during certain times of the day was supported by government's compelling interest to reduce large crowds around street performers which had diverted pedestrians into the street, thus further congesting already congested areas).

Against this backdrop, I now address several questions that have been raised regarding the Street Performance Bylaw, including the proposed revisions.

Is the Street Performance Bylaw Inconsistent with the Town's Powers Under the Home Rule Amendment?

As a starting point, I note that Attorney Cole, in his September 15<sup>th</sup> correspondence, suggests that the \$50 fine imposed under Section 9-4-8 is inconsistent with the provisions of G.L. c. 85, §10, and thus the fine is in excess of the Town's authority under the Home Rule Amendment. Under G.L. c.43B and Amend. Article 89 of the Massachusetts Constitution, a municipality may adopt local ordinances and by-laws for the exercise of its general corporate and police powers "...which [are] not inconsistent with the constitution or laws enacted by the [state legislature]..." In addition, a municipality may adopt and impose non-criminal fines of violations under G.L. c.40, §21D and pursue enforcement of such fines in state district court.

It is established beyond question that municipalities have broad authority when enacting local regulations and that a local by-law will not be struck down as in excess of a municipality's home rule authority unless there exists a sharp conflict between the local by-law and a provision of State law or the Constitution. *Bloom v. Worcester*, 363 Mass. 136, 154 (1973).

In arguing that the fine provision of the Street Performance Bylaw is in conflict with state law, Attorney Cole cites G.L. c. 85, §10, which states as follows:

Towns may make ordinances and by-laws to prevent the pasturing of cattle or other animals, either with or without a keeper; relative to the passage and driving of sheep, swine and neat cattle; prohibiting persons from riding or driving beasts of burden, carriage or draught, at a rate of speed inconsistent with public safety or convenience; regulating the passage of street cars, or other vehicles, or the use of sleds for coasting; regulating and controlling persons who frequent public places playing on hand organs, drums, trumpets or other musical instruments, upon or through any public way, and may affix penalties of not more than twenty dollars for each violation thereof. They may, by ordinance or by-law, regulate the transportation of the offal of slaughtered animals upon or through any public way and affix a penalty of not more than one hundred dollars for

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each violation thereof [emphasis added].

If Section 10 applies to persons such as those covered by the Street Performance Bylaw, then the \$50 fine would potentially be in excess of the Town's Home Rule authority, since the statute limits the fine to \$20. While the highlighted language in Section 10 appears on its face to apply to certain street performers covered under the Street Performance Bylaw, namely, those who play musical instruments, closer scrutiny needs to be applied to the statute's purpose, in my opinion. It appears that the statute serves as a codification of a previous common-law prohibition against obstructions in public ways. See *Commonwealth v. Surridge*, 265 Mass. 425, 482 (1929). The statute is entitled "Regulation of use of ways; penalties," supporting the view that the activities sought to be regulated are those activities occurring in, and thus obstructing travel along, public ways. Finally, the specific language in the statute that arguably applies to street performers is expressly limited to activities occurring "upon or through" a public way.

Thus, the question becomes whether the Town actually permits street performers to perform within the boundaries of public ways. If it does, then the Town's ability to impose fines for those activities may be governed by the language of G.L. c. 85, §10. Section 9-4-2-3 of the Street Performance Bylaw defines "public areas" in which street performances are permitted to include "all public ways in Provincetown." This language suggests that street performances are, in fact, allowed within at least some of the public ways in Town. Although the Street Performance Bylaw, including the \$50 fine, has been previously approved by the Attorney General's Office, this approval does not insulate the Town from a court challenge to the fine, or from further scrutiny of the fine by the Attorney General's Office if the Bylaw is amended.

There are several possible options to address this potential issue. First, the Town could not take any action to adjust or revise the fine provisions, and wait to see if the revised Bylaw passes Attorney General scrutiny, or is otherwise challenged in court. Because of the "severability" language of Section 9-4-11, in my opinion, if the fine amount is in conflict with G.L. c. 85, §10, the entire Bylaw should not be invalidated. Alternatively, the Town could choose to lower the fine to \$20 for only those activities that occur "upon or through" a public way which are in violation of the Bylaw. The \$50 fine would remain for all other activities in violation of the Bylaw. One variation of this option is to simply lower the fine for all violations of the Bylaw to \$20. Finally, the Town could simply delete from Section 9-4-2-3 the reference to "all public ways in Provincetown," thus making clear that the activities covered under the Street Performance Bylaw are not activities occurring "upon or through public ways," as no street performances would be permitted on public ways, although this alternative may have its own First Amendment implications given that public streets are considered traditional public fora.

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Limiting Street Performances Outside Town Hall

The August 31, 2005 version of the proposed revisions to the Street Performance Bylaw does not include an earlier proposed prohibition on street performances within 100 feet of Town Hall. Therefore, I do not address Attorney Cole's challenges in this regard. However, if the Town is still considering some limitation on performances outside Town Hall, I note that the Second Circuit Court of Appeals has upheld the City of New York's ability to limit the use of amplification in connection with the exercise of First Amendment-protected activities occurring on City Hall Plaza. See *Housing Works, Inc. v. Kerik*, 283 F.3d 471 (2d Cir. 2002). In that case, the court found that the government had a valid interest in banning sound amplification so near City Hall as it would be a distraction to City Hall employees as well as to the members of the public having business to transact at City Hall.

To the extent that the Town is contemplating some type of prohibition on street performances outside of Town Hall, I would caution that the Town closely examine what other activities it allows to occur at Town Hall generally (i.e., fund raisers for non-profit organizations, political or religious rallies, etc.). Limiting street performances while not establishing similar limitations on other forms of First Amendment activity may give rise to a constitutional challenge that the Street Performance Bylaw is not content-neutral, in my opinion. There may be some basis for limiting the use of amplification during, or the length of, performances occurring outside Town Hall, as in the *Housing Works, Inc. v. Kerik* case, so long as the Town can demonstrate that street performances cause a different (i.e. more egregious) level of sound, obstruction to pedestrian traffic, and the like than other forms of First Amendment-protected activities that occur outside Town Hall.

What is the Appropriate Noise Limit

The United States Supreme Court has ruled that the opportunity to gain the public's ears by objectionably amplified sound on public streets is "no more assured" than the unlimited opportunity to address gatherings on the streets. *Kovacs v. Cooper*, 336 U.S. 77 (1949). Accordingly, several courts have upheld a municipality's ability to impose limitations or even complete bans on the use of sound amplification in association with First Amendment-protected activity in public areas. See, e.g., *Stokes v. City of Madison*, 930 F.2d 1163 (7<sup>th</sup> Cir. 1991) (limits on use of sound amplification); *Croman v. City of Kansas City, MO*, 29 F. Supp. 587 (W.D. Mo. 1997), *aff'd* 168 F.3d 492 (8<sup>th</sup> Cir. 1998) (no sound amplification in certain area between 11 pm and 6 am). In my opinion, however, the biggest problem the Town will face when considering how to amend either the Street Performance Bylaw or the Noise Control Bylaw is not whether

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some limits can legitimately be placed on the use of amplification, but how to define the prohibited noise limits.

The proposed revisions to the Street Performance Bylaw provide that the "total limit for sound...remains near the mean of 70dB at 25 feet or total excess over ambient noise at 50'." See Section 9-4-2-1; see also Section 9-4-6-6. Ordinances and bylaws that impose sound limitations on First Amendment-protected activities have been upheld when they contain specific decibel limitations, for example. See, e.g., *Dupres v. City of Newport, RI*, 978 F. Supp. 429 (D.R.I. 1997) (ordinance set decibel limits of 65 dBa from 7 am to 10 pm and 55 dBa from 10 pm to 7 am in a residential area); *Jim Crockett Promotion, Inc. v. City of Charlotte*, 706 F.2d 486 (4<sup>th</sup> Cir. 1983) (sound amplification equipment prohibited beyond certain decibel limits, in particular areas at specific times of day, to be measured according to American National Standards Institute [ANSI] standards).

However, the language of the proposed revisions is somewhat unclear, to the extent that it refers to a "mean" decibel level. Over what period of time is the "mean" intended to cover? Who determines what is "near the mean"? Left undefined, it will be difficult for street performers and police alike to know precisely what is prohibited. Also, I do not understand the phrase "or total excess over ambient noise at 50'." Is it the intent that the revised Bylaw will prohibit sound emanations measured as exceeding 70dB over the ambient noise decibel level at 50 feet? The language of proposed Section 9-4-6-6 does not clarify these issues. Moreover, the proposed language in the Street Performance Bylaw does not appear consistent with the proposed language of the Noise Control Bylaw governing decibel limits and how such limits are measured.

Governmental regulations impacting upon First Amendment-protected activities must be clear and provide adequate notice to the public at large as to the specific conduct prohibited thereunder. See, e.g., *Trinkler v. Alabama*, 414 U.S. 955, 956-957 (1973) ("laws [must] give the person of ordinary intelligence a reasonable opportunity to know what it prohibited, so that he may act accordingly.") While it appears that the use of "mean" and "near the mean" is an attempt to provide some allowance for street performances that occasionally spike above the threshold decibel limit, in my opinion, the language is both unclear and vague, and may not survive a constitutional challenge. In order to avoid this problem, I suggest that language be included to identify precisely: 1) the point at which the measurement is to be taken (i.e. "50 feet from the source of the sound"); 2) how long the sound is to be measured (i.e. "measured for thirty seconds"); and 3) if a "mean" is to be utilized, how many measurements must be taken to establish the mean (i.e., "the mean of three measurements, each measurement thirty seconds in duration, taken within a total span of three minutes"). While I do not suggest that the language

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quoted above should in fact be used, I wanted to illustrate the level of precision that I think is required to survive a constitutional challenge based on vagueness.

When determining what decibel limits are to be imposed, please be aware that a court's scrutiny of a particular decibel level restriction will likely involve consideration of factors such as the character of location to be regulated (i.e. commercial v. residential) and the pre-existing ambient noise levels. In other words, just because one court may have upheld a 65 dBA limitation in one circumstance does not necessarily mean that the same limitation would be upheld in another, different, circumstance.

#### Duration of Performances

Governmental regulation of First Amendment-protected activities may not be overly broad or unduly restrictive. As noted above, courts will look to see whether the limitations imposed by the regulation are narrowly tailored to address the significant governmental interest(s) at issue. In proposed Section 9-4-6-4, there is a limitation on street performances at Town Hall to two hours per performer per day. A somewhat similar restriction is contained in proposed Section 9-4-6-5, which limits performers to two hours per performance per day at any specific location. My interpretation of these sections is that performers are free to move to another approved location every two hours (provided they do not return to a previously-utilized location).

There appear to be four governmental interests served by the proposed Sections 9-4-6-4 and 9-4-6-5: 1) the need to reduce obstructions to pedestrian and possibly motor vehicle traffic that arise from lengthier street performances, which may cause greater crowds to amass around the street performer; 2) the reduction of unwanted noise of a long duration at any one particular location, for the benefit of residents, local businesses, and pedestrians; 3) providing opportunity for all street performers to have access to what may be considered more desirable or "prime" locations for performances; and 4) with respect to Town Hall, ensuring that persons wishing to do business at Town Hall are not unduly hindered in their access to Town Hall, and that Town Hall employees' abilities to do their jobs are not unreasonably interfered with by unwanted noise of excessive duration in time.

On their face, in my opinion, these provision leaves open "ample alternatives" for communication.<sup>2</sup> If challenged, however, the Town will need to demonstrate that the restrictions

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<sup>2</sup> I do not know how many total "public areas" are available to street performers, however, and how many street performers are seeking to utilize these areas, on average. The fewer locations where street performances may occur,

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imposed by these sections is in furtherance of one or more of the government interests stated above, with documentable evidence of the need for such restrictions.

A different but related issue arises in terms of where performers are required to relocate once they have exhausted the two hour time limit in a single location. It is foreseeable that one or more street performers may take the position that they can move 1 foot away from the previous location, for example, and satisfy the Bylaw's requirements. I would recommend including more specific direction in terms of the relocation requirement.

#### Can the Town Limit CD Sales by Street Performers?

Under proposed Section 9-4-6-7, street performers would not be able to sell CDs "or other reproductions," but may accept donations. In my opinion, this proposed section is inconsistent in its treatment of street performers as compared to "artists" under Section 8-11-2 of the Town's General Bylaws. If the Town permits other "artists" to sell their work on a public street or sidewalk, then it may be viewed as a First Amendment violation to prohibit street performers from doing the same, because the restriction could be viewed as an improper content-based restriction. As an alternative to the proposed Section 9-4-6-7, the Town could simply include street performers within the language of Section 8-11-2, causing street performers to come under the same requirements as other artists who sell their work.

#### Permit Fees

In order to impose a fee for a permit relative the exercise of First Amendment-protected activity, that fee must be reasonably related to the actual administrative costs associated with the processing of the permit. This is a very fact specific inquiry. Thus, some courts have upheld such fees where the government can demonstrate that the fee is in line with the administrative costs of permit processing (*see, e.g., U.S. Labor Party v. Codd*, 527 F.2d 118 (2d Cir. 1975)) while other courts have struck down such fees where the government has not demonstrated such a relationship (*see, e.g., Chester Branch, Nat'l Ass'n for Advancement of Colored People v. City of Chester*, 253 F. Supp. 707 (E.D. Pa. 1966)). In my opinion, a reasonable fee for permit processing is acceptable. However, it is also my opinion that it would not be acceptable to charge a fee where the costs to be recovered by the permit fee are the costs of the purchase of sound monitoring equipment, as is contemplated by proposed Section 9-4-4-1. I am also uncertain as to the justification for an additional "amplifier permit" and the associated additional fee.

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the harder it will be to demonstrate to a court that the proposed sections leave open "ample alternatives" for communication, in my opinion.

Mr. Keith Bergman,  
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Specific Comments and Recommendations on Proposed Revisions to Street Performance Bylaw

**Section 9-4-2:** You may wish to incorporate into this section a definition for "amplifiers" to include such items as public address systems, portable stereos, traditional amplifiers, and the like.

**Section 9-4-2-1:** See above comments regarding decibel levels.

**Section 9-4-4-1:** For the reasons discussed above, I would delete in the first sentence the phrase "and purchase of noise measuring devices" as well as the requirement of an additional permit (and an additional fee) for amplifier usage.

I would also include the word "offense" after the phrase "...7 days for second..."

In addition, I note that the "season" is not defined in the Bylaw. The use of the term "season" in this section may be misleading, where the permit term, as defined by Section 9-4-4-3, is the date of issuance through the end of the calendar year.

**Section 9-4-5:** If the requirement for separate performance and amplifier permits is deleted, then the pluralization of "permits" throughout this section is unnecessary.

**Section 9-4-6-1:** You may wish to clarify from what point the 100 feet "buffer zone" is measured. For example, I would recommend rewriting Section 9-4-6-1 as follows:

"Location: Performances may take place in public areas except:

1. Within one hundred (100) feet of an elementary and/or secondary school, measured either from the exterior walls of the building or the outermost boundaries of any playgrounds and parking lots, whichever distance is further;
2. Within one hundred (100) feet of a library, measured either from the exterior walls of the building or the outermost boundaries of any parking lots, whichever distance is further;
3. Within one hundred (100) feet of a religious facility while in session, measured either from the exterior walls of the building or the outermost boundaries of any parking lots, whichever distance is further; and
4. Public areas from which all performances have been excluded by vote of the Board of Selectmen, after public hearing and notice thereon. Such

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notice shall be advertised at least once in a local newspaper not less than fourteen (14) days prior to the hearing.”

I note that Attorney Cole challenges the adequacy of proposed Section 9-4-6-1(4). In my opinion, the Board is not required to adhere to the provisions of Section 5-12 of the General Bylaws when determining whether a public area is to be excluded from those areas where street performances may occur. The Town may, however, wish to impose the same requirements as contained in Section 5-12, if there is a concern about the adequacy of notice and opportunity for public comment on any proposed changes to the public areas in which street performances may occur, or if it is the Town’s preferred practice to hold public hearings on these types of determinations (which seems to be the intent of Section 5-12). If this is the case, you could revise proposed Section 9-4-6-1(4) to simply state “Public areas from which all performances have been excluded by vote of the Board of Selectmen, said determination made in accordance with the procedural requirements of Section 5-12 of the General Bylaws.”

**Section 9-4-6-4:** See above comments regarding duration of performances. I would include the phrase “per calendar day” after the phrase “...limit appearances to two hours...” in the first sentence. I would also add the following phrase at the end of the last sentence: “...seeking access to Town Hall.”

**Section 9-4-6-5:** I believe that the second sentence should read “At the end of the two hours...” rather than “At the end of the hour...”.

Also, I recommend deleting the second sentence of this Section, regarding performers “sharing space.”

**Section 9-4-6-6:** This sentence is unclear (see above comments regarding the setting of noise limits), and it should be clarified.

**Section 9-4-6-7:** See above comments regarding sales activities.

**Section 9-4-6-8:** In my opinion, it is acceptable for the Town to create an internal appeals process for instances where a street performer has been found to be in violation of the Bylaw. While Section 9-4-8 does allow for citations or “tickets” to be issued in accordance with G.L. c. 40, §21D and Section 2-3 of the General Bylaws, it does not require that they be issued. If it is the intent of the Town to allow a non-criminal disposition ticket issued under Section 9-4-8 to be appealed as provided under Section 9-

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4-6-8, then in my opinion this would conflict with the provisions of G.L. c. 40, §21D and Section 2-3, which contain explicit appeal processes. You may wish to clarify that Section 9-4-6-8 is meant to apply only to those determinations that the Bylaw has been violated that do not result in the issuance of a non-criminal disposition ticket.

At the end of the first sentence of this section, I would include the word "section" or the symbol "§" before the number "21D." I would also rewrite the fourth sentence as follows: "Any individual performing without first having applied for and received the necessary permit shall be given one written warning..."

**Section 9-4-7:** Attorney Cole suggests that this section is vague and thus unenforceable. Respectfully, I do not agree. As the United States Supreme Court has noted, the mere fact that a regulation requires interpretation does not make it vague. *McConnell v. FEC*, 540 U.S. 93, 169 n. 64 (2003); *Rose v. Locke*, 423 U.S. 48, 49-50 (1975). In my opinion, the remainder of the section provides sufficient definition of what constitutes an "undue interference," namely, crowds of sufficient size to obstruct the public way or sidewalks, or blocking space so that there is no easy passage by pedestrians.

As a typographical note, I believe that the word "dispenses" should be "disperses" throughout this section.

**Section 9-4-10:** See above comments regarding the establishment of noise limitations. Any reference to decibel limits needs to be consistent with proposed Sections 9-4-2-1 and 9-4-6-6. I also concur with Attorney Cole's suggestion that the requirement that performers display "elements of courtesy and cooperation" is vague and ambiguous, and I would recommend deletion of this language.

#### Specific Comments and Recommendations on Proposed Revisions to Noise Control Bylaw

**Section 13-2-6-1:** I find the added language regarding decibel levels to be confusing.

The following comments apply to the current version of the Noise Control Bylaw.

**Section 13-2-6-4:** I would revise the second sentence to read "Events allowed under this section may not extend beyond midnight nor begin prior to 10 A.M."

KOPELMAN AND PAIGE, P.C.

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In the fifth sentence, I would add the word "sections" or the symbols "§§" before the numbers "13-1-2 and 13-2-6."

Conclusion

As you know, drafting local bylaws that regulate First Amendment-protected activities is a complicated task, and it is not always possible to balance the various competing interests at stake in a manner that satisfies all concerned. While the government may, "within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise," (*City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994) (citations omitted)), for example, care must be taken to ensure that the restrictions imposed by such regulation meet the court-defined tests for constitutionality. I hope this letter provides you with sufficient guidance in crafting workable – and enforceable – provisions for the Street Performance and/or Noise Control Bylaws. I am happy to answer any further questions that you or the Board of Selectmen may have, so please do not hesitate to contact me.

Very truly yours,



Michele E. Randazzo

MER/tap

Enc.

cc: Chief of Police

261830/PROV/0253



**FOLEY  
HOAG LLP**  
ATTORNEYS AT LAW

September 15, 2005

David E. Cole  
Boston Office  
617.832.3055  
dcole@foleyhoag.com

**Via E-mail and U.S. Mail**

Michele Randazzo, Esquire  
Kopelman & Paige, PC  
31 St. James Avenue  
Boston, MA 02116

**Re: *Provincetown Street Performance Bylaw***

Dear Ms. Randazzo:

On September 6, 2005, I participated in the final meeting of the Community Oriented Policing group in which the attendees attempted to draft amendments to the current Provincetown Street Performance Bylaw, Gen. Bylaws § 9-4, for consideration by the Board of Selectmen. Per the request of Chief Meyer, I am writing to you to convey some of the comments and concerns that I expressed at that meeting regarding the current text of section 9-4 as well as the most recent draft of the proposed amendments, dated September 2, 2005.

I understand that Chief Meyer and the COP group have put in considerable time and effort in drafting amendments to section 9-4 to address concerns of Provincetown's businesses, residents, and street performers. However, after reviewing both the current text of section 9-4 as well as the proposed amendments, it appears that they raise serious concerns under, among other things, the Home Rule Amendment, the First and Fourteenth Amendments and their counterparts in the Massachusetts Constitution, and doctrines concerning the separation of powers and non-delegation.

**I. GENERAL COMMENTS AS TO SECTION 9-4 AND THE PROPOSED AMENDMENTS**

**A. *The Home Rule Amendment***

Pursuant to the Massachusetts Home Rule Amendment, a town is empowered to adopt bylaws that are not inconsistent with the Massachusetts Constitution, Massachusetts General Laws, or the town's own charter. In this regard, section 9-4 appears to be inconsistent with Mass. Gen. Laws ch. 85, § 10, which states: "Towns may

make ordinances and by-laws ... regulating and controlling persons who frequent public places playing on hand organs, drums, trumpets or other musical instruments, upon or through a public way, and may affix penalties of *not more than twenty dollars* for each violation thereof" (emphasis added). In contrast, a violation of the Bylaw, which regulates the "playing [of] musical instruments," has a penalty of \$50.00, which appears to be beyond the town's power. See Gen. Bylaws §§ 2-1, 9-4-8 & Schedule A. The proposed amendments to section 9-4 do not remedy this problem.

## B. TARGETING OF STREET PERFORMERS

Where a town seeks to regulate protected speech in a traditional public forum, there exists a higher standard than where it seeks to regulate other activities such as zoning and public parking. Section 9-4 as well as its proposed amendments, however, appear to single out certain types of performers and speakers and saddle them with higher penalties than generally applicable bylaws, the possibility of multiple violations for the same activity, and contributing all of the funds for the purchase of noise measuring devices that will be used to measure not only them but the general citizenry. As such, section 9-4 may be deemed to be a content-based restriction on free speech and, in any event, the apparent targeting belies the town's claim that section 9-4 is a narrowly tailored bylaw or that it even serves a significant government interest. It also raises equal protection concerns.

### 1. Section 9-4 and the Proposed Amendments

Section 9-4 as well as the proposed amendments also appear to single out certain types of performances from all other types of speakers or performers. First, neither section 9-4 nor the proposed amendments purport to regulate the activities of leafletters, picketers, preachers, demonstrators, sellers of visual art, or orators, and I have been informed that the town has taken the position that section 9-4 does not regulate face painters either. These are of course people that would likewise contribute to the same problems allegedly contemplated by the town when enacting section 9-4—noise pollution and pedestrian traffic flow.

Second, the town has generally applicable bylaws that address noise pollution and pedestrian traffic flow. See Gen. Bylaws §§ 13-2-1, 13-2-2. As such, there does not appear to be a need for a more specific bylaw aimed at regulating the same allegedly troublesome behavior by street performers. Indeed, section 13-2-2 carries a lesser fine than section 9-4 and has a *mens rea* requirement ("willfully or negligently") which section 9-4 does not.

Third, section 9-4-6-1, which gives the Board of Selectmen the power to add public areas to the list of prohibited locations, does not follow the generally applicable procedures of town boards as set forth in section 5-12 and as a result provides the performers less process, in terms of a notice and a hearing, than would be required by the Board of Selectmen, or any other town board, for other town matters.

## 2. The Proposed Amendments

The proposed amendments to section 9-4 appear to go even further. First, the town now seeks to impose a licensing scheme that requires performers to pay a fee that would go towards paying for noise measuring devices. See Proposed Gen. Bylaws § 9-4-4-1. These same measuring devices, however, would presumably be used to measure the noise level of the other residents and businesses of the town under the proposed section 13-2-6 (the Noise Bylaw), which also requires measurements using such a device. It is not clear why the performers should be required to pay for measuring devices where they will be used to monitor not just them but the rest of the town as well. Further, the generally applicable noise pollution bylaw appears to carry a lesser fine than that for the performers.

Second, the proposed amendments seek to remove section 9-4-9, which states that, to the extent that there is a conflict between section 9-4 and the other town bylaws, section 9-4 governs. This repeal would appear to expose the performers to multiple fines for violations of not only section 9-4, but also of the other generally applicable bylaws such as sections 13-2-1 and 13-2-2 discussed above.

Third, an amendment with an effect similar to the proposed repeal of section 9-4-9 was proposed for section 9-4-10. This proposed amendment would make it much harder for a performer to take advantage of the presumption that activities in violation of section 9-4 are not violations of other generally applicable bylaws, by inserting a decibel level requirement as well as a vague and ambiguous requirement that the performer display "elements of courtesy and cooperation."

Fourth, depending on how proposed sections 9-4-2-1 and 9-4-6-6 are interpreted, it appears that the noise levels allowed for street performers ("the approximate mean of 70 db at 25' or 50' in overall ambient noise") may be lower than those for the general public found in proposed section 13-2-6 (70 db at 50 feet).

Fifth, the bylaw seems to hold the performer personally responsible for the actions crowd she or he attracts, yet this is not the same for the various businesses and restaurants that often have crowds and lines that block the public ways. It may also be pointed out that the crowds gathering to see or hear a performer are gathering to see or hear First Amendment activity, as opposed to commercial activity, and the member of that crowd have a protected right to receive such communications.

## II. SPECIFIC COMMENTS AS TO THE CURRENT SECTION 9-4

### A. *Vagueness of Section 9-4*

Where a town seeks to regulate any activity through the enactment of a bylaw, the bylaw must put the public on notice of what behavior is prohibited so that people may act accordingly. In addition, a bylaw must not give police officers too much

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discretion in its enforcement. Here, section 9-4 generally suffers from undefined, vague, and inconsistent terms as well as excess verbiage, which only contributes to the section's overall vagueness. However, some of this language (e.g., recommendations for muting amplifiers) would be useful to performers and may be more appropriate to include in the letter outlining the general policies of the bylaw, which is currently handed to performers along with the bylaw when they apply for a permit.

1. Section 9-4-6-1

Section 9-4-6-1 purports to regulate performances one hundred feet in front of Town Hall, is particularly troublesome because, among other reasons:

1. There appears to be at least two reasonable interpretations of section 9-4-6-1—one places an absolute ban on performances in front of Town Hall during business hours or when a complaint is lodged during a town meeting, and the other prohibits performances only after a complaint has been lodged;
2. It is unclear where one hundred feet is measured from—the footprint of the building, the front entrance, the lot lines, etc.; and
3. It is unclear what the term “hindering” means, given the fact that it is left undefined and other terms that may or may not describe similar prohibited activity are used within section 9-4 and other bylaws. *See* Gen. Bylaws § 9-4-7 (using the terms “undue interference” and “obstruct”), § 13-2-2 (using the term “obstruct”). The proposed amendment to this section does not remedy this problem. Indeed, the proposed amendment adds additional phrases, “easy passage” and “impeded”;
4. It is unclear what triggers a violation of the latter half of section 9-4-6-1, which requires that a performer discontinue a performance when “any person transacting such business requests that a performer discontinue,” or to whom the request should be made, i.e., to the performer or to a police officer. In any event, this latter half of section 9-4-6-1 appears to place the determination of violative conduct impermissibly within the hands of the general citizenry.

2. Section 9-4-7

Section 9-4-7 is similarly vague in that several of its terms, specifically “undue interference” and “obstruct,” are left undefined and also lead to an apparent inconsistency both internally and with other bylaws. *Compare* Gen. Bylaws § 9-4-6-1 (using the term “hindering”), § 13-2-2 (using the term “obstruct”). Indeed, the proposed amendment adds an additional phrase, “easy passage.” In addition, it is unclear if the

four sentences making up section 9-4-7 create additional duties for the performer, and thereby raising the possibility of multiple violations of this same section, or whether they create a means for a performer to "cure" her or his original violation.

**B. *The Purported Ban on Town Hall Performances During Business Hours is Neither Narrowly Tailored Nor Does it Leave Adequate Alternative Forums of Communications Available.***

Although there appear to be at least two different interpretations of section 9-4-6-1, the town seems to insist that, at a minimum, it calls for a complete ban of performances within one hundred feet of Town Hall during its business hours. Assuming that the town is correct, after review of the section 9-4 and the record of the meetings leading up to its enactment, there does not appear to be any record data supporting the need for such a ban, especially one that is in effect year-round. As such this purported ban seems arbitrary and belies any claim that the ban is, for First Amendment purposes, narrowly tailored to serve the town's purported interest.

In addition, the area surrounding Town Hall is unique because of its central location on Commercial Street, large open space, and symbolic and political value. A ban on performances in this unique area only leaves other inadequate alternative forums for the performers to use.

**III. SPECIFIC COMMENTS AS TO THE PROPOSED AMENDMENTS**

Although the town appears to have recognized some of the problems with existing section 9-4-6-1, the proposed amendments raise other concerns.

**A. *Licensing Scheme***

In proposed section 9-4-4-1, the town is attempting to set up a licensing scheme for First Amendment activity. While such licensing schemes are not per se invalid, any fees must be a nominal and imposed as a regulatory measure to defray the expenses of policing the activities in question. Here, the town is seeking to impose, on an estimated 200 street performers, a \$20 fee for a street performance license and an additional \$10 fee for street performers who use amplifiers to pay for "administrative costs" and the purchase of "noise measuring devices," which Chief Meyer has indicated cost \$1000 per unit. Such a licensing scheme appears inappropriate.

First, I am not aware of any town employee whose only duty is to oversee administering street performance ordinances. Further, to the extent that there are "administrative costs" that can be traced solely to the street performance bylaw, such costs were apparently included in the town's overhead budget while administering the existing bylaw. Second, even at \$1000 per unit, the fee appears excessive in that the costs of the noise measuring devices will be covered after only a portion of the performers pay the fee, leaving the remainder of the fees collected as pure revenue for

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the town. Third, it is unclear why the performers must pay for devices that will be used to monitor the general public as well.

**B. *Appeal to the Chief of Police and Town Manager***

Proposed sections 9-4-4-1 and 9-4-6-8 set forth an appellate process in which citations issued by a police officer may be appealed to the Chief of Police and/or the Town Manager, putting them in the role of an administrative judge or district court judge. This is improper.

**C. *Town-Wide Two Hour Time Limit on Performances***

Proposed section 9-4-6-4 appears to set a two hour time limit to performances, but also has a requirement that performers "share space" if requested, causing much confusion as to the meaning and intent of this section. Further, the phrase "share space" lacks any definition. This leaves performers without notice as to what behavior violates the section and leaves a police officer with unfettered discretion in enforcement.

In addition, proposed section 9-4-6-4, as well as section 9-4-6-5, set a two hour time limit on performances that appear arbitrary. I am unaware of any record data that justifies limiting performances to two hours as opposed to any other time limit. Indeed, the motivation behind section 9-4-6-5 appears not to be performer space allocation but the desire of certain business owners not to have to listen to the same performer for an extended period of time. Such a motivation would seem to be inappropriate when regulating protected speech in a traditional public forum. In addition, a year-round two hour time limit on performances seems to be unnecessary and unenforceable.

**D. *Decibel Levels***

Proposed sections 9-4-6-6 sets noise limits for street performers at "the approximate mean of 70 db at 25' or 50' in overall ambient noise" in order to curb interference with the noise levels within the buildings of various businesses. This section is objectionable for several reasons. First, the wording of this section is vague and ambiguous: (1) the term "approximate" as it modifies "mean" is vague and allows too much discretion in the section's enforcement; (2) it is unclear whether the noise threshold based on 70 db at 25 feet or 70 db at 50 feet; (3) it is unclear what the phrase "in overall ambient noise" modifies and what such a modification would mean; and (4) a *mean* noise measurement without reference to a time element or duration of the measurement is vague. In addition, it is not apparent that a noise measuring device, whether issued by OSHA or not, can even measure a mean noise level or whether this bylaw would require a police officer to perform such a calculation.

Second, within the last month, the town purportedly took noise measurements of performances on Commercial Street and then averaged these readings taken of small number of performers. As a result these reading seem to be overreaching and do not

Michele Randazzo, Esquire  
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address the issues sought to be remedied: (1) readings should have been taken from inside of shops or residences with their doors closed if that is the actual problem to be addressed by this section; (2) the small number of performers creates a statistically flawed basis of the resultant threshold limit; (3) whereas this threshold is based on an *average* measurement, it follows that a significant amount of the performers measured will exceed the limit while performing; (4) it is unclear why noise measurements taken during Provincetown's busy summer tourist season, where performers are naturally trying to overcome ambient crowd noise, should serve as the basis for a year-round threshold noise limit; (5) the readings appear to have been made using equipment inferior to that which will ultimately be used to enforce the proposed amendment; and (6) the measurement data were not made part of the record not were they made available to the COP group when it formulated the threshold.

**E. *Sale of CDs and Other Reproductions***

Proposed section 9-4-6-7 is a clever attempt at avoiding the restrictions of other of the town's bylaws. It purports not to allow performers "to sell CDs and other reproductions" of their performances, but does allow them to take donations in exchange for CDs and reproductions. It also limits the size of signs that they can use to indicate the "preferred donation" for these items. It would appear that, a better way of allowing performers to sell their reproductions and regulating such sales would be to create an explicit exemption for the performers in section 8-11-2 regarding the licensing a regulation of businesses. Further, the First Amendment also protects the sale of expressive merchandise, so any bylaw concerning the sales of such merchandise is subject to scrutiny.

Thank you for your attention to this matter. I have prepared and enclosed a copy of a draft bylaw that attempts to address the above concerns. If you have any questions or comments please feel free to contact me at 617.832.3055 or by e-mail at [dcole@foleyhoag.com](mailto:dcole@foleyhoag.com).

Sincerely,



David E. Cole

Enclosure

cc: Chief Ted Meyer (w/ encl. - via E-mail)  
Joshua Pemstein, Esquire (w/ encl.)  
Ashley Weaver, Esquire (w/ encl.)

## **9-4. STREET PERFORMANCES**

### **9-4-1. PURPOSE**

WHEREAS it is the intent of the Town through this bylaw to balance the street performers' rights to free speech with the Town's interests in protecting (1) its residents' reasonable expectation of peace and quiet in their homes, and (2) its business owners' reasonable expectation of public access to their shops and stores.

### **9-4-2. DEFINITIONS**

**9-4-2-1. Perform.** The term "Perform" as used herein includes the following activities if conducted live and in person in the Public Areas of the Town, as defined by section 9-4-2-3: acting, singing, playing musical instruments, pantomime, juggling, magic, dancing, reciting, and other activities that are conducted for the purposes of entertaining members of the public.

**9-4-2-2. Performer.** The term "Performer" as used herein means a person who has obtained a permit pursuant to this bylaw.

**9-4-2-3. Public Area.** The term "Public Area" as used herein means the Town's public sidewalks, parks, and playgrounds, and public ways.

**9-4-2-4. Obstruct.** The term "Obstruct" as used herein means to completely block.

### **9-4-3. PERMITS REQUIRED**

**9-4-3-1. Street Performance Permit.** No person may Perform in a Public Area without a permit issued pursuant to sections 9-4-4 of this bylaw.

**9-4-3-2. Amplifier Permit.** No Performer may Perform in a Public Area using an electronic amplifier without a permit issued pursuant to sections 9-4-5 of this bylaw.

### **9-4-4. STREET PERFORMANCE PERMIT**

**9-4-4-1. Issuance.** A street performance permit shall be issued by the Police Department to each applicant thereof in exchange for a completed application.

**9-4-4-2. Form of Application.** A completed application for a street performance permit shall contain the applicant's name, address, and telephone number.

**9-4-4-3. Certification.** The applicant's signature on the application for a street performance permit shall constitute a certification that she or he has received, read, and understood the text of this bylaw.

**9-4-4-4 False Information.** If an applicant knowingly provides false information on her or his application for a street performance permit, then any street performance permit issued therefrom shall be invalid.

**9-4-4-5. Form of Permit.** A street performance permit shall contain the Performer's name, address, telephone number, street performance permit number, and the calendar year in which the street performance permit was issued.

**9-4-4-6. Distribution of Bylaw.** Upon issuing a street performance permit to a Performer, the Police Department shall also give the Performer a copy of the street performance bylaw.

**9-4-4-7. Term of Permit.** Unless a Performer has violated section 9-4-4-5 of this bylaw, a street performance permit shall be valid from the date on which it is issued through the end of the calendar year in which it was issued.

**9-4-4-8. Individual Permits Required.** Each member of a group of Performers who Perform together shall be required to obtain a street performance permit.

**9-4-4-9. Non-Transferable.** A street performance permit shall not be transferable from the Performer to which it was issued to any other person.

#### **9-4-5. AMPLIFIER PERMIT**

**9-4-5-1. Issuance.** An amplifier permit shall be issued by the Police Department to each Performer who applies for one in exchange for a completed application.

**9-4-5-2. Form of Application.** A completed application for an amplifier permit shall contain the applicant's name, address, and telephone number.

**9-4-5-4 False Information.** If an applicant knowingly provides false information on her or his application for an amplifier permit, then any amplifier permit issued therefrom shall be invalid.

**9-4-5-5. Form of Permit.** An amplifier permit shall contain the Performer's name, address, telephone number, amplifier permit number, and the calendar year in which the amplifier permit was issued.

**9-4-5-6. Term of Permit.** Unless a Performer has violated section 9-4-5-4 of this bylaw, an amplifier permit shall be valid from the date on which it is issued through the end of the calendar year in which it was issued.

**9-4-5-7. Individual Permits Required.** Each member of a group of Performers who Perform together shall be required to obtain an amplifier permit.

**9-4-5-8. Non-Transferable.** An amplifier permit shall not be transferable from the Performer to which it was issued to any other person.

#### **9-4-6. DISPLAY AND INSPECTION OF PERMITS**

**9-4-6-1. Display.** A Performer shall (1) clearly display her or his street performance permit and, if she or he is using an amplifier, her or his amplifier permit while Performing, or (2) have her or his street performance permit and, if she or he is using an amplifier, her or his amplifier permit on her or his person while Performing.

**9-4-6-2. Inspection.** While Performing, a Performer shall allow inspection of her or his street performance permit and, if she or he is using an amplifier, her or his amplifier permit by any Provincetown police officer upon the police officer's request.

#### **9-4-7. PERMITTED PERFORMANCES**

**9-4-7-1. Performance Times.** Subject to sections 9-4-7-2 to 9-4-7-5, inclusive, and 9-4-8-2, Performers may Perform in Public Areas seven days per week between the hours of 11:00 A.M. and 11:00 P.M.

**9-4-7-2. Prohibited Locations & Times.<sup>1</sup>** A Performer shall not Perform within one hundred (100) feet of the footprints of the following buildings during the listed times:

- (1) an elementary and/or secondary school at any time while said school is in session;
- (2) a public library during its business hours;
- (3) a public place of worship during its business hours; and
- (4) a public hospital at any time.

**9-4-7-3. Street Fairs and Public Festivals.** A Performer shall not Perform in any Public Area where an authorized street fair or public festival is being conducted without the permission of the licensed sponsor of said street fair or public festival.

**9-4-7-4. Summer Town Hall Restriction.<sup>2</sup>** From Memorial Day to Labor Day, inclusive, a Performer shall be limited to two (2) performances per calendar day within one hundred (100) feet of the Commercial Street entrance to Town Hall. The time between the two allowed performances shall be at least two hours. For each such performance, a Performer shall discontinue Performing if (1) the Performer has Performed for over two hours, and (2) a Second Performer has requested the Performer discontinue Performing so that the Second Performer may Perform in the same location.

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<sup>1</sup> For the sole purpose of generating discussion, measurements of 100 feet from the footprints of the listed buildings have been adopted.

<sup>2</sup> For the sole purpose of generating discussion, the two hour time limit has been adopted. However, it is unclear if there is a legitimate basis for this number. See my comments in my letter at Part III.C.

**9-4-7-5. Locations Prohibited by the Board of Selectmen.** A Performer shall not Perform in a Public Area in which Performances have been prohibited by vote of the Board of Selectmen pursuant to section 9-4-7-6 of this bylaw.

**9-4-7-6. Board of Selectmen Hearing.**<sup>3</sup> Performances may be prohibited in a Public Area upon vote of a majority of the Board of Selectmen after a public hearing on the subject has been held. At least fourteen (14) days in advance of said hearing, a written notice of the hearing shall be published in a newspaper of general circulation in the Town and posted on the bulletin board in Town Hall. The written notice shall include a brief description of the subject Public Area, the purpose of the hearing, and the date, time, and place of the hearing. If, after the hearing, a majority of the Board of Selectmen vote in favor of prohibiting Performances in the subject Public Area, then the Board of Selectmen shall have recorded the fact of such determination and shall publish said determination and effective date thereof in a newspaper of general circulation in the Town.

#### **9-4-8. PERFORMER NOISE LEVELS**

**9-4-8-1. Noise Level.**<sup>4</sup> A Performer shall not Perform so as to exceed a mean of 75 decibels with A weighting at fifty (50) feet as measured for sixty (60) seconds by a Provincetown police officer using an OSHA approved sound measuring device.

**9-4-8-2. Amplifiers.** If a Performer using an amplifier pleads guilty to or is found on appeal to have violated section 9-4-7-1, then

(1) for the first such offense within one calendar year, the Performer's amplifier permit shall be revoked for one day from the day the plea is accepted or from when judgment is entered; or

(2) for the second such offense within one calendar year, the Performer's amplifier permit shall be revoked for three days from the day the plea is accepted or from when judgment is entered; or

(3) for the third such offense within one calendar year, the Performer's amplifier permit shall be revoked for seven days from the day the plea is accepted or from when judgment is entered.

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<sup>3</sup> This section was edited to comport with the notice provisions of section 5-12. It is not clear why the Board of Selectmen would not need to follow section 5-12 or why a lesser degree amount of process, in terms of notice and hearing, should be required for decisions concerning street performers.

<sup>4</sup> For the sole purpose of generating discussion, the 75 db limit at 50 feet has been adopted and a 60 second measurement suggested. However, it is unclear if there is legitimate basis for this threshold limit or if a noise measuring device can even measure a mean noise level. See my comments in my letter at Part III.D.

#### 9-4-9. DONATIONS AND SALES

**9-4-9-1. Display of Reproductions.**<sup>5</sup> While Performing, a Performer may accept donations for or sell compact disks or other reproductions of the Performer Performing, provided that Performer display no more than three (3) CDs or other reproductions at any one time.

**9-4-9-2. Signs.**<sup>6</sup> A Performer shall not display any printed sign indicating a suggested donation or sale price for donations or sales pursuant to 9-4-9-1 that exceeds 9 inches by 6 inches in dimension.

#### 9-4-10. INTERFERENCE WITH PUBLIC WAYS

**9-4-10-1. Sidewalks and Streets.**<sup>7</sup> A Performer shall not willfully or negligently Obstruct the free passage of members of the public in any street or upon any public sidewalk.

**9-4-10-2. Town Hall Access.** A Performer shall not willfully or negligently Obstruct the free passage of members of the public through any of the entrances to Town Hall during Town Hall business hours or during a Town Meeting.

**9-4-10-3. Crowds.** If a sufficient crowd gathers to see or hear a Performer such that the crowd Obstructs the passage of the public in any street or upon any public sidewalk or through any of the entrances to Town Hall during Town Hall business hours or during a Town Meeting, a police officer may disperse the portion of the crowd that is Obstructing the passage of the public, but said police officer shall not cause the Performer to leave the location.

#### 9-4-11. NON-CRIMINAL DISPOSITION OF VIOLATIONS

Whoever violates any provision of this bylaw may be penalized by a non-criminal disposition as provided in Mass. Gen. Laws. ch. 40, § 21D. For the purposes of this bylaw, the following officials shall be enforcing persons: Provincetown police officers. The penalty for each violation shall be twenty dollars (\$20),<sup>8</sup> with each day the violation exists constituting a separate offense. A Performer who has not applied for a street performance permit or, if required, an amplifier permit shall be given one written warning by a police officer informing the Performer of the bylaw and the requirement of a permit before any subsequent violations are issue.

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<sup>5</sup> It appears that an exception to the general bylaws may be appropriate to allow for the sale of CDs and reproductions as well as signs. See my comments in my letter at Part III.E. For the sole purposes of generating discussion, the limits of three CDs has been adopted. I am unaware of the legitimate basis, if any, for this limitation.

<sup>6</sup> The dimensions suggested are roughly the dimensions of an open CD case, which was suggested in the proposed amendments to the street performance bylaw. For the sole purposes of generating discussion, these dimensions has been adopted. I am unaware of the legitimate basis, if any, for this limitation.

<sup>7</sup> The introduction of a *mens rea* requirement may put this more in line with section 13-2-2.

<sup>8</sup> Schedule A would also need to be amended to reflect the change to a \$20 penalty.

**9-4-12. EXCLUSIVITY**

The provisions of this bylaw shall take precedence over any other town bylaws that may be applicable to Performers or their street performances. To the extent that other town regulations or bylaws are applicable and are inconsistent with this bylaw, this bylaw shall govern.

**9-4-13. PEACE AND QUIET**

A Performer who is Performing in accordance with this bylaw shall be presumed not to be in violation of sections 13-1-2, 13-2-2, or 13-2-6.

**9-4-14. SEVERABILITY**

The provisions of the sections of this bylaw are severable, and if any part of this bylaw should be held invalid by a court of competent jurisdiction, such invalidity shall not affect the remainder of this bylaw and the remainder of this bylaw shall stay in full force and effect.

3A

## **EXISTING STREET PERFORMER BYLAW**

### **General Bylaw 9-4. Street Performances.**

**9-4-1. Purpose.** The existence in Provincetown of street performers provides a public amenity that enhances the character of the town, and the town seeks to encourage such performances to the extent that they do not interfere with the reasonable expectations of (1) residents to the enjoyment of peace and quiet in their homes or (2) business owners to public access to their businesses. The bylaw seeks to balance the interests of the performers with those of the residents of the town.

#### **9-4-2. Definitions.**

**9-4-2-1. Perform.** *Perform* includes, but is not limited to, the following activities: acting, singing, playing musical instruments, pantomime, juggling, magic, dancing, reading and reciting, conducted live and in person, but shall not include presentations of audio/visual reproductions of such activities.

**9-4-2-2. Performer.** *Performer* means a person who has obtained a permit pursuant to this By-law.

**9-4-2-3. Public areas.** *Public areas* means public sidewalks, parks, playgrounds and all public ways in Provincetown.

**9-4-3. Permit required.** No person may perform in a public area without a permit issued pursuant to Section 9-4-4-1 of this bylaw.

#### **9-4-4 Permits.**

**9-4-4-1. Issuance.** A permit shall be issued by the Police Department to each applicant therefor in exchange for a completed application.

**9-4-4-2. Form of application.** A completed application for a permit, and the permit itself, shall contain the applicant's name, residence address and telephone number, and shall be signed by the applicant. The applicant's signature shall constitute a certification that she or he has received, read, and understood the text of this bylaw. If a performer has knowingly provided false information in the application for a permit or has not signed the application, any permit issued pursuant to such application shall be invalid.

**9-4-4-3. Term of permit.** A permit shall be valid from the date on which it is issued through the end of that year.

**9-4-4-4. Form of permit.** A permit shall be non-transferrable, and shall contain the permit number of the applicant and the year in which the permit is valid.

**9-4-4-5. Individual permits required.** Each member of a group of performers who play together shall be required to obtain an individual permit.

**9-4-4-6. Distribution of street performance bylaw.** Upon issuing a permit, the Police Department shall also give the performer a copy of the street performance bylaw.

**9-4-5. Display of Permit.** A performer shall clearly display his or her permit while performing, or have the permit on her or his person, and shall allow inspection of the permit by any Provincetown police officer upon request.

#### **9-4-6. Permitted Performances.**

**9-4-6-1. Location.** Performances may take place in public areas except: within one hundred (100) feet of an elementary and/or secondary school, library or religious facility while in session; within one hundred (100) feet of a hospital at any time; within one hundred (100) feet of Town Hall during business hours or any town-related meeting if any person transacting such business requests that a performance discontinue for the reason that such performance is hindering said business; and public areas from which all performances have been excluded by vote of the Board of Selectmen after public hearing and notice thereon. Such notice shall be advertised at least once in a local newspaper no less than fourteen (14) days prior to the hearing.

**9-4-6-2. Street fairs and public festivals.** Performances may take place in public areas where an authorized street fair or public festival is being conducted, with the permission of the sponsor of such fair or festival.

**9-4-6-3. Times.** Performances may take place at the following times: seven days per week, between 11:00 a.m. and 11:00 p.m.

**9-4-7. Undue interference.** A performer may not create an undue interference with the passage of the public through a public area. If a performer attracts a crowd sufficient to obstruct the public way, such performer shall request that the crowd eliminate the obstruction. If such efforts to eliminate the obstruction fail, a police officer shall ask the performer to stop the performance until that part of the crowd that is creating the obstruction disperses. A police officer may disperse the portion of the crowd that is creating the obstruction.

**9-4-8. Non-criminal disposition of violations.** Whoever violates any provision of this bylaw may be penalized by a non-criminal disposition as provided in G.L. c.40, §21D. For the purposes of this bylaw, the following officials shall be enforcing persons: Provincetown police officers. The penalty for each violation shall be fifty dollars (\$50), with each day the violation exists constituting a separate offense. A performer who has not applied for a permit shall be given one written warning by a police officer informing the performer of the bylaw and the requirement of a permit before any subsequent violations are issued.

**9-4-9.** Removed by November 13, 2006 STM Article 13 vote.

**9-4-10.** Removed by November 13, 2006 STM Article 13 vote.

**9-4-11. Severability.** The provisions of the sections of this bylaw are severable, and if any part of this bylaw should be held invalid by a court of competent jurisdiction, such invalidity shall not affect the remainder of this bylaw and the remainder of this bylaw shall stay in full force and effect.

## ***Existing Bylaw***

### **General Bylaw 13-2-6.**

#### **Excessive musical and other noise.**

**13-2-6-1. Noise permitted by person in charge.** No person occupying or having charge of any building, premises, mobile or stationary vehicle, or any part thereof shall cause, suffer or allow unnecessary loud, excessive or unusual noise (regardless of its nature, source or manner of production or preproduction) to be audible at a distance of fifty (50) feet or more from the point of origin.

**13-2-6-2. Noise caused or suffered by persons on premises.** No person present in or about any building, dwelling, premises, shelter, stationary vehicle<sup>3</sup>, boat or conveyance (or any part thereof), other than that section of any establishment licensed under M.G.L. c. 138, shall cause, suffer, or countenance any loud, unnecessary, excessive, or unusual noise, regardless of its nature, source, or manner or production or reproduction, to be audible at a distance of fifty (50) feet or more from the point of origin. A non-criminal disposition penalty will be assessed of fifty dollars (\$50) to the owner, sponsor and/or responsible party for each offense.<sup>4</sup>

**13-2-6-3.** In addition to the **non-criminal disposition penalty stated above, any 'stationary vehicle' or 'vessel'** who violates 13-2-6-1 for a period of sixty (60) minutes or more, or whose vehicle is determined to be mal-functioning by an officer of the Provincetown Police Department, shall have said vehicle or vessel removed to a location where the source of the noise can be extinguished. The cost of removal and extinguishing of the source of the offending noise shall be paid by the owner or claimant of the offending vehicle.<sup>5</sup>

**13-2-6-4.** The Licensing Board may waive any part of this noise Control bylaw for a temporary licensed public event if, in the judgment and discretion of the Licensing Board, the noise that the event will create in excess of the noise level limits established under the Noise Control bylaw is offset by the benefits of the event to the participants or the public and the noise of the event will not cause undue hardship or disturbance to the surrounding area. Events covered by this bylaw will not extend beyond midnight nor begin prior to 10 AM. The Licensing Board can stipulate any time it deems appropriate within this time frame depending on the expected noise level and impact on surrounding area. Residential private parties limited to invitation only are not affected by this bylaw as they are not licensed by the Licensing Board. They are still governed as to noise or nuisance stipulations of these bylaws under 13-1-2 and 13-2-6. The Licensing Board may impose, on the grant of a temporary waiver, terms and conditions appropriate to reduce the impact of the noise level exception. An application for a temporary waiver shall be filed with the Town Clerk. The applicant shall certify that notice of such temporary waiver application has been provided to all properties contiguous, or likely to be affected by the event, to the property where the event will occur. The applicant must also place a notice in the local media advising of the request for waiver at least two weeks prior to any hearing on the waiver by the Licensing Board. The applicant shall further certify that the Police Department has been consulted with respect to the event and has approved as to form the application for a waiver with the understanding that once the event is in process, complaints could arise necessitating action on the part of the Police, i.e., immediate consultation with the applicant to ameliorate the sound conditions if the complaints are numerous and clearly justified in the discretionary opinion of the responding Police. The application

for a temporary waiver affects all public events likely to produce sound levels that will affect the average person in a negative manner and in no instance will a waiver application be considered by the Licensing Board less than 60 days preceding any event. Applicants may receive more than one waiver in a year but the Licensing Board may recall any applications during the event year if complaints exceed the benefit to the public as determined by the Licensing Board as advised by the Police Department. The Licensing Board may suspend, modify or revoke any temporary waiver if it determines that an applicant has violated the terms or conditions of the waiver.

**Failed bylaw article - FALL STM 2007 Article 8: Noise By-law**

To see if the Town will vote to amend section 13-2-6 of the General Bylaws, by deleting the current text of section 13-2-6 in its entirety and replacing it with the following:

**13-2-6 EXCESSIVE MUSICAL AND OTHER NOISE.**

Recognizing that people have a right to and should be ensured an environment free from excessive sound and vibration capable of jeopardizing their health, safety, or welfare, or of degrading their quality of life, this section is enacted to protect, preserve and promote the health, safety, welfare, and quality of life of the citizens of Provincetown.

The following definitions shall apply to Section 13-2-6:

dBA: A-weighted sound level in decibels, as measured by a general purpose sound level meter complying with the provisions of the American National Standards Institute, "Specifications for Sound Level Meters (ANSI s1.4 1971)", or the latest approved revision thereof, properly calibrated, and operated on the "A" weighting network.

Amplification devices or similar equipment, includes, but is not limited to: phonograph, radio, television, stereo, record player, tape player, cassette player, compact disk player, digital music player, "boom box", loud speaker, or other sound amplification device.

**13-2-6-1. Noise Permitted By Person In Charge.** No person occupying or having charge of any building, premises (including public places), mobile or stationary vehicle, or any part thereof, shall cause, suffer or allow unnecessarily loud, excessive or unusual noise in Town, regardless of its nature, source or manner of production or reproduction, including but not limited to amplification devices or similar equipment, which cause or result in a noise level measured as follows:

- a) In any residential district, as defined by the Zoning By-law , in excess of 45 dBA between the hours of 11:00 p.m. and 7:00 a.m. the following day, or in excess of 55 dBA at all other hours, measured at a distance from fifty (50) feet from the point of origin of the noise; and
- b) In any commercial district, as defined by the Zoning By-law, in excess of 65 dBA between the hours of 11:00 p.m. and 7:00 a.m. the following day, or in excess of 80 dBA at all other hours, measured at a distance from fifty (50) from the point of origin of the noise.

**13-2-6-2. Noise caused or suffered by persons on premises.** No person present in or about any building, dwelling, premises (including public places and property), shelter, mobile or stationary vehicle, boat or conveyance (or any part thereof), other than that section of any establishment licensed under G.L. c.138, shall cause, suffer, or countenance any loud, unnecessary, excessive, or unusual noise, regardless of its

nature, source, or manner of production or reproduction, including but not limited to amplification devices or similar equipment, which causes or results in a noise level measured as follows:

- a) In any residential district, as defined by the Zoning By-law, in excess of 45 dBA between the hours of 11:00 p.m. and 7:00 a.m. the following day, or in excess of 55 dBA at all other hours, measured at a distance from fifty (50) feet from the point of origin of the noise; and
- b) In any commercial district, as defined by the Zoning By-law, in excess of 70 dBA between the hours of 11:00 p.m. and 7:00 a.m. the following day, or in excess of 80 dBA at all other hours, measured at a distance from fifty (50) from the point of origin of the noise.

**13-2-6-3. Construction and manufacturing activities.** No person shall operate or permit the operation of any tools or equipment in construction, drilling, blasting, mining, manufacturing or demolition work, or in preventive maintenance work for public service utilities between the hours of 9:00 p.m. and 7:00 a.m. the following day. The terms of this section shall not apply to emergency work or repair work performed by or for governmental entities or public service utilities, for public safety and welfare.

**13-2-6-4. Domestic Power Tools.** No person shall operate or permit the operation of any saw, drill, sander, grinder, lawn or garden tool, lawn mower, or similar device used outdoors in residential areas between the hours of 9:00 p.m. and 7:00 a.m. the following day.

**13-2-6-5. Penalty.** A non-criminal disposition penalty will be assessed of fifty (\$50) dollars to the owner, sponsor and/or responsible party for each offense under sections 13-2-6-1 through 13-2-6-4, above.

**13-2-6-6.** In addition to the non-criminal disposition penalty stated above, any 'stationary vehicle' or 'vessel' which violates 13-2-6-2 for a period of sixty (60) minutes or more, or whose vehicle is determined to be malfunctioning by an officer of the Provincetown Police Department, shall have said vehicle or vessel removed to a location where the source of the noise can be extinguished. The cost of removal and extinguishing of the source of the offending noise shall be paid by the owner or claimant of the offending vehicle.

**13-2-6-7. Waiver.** The Licensing Board may waive any part of this Noise Control bylaw for a temporary licensed public event if, in the judgment and discretion of the Licensing Board, the noise that the event will create in excess of the noise level limits established under the Noise Control bylaw is offset by the benefits of the event to the participants or the public and the noise of the event will not cause undue hardship or disturbance to the surrounding area. Events covered by this bylaw will not extend beyond midnight nor begin prior to 10 A.M. The Licensing Board can stipulate any time it deems appropriate within this time frame depending on the expected noise level and impact on surrounding area. Residential private parties limited to invitation only are not affected by this bylaw as they are not licensed by the Licensing Board. They are still governed as to noise or

nuisance stipulations of these bylaws under 13-1-2 and 13-2-6. The Licensing Board may impose, on the grant of a temporary waiver, terms and conditions appropriate to reduce the impact of the noise level exception. An application for a temporary waiver shall be filed with the Town Clerk. The applicant shall certify that notice of such temporary waiver application has been provided to all properties contiguous, or likely to be affected by the event, to the property where the event will occur. The applicant must also place a notice in the local media advising of the request for waiver at least two weeks prior to any hearing on the waiver by the Licensing Board.

The applicant shall further certify that the Police Department has been consulted with respect to the event and has approved as to form the application for a waiver with the understanding that once the event is in process, complaints could arise necessitating action on the part of the Police, i.e., immediate consultation with the applicant to ameliorate the sound conditions if the complaints are numerous and clearly justified in the discretionary opinion of the responding Police. The application for a temporary waiver affects all public events likely to produce sound levels that will affect the average person in a negative manner and in no instance will a waiver application be considered by the Licensing Board less than 60 days preceding any event. Applicants may receive more than one waiver in a year but the Licensing Board may recall any applications during the event year if complaints exceed the benefit to the public as determined by the Licensing Board as advised by the Police Department. The Licensing Board may suspend, modify or revoke any temporary waiver if it determines that an applicant has violated the terms or conditions of the waiver.

**13-2-6-8. Disturbing The Peace/Nuisances.** Nothing herein shall be construed as permitting conduct that would otherwise constitute a disturbance of the peace under G.L. c. 269, §1, G.L. c. 272, §53, or other applicable provision of state law. Nothing herein shall be construed as permitting conduct that would otherwise violate the provisions of General By-laws Section 13-1-2, relative to nuisances of noises.

**13-2-6-9. Exemptions.** The following are exempted from the provisions of Section 13-2-6 and shall not be considered unnecessarily loud, excessive or unusual noise for purposes of this section:

1. Noise from law enforcement motor vehicles;
2. Noise from emergency vehicles or emergency equipment which is audible during an actual emergency;
3. Noise from Town-sponsored events or activities;
4. Nonamplified crowd noises from organized activities such as at school sporting events; and resulting
5. Ferry whistles.

**13-2-6-10. Severability.** If any provision or subsection of this Section shall be held to be invalid by a court of competent jurisdiction, then such provision or subsection shall be considered separately and apart from the remaining provisions or subsections of this section, which shall remain in full force and effect.

Or to take any other action relative thereto.

*[Requested by the Board of Selectmen and the Town Manager]*

**BOARD OF SELECTMEN RECOMMENDS: 3-1-1  
FINANCE COMMITTEE HAS NO RECOMMENDATION**

Pam Parmakian moved that the Town vote to approve Article 8 as printed in the warrant, with the following amendment: by amending Section 13-2-6-1 (b) to read as follows: In any commercial district, as defined by the Zoning By-law, in excess of 65 dBA between the hours of 11:00 p.m. and 7:00 a.m. the following day, or in excess of 75 dBA at all other hours, measured at a distance from fifty (50) from the point of origin of the noise and; By amending Section 13-2-6-2 (b) to read as follows: In any commercial district, as defined by the Zoning By-law, in excess of 65 dBA between the hours of 11:00 p.m. and 7:00 a.m. the following day, or in excess of 75 dBa at all other hours, measured at a distance from fifty (50) from the point of origin of the noise.

Kathleen Fitzgerald moved to amend the motion as follows: Under proposed Article 13-2-6-9 – Exemptions, subparagraph 3. Noise from Town-sponsored events or activities; insert the following language: “with the exception of the Town Hall Clock bell which shall be adjusted so as not to chime or to chime in a muted fashion between the hours of 11:00 p.m. and 7:00 a.m.”

**Motion to Amend Does Not Pass. Motion Does Not Pass.**

**From:** Jim Golden  
**Sent:** Monday, October 03, 2016 6:46 PM  
**To:** David Panagore  
**Subject:** Street Performer Material

The Provincetown Street Performers By-Law once contained the following provisions.

**9-4-9. Exclusivity.** The provisions of this bylaw shall take precedence over any other town bylaws applicable to street performances. To the extent that other town regulations or bylaws are applicable and are inconsistent with this bylaw, this bylaw shall govern.

**9-4-10. Peace and quiet.** A performance in accordance with this bylaw shall be presumed not to constitute a "noise nuisance," "disorderly conduct," or an "excessive musical or other noise" in violation of 13-1-2 or 13-2-6.

These provisions were removed by vote of the November 13, 2006 STM Article 13 vote.

During the 2007 summer season enforcement action with regard to street performers was met with threats of legal action. **(See attached)**

Subsequent town meeting votes failed to approve a noise by-law based on decibel noise. Our street musicians are smart, organized, curiously well represented and have nearly 35 years of court decisions on their side.

**Amplification:**

New Orleans street performers in *Lionhart v. Foster* 100 F.Supp.2d 383 (E.D.La., 1999) LEXIS 17059 won federal case that declared sound level of 55db to be unconstitutional. The judge referred to cases which gave amplification First Amendment protection and cited cases in Houston: *Reeves v. McConn*, 631 F.2d at 381 n. 1. The court noted that "there is probably no more appropriate place for reasonably amplified speech than the streets and sidewalks of a downtown business district." District of Columbia Circuit struck down a federal regulation which prohibited the playing of musical instruments at a level higher than "60 decibels measured on the A-weighted scale at 50 feet." (*Doe*, 968 F.2d at 89-90, the last case also included the playing of drums in front of the White House) New Orleans artists also received a preliminary injunction restraining order on May 31, 1996 when the city tried to impose a inaudible at 25 foot requirement Case 96-1869 (E.D.La.,1996) ROSELYN LIONHART, et al versus CITY OF NEW ORLEANS, et al;1996 U.S. Dist. LEXIS 18903 (December 13, 1996).

Court case which discusses and gives full First Amendment protection to amplified music. *Casey v. City of Newport* 308 F.3d 106. 110 (1st. Cir. 2002)

...amplifiers are also used to create new "messages" that cannot be conveyed without amplification equipment. Amplification enables performers to boost the relative volume of quiet instruments, such as the bass and the lower registers of the human voice, [\*29] and to adjust the tonal qualities of voices and instruments without necessarily increasing the overall volume of the performance.

Much modern music simply cannot be performed without the use of amplifiers. Thus the ban on amplification has a direct and immediate effect on the expression at issue. The record therefore does not support the district court's conclusion that appellants "could still convey

their . . . messages" without amplification. Without amplification, some of the messages are not conveyed at all.

CONCUR: McAULIFFE, District Judge (concurring)

In the world of modern music, "amplified" is not synonymous with "made louder." Electronic musical instruments can only produce sound through a process of electronic amplification, but those instruments are not inherently louder than acoustic or unamplified instruments. A modern synthesizer, for example, can make sound only by means of electronic amplification, yet that amplified instrument easily and faithfully mimics the sounds produced by a wide range of acoustic instruments such as pianos, harps, flutes, acoustic guitars, violins, drums, etc. Moreover, the synthesizer can reproduce those musical sounds as softly and quietly as desired. Yet, the synthesizer falls within the City's ban. An electronically amplified Aeolian Harp can produce the same "soft floating witchery of sound" as nature's own, but the volume is more easily controlled on the amplified version.

### STREET PERFORMING FIRST AMENDMENT PROTECTION

#### FREE SPEECH, FREE EXPRESSION

Street performing, like other art forms, is protected by the First and Fourteenth Amendments both historically and legally. Singing of broadsides was one of the earliest and most prevalent forms of the press. Plays, dances, and singing have always been associated with expression of religious sentiment. The US Supreme Court has stated:

"Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it... "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court make freedom of expression the rule."

Southeastern Promotions, Ltd. v. Conrad, 420 US 546, 557-558, (1974)

quoting Joseph Burstyn, Inc. v. Wilson, 343 US 503 (1952).

Music is protected under the First Amendment as a form of expression and communication.

Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state. See 2 Dialogues of Plato, Republic, bk. 3, pp. 231, 245-248 (B. Jowett transl., 4th ed. 1953) ("Our poets must sing in another and a nobler strain"); Musical Freedom and Why Dictators Fear It, N.Y. Times, Aug. 23, 1981, section 2, p. 1, col. 5; Soviet Schizophrenia toward Stravinsky, N.Y. Times, June 26, 1982, section 1, p. 25, col. 2; Symphonic Voice from China Is Heard Again, N.Y. Times, Oct. 11, 1987, section 2, p. 27, col. 1. The Constitution prohibits any like attempts in our own legal order. Music, as a form of expression and communication, is protected under the First Amendment. In the case before us the performances apparently consisted of remarks by speakers, as well as rock music, but the case has been presented as one in which the constitutional challenge is to the city's regulation of the musical aspects of

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the concert; and, based on the principle we have stated, the city's guideline must meet the demands of the First Amendment.

**Ward v. Rock Against Racism, 491 U.S. 781, 790, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989)**

Excerpted from: N.Y. Law Journal Monday 8/17/98. Judge Refuses to Enforce Permit Rule for Artists

A New York City Parks Department rule requiring a \$25 monthly license to sell artwork, books or other written matter in the parks or on sidewalks adjacent to the parks is not enforceable, a Manhattan Criminal Court judge has ruled in dismissing misdemeanor charges against three artists who were arrested for unlicensed vending.

"....the City demonstrates an unduly restricted view of the First Amendment and of visual art itself. Such myopic vision not only overlooks case law central to First Amendment jurisprudence but fundamentally misperceives the essence of visual communication and artistic expression. Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection.

**Bery v. New York, 97 F. 3d 684 (2d Cir. 1996)**

#### UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 1620, 1621, 1782 August Term 1995(Argued: April 26, 1996 Decided: October 10, 1996)  
Docket Nos. 95-9089 (L), 95-9131, 96-7137 **Bery v. New York, 97 F. 3d 684 (2d Cir. 1996)**

"The City's licensing requirement was intended to catch within its net merchants engaged solely in commerce of ready-made goods that clog the sidewalks and compete unfairly with legitimate stores. Applied overbroadly, as Defendants would do, the Ordinance essentially would impose a chilling effect on genuine artists whose true calling is art and not commerce, and whose manifest purpose may be to create expression rather than markets, even if at times some of their work may skirt the line between expressiveness and merchandise. Such an extension of the licensing regime [\*293] would force artists to confront an undue dilemma: either to quell their creativity or to risk arrest if they believe their work is sufficiently expressive to fall within the protection of the First Amendment. [HN22] Freedom of expression is designed precisely to bar the government from compelling individuals into that speech-inhibiting choice. See *Reno v. American Civil Liberties Union*, 521 U.S. 844, 871-72 (1997)."

*Mastrovincenzo v. City of New York*, 313 F. Supp. 2d 280, 2004 U.S. Dist. LEXIS 5804 (S.D.N.Y., 2004)

See the following cases: *Tinker v Des Moines Independent School District*, 393 US 503 (1969) black arm band; *Spense v Washington* 418 US 405 (1974) peace symbol taped on flag; *Cohn v California*, 403 US 15 (1971) words "Fuck the Draft" sewn onto a jacket; *Joseph Burstyn, Inc. v Wilson*, 343 US 495 (1952) film "Miracle"; *Jankins v Georgia*, 418 US 153 (1973) film "Carnal Knowledge"; *Doran v Salem Inn, Inc.* 422 US 922 (1975) nude dancing; *Southeastern Promotions, Ltd. v Conrad* 420 US 546 (1975) Musical Theatre "Hair;" *Ward v. Rock Against*

Racism, 491 U.S. 781, 790, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989) rock music; White v. City of Sparks Citation: 500 F.3d 953 (9th Cir. 2007) selling art work in public park; Lionhart v. Foster 100 F.Supp.2d 383 (E.D.La.,1999) street performing with amplification; Davenport v Alexandria, 683 F2d 853 (1983), 710 F2d 148 (1983), 748 F2d 208 (1984) street performing; Friedrich v. Chicago 619 F. Supp. 1129 (D.C. Ill 1985) street performing; Turley vs NYC 988 F.Supp, 667 & 675 (1997) street performing with amplification; and Goldstein v Town of Nantucket 477 F. Supp. 606 (1979) street performing. In the last the US District Court of Massachusetts stated:

"Troubadour's public performance of Nantucket's traditional folk music was clearly within the scope of protected First Amendment expression."

Goldstein v Town of Nantucket, 477 F. Supp. 606, 608 (1979)

### STREETS, PARKS, SIDEWALKS AND OTHER PUBLIC PLACES ARE HISTORIC FIRST AMENDMENT FORUMS

The Supreme Court has repeatedly held that sidewalks, streets and parks are important First Amendment forums. See: Hague v. CIO 307 US 496; Shuttlesworth v. Birmingham, 394 US 147 (1968); Amal. Food Emp. U. Loc. 590 v. Logan Val. Plaza, 391 US 308 (1968); Coates v. City of Cincinnati, 402 US 611 (1971); and Grayned v. City of Rockford, 408 US 104 (1972), Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983), Frisby v. Schultz, 487 U.S. 474, 480 (1988),

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." Hague v. CIO., 307 US 496, 515-516 (opinion of Mr. Justice Roberts, joined by Mr. Justice Black)

Shuttlesworth v. Birmingham, 394 US 147, 152 (1968)

"...we have repeatedly referred to public streets as the archetype of a traditional public forum." "Our prior holdings make clear that a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood." "No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora."

Frisby v. Schultz, 487 U.S. 474, 480 (1988)

Street performances have been ascertained as an appropriate First Amendment activity on sidewalks, streets and parks in the following cases: Celli v. City of St. Augustine: 214 F.Supp.2d 1255 (M.D. Fla. 2000); Davenport v Alexandria, 683 F2d 853 (1983), 710 F2d 148 (1983), 748 F2d 208 (1984) street performing; Friedrich v. Chicago 619 F. Supp. 1129 (D.C. Ill 1985) street performing; and Goldstein v Town of Nantucket 477 F. Supp. 606 (1979) street performing.

**In the last the US District Court of Massachusetts stated:**

HD

"streets, sidewalks, parks, and other similar public places are ... historically associated with the exercise of First Amendment rights..." *Amal. Food Emp. U. Loc. 590 v. Logan Val. Plaza*, 391 US 308 (1968). *Goldstein v Town of Nantucket*, 477 F. Supp. 606, 608 (1979)

A reason given for prohibiting street performers is the availability of other public areas.

The Following US Supreme Court statement has been frequently quoted in numerous lower court decisions:

"One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v State*, 308 US 147, 163 (1939).

The Street Performer Advocacy (Buskers) website has quite a detailed account of the history. Here is the link:

<http://www.buskersadvocates.org/saalegalprovincetown.html>

Jim Golden  
Chief of Police  
Provincetown Police Department  
26 Shankpainter Road  
Provincetown, MA 02657  
(508) 487-1212 (Business Line)  
(508) 487-4488 (Administrative Fax)  
[jgolden@provincetown-ma.gov](mailto:jgolden@provincetown-ma.gov)



**KOPELMAN AND PAIGE, P.C.**  
*Attorneys at Law*

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Boston, MA 02110  
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August 27, 2007

**Michele E. Randazzo**  
mrandazzo@k-plaw.com

BY HAND

Marc LaCasse, Esq.  
The McCormack Firm  
One International Place  
Boston, MA 02110

Re: Town of Provincetown

Dear Mr. LaCasse:

As a result of certain challenges made to the Town of Provincetown's Street Performances Bylaw (Section 9-4 of the General Bylaws) and the Excessive Musical and other noise Bylaw (Section 13-2-6 of the General Bylaws), and the Town's enforcement of said bylaws, the Town of Provincetown and Marcia Kostick [a/k/a Marcia Mello] have come to the following agreement.

In enforcing Sections 9-4 and Section 13-2-6 of the General Bylaws, the Provincetown Police Department will only issue verbal or written warnings to street performers until the fall town meeting, tentatively scheduled for November 5, 2007. No citations or fines shall be issued. Warnings will be to turn the music down [not off] unless there is some other factor (i.e. playing before 11:00 a.m. or after 11:00 p.m. or some other bylaw and/or public safety violation not solely noise-related) that warrants a requirement that the music be turned off.

The following citations issued pursuant to by-law 13-2-6-1 by the Police to Marcia Kostick of 25E Bradford Street shall be dismissed:

Citation No. 8476 issued on July 14, 2007  
Citation No. 7329 issued on July 31, 2007  
Citation No. 8036 issued on July 26, 2007

The Town of Provincetown will undertake to revise the Street Performances and/or the Excessive Musical and other noise By-laws (as appropriate), to include objective noise measurements of musical performance which will enable street performers to conform their performance to the requirements of the by-law, for submission to the voters at the fall town meeting.

No lawsuit will be filed in either state or federal court alleging that the By-laws referenced above, and their enforcement, are illegal or unconstitutional, including but not limited to any claims that these By-laws or their enforcement constitute a violation of 42 U.S.C. section 1983 alleging that Marcia Kostick's rights under the First and Fourteenth Amendments to the United States Constitution have been thereby violated, until such time as the fall 2007 town meeting has occurred.

**KOPELMAN AND PAIGE, P.C.**

Marc LaCasse, Esq.  
August 27, 2007  
Page 2

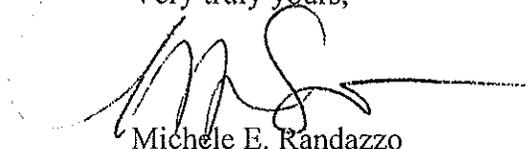
Marcia Kostick reserves her right to challenge, if necessary, any revised by-law and/or any future enforcement of either the existing by-laws or revised by-laws to the extent that she alleges that the above-referenced By-laws, or their enforcement, infringe on her constitutional rights. Such future challenge may include a lawsuit in federal or state court.

Marcia Kostick retains the right to separately pursue a citizen initiative petition for insertion onto the warrant for the fall town meeting concerning the By-laws which are the subject of this agreement.

This agreement shall not be confidential and may be disclosed to any person who inquires about the status of the issues set forth herein, including the press.

If you have any questions, please do not hesitate to contact me.

Very truly yours,



Michele E. Randazzo

MER/tap

cc: Town Manager  
Acting Chief of Police

On behalf of Marcia Kostick:



Marc LaCasse, Esq.  
The McCormack Firm  
One International Place  
Boston, MA 02110

323964/PROV/0253

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Town of Provincetown

Police Department

James F. Golden  
Acting Chief of Police  
jgolden@provincetown-ma.gov



26 Shank Painter Road  
Provincetown, MA 02657  
Phone: (508) 487-1213  
Fax: (508) 487-4077  
www.provincetown-ma.gov

## TOWN OF PROVINCETOWN POLICE DEPARTMENT

### Application for Street Performer Permit

*(Permit must be carried on person at all times when performing)*

*(Please print clearly-one application for each performer)*

Date of application: \_\_\_\_\_

Applicant's Full Name: \_\_\_\_\_  
Last First Middle Initial

Permanent Residence Address: \_\_\_\_\_  
No. Street

\_\_\_\_\_ City State Zip

\_\_\_\_\_ Telephone -- Area Code -- Number

Type of Entertainment (Optional) \_\_\_\_\_

By signing this application, I certify that I have received a copy of the Town of Provincetown By-Law, Article 9, Section 4 relating to Street Performances. I further certify that I have read and understand the contents of the By-Law.

Applicant's signature \_\_\_\_\_

(Permits are issued for calendar year and expire on December 31 of the year for which the permit was issued)

4/6

# Town of Provincetown

James F. Golden  
Acting Chief of Police  
jgolden@provincetown-ma.gov



# Police Department

26 Shank Painter Road  
Provincetown, MA 02657  
Phone: (508) 487-1213  
Fax: (508) 487-4077  
www.provincetown-ma.gov

**WELCOME!** Provincetown welcomes street performers as part of our essential character. Your participation as an artist is as important to us as is the well-being of our residents, business owners and other visitors. We seek mutual respect for everyone's rights. The street performer by-law was approved at the 1995 annual town meeting to give you maximum protection while assuring that government functions, community safety, enjoyment and comfort are not hampered. Your help is essential in continuing to make this system a happy one for all.

**THE BY-LAW.** When you sign the application for your performance permit, you agree that you have read and understand the by-law. While this by-law does not regulate space or time limits for performers, we ask that you comply with the suggestions below. Police might advise you if you are too loud and will request that you lower volumes or presentation. The street performer by-law has been modified to reflect the same expectations from you as from everyone else in the community.

**SPACE.** Please share your space, limiting yourself to an hour or two if other performers request the same location. We do not have enough space for anyone to camp out all day. It is up to our performers to share, otherwise, we'll have to resort to time and space restrictive permits.

**SOUND LEVELS.** Please be reasonable with volumes. Be a part of the total sound ambience. Voluntary compliance with reasonable sound levels that do not intrude on nearby businesses or residences will help all of us. The alternative is to start using a decibel-level system that would apply to all sound sources and which could result in valid fines and penalties. This system also would certainly require that we charge an appropriate fee for street performer permits.

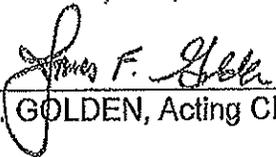
**SALE OF PRODUCTS.** The by-law does not authorize you to sell reproductions of your performance. (cassettes, CDs, books, etc.) You are entitled to receive donations for your performance.

**PRIVATE PROPERTY USE.** Provincetown has limited public space. Businesses have to obtain special entertainment licenses from the Town before you can perform on private property. Please make mutually satisfactory arrangements before you perform at a business.

**FINAL THOUGHTS.** Stephen Baird, founder of the Street Artists Guild (PO Box 570, Cambridge, MA 02238) offers these words to performers, which we adopt:

"There is no substitute for open and honest communication between all street artists amongst themselves as well as with the communities where performances occur. There is a symbolic relationship between artists and their community... If street artists are so loud as to interfere with each other or choose to disregard how their performances affect the entire community, then everyone suffers. So share the space, trade off time slots. Make sure the crowd does not totally block the sidewalks. Challenge and entertain your audiences, listen and support each other. Good luck with your performance!"

Thank you for your support, courtesy and creative energy.

  
JAMES F. GOLDEN, Acting Chief of Police

AM

**From:** "John W. Thomas" <[john@johnwthomas.com](mailto:john@johnwthomas.com)>  
**Date:** August 24, 2015 at 1:59:00 PM EDT  
**To:** David Gardner <[dgardner@provincetown-ma.gov](mailto:dgardner@provincetown-ma.gov)>  
**Cc:** Jim Golden <[jgolden@provincetown-ma.gov](mailto:jgolden@provincetown-ma.gov)>  
**Subject:** Re: Street performers across from Cortile Gallery

Hi, David and Jim.

Thanks for sending this and the emails from Kerry and Melissa.

The first thing I will do is forward these two communications to Will Harrington so he can participate in this discussion, as is appropriate.

I disagree with the interpretation of the street performer by-law by Melissa and Kerry, and since I wrote it, I am confident that my interpretation is correct. As is usually the case, there is a lot of "urban myth" about what our local by-law means as well as the constitutional rights of street performers in the United States. The space where the piano is occasionally used during the permitted times (11am-11pm) is not a permanent stage; it is a legal and valid public performance space. Most of the time I pass the area, the piano is secured and protected with tarp against the side of the building for the majority of the 11am-11pm time frame. It is rarely used before the end of the afternoon. The sun blazes on to that space in the mid-day and it is simply too hot to perform music there.

Also, was there an agenda item in a previous Board of Selectmen meeting about street performers or was it merely a public statement? If there is ever an agenda item, I think it would behoove the Board and Town to give me prior notice so that I can help interpret the history and the law and the options and to help prevent the town from heading down a likely losing litigious path. I continue to offer that as a volunteer who is interested in a street performer by-law that works for all within the protections of the First Amendment of the United States Constitution.

Certainly careful meaningful dialogue with better resolutions and outcomes is appropriate here, and I will do what I can to help.

Thank you.

John

*Melissa Yeaw*

**From:** Melissa Yeaw [<mailto:melissa.yeaw@gmail.com>]  
**Sent:** Monday, August 24, 2015 1:00 PM  
**To:** Loretta Dougherty  
**Cc:** Cortile Gallery  
**Subject:** Street performers across from Cortile Gallery

Dear Select Board,

I was hoping to attend this meeting but I have to record it so instead I am writing this letter. I work at Cortile Gallery and am in full support of Kerry Filiberto, the Gallery Director and owner's, comments about the invasiveness of the piano parked across the street. At any time of any day, any of three performers play that piano, which is always in the same spot. The music is extremely loud and comes right into the gallery, making it difficult to talk to patrons. It affects my train of thought, it's distracting for all people, and I'm positive it affects our business on a regular basis.

What are the guidelines? Can we ask him to move? Aren't the street performers supposed to move? Even if they only performed 45 minutes (which since they switch off it's almost always much longer than that) even for a little while it is extremely loud in our space. The alley where the Old Reliable was acts as a funnel, and the music and sometimes extremely loud singing comes right into our space.

I'm very surprised that everyone at the gallery seems to think there is no option for us. For years, I worked in my mom's music store and if a street performer was too loud, we just asked them to move. We didn't enjoy it, we'd rather not do it, we loved (love) the street performers, but they affected our business, understood, and moved on. Here, this is not the case. We are in fact held hostage by this piano (and 3+ players) and affected daily by their loud invasive performing. Please examine the by-laws and see if our gallery has options. It seems extremely unfair and unreasonable that they continue to inhabit that space that so much affects us and our ability to conduct our business.

Sincerely,  
Melissa Yeaw  
[617-953-1630](tel:617-953-1630)  
[melissa.yeaw@gmail.com](mailto:melissa.yeaw@gmail.com)

**Loretta Dougherty**

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**From:** Cortile Gallery <cortilegallery@comcast.net>  
**Sent:** Saturday, August 22, 2015 10:54 PM  
**To:** Cheryl Andrews  
**Cc:** Loretta Dougherty  
**Subject:** Street Performer issue  
**Attachments:** Musician log.xlsx

*Kerry Silbert  
Gallery Director  
230 Commercial St.  
Provincetown, MA*

Hi Cheryl,

I learned that there was an inquiry about the interpretations of the regulations of street performances in the last selectmen meeting. I wanted to ensure that my voice was heard on this issue given the impact the street performances has had on our business over the past 6 years. I have, over the years, contacted the police dept; contacted the business owner of where the piano is stored and where it is rolled out every day, filed formal complaints with the town and spoken to John Thomas who was sent to talk to me; all to no solution to understanding how to eliminate the impediment of the sound levels that interfere with our regular business. It is very clear that the sound levels travel frequently over 50' (certainly beyond 50' inside of our location), reverberate throughout our store, and interfere with normal business dealings. I am hoping by pleading my case to you directly that perhaps, given the inquiry regarding the topic at the meeting, that some resolution will be forthcoming.

I am certainly not opposed to street performances in Provincetown as I believe they are part of the fiber of our community. I do have, however, an issue with a permanent stage across the street that impedes our business on a daily basis. We have been keeping a log this past week of the rotation of players and their hours of playing to demonstrate that the musical instrument (the piano) never moves from its location when they play, only the musicians change, which deems the location more of a stage and less street performance. We have also taken several videos inside of our business to demonstrate the difficulty in having a normal business conversation with customers by having street performers use this location for performances. On many occasions it has been necessary to close our business door during our operating hours to conduct our regular business as well as turn off the music inside our gallery. All other performers who use the alley way across from our door, move on, but not the piano.

I noticed that a follow up to this topic is not listed on the docket for this next meeting but would like to see if I can meet with you prior to the meeting to share the videos taken to demonstrate the difficult situation we work in every day the performances occur. Unfortunately, I am unable to attach the videos as they compress via email. I have, however, attached the log that we are keeping for the times of performances and rotation of players. Again, I am not advocating to rid the town of the performers simply to eliminate the location across from our door of business as a location for street performers so that we can conduct our daily business without interference.

If you could please let me know if there is a time that I could meet with you to discuss this further and to show you the videos as I believe they speak much greater than any words can convey I would greatly appreciate it. Thank you for any assistance you can provide in this matter.

Regards,

*SD*

MEMORANDUM

November 19, 2015

To: Provincetown Board of Selectmen, Provincetown Town Manager, Provincetown Assistant Town Manager, Provincetown Chief of Police

Fr: John W. Thomas, Esq.

Re: Board of Selectmen November 23, 2015 meeting  
Item 6A – review and discussion of existing regulations regarding street performers and the noise bylaw

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In anticipation of the discussion, I am providing (1) an attached document that I wrote and have distributed to other communities titled "Provincetown street performer by-law history" and (2) some "Legal and Factual Observations" written below that may help to streamline the discussion at the meeting of the Board of Selectmen.

The "Provincetown street performer by-law history" document shows that essentially this is a success story, despite occasional challenges coming from a very few businesses and/or street performers. The information below is cautionary and intended to protect the Town from becoming a losing defendant in a lawsuit.

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"Legal and Factual Observations"

1. In 1994, I (in my role at the time as an attorney representing a street musician) put the Town on notice of litigation to be filed based on violations of constitutional law against street performers. Specifically, the enforcement of a noise ordinance prohibiting sound to be heard more than fifty feet from its source was applied only to street performers expressing their First Amendment rights of free speech and not against any other commercial or other source of sound. This is not permissible under federal law.
2. The Board of Selectmen requested an amicable resolution in lieu of litigation. When the street performer by-law was adapted at the 1995 annual Town meeting, it contained a section that specifically stated that the 50-foot noise parameter did not apply to street performers. That section was removed at a subsequent annual Town meeting (that I did not attend). However, it changes nothing regarding permissible and impermissible parameters of enforcement. It is crucial to note that the ban on sounds heard more than 50 feet from their source – if it is to be enforced at all - must be fairly applied 100% across the board against every source of sound whether it comes from a street performer, a nightclub, amplified music from businesses, lawnmowers, church

bells, loud motorcycles revving their engines down Commercial Street, screaming babies and all other sources.

3. Since the adoption of the bylaw in 1995, I chose to discontinue my availability as a legal representative for street performers and moved into the role of voluntary community liaison and monitor of the bylaw. I have put hundreds of hours into this endeavor in the past two decades.
4. In 2007 (I was not aware of this until earlier this year) the Town was almost a defendant in a lawsuit because three citations based on sound levels were issued to a street performer. A settlement agreement letter from Kopelman and Page, P.C. dated August 27, 2007, memorializes the resolution of that claim, which included the dismissal of the citations and the Town's agreement not to issue any citations based on the 50-foot noise bylaw.
5. In 2012 a citation based on the 50-foot noise bylaw was issued to another street performer, and I personally intervened to resolve the situation. The citation was dismissed, and all police officers were again notified (in addition to my clear instruction on this point in my annual training of summer officers) not to issue such citations.
6. To enforce the fifty-foot noise ban solely against street performers likely will result in litigation against the Town from street performers or civil rights groups (e.g., Massachusetts Civil Liberties Union), and the Town will lose and be subject to financial penalties due to its prior notice of the law and its repeated history of violations.
7. The Town will benefit from a continued clear understanding of the variety of constitutional parameters of the First Amendment rights to free speech and expression, which include street performers.
8. For example, in the summer of 2015 a local business expressed its dissatisfaction with street performers across the street from the establishment, and it used its observations during the raucous (and loud) Carnival Week as evidence. I do not think that an analysis of the accuracy of the business's claims are relevant, but, if asked, I can and will dispute the key allegations based on my own specific personal knowledge as both a street performer monitor, a performer, and a liaison who spoke with the business representative and the street musicians, at the request of the Acting Town Manager. However, the factual allegations (and the extent of their truthfulness or falsity) are irrelevant to my concern about the business's proposal.
9. Specifically, the business in question requested the Board of Selectmen to put in place a permanent exclusionary ban on the small area across the street from its business in order to prohibit street performers from engaging in their First Amendment constitutional rights. This is absolutely prohibited by federal

constitutional law, and were the Town to do so, it would certainly be sued and would lose and be liable for perhaps significant financial penalties.

10. There is a section in the existing bylaw (9-4-6-1) that permits the Board of Selectmen to exclude an area from all street performance after a public hearing and notice thereon, to be advertised at least once in a local newspaper no less than fourteen days prior to the hearing. However, the same section makes clear that appropriate areas of exclusion involve proximity to schools, libraries, churches, hospitals and Town hall when in session. These areas involve public functions and institutions (for which a ban on performance may be appropriate if carefully delineated), not private businesses (where creating a banned performance area is never appropriate). Even the prohibition regarding Town Hall is being carefully watched by civil rights groups and street performer advocates, and the trend in the past several years has been to allow street performers to engage in their federally protected constitutional rights even when Town Hall is in session rather than take the risk of losing litigation. Thus, keeping location restrictions to a minimum and the narrowest possible "time, manner and place" formulas – the necessary standard regarding expression of federal constitutional rights – is acceptable for situations involving public safety and governmental functions, but they can never be expanded to include the wishes and desires of commercial businesses. The Town needs to stay clear of the temptation to wade into these troublesome litigious waters.
11. There is an option to consider. It has always been available. We can move to a decibel monitoring system. However, a decibel system must apply to every source of sound. In a place such as Provincetown with its generally accepted New England style "Bourbon Street" atmosphere in the summer tourism season, a decibel system would make this one very quiet puritanical town.
12. The street performer bylaw is not perfect, but it has functioned relatively effectively for more than two decades. Street performers provide an ambience that is part of the history and cultural vibrancy of our Town. There have always been a few fringe street performers and fringe businesses that do not like the bylaw and consciously or ignorantly attempt to subvert it. I personally believe that the street performer by law, and what it represents - a love of music and street culture and eccentric variety - has the enthusiastic support of the great majority of the business community, street performers, police department, and Town officials. Nearly everyone views the inter-relationship among businesses, street performers, the public, and the police as beneficial. The occasional blips are just those: we do our best to smooth it out among the parties, and even though sometimes we can't, in the big picture everything works out pretty well.

## Provincetown Street Performer By-Law History

Provincetown, a small community at the tip of Cape Cod, Massachusetts, transforms into a tourist mecca during a long summer season (as well as weekends in spring and autumn) when tens of thousands of people converge daily on Commercial Street, the primary public space in town. The energy is often as intense as a capacity-level carnival midway with a significant cumulative level of noise. Street performers, whose numbers have increased in the past several years, can be found and heard in most of the premium available public areas.

The rights of street performers (including accepting donations to help them generate needed income) have been maintained in Provincetown by establishing a solid position that constitutional rights must be honored and enforced: there is no bartering away the extent of those rights. The government may regulate "time, manner and place" of their expression, but only in the narrowest possible ways. The Town and its police understand that these free speech rights are not privileges given out at the discretion of the business community.

In Provincetown, a still existing noise ordinance prohibits any sound heard more than fifty feet from its source. The ordinance is rarely enforced today, but until 1994 it was used almost exclusively to stop street performers from performing when a business owner complained to the police. That year, a drummer was arrested on a hot summer evening as she played in front of Town Hall. The threat of a federal lawsuit prompted the Town to work with the musician's legal representative to create a by-law that complied with constitutional parameters.

Street performers apply at the police station for a free permit that may be obtained at all times. They receive a packet with a "welcome" letter from the police chief and a copy of the by-law. Their signature on the application certifies that they have received, read and understood the contents of the by-law.

The first paragraph of the "welcome" letter makes an important statement: "Provincetown welcomes street performers as part of our essential character. Your participation as an artist is as important to us as is the well-being of our residents, business owners and other visitors. We seek mutual respect for everyone's rights. The street performer by-law was approved at the 1995 annual town meeting to give you maximum protection while assuring that government functions, community safety, enjoyment and comfort are not hampered. Your help is essential in continuing to make this system a happy one for all."

The by-law allows street performances from 11am to 11pm in all public places not otherwise restricted and requests that a street performer assist in ensuring that any crowd that the performance attracts does not obstruct public ways. The police are authorized to stop a performance until the obstruction is clear. This rarely happens because pedestrians walk on the street as much as the sidewalks.

There is no sound decibel limit in the Provincetown by-law. Street performers are asked in the "welcome" letter to be a reasonable "part of the total sound ambience." Proposed sound decibel amendments have not succeeded, likely because of the collective knowledge that a decibel level system will apply equally to all sources of sound and not only street performers. As a result of the 1994 litigation threat, the Town is on notice not to enforce the fifty-foot sound prohibition against street performers unless it does so against every source of sound.

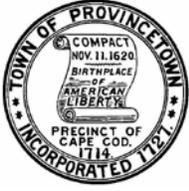
An essential component of Provincetown's success is an annual one-hour training and education session for the summer police personnel. They are taught the history and enforcement of the by-law, its constitutional parameters, and the value of establishing good relations between police and street performers from the first encounter.

Provincetown's two-decade experience has been a success. Isolated complaints from business owners are documented in an activity book at the police station; no action is taken. A few musicians play with excessive volume or do not cooperate with other street performers. The overwhelming majority of street performers and businesses cooperate to their mutual benefit. People enjoy the performances, and tourists' visits to adjacent businesses are often increased because of the street performers' presence.

///

John W. Thomas is a musician and attorney specializing in street performer rights as well as federal grand jury law. He wrote the Provincetown street performer by-law with the support of Police Chief Robert Anthony and discussions with street arts and buskers advocate Stephen Baird. [john@johnwthomas.com](mailto:john@johnwthomas.com)

February 9, 2015



Provincetown Board of Selectmen  
**AGENDA ACTION REQUEST**

Tuesday, October 11, 2016

2

---

## PUBLIC STATEMENTS

Requested by: Board of Selectmen

Action Sought: Open

Proposed Motion(s)

Three (3) minutes maximum. Selectmen do not respond during Public Statements.

Additional Information

Board Action

<i>Motion</i>	<i>Second</i>	<i>Yea</i>	<i>Nay</i>	<i>Abstain</i>	<i>Disposition</i>

---



Provincetown Board of Selectmen  
**AGENDA ACTION REQUEST**

Tuesday, October 11, 2016

3

---

## SELECTMEN'S STATEMENTS

Requested by: Town Manager David B. Panagore

Action Sought: Discussion

### Proposed Motion(s)

*Motions may be made and votes may be taken.*

**Tom Donegan**

**Cheryl Andrews**

**Robert Anthony**

**Erik Yingling**

**Raphael Richter**

### Additional Information

### Board Action

<i>Motion</i>	<i>Second</i>	<i>Yea</i>	<i>Nay</i>	<i>Abstain</i>	<i>Disposition</i>

---



Provincetown Board of Selectmen  
**AGENDA ACTION REQUEST**

Tuesday, October 11, 2016

4A

---

## BARNSTABLE COUNTY & CAPE COD COMMISSION Updates

Requested by: Town Manager David B. Panagore

Action Sought: Discussion

### Proposed Motion(s)

**Discussion dependent. Votes may be taken.**

### Additional Information

Barnstable County Administrator Jack Yunits, Cape Cod Commission Executive Director Paul Niedzwiecki, and Barnstable County Assembly Delegate for Provincetown Dr. Brian O'Malley.

### Board Action

<i>Motion</i>	<i>Second</i>	<i>Yea</i>	<i>Nay</i>	<i>Abstain</i>	<i>Disposition</i>



Provincetown Board of Selectmen  
**AGENDA ACTION REQUEST**

Tuesday, October 11, 2016

4B

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**PRESENTATION – US ARMY CORP OF ENGINEERS**  
Long Point Dike Modification Project Update  
Water Resources Development Act, Section 1135 Environmental  
Restoration Grant Program

Requested by: Town Manager David B. Panagore

Action Sought: Discussion

**Proposed Motion(s)**

**Discussion dependent. Votes may be taken.**

**Additional Information**

See attached history of the project, including the Detailed Project Report, Environmental Assessment, Finding of No Significant Impact, and Clean Water Act, Section 404(b)(1) Evaluation dated December 2015.

The restoration project, if approved, would be funded by the Program up to 75% of for design and construction with the Town's match being 25%.

**Board Action**

<i>Motion</i>	<i>Second</i>	<i>Yea</i>	<i>Nay</i>	<i>Abstain</i>	<i>Disposition</i>

---

# **LONG POINT DIKE PROJECT HISTORY**

US Army Corp of Engineers

Water Resources Development Act, Section 1135 Environmental Restoration

In 2006 the Selectmen voted to request a feasibility study under Section 1135 Environmental Restoration, Federal Water Resources Development Act. At the time the Army Corp of Engineers (ACOE) responded that funding for the project was not available.

On May 12, 2010, the ACOE contacted the town indicating that funds were likely now available. The Harbormaster and Shellfish Constable both expressed a need for this project and a desire to proceed.

In June 2010, the Selectmen voted to submit a Letter of Intent for a Section 1135 Environmental Restoration Project Feasibility Study for a potent project to restore salt marsh and other estuarine habitats by modifications to the Long Point Dike to reduce tidal restrictions. At the time the Army Corp of Engineers (ACOE) responded that funding for the project was not available at the time.

On May 30 2013, the ACOE contacted the town indicating that funds were likely now available.

On June 10, 2013, Selectmen vote yet again to submit a Letter of Intent for a Section 1135 Environmental Restoration Project Feasibility Study for a potent project to restore salt marsh and other estuarine habitats by modifications to the Long Point Dike to reduce tidal restrictions.

Both the Conservation Commission and the Cape Cod National Seashore submitted letters of support for the project.

*"My scientists have now all weighed-in and are up to speed on the project. And the answer is still yes, we support the project and proposal. They believe ultimately allow more salt water flow beyond the breakwater will have great benefits." George Price*

January 16, 2014, kickoff meeting held on the study.

December 2015, the report was completed.

---

# **DQC REVIEW DRAFT**

Detailed Project Report, Environmental  
Assessment, Finding of No Significant Impact,  
and Clean Water Act, Section 404(b)(1)  
Evaluation

---

## **Long Point Dike Modification Provincetown, Massachusetts**



US ARMY CORPS  
OF ENGINEERS  
New England District

**December 2015**

# **DRAFT**

## **Detailed Project Report Environmental Assessment, Clean Water Act Section 404(b)(1) Evaluation, and Finding of No Significant Impact**

### **Long Point Dike Modification Provincetown, Massachusetts**

Prepared by:

Engineering/Planning Division  
U.S. Army Corps of Engineers  
New England District  
Concord, Massachusetts

**December 2015**

## FINDING OF NO SIGNIFICANT IMPACT

Pursuant to the Council on Environmental Quality (CEQ) regulations (40 *Code of Federal Regulations* [CFR] 1500-1508) for implementing the procedural provisions of the *National Environmental Policy Act* (NEPA) (42 U.S.C. 4321 et. seq.) and the U.S. Army Corps of Engineers (USACE) Regulation 33 CFR 230 (*Procedures for Implementing NEPA*), the U.S. Army Corps of Engineers (USACE) conducted an Environmental Assessment of potential environmental effects associated with the modification of Long Point Dike (a feature of the Provincetown Harbor Federal Navigation Project) to restore estuarine aquatic resources.

The proposed Long Point Dike Environmental Project Modification will restore salt marsh and estuarine habitats for fish and wildlife in the area known as West End Marsh, or the Moors. Access to approximately 385 acres of salt marsh and intertidal flats will be restored for large fish and invertebrates.

Two alternatives were considered for the project. The alternatives included: 1) a no action alternative which would make no improvements to the project area, and the salt marsh, intertidal flat and open-water areas behind Long Point Dike would continue to be unavailable to large fish and large invertebrates, altering the composition of the marsh community structure; 2) an opening in the dike with a 10-foot base width and a concrete bridge over the opening.

The Environmental Assessment evaluates the modification of Long Point Dike to restore estuarine aquatic resources consistent with its authorized purpose of navigation. Impacts were analyzed for water resources, fish and wildlife, vegetation and wetlands, endangered and threatened species, land use and recreation areas, cultural resources, air quality, and floodplains. My determination of a Finding of No Significant Impact is based on the Environmental Assessment and the following considerations:

Impacts on public health or safety: The recommended plan will not adversely affect public health or safety or tidal flooding from hurricanes and other coastal storms.

Unique characteristics: The project will not affect the unique characteristics of Long Point Dike, the Provincetown Harbor Federal Navigation Project, or the surrounding area.

Controversy: The project is not controversial.

Uncertain impacts: The impacts of the proposed project are not uncertain; they are readily understood based on similar projects.

Precedent for future actions: The project will not establish a precedent for future actions.

Cumulative significance: There are no reasonably foreseeable activities associated with this project to anticipate a cumulatively significant impact on the environment.

Historic resources: The project will have no known adverse impact on historic properties.

Endangered species: The project will have no adverse impacts to Federal threatened or endangered species or state-listed species of concern, rare or endangered species.

Potential violation of state or federal law: The project will not violate Federal or state laws.

Measures to minimize adverse environmental effects from the project modification are discussed in the Environmental Assessment.

Based on my review and evaluation of the environmental effects as presented in the Environmental Assessment, I have determined that implementation of the proposed Long Point Dike Environmental Project Modification is not a major Federal action significantly affecting the quality of the human environment. Therefore, this project is exempt from the requirement to prepare an Environmental Impact Statement.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Christopher J. Barron  
Colonel, Corps of Engineers  
District Commander

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- A. Monitoring Plan
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- C. Pertinent Correspondence and Comment Responses
- D. Air Quality Record of Non-Applicability
- E. Sea Level Change Analysis

## **INTRODUCTION**

The purpose of this Detailed Project Report and Environmental Assessment (DPR/EA) is to present the findings of the feasibility investigation that developed and evaluated alternatives to restore connectivity for fish and other nekton and restore salt marsh and estuarine habitats at West End Marsh in Provincetown, Massachusetts. This report documents the problems and opportunities in the study area, describes planning objectives and restoration measures to address the problems and opportunities, and combines those measures into alternative plans. The merits of the alternatives are examined and evaluated in an environmental assessment with respect to habitat restoration, engineering feasibility, effects on environmental resources, and cost. Because of the nature and constraints on the project, the restoration options are limited. The alternatives consist of a no action plan and an option of creating an opening in Long Point Dike while maintaining continued pedestrian access along the dike. The study concludes with the recommendation of a plan that achieves the planning objectives in an efficient manner while considering the interests of the sponsor. The report also presents details on Corps and sponsor participation needed to implement the plan.

This report contains an integrated Environmental Assessment (EA) which presents information on the environmental features of the project area (affected environment) and assesses the potential impacts of the proposed aquatic habitat restoration project alternatives. The EA describes project compliance with the National Environmental Policy Act of 1969 (NEPA) and all applicable Federal and State environmental regulations, laws, and executive orders. Methods used to evaluate the environmental resources of the area include biological sampling, sediment analysis, review of available information, and coordination with appropriate environmental agencies and knowledgeable persons. This report provides an assessment of environmental impacts and alternatives considered along with other data applicable to the Clean Water Act, Section 404 (b)(1) Evaluation requirements.

## **PROJECT LOCATION AND SITE HISTORY**

Provincetown Harbor is located in the bight of the northernmost tip of Cape Cod in Provincetown, Massachusetts, 40 miles southeast of Boston Harbor (Figure 1). The salt marsh inland of Long Point Dike, known as West End Marsh or The Moors, is owned by the National Park Service as part of the Cape Cod National Seashore. Initial construction of Provincetown Harbor during the 19<sup>th</sup> century provided for beach protection works to preserve the west end of the harbor. Features of the Provincetown Harbor project include a 2,500 foot long breakwater with an elevation of 15.5 feet MLLW and the 6,150-foot-long dike that extends southerly from Stevens Point across House Point Island Flats to the sandy spit at Wood End (Figures 1 and 2). Construction of the dike was completed in 1914 and construction of the breakwater was completed in 1972.

## **PROJECT AUTHORIZATION AND REQUIREMENTS**

At the request of the town of Provincetown, Massachusetts, the New England District initiated this study for habitat restoration under the authority contained in Section 1135 of the Water Resources Development Act of 1986 (PL99-662), as amended. Section 1135, entitled "Project Modifications for Improvement of Environment," states, in part,

“The Secretary is authorized to review the operation of water resources projects constructed by the Secretary before the date of enactment of this Act to determine the need for modification in the structures and operations of such projects for the purpose of improving the quality of the environment in the public interest.”

The restoration of aquatic resources through the alteration of Long Point Dike is a modification of the Provincetown Harbor Navigation Project. Long Point Dike has blocked the connection between Cape Cod Bay and West End Marsh and impeded the flow of salt water to estuarine resources behind the dike impacting the utilization, quality, and diversity of habitats.

Implementation of an alternative plan or combination of alternatives is subject to the recommendation and approval of the Corps of Engineers, as well as approval of the Federal budgets on which its program funding depends.

#### **PURPOSE AND NEED FOR THE ACTION**

The goal of the project is to restore connectivity and tidal exchange between Cape Cod Bay (the Bay) and the approximately 385 acres of salt marsh and estuarine habitat in the West End Marsh located inland of Long Point Dike. Long Point Dike creates an impediment to the flow of water, fish, and invertebrates through much of the tidal cycle that is detrimental to the restricted habitats and separates the productivity of these habitats from ocean habitat. The dike has reportedly lost permeability over time, restricting tidal flushing and altering the natural shallow subtidal and salt marsh habitats, which in turn may reduce marsh growth and viability. The lack of full connectivity between the Bay and the affected marsh and estuarine habitat reduces access to the habitat by large estuarine fish and invertebrates, reducing habitat value and utilization inside and outside the dike. Tidal flushing is also an important component of salt marsh ecology as it is a prime driver of habitat distribution and zonation and productivity. Restricted drainage can reduce salt marsh productivity and its capacity to keep pace with sea level rise by reducing the tidal energy subsidy and reducing marine sediment input and distribution over the marsh surface. Habitats that would be restored by creating an opening in Long Point Dike include salt marsh and shallow subtidal and intertidal estuarine habitats in close proximity to coastal dune and marine habitats. Restoration of connectivity through the dike will restore access to 385 acres of salt marsh and estuarine habitat for large fish and invertebrates. Creation of the opening would also allow water to drain from the marsh after very large storms, which would protect the beach and associated habitats to the west of the dike (Ashley, 1987).

Restoration of connectivity to West End Marsh involves removing a section of the dike and installing a bridge over the opening to allow continued pedestrian access. The rock removed to create the opening will be placed near the opening and will continue to serve as rocky intertidal/subtidal habitat.

## **FUTURE WITHOUT PROJECT CONDITIONS/NO ACTION ALTERNATIVE**

Without the project, habitats behind the dike will continue to degrade and be underutilized by marine and estuarine organisms.

## **EXISTING FEDERAL NAVIGATION PROJECT TO BE MODIFIED**

Initial construction of Provincetown Harbor during the 19th century provided for beach protection works to preserve the west end of the harbor. The project was originally authorized in 1826. The most recent configuration of Long Point Dike was authorized by the River and Harbor Act of 1910, which authorized completion of the project as described in a Chief's Report. Features of the Provincetown Harbor project include a 2,500 foot long breakwater with an elevation of 15.5 feet and the 6,150-foot-long dike (Long Point Dike) that extends southerly from Stevens Point across House Point Island Flats to the sandy spit at Wood End (Figure 2). Construction of the dike was completed in 1914 and construction of the breakwater was completed in 1972.

## **PROBLEMS AND OPPORTUNITES**

The first step in the planning process is to identify the problems and opportunities that the study will address. This section identifies problems and opportunities related to the West End Marsh estuary's capacity to support fish and wildlife. Restoration opportunities are identified by comparing existing conditions to historic and potential future conditions, or by identifying areas that are functioning below their capacity.

The problems in West End Marsh are:

1. Reduced connectivity between the marsh and intertidal habitats and Cape Cod Bay
2. Reduced salt marsh productivity and capacity to keep pace with sea rise due to restricted drainage
3. Habitat degradation and underutilization behind the dike
4. Restricted commercial and residential fishing use
5. Decreased water depth

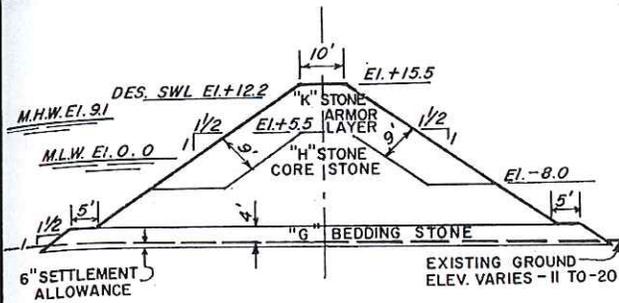
The opportunities in Long Point Dike are:

1. Restore connectivity and tidal exchange between Cape Cod Bay and salt marsh inland of Long Point Dike
2. Restore access of fish and invertebrates to salt marsh
3. Restore Special Aquatic Sites
4. Provide access to additional species of marine and estuarine fish
5. Increase benefits to commercial and recreational fisheries
6. Restore marine and estuarine food webs
7. Increase resiliency of the beach west of West End Marsh



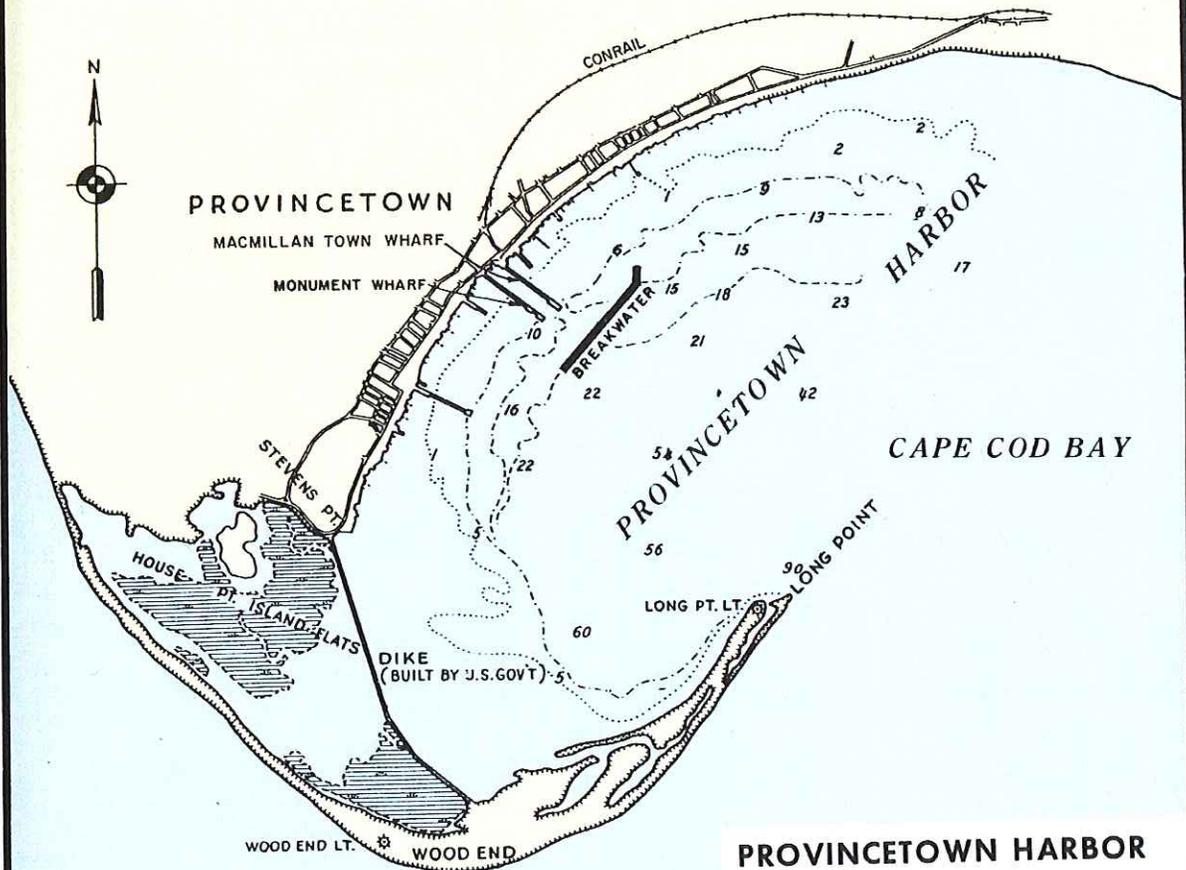
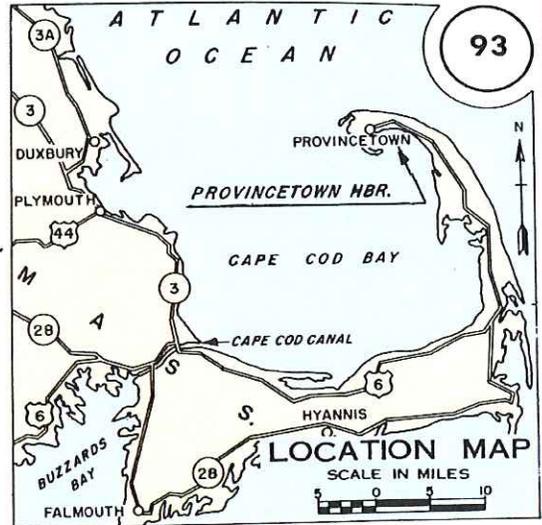
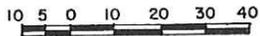
Figure 1. Long Point Dike Project Location

**Figure 2. Provincetown Harbor Federal Navigation Project**



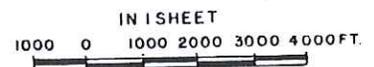
**BREAKWATER**

TYPICAL SECTION  
SCALE IN FEET



**PROVINCETOWN HARBOR  
MASSACHUSETTS**

30 SEPTEMBER 1986



DEPARTMENT OF THE ARMY  
NEW ENGLAND DIVISION, CORPS OF ENGINEERS  
WALTHAM, MASS.

14

**Figure 3. National Park Service Land Ownership Boundaries**

## **GOALS AND OBJECTIVES**

The goal of this project is to restore estuarine habitat quality in West End Marsh.

The objective is to increase connectivity for large fish that use salt marsh and shallow estuary habitats and improve tidal exchange.

## **PLANNING CONSTRAINTS**

Projects conducted under Section 1135 of the Water Resources Development Act of 1986 must be compatible with the existing project purpose; therefore, any proposed alternatives must maintain the capacity of Long Point Dike to protect the navigation work of Provincetown Harbor.

During the initial agency meeting to discuss the project, attendees identified the fact that there is a significant amount of recreational use on and around the dike. To be acceptable, the project must allow for continued access across the dike by pedestrians and must not create an unacceptable hazard to swimmers and kayakers (through the creation of enclosed spaces with high velocities) who use the area around the dike.

The land and water resources behind Long Point Dike are owned by the National Park Service (Figure 3). Corps of Engineers policy allows projects to accrue benefits on other Federal agency lands, but does not allow those benefits to be included in the benefits evaluation; therefore, this study focuses on benefits to fish and other wildlife benefiting from the modification of the U.S. Army Corps of Engineers owned dike, rather than the benefits to the habitats behind the dike. The habitat benefits are discussed in the report.

## **CONCEPTUAL MODEL**

This project is conceptually very simple. The dike currently creates a physical separation between Cape Cod Bay and West End Marsh. Creating an opening in the dike large enough for large fish and invertebrates to enter and leave the site throughout the tide range will restore conditions similar to an unrestricted marsh and shallow estuarine habitat. Salt marshes and estuarine habitats are normally connected to larger marine and estuarine water bodies by open tidal inlets or bays that allow fluctuating tides and access by marine organisms. Tidal exchange allows zones of marsh vegetation to develop (high marsh – roughly above mean high water on site and low marsh – roughly from MHW to mean tide level on-site) and marsh processes to occur (e.g. sediment subsidy to allow the marsh to keep pace with sea level rise). Fish and invertebrates enter the marsh during higher tides and feed on the plants and animals produced in the marsh and transport that productivity back to the marine environment when they return there during low tide. The isolation created by Long Point Dike does not allow this transfer or energy to occur. Large fish and invertebrates complete the marsh food web when they access the marsh during high tides by controlling populations of prey species.

## **PROPOSED PLAN SUMMARY**

The proposed plan involves restoring tidal flushing to the salt marsh system by breaching the dike and installing a bridge over the opening.

## **ALTERNATIVES**

Restoration alternatives for West End Marsh are very limited. The primary objective of the restoration project is to restore connectivity between West End Marsh and Cape Cod Bay for large fish and invertebrates, such as horseshoe crabs. Restoration of full tidal flushing that would completely match the tidal regime open the unrestricted side of the dike in Cape Cod Bay would require a very large opening beyond the scope necessary to achieve the primary benefit of improving connectivity. Therefore, this study focuses on a relatively small, implementable alternative that achieves the project purpose without formulation of additional alternatives that would be very difficult to distinguish from the base plan.

### **ALTERNATIVE 1 - NO ACTION AND FUTURE WITHOUT PROJECT CONDITIONS**

If no action is taken to restore the salt pond and estuarine habitats, the West End marsh will persist as a degraded estuarine pond with low benthic diversity and under-utilization of the habitat by large fish and invertebrates. The area behind the dike is a stable but limited ecosystem. Large, predatory fish are not able to access the marsh for forage or spawning. The improvements in fish and wildlife resource value that would be generated with the project would not be achieved if the no action alternative is chosen.

### **ALTERNATIVE 2 – CREATE AN OPENING IN LONG POINT DIKE**

Alternative 2 consists of the construction of an opening in Long Point Dike with a width at the base of 10 feet with 1:1 side slopes creating an opening at the top of the dike of approximately 40 feet (Figure 4). The opening would be spanned by a 9-foot wide concrete slab bridge with steel hand railings. The opening would provide approximately 375 square feet of unrestricted opening in the dike for large fish to pass in and out of the site throughout the tidal cycle. The opening would be located at the low point in the exiting topography of West End Marsh as shown in Figure 5.

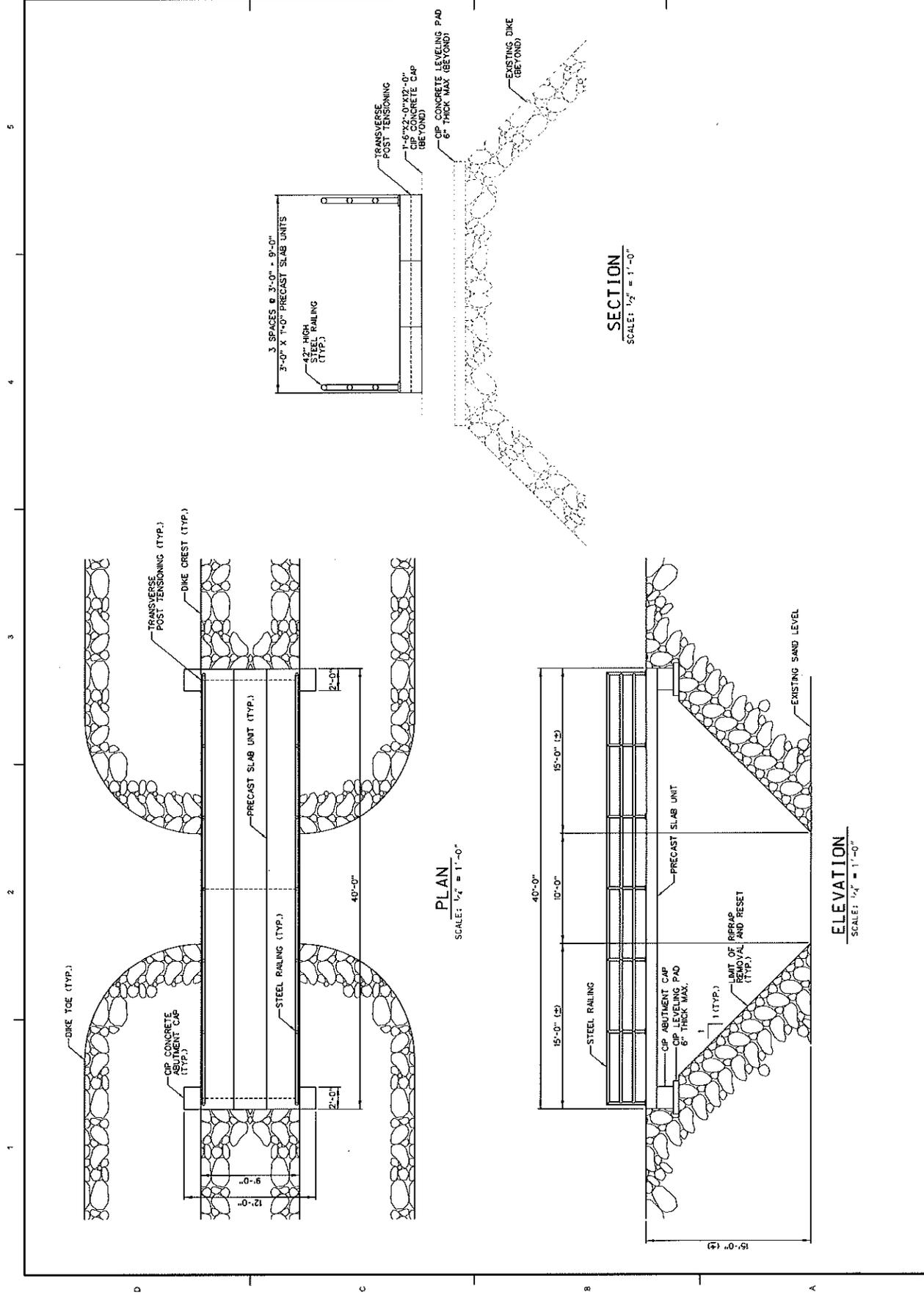
The construction cost of Alternative 2 is \$840,000 and the total project cost is \$1,100,000 including the feasibility study cost of \$100,000 and the design (plans and specifications) and permitting cost of \$160,000.

## **COMPARISON OF ALTERNATIVES**

This project does not involve unresolved conflicts concerning alternative uses of available resources and it would not be possible to distinguish the difference in the effects of alternative plans to a sufficient level of accuracy to justify what would essentially be a

**Figure 4. Proposed Opening for Long Point Dike Cross Section**

 U.S. Army Corps of Engineers District Office District	U.S. ARMY ENGINEER DISTRICT CORPUS OF ENGINEERS FORT MONMOUTH, MASSACHUSETTS PROJECT NO.: CONTRACT NO.: DRAWING NO.: DATE:	GENERAL PLAN FAIRBANKS, MASSACHUSETTS NEW WHARF WOODS HOLE BERTHING FACILITY PROJECT	SHEET IDENTIFICATION <b>S-101</b>
--	--	---	--------------------------------------



PRELIMINARY - NOT FOR CONSTRUCTION

**Figure 5. Project Modification – Plan View Location**



Although these data have been processed successfully on NPS computers, the NPS gives no warranty, expressed or implied, as to the accuracy, reliability, or completeness of these data, nor shall the act of distribution constitute any such warranty.



**Legend**  
— NPS Boundary



doubling of project construction costs to create an additional opening, or a tripling of construction costs for three openings, and so forth. The size of an opening that would completely restore the pre-dike tidal flushing is well beyond the scale needed to meet the project purpose and need of restoring connectivity for large fish and invertebrates and would not be compatible with the existing project purpose of protecting Provincetown Harbor. This report does not contain a formal cost effectiveness/incremental cost analysis (CEICA) because the scale of the project and the nature of the project benefits do not lend themselves to meaningful CEICA. The lowest cost plan can always be selected as a best buy plan in CEICA and there is no suitable plan at a smaller scale than the construction alternative considered in this report. The property behind Long Point Dike is owned and managed by the National Park Service, therefore, the benefits to that may accrue on lands owned by other Federal agencies may be discussed, but cannot be included in the benefits evaluation. Based on the assessment in this report, the benefits of providing connectivity and passage for large fish and invertebrates (i.e. the increase in benefits over the without project conditions) is worth the implementation cost of \$1,000,000. Appendix G described to significance of the resources restored by the project.



**Figure 6 - Bridge and Opening at Plymouth Harbor, Massachusetts**

#### **DETAILED DESCRIPTION OF THE RECOMMENDED PLAN**

The recommended plan consists of the construction of an opening in Long Point Dike with a width at the base of 10 feet with 1:1 side slopes creating an opening at the top of the dike of approximately 40 feet (Figure 4). The opening would be spanned by a 9-foot wide concrete slab bridge with steel hand railings. The opening would provide approximately 375 square feet of unrestricted opening in the dike for large fish to pass in and out of the site throughout the tidal cycle. The opening would be located at the low point in the existing topography of

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West End Marsh as shown in Figure 5. A similar, but longer bridge and opening at Plymouth Harbor Dike in Massachusetts is shown in Figure 6.

The estimated construction cost of the recommended plan is \$840,000 and the estimated total project cost is \$1,100,000 including the feasibility study cost of \$100,000 and the design (plans and specifications) and permitting cost of \$160,000. No utilities will be affected by the project and no real estate acquisitions are required.

## **PRELIMINARY CONSTRUCTION METHODS**

Alteration of Long Point Dike would be a marine based operation. The contractor would access the work site using a barge, most likely moored at the pier in Provincetown Harbor. Material and equipment storage requirements would be minimal and would be arranged and paid for by the contractor. Given the shortage of space in the vicinity and the large number of rental facilities, the contractor would rent a private facility for his staff and our construction supervision and administration staff and their parking.

## **IMPLEMENTATION SCHEDULE**

Implementation of the recommendation contained in this report is subject to the Corps review, approval and funding processes and sponsor participation, including execution of a Project Partnership Agreement (PPA). Upon receiving project approval from North Atlantic Division, the New England District would prepare plans and specifications prior to solicitation of bids and contract award. Construction of the restoration project could begin as soon as the fall of 2016.

## **OPERATION AND MAINTENANCE**

Operation and maintenance of the project consists of inspecting the concrete bridge, hand rail, and supporting structure and replacing the hand railing when it shows unacceptable signs of deterioration.

## **MONITORING AND ADAPTIVE MANAGEMENT**

The environmental quality benefits attributed herein are expected to accrue over a period of years after the project is constructed. Post-construction monitoring of similar projects suggests that many of the benefits associated with connectivity will be realized soon after tidal flow is restored to the area. A post-construction monitoring plan for the Long Point Dike environmental modification project is included as Appendix A in this report. Do to the nature of the project, no adaptive management is proposed.

## **PROJECT COSTS**

The estimated cost of constructing an opening in Long Point Dike and constructing a bridge over the opening is \$840,000. The total project cost of the recommended alternative is estimated to be \$1,000,000. That amount includes the costs of the feasibility study, preparation of plans & specifications, construction contract costs, and supervision and administration during the construction phase. No real estate acquisitions are necessary for the project. Section 1135 projects are cost shared at 75 percent Federal and 25 percent non-Federal contributions proportional share. The Federal cost would therefore be \$850,000 and the non-Federal cost \$250,000. See Appendix B for a detailed construction cost estimate.

## **FINANCIAL ANALYSIS**

The non-Federal sponsor, the town of Provincetown, has indicated its willingness to execute a Project Partnership Agreement for this project. The Town is aware of its obligations with respect to project implementation including providing 25 percent of the implementation costs and 100 percent of operation, maintenance, repair, rehabilitation, and replacement costs and is able to meet its financial obligations.

## **VIEWS OF THE PROJECT SPONSOR**

The non-Federal sponsor has reviewed the information and findings in this report and supports the recommended plan to increase connectivity between West End Marsh and Cape Cod Bay.

## **REAL ESTATE REQUIREMENTS**

No easements or other real estate instruments are required for project implementation. Long Point Dike is owned by the U.S. Army Corps of Engineers and the site will be accessed by barge. The subtidal areas surrounding the dike are below the mean high water elevation and are publicly owned. Appendix F contains the Real Estate Plan.

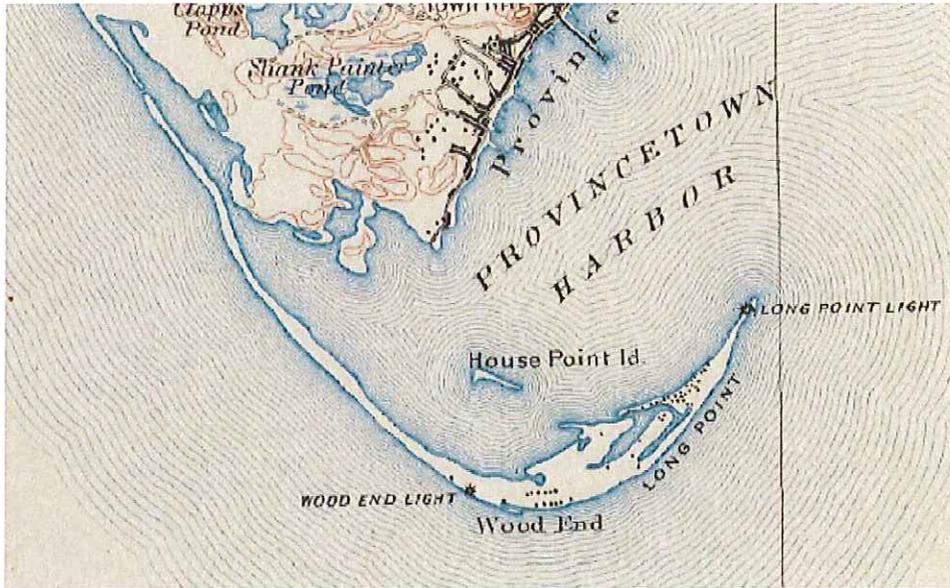


Figure 7 - Provincetown Harbor circa 1890

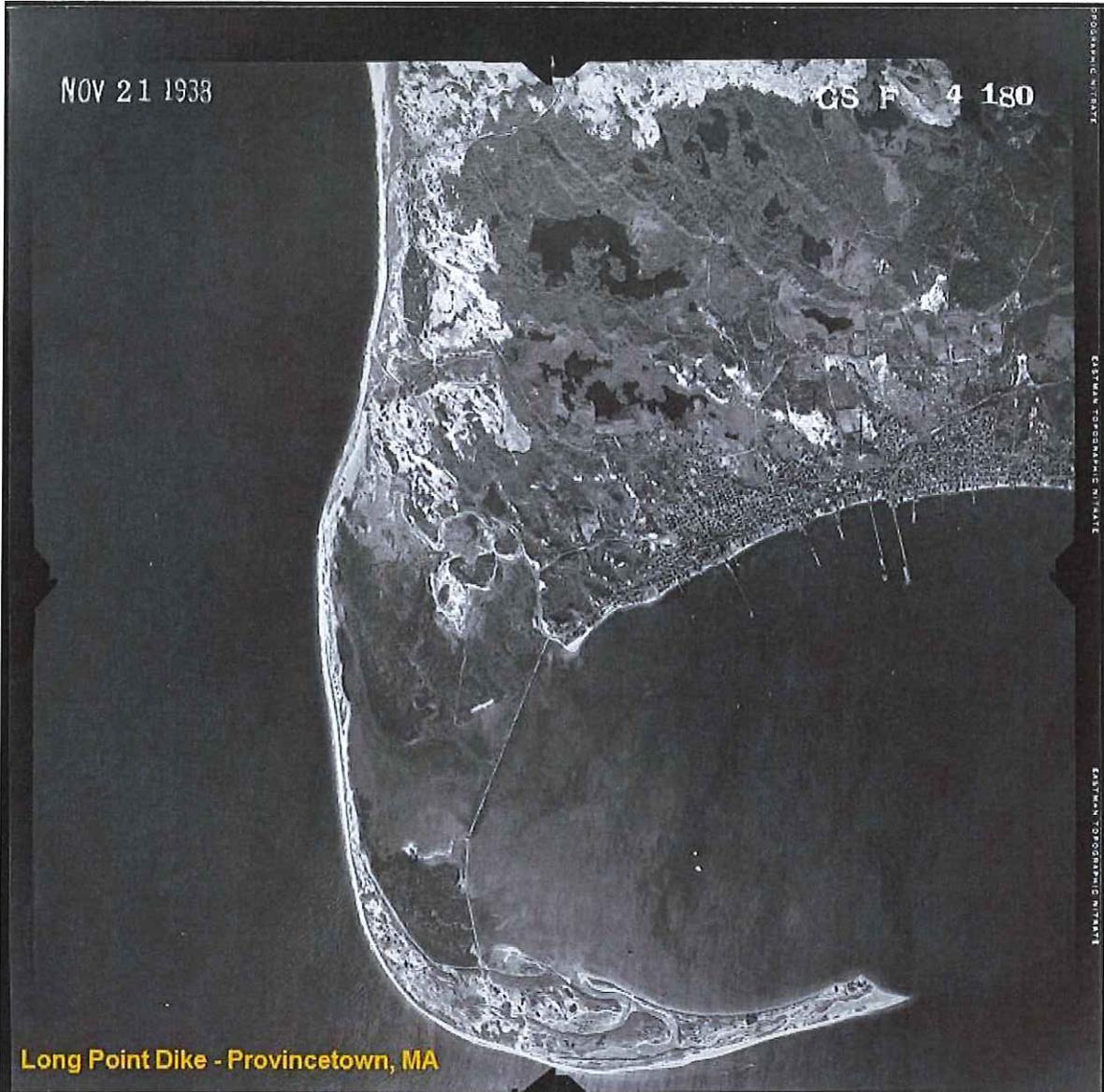


Figure 8. 1938 Aerial Photograph of Long Point Dike Project Area

## AFFECTED ENVIRONMENT

### General Conditions

Provincetown, Massachusetts and the Long Point Dike are located adjacent to Cape Cod Bay. This area is ecologically rich with a complex and diverse array of coastal and marine habitats. The beaches, salt marsh and tidal flats provide foraging and nesting habitat for a variety of fish and wildlife including endangered bird species such as the roseate tern and piping plover. ([www.coastalstudies.org/cape-cod-bay](http://www.coastalstudies.org/cape-cod-bay))

West End Marsh is part of the Cape Cod National Seashore and is bordered by the Long Point Dike, a 2,500 foot long breakwater from Stevens Point across House Point Island Flats to the sandy spit at Wood End. The tidal flats and salt marsh area total roughly 385 acres.

The West End Marsh was significantly smaller, prior to the construction of the dike (Figures 7 and 8). Tides and storm surges had direct access to the embayment so the marsh and the flats were exposed to regular erosion and accretion from natural hydrologic processes. The construction of the dike prevented natural tidal exchange and reduced wave energy in the embayment. This allowed the marsh to expand.

### Wetlands and Coastal Habitats

Vegetative cover at the West End Marsh project site consist primarily of salt marsh, intertidal flats, shallow subtidal, and dune habitats. The approximate area of each vegetation community is shown in Table 1.

**Table 1. Approximate Area of Vegetation Communities at West End Marsh**

VEGETATION TYPE	Area (acres)
Salt Marsh	225
Intertidal flats	160

**Salt Marsh.** Vegetation types in coastal wetlands are strongly influenced by tidal elevation, which affects the frequency of flooding and salinity. Salt marshes are generally classified into two types (high marsh and low marsh) based on the dominant vegetation and its characteristics and the frequency of tidal flooding. The low salt marsh vegetation consists almost exclusively of salt marsh cordgrass (*Spartina alterniflora*). The taller form of this species grows in the low marsh where frequent flooding and draining of the sediments creates favorable growth conditions. The low salt marsh extends from a lower limit around mean sea level, depending on a number of hydrologic factors, to about mean high water (MHW).

High salt marsh is situated between about MHW and the level of the highest astronomic tides (Lefor *et. al.* 1987; Bertness and Ellison 1987) or mean spring high water (MSHW) (Niering and Warren 1980). MSHW is probably a good estimate of the upper limit of the marsh plain with higher astronomic tides and storm tides flooding the generally steeper sloped upper border of the marsh where high tide bush (*Iva frutescens*) and switchgrass (*Panicum virgatum*) grow.

The high marsh supports a greater diversity of vegetation than the low marsh, but is usually dominated by one or a combination of four plants. Salt meadow grass (*Spartina patens*) is usually most abundant and grows over most of the high marsh. Spike grass (*Distichlis spicata*) grows intermixed with salt meadow grass and is often dominant in areas of particularly high or low salinity, where the soils are waterlogged, and in recently disturbed areas. Black grass (*Juncus gerardi*) grows in high areas and on the upper border of the high marsh. The short form of salt marsh cordgrass grows where the soil is waterlogged or covered with shallow water. Table 2 lists the species observed during field investigations for this study.

**Table 2. Salt Marsh Species Observed during Field Investigations**

Common Name	Scientific Name
Salt marsh cordgrass	<i>Spartina alterniflora</i>
Salt meadow grass	<i>Spartina patens</i>
Spike grass	<i>Distichlis spicata</i>
Saltwort	<i>Salicornia europaea</i>
Sea lavender	<i>Limonium sp.</i>
Marsh orach	<i>Atriplex patula</i>
High tide bush	<i>Iva frutescens</i>
Switchgrass	<i>Panicum virgatum</i>

In addition to the dominant salt marsh species listed above, other species observed in this portion of the marsh include common glasswort (*Salicornia europaea*), sea lavender (*Limonium sp.*), seaside goldenrod (*Solidago sempervirens*), high tide bush, switchgrass, sea blight (*Suaeda linearis*), marsh orach (*Atriplex patula*), and phragmites. Salt marsh composed of both high and low marsh makes up about 225 acres of West End Marsh.

**Intertidal and Subtidal Habitats.** The area behind Long Point Dike includes approximately 160 acres of intertidal flats that are exposed at low tide (Figure 9).

Small minnows such as mummichogs (*Fundulus sp.*) and Atlantic silversides (*Menidia menidia*) were observed behind the dike. Small amounts of oysters (*Crassostrea virginica*) are present in a few areas on the rocky substrate.

No submerged aquatic vegetation (SAV) (i.e., eelgrass (*Zostera marina*) or widgeon grass (*Ruppia maritima*)) is present in West End Marsh however eelgrass has been identified on the Bay side of the dike.



**Figure 9 - Long Point Dike during low tide. The Provincetown Harbor side is to the left.**

### **Benthic Invertebrates and Shellfish**

#### *Benthic Invertebrates*

Benthic infaunal communities are composed of a variety of small organisms including worms, clams, snails, and crustaceans. The major ecological functions of the benthos include the production of biomass which serve as a food resources for higher trophic levels and the bioturbating (mixing) of sand and mud.

Benthic organisms are very sensitive to habitat disturbances, including organic enrichment and contamination of sediments by toxic substances. Benthic communities can therefore provide a useful environmental monitoring tool to evaluate estuarine systems.

Corps of Engineers biologists collected grab samples was from either side of Long Point Dike, August 7, 2014. Qualitative samples were gathered using a shovel during tide. Sediment samples were washed thru a 0.5 mm mesh screen, stained with biological dye (rose Bengal) and fixed in 10% buffered formalin. Specimens were then sorted, transferred and stored in 70% ethanol. All organisms were identified to the lowest possible taxonomic category and counted.

The benthic structure of the two sampling stations is summarized in Table 3. A total of 4 taxa were reported from the sampling station on the West End Marsh side of the dike and 16

taxa were recorded from the sampling station on the Cape Cod Bay side. Oysters (*Crassostrea virginica*), hermit crabs (*Pagurus pollicaris*), green crabs, and striped killifish (*Fundulus majalis*) were found on either side of the dike.

**Table 3. Benthic Survey Results**

SPECIES	Inside LPD	Outside LPD
<i>Metridium senile</i>	0	1
<i>Nematoda spp.</i>	0	1
<i>Medea masta</i>	70	0
<i>Neris zonata</i>	7	0
<i>Nucula proxima</i>	2	9
<i>Gemma gemma</i>	0	2
<i>Talorchestia spp.</i>	1	0
<i>Mytilus edulis</i>	0	1
<i>Mulina lateralis</i>	0	1
<i>Corophium insidiosum</i>	0	14
<i>Idotea balthica</i>	0	4
<i>Ampharete acutifrons</i>	0	2
<i>Asabellides oculata</i>	0	4
<i>Clymenella torquata</i>	0	2
<i>Eteone longa</i>	0	1
<i>Polycirrus eximius</i>	0	4
<i>Podarke obscura</i>	0	9
<i>Sphaeroma quadridentatum</i>	0	1

### *Shellfish, Crabs and Lobster*

Per a letter from the Massachusetts Division of Marine Fisheries dated 24 July, 2014, the project site lies within and adjacent to mapped shellfish habitat for soft shell clams (*Mya arenaria*), quahog (*Mercenaria mercenaria*), American oysters (*Crassostrea virginica*), and blue mussels (*Mytilus edulis*). Subtidal waters within the project site have habitat characteristics suitable for these species. Land containing shellfish is deemed significant to the interest of the Wetlands Protection Act (310 CMR 10.34) and the protection of marine fisheries. There are three aquaculture operations seaward of the project site with four aquaculture sites proposed as well. The town has a “grow out” area seaward of the dike off the nearby hotel.

The Barnstable County Cooperative Extension funded shellfish sampling in 2007. The flats to the northern side of the breakwater were surveyed from a distance of 1.5 km to the shoreline. Random test pits were dug in sandy areas every 20 m along the breakwater toward shore. Very few shellfish were encountered in most random holes. However, areas where the Shellfish Constable had previously seeded did produce quahog clams with shell heights of 1.5 to 3 inches. Several first-year bay scallops were also found attached to various seaweeds and blue mussels were relatively abundant along rocks of the breakwater. Quahog clams were encountered in specific regions of the breakwater area where previous seeding had taken place or in specific bed forms. Sizes were not measured but were estimated to be between 1.5 and 3 inches in shell length and approximately 2 to 4 years old.

There is a horseshoe crab (*Limulus polyphemus*) spawning beach seaward of the dike at the hotel area. Horseshoe crabs range from Bar Harbor, Maine to the Gulf of Mexico. They migrate onto intertidal beaches and offshore to depths up to 75 feet at different stages in their life history. Adults nest on sandy beaches in May and June; at moon high tide, females typically deposit their eggs in the sand in the upper intertidal zone. For the eggs to be viable, the nests must meet specific physical requirements such as sediment grain size, dissolved oxygen, sand moisture, wave energy, sand temperature, and salinity. The eggs hatch into trilobite larvae between 15 and 28 days after being deposited and remain in nearshore plankton through mid-August. After the trilobites molt, they become instar juveniles. The instar juveniles settle and spend the first years in the intertidal and subtidal shallows while undergoing multiple molts (MA DMF, 2011).

Horseshoe crab populations have declined in recent years due to overharvesting and habitat degradation. Horseshoe crabs are valuable as bait primarily for eel and whelk fisheries. In addition, their blood contains amebocytes which have a clotting factor that is used in the *Limulus* Amebocyte Lysate test to detect bacterial endotoxins in pharmaceuticals and to test for several bacterial diseases. Horseshoe crab eggs also serve as a food source for the endangered migratory shorebird, the red knot. This has led several states to ban horseshoe crab harvesting. In Massachusetts, the allowable harvest limit was reduced by 50% in 2008 to 165,000 animals with a daily limit of 400. Harvest was also restricted on beaches during and around the full and new moon phases during mating season (MA DMF, 2011).

### **Submerged Aquatic Vegetation**

The subtidal region adjacent to the mudflats seaward of the dike has been mapped by DEP as an eelgrass bed. Eelgrass beds provide one of the most productive habitats for numerous marine species (Heck et al., 2008; Jackson et al., 2001) and are designated “special aquatic sites” under the Federal Clean Water Act Section 404(b) (1) guidelines. Eelgrass was also observed landward of the dike.

### **Fish**

West End Marsh supports limited coastal New England fish assemblages. Killifish (*Fundulus* spp.), silversides (*Menidia* spp.), and sheepshead minnows (*Cyprinodon variegatus*) are able to access the marsh through the porous Long Point dike due to their small size. Fish populations in the marsh are restricted by the dike and no larger fish species are believed to use the habitat inside the dike.

### **Essential Fish Habitat**

Pursuant to the Magnuson-Stevens Fishery Conservation and Management Act and amended by the Sustainable Fisheries Act of 1996, an Essential Fish Habitat (EFH) consultation is necessary for this project. EFH is broadly defined as “those waters and substrates necessary to fish for spawning, breeding, feeding, or growth to maturity.” Provincetown Harbor and Cape Cod Bay fall into this category and thus have the potential to provide habitat for fish species in the area.

As stated in the NMFS EFH descriptions (<http://www.nero.noaa.gov/ro/doc/list.htm>), Federally managed species have the potential to occur within the project area in Cape Cod Bay. These include: Atlantic cod (*Gadus morhua*); winter flounder (*Pleuronectes americanus*); Atlantic sea herring (*Clupea harengus*); bluefish (*Pomatomus saltatrix*); Atlantic mackerel (*Scomber scombrus*); scup (*Stenotomus chrysops*); black sea bass (*Centropristus striata*); American plaice (*Hippoglossoides platessoides*); haddock (*Melanogrammus aeglefinus*); ocean pout (*Zoarces americanus*); witch flounder (*Glyptocephalus cynoglossus*); pollock (*Pollachius virens*); whiting (*Merluccius bilinearis*); yellowtail flounder (*Limanda ferruginea*); sea scallop (*Placopecten magellanicus*); summer flounder (*Paralichthys dentatus*); windowpane flounder (*Scophthalmus aquosus*); redfish (*Sebastes fasciatus*); monkfish (*Lophius americanus*); Atlantic halibut (*Hippoglossus hippoglossus*); white hake (*Urophycis tenuis*); red hake (*Urophycis chuss*); offshore hake (*Merluccius albidus*); spiny dogfish (*Squalus acanthias*); surf clam (*Spisula solidissima*); ocean quahog (*Artica islandica*); tilefish (*Lopholatilus chamaeleonticeps*); blue shark (*Prionace glauca*); northern shortfin squid (*Illex illecebrosus*); longfin squid (*Loligo pealeii*); Atlantic butterfish (*Peprilus triacanthus*); and bluefin tuna (*Thunnus thynnus*).

## Wildlife

West End Marsh and the surrounding habitats provide fish and wildlife habitats. A comprehensive list of species likely to use the site is provided in Table 4.

### Mammals

Mammals with historical accounts in the area and appropriate geographical ranges that are likely to occur adjacent to the project area include red fox (*Vulpes fulva*), mink (*Mustela vison*), raccoon (*Procyon lotor*), skunk (*Mephitis mephitis*), chipmunk (*Tamias striatus*), coyote (*Canis latrans*), several species of squirrels, and white-tailed deer (*Odocoileus virginianus*).

### Birds

The bird population is represented by typical resident and migrant species found in New England. Species noted on site include herring gulls (*Larus argentatus*), great black-backed gulls (*Larus marinus*), laughing gulls (*Larus atricilla*), common terns (*Sterna hirundo*), double-crested cormorants (*Phalacrocorax auritus*), green heron (*Butorides striatus*), blue heron (*Ardea herodias*), osprey (*Pandion halietus*), kingfisher (*Megaceryle alcyon*), black duck (*Anas rubripes*), mallard (*Anas platyrhynchos*), and starlings (*Sturnus vulgaris*). Salt marsh species such as seaside sparrows (*Ammodramus maritimus*) and sharp-tailed sparrows (*A. nelsoni*) are also likely to use the site.

**Table 4. Predicted Changes in Wildlife Use as a Result of Restoring Tidal Flushing to West End Marsh.** "+" indicates an increase in habitat value or positive effect on wildlife populations; "-" indicates a decrease in habitat value or negative effect on wildlife populations; "N" indicates a negligible change; and "NA" indicates that the species does not use the West End Marsh for the activity listed and is not expected to use the site after the

restoration project. The signs do not indicate that the animal will use the site; they indicate whether the change in habitat would benefit the species if it does use the site.

**BIRDS**

	<b>Nesting</b>	<b>Feeding</b>	<b>Resting</b>	<b>Overall</b>
<b>Perching birds</b>				
Red-winged blackbird <sup>1,2,4</sup>	N	+	-	N
Common yellowthroat <sup>1,2</sup>	N	N	N	N
Yellow warbler <sup>1</sup>	N	N	N	N
Song sparrow <sup>1,2</sup>	N	N	N	N
Willow flycatcher <sup>1</sup> -	N	N	N	N
Gray catbird <sup>1,2</sup>	N	N	N	N
Sharp-tailed sparrow <sup>1,2</sup>	+	+	+	+
American robin <sup>4</sup>	N	N	N	N
European starling <sup>1</sup>	N	N	N	N
House finch <sup>1</sup>	N	N	N	N
American goldfinch <sup>1,4</sup>	N	N	N	N
Cedar waxwing <sup>1</sup>	N	N	N	N
Common grackle <sup>1</sup>	N	N	N	N
Swamp sparrow <sup>1</sup>	N	N	N	N
Northern cardinal <sup>1</sup>	N	N	N	N
Rufous-sided towhee <sup>1</sup>	N	N	N	N
Purple finch <sup>1</sup>	N	N	N	N
Mourning dove <sup>1,4</sup>	N	N	N	N
Black-billed cuckoo <sup>1</sup>	N	N	N	N
Carolina wren <sup>1</sup>	N	N	N	N
Marsh wren <sup>1,2</sup>	+	+	+	+
Black-capped chickadee <sup>1</sup>	N	N	N	N
Eastern phoebe <sup>1</sup>	N	N	N	N
Red-eyed vireo <sup>1</sup>	N	N	N	N
Yellow-rumped warbler <sup>1</sup>	N	N	N	N
American tree sparrow <sup>1</sup>	NA	N	N	N
Seaside sparrow <sup>1,2</sup>	+	+	+	+
Meadowlark <sup>2</sup>	N	N	N	N
Savannah sparrow <sup>2</sup>	N	N	N	N
Kingbird <sup>2</sup>	N	N	N	N
Grackle <sup>2</sup>	N	N	N	N
Swallow <sup>2,4</sup>	N	N	N	N
Chimney swift <sup>2</sup>	N	N	N	N
Belted kingfisher <sup>4</sup>	N	+	N	+
	<b>Nesting</b>	<b>Feeding</b>	<b>Resting</b>	<b>Overall</b>
<b>Diving Birds</b>				
Pied-billed grebe	+	+	+	+
Common moorhen	+	+	+	+
Double-crested cormorant	+	+	+	+
	<b>Nesting</b>	<b>Feeding</b>	<b>Resting</b>	<b>Overall</b>
<b>Shorebirds</b>				
Semipalmated sandpiper <sup>1</sup>	NA	+	+	+
Black-bellied plover <sup>1</sup>	NA	+	+	+
Sanderling <sup>1</sup>	NA	N	N	N
Dunlin <sup>1</sup>	NA	+	+	+
Killdeer <sup>1</sup>	N	+	+	+

Willet <sup>2</sup>	+	+	+	+
American oystercatcher <sup>5</sup>	N	+	+	+
Ruddy turnstone <sup>5</sup>	NA	+	+	+
Semipalmated plover <sup>5</sup>	NA	+	+	+
Piping plover <sup>5</sup>	NA	+	N	N
Short-billed dowitcher <sup>5</sup>	NA	+	+	+
Long-billed dowitcher <sup>5</sup>	NA	+	+	+
Greater yellowlegs <sup>5</sup>	NA	+	+	+
Lesser yellowlegs <sup>5</sup>	NA	+	+	+
Stilt sandpiper <sup>5</sup>	NA	+	+	+
Red knot <sup>5</sup>	NA	+	+	+
Pectoral sandpiper <sup>5</sup>	NA	+	+	+
Spotted sandpiper <sup>5</sup>	NA	+	+	+
Purple sandpiper <sup>5</sup>	NA	N	+	N
Least sandpiper <sup>5</sup>	NA	+	+	+
Western sandpiper <sup>5</sup>	NA	+	+	+
White-rumped sandpiper <sup>5</sup>	NA	+	+	+
Hudsonian godwit <sup>5</sup>	NA	N	N	N
Marbled godwit <sup>5</sup>	NA	+	+	+
Sora	N	N	N	N

**Waterfowl**

American black duck <sup>1,2,4</sup>	+	+	+	+
Mallard <sup>1,4</sup>	+	+	+	+
Canada goose <sup>1,2</sup>	+	+	+	+
Atlantic brant <sup>4</sup>	NA	+	+	+
Blue-winged teal <sup>2</sup>	+	+	+	+
Green-winged teal <sup>3</sup>	+	+	+	+
Lesser scaup	NA	+	+	+
Common pintail	NA	+	+	+
American widgeon <sup>1</sup>	NA	+	+	+
Hooded merganser <sup>1</sup>	N	+	+	+
Red-breasted merganser <sup>1</sup>	NA	+	+	+
Gadwall <sup>1</sup>	+	+	+	+
Bufflehead <sup>1</sup>	NA	+	+	+
Mute swan <sup>1,4</sup>	+	N	+	+

**Wading birds**

Great blue heron <sup>1,4</sup>	NA	+	+	+
Great egret <sup>1,4</sup>	NA	+	+	+
Snowy egret <sup>1</sup>	NA	+	+	+
Green-backed heron <sup>3</sup>	N	+	+	+
Black-crowned night heron <sup>1</sup>	NA	+	+	+
Yellow-crowned night heron <sup>1</sup>	N	+	+	+
Glossy ibis <sup>2</sup>	NA	+	+	+
American bittern <sup>1</sup>	N	+	N	N
Least bittern	N	N	N	N
Virginia rail <sup>1,4</sup>	N	+	+	+
Clapper rail <sup>2</sup>	N	+	+	+

Nesting                  Feeding                  Resting                  Overall

**Gulls and Terns**

Herring gull <sup>1</sup>	NA	+	+	+
Great black-backed gull <sup>1</sup>	NA	+	+	+
Terns <sup>2</sup>	NA	+	+	+

**Raptors**

Northern harrier <sup>1,2</sup>	NA	+	N	+
Short-eared owl <sup>2</sup>	NA	+	+	+

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Snowy owl	NA	+	+	+
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**MAMMALS**

	<b>Cover</b>	<b>Food</b>	<b>Overall</b>
River otter <sup>3,4</sup>	N	+	+
Mink <sup>2,3,4</sup>	N	+	+
Long-tailed weasel <sup>3</sup>	N	+	N
Red fox <sup>3,4</sup>	N	N	N
Gray fox <sup>3,4</sup>	N	N	N
White-tailed deer <sup>3</sup>	N	N	N
Muskrat <sup>2,3,4</sup>	N	N	N
Raccoon <sup>2,3,4</sup>	N	N	N
Meadow jumping mouse <sup>2</sup>	N	+	N
Meadow vole <sup>2,3</sup>	N	+	N
Star-nosed mole <sup>3</sup>	N	N	N
Virginia opossum <sup>3</sup>	N	N	N
Masked shrew <sup>2</sup>	N	N	N
Short-tailed shrew <sup>3</sup>	N	N	N
Big brown bat <sup>3</sup>	N	N	N
House mouse <sup>2,3</sup>	N	N	N
Norway rat <sup>3</sup>	N	N	N
Striped skunk <sup>2,3,4</sup>	N	N	N

**REPTILES AND AMPHIBIANS**

	<b>Cover</b>	<b>Food</b>	<b>Overall</b>
Painted turtle <sup>3</sup>	-	-	-
Spotted turtle <sup>3,4</sup>	-	-	-
Snapping turtle <sup>3,4</sup>	-	-	N
Diamondback terrapin <sup>3</sup>	NA(+)	NA(+)	+
Northern watersnake <sup>3</sup>	N	N	N
Salamanders <sup>3</sup>	-	-	N
Frogs <sup>3</sup>	-	-	N

<sup>1</sup> - Eddleman, W.R. 1993. Performance report: Galilee Bird Sanctuary avian species and habitat associations. Federal Aid in Wildlife Investigation, Project No. W-23-R-32, III, 3. (The Galilee Bird Sanctuary has a similar combination of habitat types to the West End Marsh area.)

<sup>2</sup> - Nixon, S.W. 1982. The Ecology of New England High Salt Marshes: A Community Profile. FWS/OBS-81-55. U.S. Fish and Wildlife Service, Office of Biological Services, Washington, D.C. 70 pp.<sup>3</sup> - Odum, W.E., T.J. Smith III, J.K. Hoover, and C.C. McIvor. 1984. The ecology of tidal freshwater marshes of the United States east coast: a community profile. U.S. Fish and Wildlife Service. FWS/OBS-83/17. 177pp.

<sup>4</sup> - Reported or observed on-site.

<sup>5</sup> - Whitlatch, R.B. 1982. The ecology of New England tidal flats: a community profile. FWS/OBS-81/01. U.S. Fish and Wildlife Service, Office of Biological Services, Washington, D.C. 125 pp.

*Amphibians and Reptiles*

Amphibians do not occur within the tidal portion of the coastal environment as salt water has detrimental effects upon their highly permeable skin. Reptiles, including turtles and snakes, are common inhabitants of the salt marsh areas. Snapping, spotted, and eastern painted turtles generally inhabit the upland freshwater areas of the watershed, but have been documented to range into brackish water and saltmarsh habitats. The northern diamond back terrapin (*Malaclemys terrapin*) is an estuarine turtle that may be found in the area. Only the

northern water snake is known to exist in the semi-aquatic fresh and/or saltwater habitats in the area.

### Threatened and Endangered Species

In a letter dated July 23, 2014, the Massachusetts Department of Natural Heritage and Endangered Species Program (NHESP) stated, the existing dike bisects staging habitat for terns and is within close proximity to nesting habitat for piping plover, terns, and diamond-backed terrapin. Additionally, this site is near breeding habitat for Eastern Spadefoot. Opening sections of the dike to improve tidal flushing within West End marsh could improve habitat for some state-listed species by improving water quality and potentially improving access to nesting areas. While the NHESP strongly supports habitat restoration, care must be taken to prevent impacts to state-listed species and their habitats. In a letter dated December 17, 2014, the U.S. Fish and Wildlife Service concurred with the USACEs findings of not likely to adversely affect piping plover, however they did not have sufficient information at that time, to assess potential benefits from the increased tidal flushing of the West End marsh.

**Table 5. Threatened and Endangered Species**

Scientific Name	Common Name	Taxonomic Group	State Status	Federal Status
<i>Sterna dougallii</i>	Roseate Tern	Bird	Endangered	Endangered
<i>Sterna hirundo</i>	Common Tern	Bird	Special concern	-
<i>Sterna paradisaea</i>	Arctic Tern	Bird	Special concern	-
<i>Sternula antillarum</i>	Least Tern	Bird	Special concern	-
<i>Charadrius melodus</i>	Piping Plover	Bird	Threatened	Threatened
<i>Malaclemys terrapin</i>	Diamondback terrapin	Amphibian	Threatened	-
<i>Scaphiopus holbrookii</i>	Eastern Spadefoot	Amphibian	Threatened	-
<i>Eubalaena glacialis</i>	Northern Right Whale	Mammal	Endangered	Endangered

### Recreation and Aesthetics

Long Point Dike is used by tourists and residents to access the beaches and the light house on Long Point. The dike is used for fishing, sunbathing, and shellfish beds are located close to the dike on the Bay side. Cape Cod Bay supports a healthy recreational and commercial fishery as well as whale watching tours.

Long Point Dike is a popular location that provides a unique vantage point of Provincetown, the West End Marsh and beaches.

### Water Quality

The waters within West End Marsh and surrounding coastal waters are classified by the Massachusetts Department of Environmental Protection as Class SA. Class SA waters are designated as an excellent habitat for fish, other aquatic life and wildlife, including for their reproduction, migration, growth and other critical functions, and for primary and secondary

contact recreation. In certain waters, excellent habitat for fish, other aquatic life and wildlife may include, but is not limited to, seagrass. The salinity within West End Marsh is 32-35 ppt, due to lack of freshwater input from runoff or inland streams and the direct connection to Cape Cod Bay.

### Air Quality

Ambient air quality is protected by Federal and state regulations. The U.S. Environmental Protection Agency (EPA) has developed National Ambient Air Quality Standards (NAAQS) for certain air pollutants, with the NAAQS setting concentration limits that determine the attainment status for each criteria pollutant. The six criteria air pollutants are ozone, carbon monoxide, nitrogen dioxide, sulfur dioxide, particulate matter, and lead.

The entire State of Massachusetts is designated as a non-attainment area for ozone. Effective June 15, 2004, all of Eastern Massachusetts was designated by the EPA as a moderate non-attainment areas for the 8-hour ozone standard (U.S. Environmental Protection Agency, 2005).

Under the Federal Clean Air Act and its associated amendments (42 USC 7401 et seq.), the Federal Environmental Protection Agency (EPA) regulates six "criteria" air pollutants:

- Nitrogen dioxide (NO<sub>2</sub>)
- Sulfur dioxide (SO<sub>2</sub>)
- Lead (Pb)
- Carbon monoxide (CO)
- Particulate matter with a diameter of 10 microns or less (PM<sub>10</sub>)
- Ozone (O<sub>3</sub>)

The Air Quality Indicator tracks the Massachusetts Department of Environmental Protection (DEP) Air Quality Index (AQI) for Cape Cod as measured at its Truro station. In Massachusetts, the AQI is based on measurements of ground-level ozone, one of the six criteria pollutants listed in the NAAQS.

The Commonwealth of Massachusetts is classified as serious nonattainment for ozone, and is divided into two nonattainment areas. The Eastern Massachusetts ozone nonattainment area includes Barnstable (where the project is located), Bristol, Dukes, Essex, Middlesex, Nantucket, Norfolk, Suffolk, and Worcester counties. Berkshire, Franklin, Hampden, and Hampshire counties comprise the Western Massachusetts ozone nonattainment area.

With these classifications, the 1990 Clean Air Act Amendments (CAAA) required the Commonwealth to reduce its emissions of volatile organic compounds (VOCs) and nitrogen oxides (NO<sub>x</sub>), the two major precursors to ozone formation to achieve attainment of the ozone standard (Cape Cod Regional Transportation Plan, August 2011).

## **Historic and Archaeological Resources**

Long Point Dike is part of the Provincetown Navigation Improvement Project. The dike, started in 1910, was completed in 1914, repaired in the 1950s, and substantially rebuilt in 1972.

In 1845, 200 people lived at Long Point, which then included a fishery, salt works, and windmills. These buildings, having been there for many years, were moved by barge to Provincetown just before the Civil War. During the Civil War, two forts were built adjacent to the lighthouse station (first illuminated in 1827). Evidence of the two forts remain as two small hills. At either end of the dike are the two extant lighthouses, Long Point Lighthouse and Wood End Lighthouse. Both lighthouses were constructed circa 1873, are owned by the National Park Service and are listed on the National Register of Historic Places.

## **Flooding Potential and Hydraulic Conditions**

The project area is subject to the daily ebb and flood of the tide cycle. The existing dike dampens, but does not prevent, the tide cycle on the landward side. The National Park Service monitored tides inside and outside Long Point Dike in 2006 at the locations shown in Figure 10. The results are shown in Figure 11. The tides behind Long Point Dike are approximately 1 to 2 feet lower than tides outside the dike.

There are no structures in the vicinity of the project that would be affected by the project.



Figure 10 - Location of tide gages

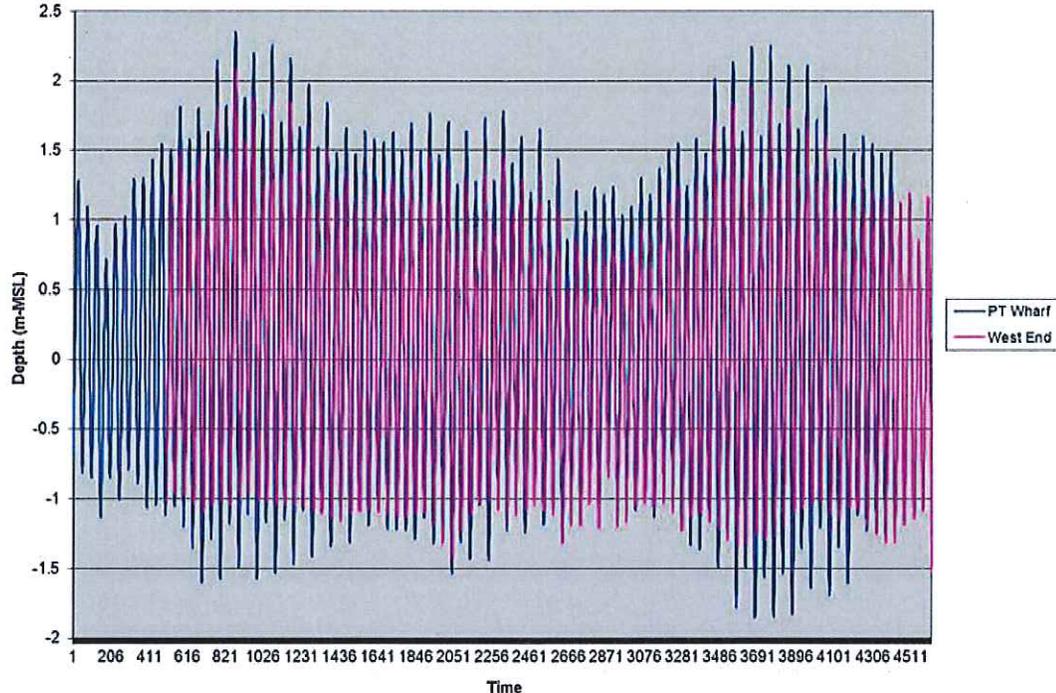


Figure 11 - 2006 tidal hydrograph for the Provincetown Wharf and West End tide gages NPS (2006)

## ENVIRONMENTAL CONSEQUENCES

### General

The purpose of this project is to restore access to the West End Marsh for fish for spawning, feeding, and shelter. The targeted effect of this restoration project is to restore previously existing ecological functions to the West End Marsh to increase the habitat quality and access for fish and wildlife. From a national perspective, salt marsh restoration is very important because of the high ecological value of the marsh and the relatively limited zone within which they can occur. Detailed effects of the project are described in the following sections.

All the work associated with the project would take place from a barge. No land access for construction equipment would be required. Therefore, the size and disturbance of the project area would be limited to the minimum necessary for construction access (via barge). During construction, no pedestrian access would be allowed on the dike for safety reasons. This would likely reduce access to Long Point beach for a brief period of time.

### Wetlands

This project would improve access to West End Marsh and its associated mudflats for large fish and invertebrates increasing their foraging habitat by 385 acres and allowing them to exert an influence on the community structure of the marsh. The large fish and invertebrates will benefit from the food sources produced by the marsh/shallow water ecosystem and will help to control the populations of herbivores that may otherwise become out of balance in the marsh foodweb. Human induced changes in estuarine and marine systems can lead to dramatic declines in habitats brought about by the lack of control by predator species of marsh herbivores (Bertness and Silliman, 2008). For instance, Bertness and Silliman (2008) cite a study by Silliman and Newell (2003) that found that marsh snails, which would normally be controlled by predators such as blue crabs (*Callinectes sapidus*), can entirely denude stands of marsh cordgrass in less than a growing season when crab populations are reduced. The benefits of restoring connectivity to the West End Marsh include: 1) restoration of the food web to control marsh herbivores; 2) increased potential for energy subsidy from the marsh to the marine system; 3) minor restoration of tidally influenced marsh habitat distribution; 4) increasing the recreational fishing potential of the shallow open water behind the dike by providing habitat for a number of important fishery species (e.g., winter flounder and striped bass, and bluefish) and; 5) increased nursery potential of the area for a variety of estuarine and marine species.

### Benthic Invertebrates and Shellfish

#### *Benthic Invertebrates*

The project would have minimal effects on benthic resources in the project area during construction as the construction footprint is very small. Immobile benthic organisms in the direct footprint of construction activities would be destroyed, but would begin to recover soon after construction is complete. Positive impacts to benthic communities may occur following

construction since the qualitative sampling conducted for this project suggests that the benthic community is more diverse outside of Long Point Dike.

### *Shellfish*

Horseshoe crabs would experience an increase in accessible habitat for foraging and resting.

### **Fish**

The potential adverse impacts of the project to fish resources are expected to be to short term physical effects, as dredging and construction operations are not likely to have long term negative effects on water quality or habitats. The physical effects of the construction effort would include minor increases in turbidity in the water associated with the construction.

The increases in turbidity levels around the construction would be short term. Since fish are mobile, they can avoid the areas of increased turbidity that may result from construction.

Multiple positive impacts to fish resources in this area are anticipated. An increased forage base for fish resources would become available as the large fish are able to access approximately 385 acres of additional habitat for feeding during high tides. These fish would export a portion of the marsh and intertidal habitat productivity to the marine system when they return to Cape Cod Bay and the Atlantic Ocean during low tides.

Some of the aquatic species from Cape Cod Bay that would be using the West End Marsh for foraging and refuge if there was access through Long Point Dike include: striped bass (*Morone saxatilis*), bluefish (*Pomatomus saltatrix*), and winter flounder (*Pseudopleuronectes americanus*). Winter flounder would likely use the area for foraging/nursery habitat as well. Smaller fish that use the marsh under existing conditions such as mummichog (*Fundulus heteroclitus*) and Atlantic silverside (*Menidia menidia*), would serve as forage for the larger species.

The Essential Fish Habitat section documents the impacts to fish species that have essential fish habitat designations in the area.

### **Essential Fish Habitat**

Thirty-one species have EFH designated within the NOAA-Fisheries designated quadrat that contains the West End marsh. Temporary disruption to benthic organisms associated with the removal and placement of the large boulders from the dike would be minimal as the disturbance would be limited to a small area. The benthic community would reestablish quickly once construction is complete. No negative impacts on EFH are anticipated as a result of this project.

As previously stated, multiple positive impacts to fish resources in this area are anticipated. All fish that have EFH designations (and have the potential to occur) in the project area would benefit from this project.

No submerged aquatic vegetation (SAV) is present in West End Marsh. Therefore, no impacts to SAV are anticipated.

## **Wildlife**

### *Mammals*

Mammals inhabiting the areas surrounding the restoration site may experience minor disturbances from the construction activities associated with construction. These impacts would be minimal as most mammal species are highly mobile and would be able to avoid construction areas. Following restoration activities, raccoons, skunks, and mink may experience increases in the quality of available food resources associated with the higher quality fish populations *Spartina* salt marsh and intertidal flats habitats.

### *Birds*

Impacts to birds associated with West End Marsh would be short-term and minimal, while the long-term benefits are expected to be positive. The impact for all types of wildlife, including bird species, would be the temporary disturbance of habitat during the field construction period.

The benefits associated with this project for bird species include the increased productivity of the ecosystem, which should increase the foraging potential of the habitat.

### *Amphibians and Reptiles*

No significant adverse impacts to amphibian and reptile populations are expected. The impact for all types of wildlife in the brackish water habitats will be the temporary disturbance of habitat during the field construction period. Wildlife can temporarily leave the project area and retreat to the adjacent surrounding habitats.

## **Threatened and Endangered Species**

No Federal or State threatened or endangered species are expected to be impacted by this project. See Appendix C for correspondence from the National Marine Fisheries Service, U.S. Fish and Wildlife Service, and commonwealth of Massachusetts concurrence with this assessment of threatened and endangered species.

## **Recreation and Aesthetics**

The reconnection of the harbor to West End Marsh should enhance the recreational value of the area on and around Long Point dike. *Spartina* marshes and their associated open water habitats would attract recreationally important fish species to the area as well as a more diverse bird fauna for passive recreational use such as bird watching.

The installation of a bridge over the notch in the dike will allow for continued, safe pedestrian access to the Long Point beach.

Noise impacts from the construction of the proposed project should be minimal as all construction will take place during daylight hours.

### **Water Quality**

The project would improve the tidal exchange to West End Marsh. Alternative 2 would increase tidal exchange to the marsh area. The project would have minimal effects on water quality. There would be minor short term increases in turbidity during construction. The sediment in the vicinity of the construction work is sand and any suspended sediments would settle quickly without affecting water quality.

### **Air Quality Statement of Conformity**

The project would have no long-term impacts on air quality (Appendix D). During construction equipment operating on the site would emit pollutants including nitrogen oxides that can lead to the formation of ozone. In order to minimize air quality effects during construction, construction activities would comply with applicable provisions of the Massachusetts Air Quality Control Regulations pertaining to dust, odors, construction, noise, and motor vehicle emissions. This project therefore conforms to the Federal requirements for activities under the Clean Air Act within the Massachusetts State Implementation Plan.

### **Historic and Archaeological Resources**

The breaching and bridging of Long Pond Dike should have no effect on historic properties. The dike itself is not eligible for the National Register as a historic structure due to repeated maintenance and the recent rebuilding of large sections of the dike in the 1970s. The Massachusetts State Historic Preservation Officer, Mashpee Tribal Historic Preservation Officer, Wampanoag Tribal Historic Preservation Officer and the Executive Director of the Massachusetts Board of Underwater Archaeological Resources have all concurred in this determination.

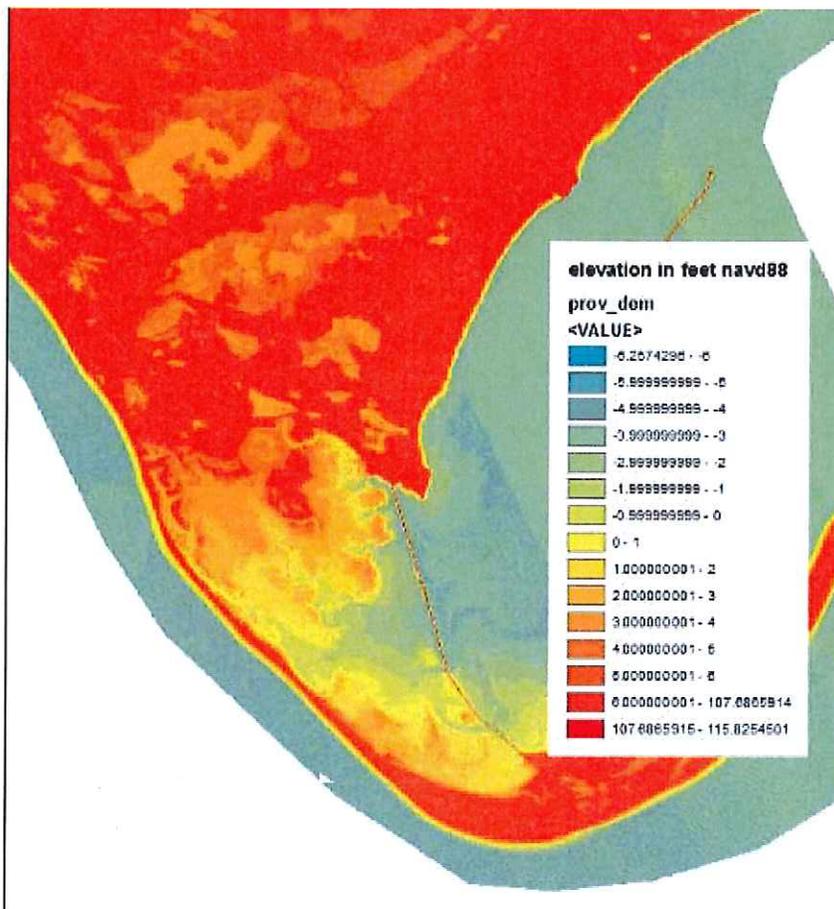
### **Flooding and Hydrodynamics**

Construction of an opening in Long Point Dike with a base width of 10 feet and a top width of approximately 40 feet would not measurably increase flood heights in the area. Although the dike restricts tidal exchange, it is porous and allows flow through so that from a hydraulic standpoint there is no substantial head differential between West End Marsh and Cape Cod Bay.

Corps of Engineers coastal engineers conducted analyses to assess the effects of the construction of an opening in Long Point Dike on tide levels and waves. The analyses summarized below show that the opening would have minimal effects on tide heights and waves.

The tidal hydrograph (Figure 11) for the gauges at the Provincetown Harbor and inside Long Point Dike shows that the tidal range inside the dike is roughly 1 to 2 feet less than the full tidal range in the harbor. Using lidar data and GIS (Figure 12), the engineers estimated the area behind the dike at roughly the 1.5 meter contour was 17,606,800 sq ft. An increase in tidal range of 1 ft in this area would thus require an increased volume of 17,606,800 cubic feet of water from one side of the dike to the other over the duration of the flood tide (6 hours). This flow was determined to not be feasible by means of culvert installation or relatively small bridge opening. This led to the conclusion that the potential project goal of fully increased tidal range was not practicable.

Coastal engineers considered a 200 foot wide opening in Long Pont Dike to estimate the effects of an opening on waves. A wave period of 9 seconds results in a deepwater wavelength of 415 ft. Thus with the gap width of 200 ft a B/L of 0.5 is applied (Figure 13).

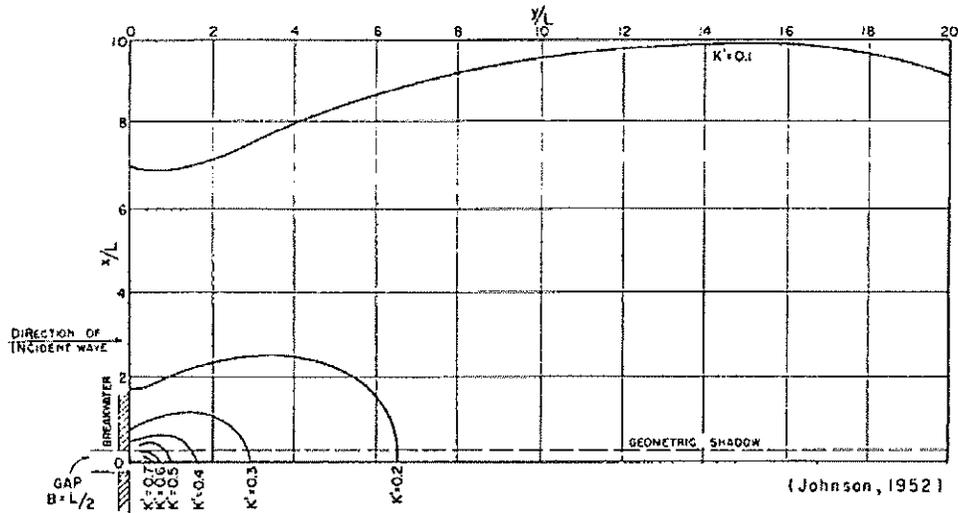


**Figure 12: Lidar data in NAVD 88, used to determine area behind the dike at a specific contour.**

The distance of Provincetown harbor from dike is approximately 7,300 ft, which corresponds close to the x axis index on the graph of about 18 ( $18 \times 400 = 7,200$ ).  $K'$  is the ratio of diffracted wave height to incident wave height. This results in the gap allowing a wave of only 0.1 times the height of the incident windward wave to reach Provincetown Harbor

HH

indicating that the project would have minimal impact on wave heights in Provincetown Harbor.



**Figure 13. Contours of equal diffraction coefficient gap width = 0.5 wavelength (B/L = 0.5)**

Long Point Dike will be overtopped with increasing frequency with sea level rise (Appendix E), but sea level rise under any scenario analyzed will not significantly affect the benefits of the project.

The project will increase flushing during the normal tides, but will not increase the impacts of storm induced tidal floods or wave action to the landward side of the dike, which are already exposed to storm tides through the permeable dike. Increases to sea level rise will have similar consequences and impacts on interior flooding and wave action toward interior with or without the project.

### CUMULATIVE EFFECTS

Cumulative effects are those resulting from the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable future actions. Past and current activities in the within the West End Marsh ecosystem are limited to passive recreational uses such as fishing, hiking, and bird watching. Reasonably foreseeable future actions include the continuation of past and current activities.

This project is expected to benefit the overall ecological health of the West End Marsh ecosystem by restoring tidal connectivity and the full fish community to the ecosystem. Therefore, no adverse cumulative impacts are projected as a result of this project.

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## **OTHER CONSIDERATIONS/SUSTAINABLE DEVELOPMENT**

No adverse impacts to children, minority or low income populations are anticipated. The environmental effects of this project are occurring in coastal areas without disproportionately large populations of children, minorities, or low-income people. The project represents restoration of a feature impacted during previous (circa 1930) development.

## **MONITORING**

The project team will conduct post construction monitoring to assess the success of the project in restoring access for large fish and invertebrates to the marsh. (See Appendix A.) The monitoring focuses on large fish and invertebrate passage because these benefits are eligible for consideration under the Section 1135 Project Modifications to Improve the Environment Program; effects on the salt marsh and benthic habitats will occur on land owned by the National Park Service and are not eligible for monitoring under the Corps program.

## **COORDINATION**

The Corps of Engineers and the town of Provincetown conducted an interagency meeting to discuss the project and obtain agency input on June 24, 2014. The Corps will release a public notice for this project to obtain public input. Refer to Appendix C for coordination letters. The following agencies that have been contacted for this project include:

### Federal Agencies:

U.S. Environmental Protection Agency, Region 1, Boston, MA  
U.S. Fish and Wildlife Service, Concord, NH  
National Marine Fisheries Service, Gloucester, MA

### State Agencies:

Executive Office of Environmental Affairs  
Massachusetts Department of Environmental Protection  
Massachusetts Department of Environmental Management  
Massachusetts Department of Marine Fisheries  
Massachusetts Office of Coastal Zone Management  
State Historic Preservation Office

### Local Agencies:

Provincetown Conservation Commission  
Provincetown Selectmen

## **CONCLUSIONS AND RECOMMENDATIONS**

### **Conclusions**

The lack of full connectivity between Cape Cod Bay and the affected marsh and estuarine habitat reduces access to the habitat by estuarine fish and large invertebrates, reducing habitat value and utilization. Habitats to be restored include salt marsh and shallow subtidal and intertidal estuarine habitats in close proximity to coastal dune and marine habitats. Restoration of connectivity through the dike will restore access to 385 acres of salt marsh and estuarine habitat for fish and invertebrates.

Alternative 2 is a restoration plan which consists of a constructing an opening in Long Point Dike with a bottom width of 10 feet and top width of approximately 40 feet and providing a concrete bridge to maintain pedestrian access, provides important habitat benefits that are in the Federal interest.

### Recommendations

I recommend that the New England District and town of Provincetown secure the necessary funds, Federal and non-Federal, to implement the selected plan. The restoration plan is consistent with current administration policy and, if implemented, will provide measurable environmental benefits through modification of the Long Point Dike.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Christopher J. Barron  
Colonel, Corps of Engineers  
District Engineer

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## COMPLIANCE WITH ENVIRONMENTAL FEDERAL STATUTES AND EXECUTIVE ORDERS

### Federal Statutes

1. Archaeological Resources Protection Act of 1979, as amended, 16 USC 470 et seq.

Compliance: Issuance of a permit from the Federal land manager to excavate or remove archaeological resources located on public or Indian lands signifies compliance. Not applicable to this project.

2. Preservation of Historic and Archeological Data Act of 1974, as amended, 16 U.S.C. 469 et seq.

Compliance: Project has been coordinated with the State Historic Preservation Officer. Impacts to archaeological resources will be mitigated.

3. American Indian Religious Freedom Act of 1978, 42 U.S.C. 1996.

Compliance: Must ensure access by native Americans to sacred sites, possession of sacred objects, and the freedom to worship through ceremonials and traditional rites. Not applicable to this project.

4. Clean Air Act, as amended, 42 U.S.C. 7401 et seq.

Compliance: Public notice of the availability of this report to the Environmental Protection Agency is required for compliance pursuant to Sections 176c and 309 of the Clean Air Act.

5. Clean Water Act of 1977 (Federal Water Pollution Control Act Amendments of 1972) 33 U.S.C. 1251 et seq.

Compliance: A Section 404(b)(1) Evaluation and Compliance Review will be incorporated into the project report. An application shall be filed for State Water Quality Certification pursuant to Section 401 of the Clean Water Act.

6. Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1451 et seq.

Compliance: A CZM consistency determination shall be provided to the State for review and concurrence that the proposed project is consistent with the approved State CZM program.

7. Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 et seq.

Compliance: Coordination with the U.S. Fish and Wildlife Service (FWS) and/or National Marine Fisheries Service (NMFS) will determine formal consultation requirements pursuant to Section 7 of the Endangered Species Act.

8. Estuarine Areas Act, 16 U.S.C. 1221 et seq.

Compliance: Applicable only if report is being submitted to Congress.

9. Federal Water Project Recreation Act, as amended, 16 U.S.C. 4601-12 et seq.

Compliance: Public notice of availability to the project report to the National Park Service (NPS) and Office of Statewide Planning relative to the Federal and State comprehensive outdoor recreation plans signifies compliance with this Act.

10. Fish and Wildlife Coordination Act, as amended, 16 U.S.C. 661 et seq.

Compliance: Coordination with the FWS, NMFS, and State fish and wildlife agencies signifies compliance with the Fish and Wildlife Coordination Act.

11. Land and Water Conservation Fund Act of 1965, as amended, 16 U.S.C. 4601-4 et seq.

Compliance: Public notice of the availability of this report to the National Park Service (NPS) and the Office of Statewide Planning relative to the Federal and State comprehensive outdoor recreation plans signifies compliance with this Act.

12. Marine Protection, Research, and Sanctuaries Act of 1971, as amended, 33 U.S.C. 1401 et seq.

Compliance: Applicable if the project involves the transportation or disposal of dredged material in ocean waters pursuant to Sections 102 and 103 of the Act, respectively. Disposal of dredge material in ocean waters will not occur.

13. National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470 et seq.

Compliance: Coordination with the State Historic Preservation Office signifies compliance.

14. Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3000-3013, 18 U.S.C. 1170

Compliance: Regulations implementing NAGPRA will be followed if discovery of human remains and/or funerary items occur during implementation of this project.

15. National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321 et seq.

Compliance: Preparation of an Environmental Assessment signifies partial compliance with NEPA. Full compliance shall be noted at the time the Finding of No Significant Impact or Record of Decision is issued.

16. Rivers and Harbors Act of 1899, as amended, 33 U.S.C. 401 et seq.

Compliance: No requirements for projects or programs authorized by Congress. The proposed aquatic ecosystem restoration project is being conducted pursuant to the Congressionally-approved authority.

17. Watershed Protection and Flood Prevention Act as amended, 16 U.S.C 1001 et seq.

Compliance: Floodplain impacts must be considered in project planning. No floodplain impacts will occur.

18. Wild and Scenic Rivers Act, as amended, 16 U.S.C 1271 et seq.

Compliance: Coordination with the Department of the Interior to determine projects impacts on designated Wild and Scenic Rivers must occur.

19. Magnuson-Stevens Act, as amended, 16 U.S.C. 1801 et seq.

Compliance: Coordination with the National Marine Fisheries Service and preparation of an Essential Fish Habitat (EFH) Assessment signifies compliance with the EFH provisions of the Magnuson-Stevens Act.

#### Executive Orders

1. Executive Order 11593, Protection and Enhancement of the Cultural Environment, 13 May 1971

Compliance: Coordination with the State Historic Preservation Officer signifies compliance.

2. Executive Order 11988, Floodplain Management, 24 May 1977 amended by Executive Order 12148, 20 July 1979.

Compliance: Public notice of the availability of this report or public review fulfills the requirements of Executive Order 11988, Section 2(a) (2).

3. Executive Order 11990, Protection of Wetlands, 24 May 1977.

Compliance: Public notice of the availability if this report for public review fulfills the requirements of Executive Order 11990, Section 2 (b).

4. Executive Order 12114, Environmental Effects Abroad of Major Federal Actions, 4 January 1979.

Compliance: Not applicable to projects located within the United States.

5. Executive Order 12898, Environmental Justice, 11 February 1994.

Compliance: Not applicable, the project is not expected to have a significant impact on minority or low income population, or any other population in the United States.

6. Executive Order 13007, Accommodation of Sacred Sites, 24 May 1996

Compliance: Not applicable unless on Federal lands, then agencies must accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners, and avoid adversely affecting the physical integrity of such sacred sites.

7. Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. 21 April, 1997.

Compliance: Not applicable, the project would not create a disproportionate environmental health or safety risk for children.

8. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, 6 November 2000.

Compliance: Consultation with Indian Tribal Governments, where applicable, and consistent with executive memoranda, DoD Indian policy, and USACE Tribal Policy Principles signifies compliance.

#### Executive Memorandum

Analysis of Impacts on Prime or Unique Agricultural Lands in Implementing NEPA, 11 August 1980.

Compliance: Not applicable if the project does not involve or impact agricultural lands.

White House Memorandum, Government-to-Government Relations with Indian Tribes, 29 April 1994.

Compliance: Consultation with Federally Recognized Indian Tribes, where appropriate, signifies compliance.

**NEW ENGLAND DISTRICT  
U.S. ARMY CORPS OF ENGINEERS, WALTHAM, MA  
CLEAN WATER ACT SECTION 404 (b) (1) EVALUATION**

PROJECT: Long Point Dike Modification

PROJECT MANAGER: Larry Oliver

PHONE NO.: (978) 318-8347

FORM COMPLETED BY: Erika Mark

PHONE NO.: (978) 318-8250

**PROJECT DESCRIPTION:** The proposed Long Point Dike Environmental Project Modification will restore salt marsh and estuarine habitats for fish and wildlife in the area known as West End Marsh, or the Moors. Access to approximately 385 acres of salt marsh and intertidal flats will be restored which will restore habitat utilization by fish, benthic invertebrates, and wildlife.

**NEW ENGLAND DISTRICT  
U.S. ARMY CORPS OF ENGINEERS, CONCORD, MA  
EVALUATION OF CLEAN WATER ACT SECTION 404 (B) (1) GUIDELINES**

PROJECT: Long Point Dike Modification, Provincetown, Massachusetts

1. Review of Compliance (Section 230.10(a)-(d)).

	YES	NO
a. The discharge represents the least environmentally damaging practicable alternative and if in a special aquatic site, the activity associated with the discharge must have direct access or proximity to, or be located in the aquatic ecosystem to fulfill its basic purpose.	X	
b. The activity does not appear to: 1) violate applicable state water quality standards or effluent standards prohibited under Section 307 of the CWA; 2) jeopardize the existence of Federally listed threatened and endangered species or their habitat; and 3) violate requirements of any Federally designated marine sanctuary.	X	
c. The activity will not cause or contribute to significant degradation of waters of the U.S. including adverse effects on human health, life stages of organisms dependent on the aquatic ecosystem, ecosystem diversity, productivity and stability, and recreational, aesthetic, and economic values.	X	
d. Appropriate and practicable steps have been taken to minimize potential adverse impacts of the discharge on the aquatic ecosystem.	X	

2. Technical Evaluation Factors (Subparts C-F).

	N/A	Not Significant	Significant
<b>a. Potential Impacts on Physical and Chemical Characteristics of the Aquatic Ecosystem (Subpart C)</b>			
1) Substrate		X	
2) Suspended particulates/turbidity		X	
3) Water column impacts		X	
4) Current patterns and water circulation		X	
5) Normal water fluctuations		X	
6) Salinity gradients		X	
<b>b. Potential Impacts on Biological Characteristics of the Aquatic Ecosystem (Subpart D)</b>			
1) Threatened and endangered species		X	
2) Fish, crustaceans, mollusks, and other organisms in the aquatic food web		X	

		N/A	Not Significant	Significant
	3) Other wildlife (mammals, birds, reptiles, and amphibians)		X	
c. Potential Impacts on Special Aquatic Sites (Subpart E).				
	1) Sanctuaries and refuges	X		
	2) Wetlands		X	
	3) Mud flats		X	
	4) Vegetated shallows		X	
	5) Coral reefs	X		
	6) Riffle and pool complexes	X		
d. Potential Effects on Human Use Characteristics (Subpart F).				
	1) Municipal and private water supplies	X		
	2) Recreational and commercial fisheries		X	
	3) Water related recreation		X	
	4) Aesthetics impacts		X	
	5) Parks, national and historic monuments, national seashores, wilderness areas, research sites and similar preserves		X	

3. Evaluation and Testing (Subpart G).

a. The following information has been considered in evaluating the biological availability of possible contaminants in dredged or fill material. (Check only those appropriate.)		
	1) Physical characteristics	X
	2) Hydrography in relation to known or anticipated sources of contaminants	X
	3) Results from previous testing of the material or similar material in the vicinity of the project	
	4) Known, significant sources of persistent pesticides from land runoff or percolation	
	5) Spill records for petroleum products or designated hazardous substances (Section 311 of CWA)	
	6) Public records of significant introduction of contaminants from industries, municipalities, or other sources.	
	7) Known existence of substantial material deposits of substances which could be released in harmful quantities to the aquatic environment by man-induced discharge activities	
	8) Other sources (specify)	

List appropriate references. See Environmental Assessment for Maintenance Dredging of Sagamore Creek Federal Navigation Project,

	YES	NO
b. An evaluation of the appropriate information in 3a above indicates that there is reason to believe the proposed dredged material is not a carrier of contaminants or that levels of contaminants are substantively similar at extraction and disposal sites and not likely to require constraints. The material meets the testing exclusion criteria.	X	

4. Disposal Site Delineation (Section 230.11(f)).

a. The following information has been considered in evaluating the biological availability of possible contaminants in dredged or fill material. (Check only those appropriate.)		
1)	Depth of water at disposal site	X
2)	Current velocity, direction, variability at disposal site	X
3)	Degree of turbulence	X
4)	Water column stratification	
5)	Discharge vessel speed and direction	
6)	Rate of discharge	
7)	Dredged material characteristics (constituents, amount, and type of material, settling velocities)	
8)	Number of discharges per unit of time	
9)	Other factors affecting rates and patterns of mixing (specify)	
<u>List appropriate references.</u> See Environmental Assessment for Maintenance Dredging of Sagamore Creek Federal Navigation Project, Sagadahoc County, ME.		
		<b>YES NO</b>
b.	An evaluation of the appropriate information factors in 4a above indicated that the disposal sites and/or size of mixing zone are acceptable.	X

5. Actions to Minimize Adverse Effects (Subpart H).

	YES	NO
All appropriate and practicable steps have been taken, through application of recommendation of Section 230.70-230.77 to ensure minimal adverse effects of the proposed discharge.	X	

List actions taken

Efforts will be taken to avoid dredging shoal areas within the channel that contain eelgrass.  
 Will use the dredge window of November 15 and March 15 to minimize impacts to spawning winter flounder, shellfish, and anadromous fish migrations

6. Factual Determination (Section 230.11).

A review of appropriate information, as identified in Items 2 – 5 above, indicates there is minimal potential for short or long term environmental effects of the proposed discharge as related to:		
	YES	NO
a. Physical substrate at the disposal site (review Sections 2a, 3, 4, and 5 above)	X	
b. Water circulation fluctuation and salinity (review Sections 2a, 3, 4, and 5)	X	
c. Suspended particulates/turbidity (review Sections 2a, 3, 4 and 5)	X	
d. Contaminant availability (review Sections 2a, 3, and 4)	X	
e. Aquatic ecosystem structure, function and organisms (review Sections 2b and 2c, 3, and 5)	X	
f. Proposed disposal site (review Sections 2, 4, and 5)	X	
g. Cumulative effects on the aquatic ecosystem	X	
h. Secondary effects on the aquatic ecosystem	X	

7. Findings of Compliance or Non-compliance

	YES	NO
The proposed disposal site for discharge of dredged or fill material complies with the Section 404(b)(1) guidelines.	X	

\_\_\_\_\_  
Date

\_\_\_\_\_  
Christopher J. Barron  
Colonel, Corps of Engineers  
District Engineer

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**APPENDIX A – MONITORING PLAN**

**Long Point Dike Modification  
Ecological Resources Monitoring Plan  
August 21, 2015**

**Introduction**

This monitoring plan has been developed for the planned modification of Long Point Dike in Provincetown, Massachusetts. The purpose of this monitoring plan is to measure the success of the project. All of the procedures in this plan will be performed by or under the guidance of the New England District, Corps of Engineers. The plan is intended to measure and ensure achievement of the goals and objectives established during planning. It is intended to be flexible to allow readjustment as new information and conditions develop.

Goals and objectives formulated during the early planning of the project are the basis for the establishment of monitoring criteria. Performance indicators are specific, measurable quantities such as pH, amount of chlorophyll in a water sample, or Secchi disk visibility (NRC, 1992). The goals, objectives and performance criteria for this project are specified in this document.

**Project Goal**

- Improve the value of existing estuarine habitat by restoring the hydraulic connection for large fish and invertebrates.

**Objective**

1. Increase connectivity for large fish that use salt marsh and shallow estuary habitats.

**Project Objectives, Success Criteria and Methods**

**Objective:** Increase connectivity for large fish that use salt marsh and shallow estuary habitats.

**Success Criteria:**

Large fish and invertebrates are using the habitat inside the dike

**Method:**

Cameras placed in newly created opening record large fish moving in and out of the area behind Long Point Dike for one day.

Horseshoe crab survey to estimate habitat utilization by horseshoe crabs.

**Duration and Estimated Cost:**

Monitoring will be conducted for one year following construction for one day per month

between the months of May through October.

**APPENDIX B – COST ANALYSIS**

Print Date Tue 6 January 2015  
Eff. Date 1/6/2015

U.S. Army Corps of Engineers  
Project Feasibility: Long Point Dike Feasibility Study  
COE Standard Report Selections

Time 11:20:33

Title Page

Long Point Dike Feasibility Study  
Long Point Dike, Provincetown, MA

Estimate - Feasibility

Scope: The project scope consists of removal of approximately 10 feet of the dike's riprap down to the existing sand level (approximately 15 foot depth of stone). The dike's riprap/stone will be removed and reset along the edge of the removed area with a 1:1 slope back to the crest. A cast in place leveling pad and concrete cap will be placed at each side of the new dike opening. Three 40 foot long, 3 foot wide, 1 foot thick precast post tensioned slabs will be placed on the concrete caps to serve as a pedestrian bridge. A three rail steel railing will be installed on each side of the pedestrian bridge.

Assumptions: No additional stone will be necessary to form the 1:1 slope. Project will be completed via marine plant. Contractor will have adequate pier space at MacMillian Pier in Provincetown, MA to access the project site from a marine plant. Existing stone that is removed will be barged to shore and

Risks: Water level might not be sufficient to accommodate marine plant. Mitigated by assuming MHW level is sufficient to float equipment in and equipment includes crane barge with spuds to work in low tide. Project site is small portion of dike ~60 foot wide; plant will not require much, if any, movement to work all portions of the project area.

Contractor: Assume small business aquisition; assume prime contractor will perform limited work and sub out marine and concrete work. Prime Contractor: JOOH 4%, HOOH 6%, Profit 10%, Bond 3%. Subs: JOOH 5%, HOOH 5%, Profit 10%.

Markups: Productivity 90% due to remoteness of project site and difficulty working in confined space on dike, Escalation 6%, Contingency 20%

Estimated by Jeffrey Gaeta  
Designed by Concepts by NAE  
Prepared by Jeffrey Gaeta

Preparation Date 1/6/2015  
Effective Date of Pricing 1/6/2015  
Estimated Construction Time 60 Days

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Labor ID: NLS2012

EQ ID: EP14R01

Currency in US dollars

TRACES MII Version 4.2

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Print Date Tue 6 January 2015  
Eff. Date 1/6/2015

U.S. Army Corps of Engineers  
Project Feasibility: Long Point Dike Feasibility Study  
COE Standard Report Selections

Time 11:20:33

Library Properties Page vii

Designed by  
Concepts by NAE  
Estimated by  
Jeffrey Gaeta  
Prepared by  
Jeffrey Gaeta

Design Document General Plan & Bridge Location PP  
Document Date 10/27/2014  
District New England District  
Contact Jeffrey Gaeta x 438  
Budget Year 2015  
UOM System Original

Direct Costs  
LaborCost  
EQCost  
MatlCost  
SubBidCost

Timeline/Currency  
Preparation Date 1/6/2015  
Escalation Date 1/6/2015  
Eff. Pricing Date 1/6/2015  
Estimated Duration 60 Day(s)

Currency US dollars  
Exchange Rate 1.000000

Costbook CB12EB-b: MII English Cost Book 2012-b

Labor NLS2012: National Labor Library - Seattle 2012

dol.gov is the website for current Davis Bacon & Service Labor Rates. Fringes paid to the laborers are taxable. In a non-union job the whole fringes are taxable. In a union job, the vacation pay fringes

Labor Rates  
LaborCost1  
LaborCost2  
LaborCost3  
LaborCost4

Equipment EP14R01: MII Equipment 2014 Region 01

01 NORTHEAST  
Sales Tax 6.00  
Working Hours per Year 1,000  
Labor Adjustment Factor 1.15  
Cost of Money 2.13  
Cost of Money Discount 25.00  
Tire Recap Cost Factor 1.50  
Tire Recap Wear Factor 1.80  
Tire Repair Factor 0.15  
Equipment Cost Factor 1.00  
Standby Depreciation Factor 0.50

Fuel  
Electricity 0.132  
Gas 3.770  
Diesel Off-Road 3.660  
Diesel On-Road 4.190

Shipping Rates  
Over 0 CWT 19.34  
Over 240 CWT 17.80  
Over 300 CWT 15.56  
Over 400 CWT 13.43  
Over 500 CWT 6.79  
Over 700 CWT 6.79  
Over 800 CWT 11.41

Labor ID: NLS2012

EQ ID: EP14R01

Currency in US dollars

TRACES MII Version 4.2

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**Direct Cost Markups**

	Category			Method				
	Days/Week	Hours/Shift	Shifts/Dry	Productivity	Overtime	1st Shift	2nd Shift	3rd Shift
Productivity								
Overtime								
<i>Standard</i>	5.00	8.00	1.00	8.00		0.00		0.00
<i>Actual</i>	5.00	8.00	1.00	8.00		0.00		0.00
<i>Day</i>	<i>OT Factor</i>		<i>Working</i>			<i>OT Percent</i>		<i>FCCM Percent</i>
Monday	1.50		Yes			0.00		0.00
Tuesday	1.50		Yes					
Wednesday	1.50		Yes					
Thursday	1.50		Yes					
Friday	1.50		Yes					
Saturday	1.50		No					
Sunday	2.00		No					

Sales Tax  
 MatlCost

TaxAdj

Running % on Selected Costs

**Contractor Markups**

	Category	Method
JOOH	JOOH	Running %
HOOH	HOOH	Running %
Profit	Profit	Running %
Bond	Bond	Running %
Excise Tax	Excise	Running %

**Owner Markups**

	Category	Method
Escalation	Escalation	Running %
Contingency	Contingency	Running %
SIOH	SIOH	Running %

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Description	Quantity	UOM	LaborCost	MatlCost	EQCost	SubBidCost	BareCost	ContractCost	ProjectCost
<b>Project Cost Summary Report</b>			89,376	52,072	149,014	145,306	435,768	659,937	839,440
Long Point Dike Pedestrian Bridge	1.00	LS	89,376	52,072	149,014	145,306	435,768	659,937	839,440
Long Point Dike Pedestrian Bridge	1.00	LS	89,376	52,072	149,014	145,306	435,768	659,937	839,440
<b>0001 GENERAL REQUIREMENTS</b>	1.00	LS	41,541	46,400	46,881	96,740	231,563	327,311	416,339
<b>Mobilization</b>	1.00	LS	9,818	0	28,182	0	38,000	65,020	82,705
Marine Equipment Platform	4.00	DAY	0	0	28,182	0	28,182	47,432	60,333
(Note: Work Tug 500 HP, Work Barge 2000 Ton with Spuds, Mounted Crane 350 Ton 200' Boom, 7 CY Grapple, Gen Set, and Additional Work Barge. Mob, Demob, and setup time of crew and equipment. Assume 2 days to setup, 2 days to break down. Carry 4 days total.)									
Marine Labor Crew	4.00	DAY	9,818	0	0	0	9,818	17,588	22,372
(Note: Labor crew for operation of Marine Equipment Platform to include Tug Engineer, Deckhand, Heavy Operator, and three laborers. Mob, Demob, and setup time of crew and equipment. Assume 2 days to setup, 2 days to break down. Carry 4 days total.)									
<b>General Conditions &amp; Requirements</b>	1.00	LS	31,723	46,400	18,699	96,740	193,563	262,291	333,634
<b>Personnel</b>	1.00	EA	0	0	0	72,200	72,200	90,179	114,708
Field Personnel, project manager, average	4.00	WK	0	0	0	12,800	12,800	15,987	20,336
(Note: PM, coordination, logistics, planning, submittals and plans, pay requests. -> Time is up front. Assume project duration of 8 weeks. Assume 2 weeks up front then on project 1/4 time. 8 weeks/4 + 2 weeks = assume 4 weeks total.)									
Field Personnel, superintendent, average	12.00	WK	0	0	0	36,000	36,000	44,965	57,195
(Note: Assume project duration of 8 weeks. Additional 2 weeks for Mob/Prep time and 2 weeks prior for project close-out. Duties: Super & QC.)									
Safety engineer	9.00	WK	0	0	0	23,400	23,400	29,227	37,177
(Note: Separate SSHO required by Spec. Separate SSHO required by Spec. Assume project duration of 8 weeks with additional 1 week up front for prep.)									
<b>Facilities</b>	1.00	EA	3,032	15,470	285	2,340	21,126	28,104	35,749
<b>Field Office</b>	2.00	MO	0	0	0	900	900	1,124	1,430
Office Trailer, furnished, rent per month, 20' x 8', excl. hookups	2.00	EA	0	0	0	900	900	1,124	1,430
(Note: Assume in place 2 months. One trailer, share with Contractor and USACE.)									
<b>Temporary Utilities</b>	2.00	MO	904	3,306	0	480	4,690	6,356	8,085
Electrical Service	1.00	MO	904	2,960	0	0	3,864	5,324	6,773
Field Office Expense, field office lights & HVAC	2.00	MO	0	300	0	0	300	375	477
(Note: Assume project duration of 2 months.)									
Temporary electrical power equipment (pro-rated per job), connections, office trailer, 200 amp	4.00	EA	904	2,660	0	0	3,564	4,950	6,296

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Description	Quantity	UOM	LaborCost	MatlCost	EQCost	SubBidCost	BareCost	ContractCost	ProjectCost
<b>Sanitation Facilities</b>	1.00	MO	0	346	0	480	826	1,032	1,312
Toilet, portable, chemical, rent per month	4.00	MO	0	346	0	480	826	1,032	1,312
(Note: Assume two toilets, 2 months each for 4 months total.)									
<b>Telephone and Communications</b>	2.00	MO	0	162	0	0	162	202	257
Field Office Expense, telephone bill; avg. bill/month, incl. long dist.	2.00	MO	0	162	0	0	162	202	257
<b>Field Office Equipment</b>	2.00	MO	0	310	0	0	310	387	493
Field Office Expense, office equipment rental, average	2.00	MO	0	310	0	0	310	387	493
<b>Field Office Supplies</b>	2.00	MO	0	170	0	0	170	212	270
Field Office Expense, office supplies, average	2.00	MO	0	170	0	0	170	212	270
<b>Trailer Custodial Service Cost</b>	2.00	MO	0	0	0	360	360	450	572
Field Office Expense, office trailer custodial services, per month	2.00	MO	0	0	0	360	360	450	572
<b>Field Office Storage</b>	2.00	MO	0	0	0	600	600	749	953
Storage Boxes, rent per month, 20' x 8'	4.00	EA	0	0	0	600	600	749	953
(Note: 2 storage boxes, 2 months each.)									
<b>Field First Aid</b>	1.00	LS	0	150	0	0	150	187	238
First Aid Kits per 25 employees N.Safety Council Data Sheet #202	2.00	EA	0	150	0	0	150	187	238
<b>Project Signs</b>	1.00	LS	582	3,231	0	0	3,813	5,084	6,466
Project Signs, sign, high intensity reflectorized, buy, excl. posts	88.00	SF	0	2,992	0	0	2,992	3,737	4,754
(Note: (1) 4 ft x 6 ft [24 sf] + (1) 4 ft x 4 ft [16 sf] + (8) 2 ft x 3 ft [6 sf] = 88 total sf)									
4" x 4" wood posts for signs	144.00	LF	582	239	0	0	821	1,346	1,713
(Note: (12) posts x 12 lf each = 144 lf total.)									
<b>Traffic Control</b>	1.00	LS	1,479	7,741	212	0	9,432	12,632	16,068
LITE SET, TRAILER MTD., 25 LED LAMP, FLASHING ARROW, W/TWO 8D BATTERIES AND 50W SOLAR ARRAY	2.00	DAY	0	0	36	0	36	50	64
Temporary Fencing, chain link, rented up to 12 months, 6' high, 11 ga, to 1000'	570.00	LF	774	3,591	0	0	4,365	5,879	7,479
Security vehicle barriers, concrete barrier, jersey, 10' L x 2' by 6" W x 32" H, 10 or more same site	10.00	EA	705	4,150	176	0	5,031	6,702	8,526
<b>Cleanup &amp; Disposal</b>	1.00	MO	67	400	73	0	540	720	916

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Description	Quantity	UOM	LaborCost	MatlCost	EQCost	SubBidCost	BareCost	ContractCost	ProjectCost
Selective demolition, rubbish handling, dumpster, alternate pricing method, haul, average for all sizes, includes one dump per week, cost to be added to demolition cost. (Note: Assume dumpster needs to be emptied once per month. Project duration = 2 months.)	2.00	EA	0	400	0	0	400	500	636
Snow removal, plowing, 2"-4" deep, 12 ton truck (Note: Assume staging area = 15,000 sf = 15 ksf. Assume 3 snow events throughout project time period = 15 x 3 = 45 ksf.)	45.00	MSF	67	0	73	0	140	221	281
Transportation Vehicles	1.00	LS	0	0	13,274	0	13,274	18,422	23,433
Outboard boat for Gov't usage	60.00	DAY	0	0	2,074	0	2,074	2,879	3,662
TRUCK, HIGHWAY, CONVENTIONAL, 8,800 LB ( 3,992 KG) GVW, 4X4, 2 AXLE, 3/4 TON (0.68 MT) - PICKUP (Note: Assume 2 site trucks for management personnel and transferring of small tools and materials. 10 hours per day at 20 work days per month at 2 months x 2 trucks = 800 hrs.)	800.00	HR	0	0	11,200	0	11,200	15,543	19,771
Sub Lease_Pier and Staging Area	1.00	EA	0	0	0	10,000	10,000	12,490	15,888
Sub Lease Pier and Staging Area, Monthly Cost (Note: Monthly cost to sub lease pier and parking area where crew and barge will be docked during non-working hours. Estimate assumes that Contractors home yard and office are not in vicinity of the Provincetown area.)	2.00	EA	0	0	0	10,000	10,000	12,490	15,888
Pavement Protection	1.00	EA	2,016	22,680	5,140	2,000	31,836	41,575	52,883
Drilling and blasting rock, blasting mats, rent, first day (Note: Mats are assumed to be 10' x 20'. Assume 8 will be necessary. Assume price includes delivery with separate cost to set and place.)	8.00	EA	0	1,080	0	2,000	3,080	3,847	4,893
Drilling and blasting rock, blasting mats, rent, per added day (Note: Assume 8 mats will be necessary for duration of project (60 days). 8 mats x 60 days = 480)	480.00	EA	0	21,600	0	0	21,600	26,979	34,317
Mat Setting (Note: Crew of loader and operator to set Mats and moe around as needed.)	4.00	DAY	2,016	0	5,140	0	7,156	10,749	13,673
Engineering and Shop Drawings	1.00	LS	9,419	0	0	0	9,419	17,136	21,797
Accident Prevention Plan	1.00	LS	714	0	0	0	714	1,302	1,656
Safety Engineers (Note: Assumed a Occupation Code of #29086 Engineer Technician III)	24.00	HR	714	0	0	0	714	1,302	1,656
Work Plan	1.00	LS	2,643	0	0	0	2,643	4,799	6,104
Field Constr. QC/Lab Technician (Note: Assumed a Occupation Code of #29210 Laboratory Technician 30210)	24.00	HR	418	0	0	0	418	757	962
Schedulers	24.00	HR	989	0	0	0	989	1,812	2,305

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Description	Quantity	UOM	LaborCost	MatlCost	EQCost	SubBidCost	BareCost	ContractCost	ProjectCost
(Note: Assumed a Occupation Code of #29086 Engineer Technician IV)									
General Superintendents (P.M.)	24.00	HR	1,235	0	0	0	1,235	2,230	2,837
(Note: Assumed a Carpenter / Millwright Wages plus \$3.00 / hour)									
Activity Hazard Analysis	1.00	LS	817	0	0	0	817	1,484	1,887
General Superintendents (P.M.)	8.00	HR	412	0	0	0	412	743	946
(Note: Assumed a Carpenter / Millwright Wages plus \$3.00 / hour)									
Safety Engineers	8.00	HR	238	0	0	0	238	434	552
(Note: Assumed a Occupation Code of #29086 Engineer Technician III)									
Personnel Clerks	8.00	HR	167	0	0	0	167	306	390
(Note: Assumed a Occupation Code of #01264 Personnel Assistant (Employment) I)									
Site Plan	1.00	LS	1,062	0	0	0	1,062	1,921	2,443
General Superintendents (P.M.)	16.00	HR	824	0	0	0	824	1,487	1,891
(Note: Assumed a Carpenter / Millwright Wages plus \$3.00 / hour)									
Safety Engineers	8.00	HR	238	0	0	0	238	434	552
(Note: Assumed a Occupation Code of #29086 Engineer Technician III)									
Construction Schedule	1.00	LS	1,649	0	0	0	1,649	3,020	3,842
(Note: Includes updates during construction.)									
Schedulers	40.00	HR	1,649	0	0	0	1,649	3,020	3,842
(Note: Assumed a Occupation Code of #29086 Engineer Technician IV)									
Environmental Protection Plan	1.00	LS	706	0	0	0	706	1,295	1,647
Engineers, Project	24.00	HR	706	0	0	0	706	1,295	1,647
(Note: Assumed a Occupation Code of #29086 Engineer Technician IV)									
Waste Management Plan	1.00	LS	412	0	0	0	412	743	946
General Superintendents (P.M.)	8.00	HR	412	0	0	0	412	743	946
(Note: Assumed a Carpenter / Millwright Wages plus \$3.00 / hour)									
Health and Safety Program and Plan	1.00	LS	476	0	0	0	476	868	1,104
Safety Engineers	16.00	HR	476	0	0	0	476	868	1,104
(Note: Assumed a Occupation Code of #29086 Engineer Technician III)									
Crane Critical Lift Plan	1.00	LS	940	0	0	0	940	1,705	2,169

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Description	Quantity	UOM	LaborCost	MatlCost	EQCost	SubBidCost	BareCost	ContractCost	ProjectCost
Safety Engineers (Note: Assumed a Occupation Code of #29086 Engineer Technician III)	16.00	HR	476	0	0	0	476	868	1,104
General Superintendents (P.M.) (Note: Assumed a Carpenter / Millwright Wages plus \$3.00 / hour)	8.00	HR	412	0	0	0	412	743	946
Engineers, Quality Control (Note: Assumed a Occupation Code of #29086 Engineer Technician III --- This person is also used as the safety and health person. Assume 1/2 duration with 4 hrs/day = 3 months.)	0.01	MO	52	0	0	0	52	94	120
Survey & Control	1.00	EA	17,258	0	0	0	17,258	31,339	39,863
Field Personnel, surveyor (Note: Per Spec, control and layout on dike for setting of deck planks and stone. Registered Land Surveyor.)	2.00	MO	9,252	0	0	0	9,252	16,828	21,405
Laborers, (Semi-Skilled) (Note: Assume laborer necessary to assist surveyor with field duties 1/2 the surveyor time. Assume 2 month project duration, 1 month for laborer. 20 working days x 10 hours/day = 200 hours. Assumed Davis Bacon Laborers: Group 3: General Laborer General Decision Number: WA120038 02/10/2012 WA38)	200.00	HR	8,006	0	0	0	8,006	14,511	18,459
Documentation	1.00	EA	0	8,250	0	10,200	18,450	23,044	29,312
Construction Photographs, cameraman and film, incl. processing, color	6.00	DAY	0	8,250	0	0	8,250	10,304	13,107
Draftsman, Eng Technician (Note: Draftsman time to prepare Record Drawings.)	120.00	EA	0	0	0	6,000	6,000	7,494	9,533
Personnel Clerks, Admin	120.00	HR	0	0	0	4,200	4,200	5,246	6,673
<b>0002 SITE DEMOLITION</b>	1.00	LS	26,989	0	65,968	18,450	111,407	181,740	231,173
Dike Stone Removal	1.00	LS	17,129	0	43,003	0	60,131	102,896	130,884
Marine Equipment Platform (Note: Work Tug 500 HP, Work Barge 2000 Ton with Spuds, Mounted Crane 350 Ton 200' Boom, 7 CY Grapple, Gen Set, and Additional Work Barge. Assume 552 cy needs to be removed; @165 lb/cf or 2.2275 tons/cy assume approximately 1229.58 tons needs to be removed; use 1230 tons. Work day is 12 hours, effective for 10 due to transport and weather. Cycle time of stone setting is 6 minutes to pick from stockpile, 1 minutes to swing, 2 minute to drop on barge, and 1 minutes to return swing = 10 minute cycle = 6 cycles per hour = 60 cycles per day. 1,230 tons of stone to remove at 4 ton average (gross assumption) = 307.5 stones to remove, use 308 stones. 308 stones / 60 stones/day = 5.13 days, use 6 days.)	6.00	DAY	0	0	42,273	0	42,273	71,147	90,499
Marine Labor Crew (Note: Labor crew for operation of Marine Equipment Platform to include Tug Engineer, Deckhand, Heavy Operator, and two laborers.)	6.00	DAY	14,727	0	0	0	14,727	26,382	33,558
Crew Transport Over Water (Note: Boat to transport crew to crane work barge, two trips daily. Productions set/limited by Stone placement.)	6.00	DAY	2,402	0	730	0	3,132	5,366	6,826
Dike Stone Disposal	1.00	LS	1,296	0	1,464	18,450	21,210	27,396	34,848

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Description	Quantity	UOM	LaborCost	MatlCost	EQCost	SubBidCost	BareCost	ContractCost	ProjectCost
Cycle hauling(wait, load,travel, unload or dump & return) time per cycle, excavated or borrow, loose cubic yards, 20 min load/wait/unload, 16.5 CY truck, cycle 10 miles, 30 MPH, excludes loading equipment (Note: rock to be removed is approximately 552 cy in place. 552 cy x 1.25 void space = 690 lcy)	690.00	LCY	1,296	0	1,464	0	2,760	4,352	5,535
Dumping & Tipping Fee (Note: assume no dumping fee as rock removed from dike will have a beneficial use elsewhere for contractor performing work.)	1,230.00	TON	0	0	0	18,450	18,450	23,044	29,312
Dike Stone Remove/Reset	1.00	LS	8,564	0	21,501	0	30,066	51,448	65,442
Marine Equipment Platform (Note: Work Tug 500 HP, Work Barge 2000 Ton with Spuds, Mounted Crane 350 Ton 200' Boom, 7 CY Grapple, Gen Set, and Additional Work Barge. Assume 55 cy * 1.25 (quantity contingency) 68.75 cy needs to be removed and reset; @165 lb/cf or 2.2275 tons/cy assume approximately 153.14 tons needs to be removed and reset; use 155 tons. Work day is 12 hours, effective for 10 due to transport and weather. Assume average cycle time of stone removing/resetting is 15 minutes = 4 cycles per hour = 40 cycles per day. 155 tons of stone to remove/reset at 4 ton average (gross assumption) = 38.75 stones to remove, use 40 stones. 40 stones / 40 stones/day = 1 day, use 3 days.)	3.00	DAY	0	0	21,136	0	21,136	35,574	45,250
Marine Labor Crew (Note: Labor crew for operation of Marine Equipment Platform to include Tug Engineer, Deckhand, Heavy Operator, and two laborers.)	3.00	DAY	7,364	0	0	0	7,364	13,191	16,779
Crew Transport Over Water (Note: Boat to transport crew to crane work barge, two trips daily. Productions set/limited by Stone placement.)	3.00	DAY	1,201	0	365	0	1,566	2,683	3,413
<b>0003 BRIDGE CONSTRUCTION/PLACEMENT</b>	1.00	LS	20,846	5,672	36,165	30,116	92,799	150,886	191,928
<b>CIP Abutments</b>	1.00	LS	2,040	1,057	4	0	3,101	5,113	6,504
Reinforcing Steel, in place, slab on grade, #3 to #7, A615, grade 60, incl labor for accessories, excl material for accessories (Note: reduced crew output from 131.25 to 50 to account for remote working location on dike and difficult working conditions to set forms on dike.)	200.00	LB	229	98	0	0	327	644	819
C.I.P. concrete forms, slab on grade, curb, wood, 6" to 12" high, 1 use, includes erecting, bracing, stripping and cleaning (Note: 2' x 12' x 2' x 12' for each leveling pad (over estimate) x 0.66' high = 18.66 sfc x 2 pads = 37.32 sfc, use 38 sfc. reduced crew output from 26.875 to 10 to account for remote working location on dike and difficult working conditions to set forms on dike.)	38.00	SFC	705	75	0	0	780	1,365	1,736
C.I.P. concrete forms, pile cap, square or rectangular, plywood, 1 use, includes erecting, bracing, stripping and cleaning (Note: 2' x 12' x 2' x 12' for each leveling pad (over estimate) x 1.66' high = 46.48 sfc x 2 pads = 92.96 sfc, use 93 sfc. reduced crew output from 36.25 to 25 to account for remote working location on dike and difficult working conditions to set forms on dike.)	93.00	SFC	690	219	0	0	909	1,519	1,932
Structural concrete, in place, lightweight ready mix, radiant heat ground slab (3000 psi), 1:6 mix, includes concrete, placing and screed finish only, excludes forms and reinforcing (Note: reduced crew output from 11.5 to 5 to account for remote working location on dike and difficult working conditions to mix and pour concrete.)	5.00	CY	416	665	4	0	1,085	1,586	2,017

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Description	Quantity	UOM	LaborCost	MatlCost	EQCost	SubBidCost	BareCost	ContractCost	ProjectCost
Preengineered Deck Slabs	1.00	LS	0	0	0	30,116	30,116	45,618	58,026
Preengineered/Prefabricated Deck Slabs	1.00	EA	0	0	0	30,116	30,116	45,618	58,026
(Note: budget price from Mike Davis @ J.P. Carrara & Sons, Inc. on 05 January 2015 (mdavis@jpcarrara.com); \$25,916 + \$4,200 transportation = \$30,116)									
Placement	1.00	LS	8,839	55	21,501	0	30,395	52,006	66,152
Marine Equipment Platform	3.00	DAY	0	0	21,136	0	21,136	35,574	45,250
(Note: Work Tug 500 HP, Work Barge 2000 Ton with Spuds, Mounted Crane 350 Ton 200' Boom, 7 CY Grapple, Gen Set, and Additional Work Barge. assume worst case that marine platform can place one section per day; 3 sections = 3 days.)									
Marine Labor Crew	3.00	DAY	7,364	0	0	0	7,364	13,191	16,779
(Note: Labor crew for operation of Marine Equipment Platform to include Tug Engineer, Deckhand, Heavy Operator, and two laborers.)									
Crew Transport Over Water	3.00	DAY	1,201	0	365	0	1,566	2,683	3,413
(Note: Boat to transport crew to crane work barge, two trips daily. Productions set/limited by Stone placement.)									
Reinforcing steel, in place, dowels, deformed, epoxy coated, 2' long, #9, A775, grade 60	12.00	EA	275	55	0	0	329	558	710
Hand Rail	1.00	LS	1,849	4,560	92	0	6,501	9,122	11,603
Railing, pipe, steel, galvanized, 3 rails, 3'-6" high, posts @ 5' O.C., 1-1/2" dia, shop fabricated	80.00	LF	1,849	4,560	92	0	6,501	9,122	11,603
(Note: 40 lf per side x 2 sides = 80 lf. reduce crew output from 17.125 to 10 to account for remote working location on dike.)									
Tug Boat & Crew	1.00	LS	8,118	0	14,567	0	22,686	39,027	49,642
TUG BOAT, 150-400 HP (112-298 KW)	80.00	HR	0	0	14,567	0	14,567	24,517	31,186
(Note: cost represents tug necessary to move deck slabs from pier to project site as well as push removed stone from project site to pier for disposal.)									
Tugs/Tending- Engineer	80.00	HR	3,966	0	0	0	3,966	7,109	9,042
(Note: Assumed Davis Bacon Dredging: Group 3: Assistant Engineer)									
Tugs/Tending- Tug Mate	80.00	HR	4,153	0	0	0	4,153	7,401	9,414
(Note: Assumed Davis Bacon Dredging: Group 1: Assistant Mate)									

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**APPENDIX C – PERTINENT CORRESPONDENCE AND COMMENT RESPONSES**

\*\*\*\* TOTAL PROJECT COST SUMMARY \*\*\*\*

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PROJECT: CAP Section 1135 Long Point Dike Modification  
PROJECT NO: P2 153963  
LOCATION: Provincetown, MA

DISTRICT: NAE NEW ENGLAND PREPARED: 10/23/2015

POC: CHIEF, COST ENGINEERING, Patricia Bolton

This Estimate reflects the scope and schedule in report; CAP Feasibility Study

Civil Works Work Breakdown Structure		ESTIMATED COST				PROJECT FIRST COST (Constant Dollar Basis)					TOTAL PROJECT COST (FULLY FUNDED)			
WBS NUMBER	Civil Works Feature & Sub-Feature Description	COST (\$K)	CNTG (\$K)	CNTG (%)	TOTAL (\$K)	Program Year (Budget EC): Effective Price Level Date:			2016 1-Oct-15 Spent Thru: 10/1/2013 (\$K)	TOTAL FIRST COST (\$K)	ESC (%)	COST (\$K)	CNTG (\$K)	FULL (\$K)
						ESC (%)	COST (\$K)	CNTG (\$K)						
11	LEVEES & FLOODWALLS #N/A	\$824	\$187	23%	\$1,011	-	\$824	\$187	\$1,011	-	\$855	\$194	\$1,048	
<b>CONSTRUCTION ESTIMATE TOTALS:</b>		\$824	\$187		\$1,011		\$824	\$187	\$1,011		3.7%	\$855	\$194	\$1,048
01	LANDS AND DAMAGES													
30	PLANNING, ENGINEERING & DESIGN	\$132	\$15	11%	\$147		\$132	\$15	\$147		4.4%	\$138	\$15	\$153
31	CONSTRUCTION MANAGEMENT	\$61	\$12	20%	\$73		\$61	\$12	\$73		3.7%	\$63	\$13	\$76
<b>PROJECT COST TOTALS:</b>		\$1,017	\$214	21%	\$1,231		\$1,017	\$214	\$1,231		3.8%	\$1,056	\$222	\$1,278

- \_\_\_\_\_ CHIEF, COST ENGINEERING, Patricia Bolton
- \_\_\_\_\_ PROJECT MANAGER, Lawrence Oliver
- \_\_\_\_\_ CHIEF, REAL ESTATE, Vacant
- \_\_\_\_\_ CHIEF, PLANNING, John Kennelly
- \_\_\_\_\_ CHIEF, ENGINEERING, Scott Acone
- \_\_\_\_\_ CHIEF, OPERATIONS, Frank Fedele
- \_\_\_\_\_ CHIEF, CONSTRUCTION, Sean Dolan
- \_\_\_\_\_ CHIEF, CONTRACTING, Sheila Winston-Vinciglia
- \_\_\_\_\_ CHIEF, PM-PB, xxxx
- \_\_\_\_\_ CHIEF, DPM, William Scully

ESTIMATED TOTAL PROJECT COST:	\$1,278
ESTIMATED FEDERAL COST:	75% \$958
ESTIMATED NON-FEDERAL COST:	25% \$319
<b>22 - FEASIBILITY STUDY (CAP studies):</b>	<b>\$100</b>
ESTIMATED FEDERAL COST:	\$100
ESTIMATED NON-FEDERAL COST:	
<b>ESTIMATED FEDERAL COST OF PROJECT</b>	<b>\$1,058</b>

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\*\*\*\* TOTAL PROJECT COST SUMMARY \*\*\*\*

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\*\*\*\* CONTRACT COST SUMMARY \*\*\*\*

PROJECT: CAP Section 1135 Long Point Dike Modification  
LOCATION: Provincetown, MA  
This Estimate reflects the scope and schedule in report; CAP Feasibility Study

DISTRICT: NAE NEW ENGLAND  
POC: CHIEF, COST ENGINEERING, Patricia Bolton

PREPARED: 10/23/2015

WBS Structure		ESTIMATED COST				PROJECT FIRST COST (Constant Dollar Basis)				TOTAL PROJECT COST (FULLY FUNDED)				
		Estimate Prepared: 10/21/2015 Estimate Price Level: 42278				Program Year (Budget EC): 2016 Effective Price Level Date: 1-Oct-15								
		RISK BASED												
WBS NUMBER	Civil Works Feature & Sub-Feature Description	COST (\$K)	CNTG (\$K)	CNTG (%)	TOTAL (\$K)	ESC (%)	COST (\$K)	CNTG (\$K)	TOTAL (\$K)	Mid-Point Date	ESC (%)	COST (\$K)	CNTG (\$K)	FULL (\$K)
A	B	C	D	E	F	G	H	I	J	P	L	M	N	O
11	PHASE 1 or CONTRACT 1 LEVEES & FLOODWALLS #N/A	\$824	\$187	22.7%	\$1,011		\$824	\$187	\$1,011	2018Q1	3.7%	\$855	\$194	\$1,048
<b>CONSTRUCTION ESTIMATE TOTALS:</b>		\$824	\$187	22.7%	\$1,011		\$824	\$187	\$1,011			\$855	\$194	\$1,048
01	LANDS AND DAMAGES													
30	PLANNING, ENGINEERING & DESIGN													
0.015	Project Management	\$12	\$1	11.2%	\$13		\$12	\$1	\$13	2017Q1	3.6%	\$12	\$1	\$14
0.0075	Planning & Environmental Compliance	\$6	\$1	11.2%	\$7		\$6	\$1	\$7	2017Q1	3.6%	\$6	\$1	\$7
0.095	Engineering & Design	\$78	\$9	11.2%	\$87		\$78	\$9	\$87	2017Q1	3.6%	\$81	\$9	\$90
0.0075	Engineering Tech Review ITR & VE	\$6	\$1	11.2%	\$7		\$6	\$1	\$7	2017Q1	3.6%	\$6	\$1	\$7
0.005	Contracting & Reprographics	\$4	\$0	11.2%	\$4		\$4	\$0	\$4	2017Q1	3.6%	\$4	\$0	\$5
0.02	Engineering During Construction	\$16	\$2	11.2%	\$18		\$16	\$2	\$18	2018Q1	7.8%	\$17	\$2	\$19
0.0125	Planning During Construction	\$10	\$1	11.2%	\$11		\$10	\$1	\$11	2018Q1	7.8%	\$11	\$1	\$12
	Project Operations			11.2%										
31	CONSTRUCTION MANAGEMENT													
0.06	Construction Management	\$49	\$10	19.9%	\$59		\$49	\$10	\$59	2018Q1	3.7%	\$51	\$10	\$61
	Project Operation:			19.9%										
0.015	Project Management	\$12	\$2	19.9%	\$14		\$12	\$2	\$14	2018Q1	3.7%	\$12	\$2	\$15
<b>CONTRACT COST TOTALS:</b>		\$1,017	\$214		\$1,231		\$1,017	\$214	\$1,231			\$1,056	\$222	\$1,278

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**APPENDIX D - AIR QUALITY RECORD OF NON-APPLICABILITY**

**GENERAL CONFORMITY - RECORD OF NON-APPLICABILITY**

Project/Action Name: *Long Point Dike Modification, Section 1135*

Project/Action Identification Number:

Project/Action Point of Contact: Erika Mark, *USACE Biologist*  
Phone: 978-318-8250

Begin Date: 6-22-2015

End Date: 6-24-2015

General Conformity under the Clean Air Act, Section 176 has been evaluated for the project described above according to the requirements of 40 CFR 93, Subpart B. The requirements of this rule are not applicable to this project/action because:

\_\_\_\_\_ The project/action is an exempt action under 40 CFR 93.153(c) or (d), (SPECIFY APPLICABLE EXEMPTION CATEGORY AND REGULATORY CITATION)

**OR**

\_\_\_X\_\_\_ Total direct and indirect emission from this project/action have been estimated (NO<sub>x</sub> = tons per year/VOC = tons per year), and are below the conformity threshold value established at 40 CFR 93.153(b) (NO<sub>x</sub> = 100 tons per year/VOC = 50 tons per year);

**AND**

The project/action is not considered regionally significant under 40 CFR 93.153(i).

Supporting documentation and emissions estimates are:

- ATTACHED
- APPEAR IN THE NEPA DOCUMENTATION (PROVIDE REFERENCE)
- OTHER

Date: \_\_\_\_\_

Signed: \_\_\_\_\_  
Erika L. Mark, Biologist

General Conformity Review and Emission Inventory for the Nantasket Beach Section 103 Project (Hull, Ma)  
 Estimates from Project Manager  
 15-Jan-13

1	2	3	4	5	6	7	8	9	10	11
Equipment/Engine Category	Project Emission Sources and Estimated Power						NOx Emission Estimates		VOC Emission Estimates	
	# of Engines	hp	LF	hrs/day	Days of Operation	hp-hr	NOx EF (g/hp-hr)	NOx Emissions (tons)	VOC EF (g/hp-hr)	VOC Emissions (tons)
500 hp Tugboat	1	500	1.00	10	26	130,000				
350 ton 200'boom crane	1	645	1.00	10	26	167,700	9.200	1.70	1.300	0.24
13' boat	1	120	1.00	10	20	24,000	9.200	0.24	1.300	0.03
17' boat	1	150	1.00	10	3	4,500	9.200	0.05	1.300	0.01
TRK mounted crane	1	112	1.00	10	0.5	560	9.200	0.01	1.300	0.00
140,000 lb hydraulic excavator	1	375	1.00	10	2	7,500	9.200	0.08	1.300	0.01
47" 2.7 ton roller	1	36	1.00	10	1	360	9.200	0.00	1.300	0.00
Dozer, Crawler	1	250	1.00	10	1	2,500	9.200	0.03	1.300	0.00
3/4 ton pickup	1	385	1.00	10	133	512,050	9.200	5.19	1.300	0.73
12 CY dump truck	1	430	1.00	10	0.5	2,150	9.200	0.02	1.300	0.00
6 CY FE wheel loader	1	250	1.00	10	4.5	11,250	9.200	0.11	1.300	0.02
45,000 lb dump truck	1	430	1.00	10	3	12,900	9.200	0.13	1.300	0.02
350 ton barge mounted crane	1	610	1.00	10	26	158,600	9.200	1.61	1.300	0.23
skid mounted gen set	1	475	1.00	10	26	123,500	9.200	1.25	1.300	0.18
300 amp trailer mounted welder	1	22	1.00	10	1	220	9.200	0.00	1.300	0.00
concrete vibrator	1	7.5	1.00	10	0.5	38	9.200	0.00	1.300	0.00
<b>Total Emissions</b>	<b>0</b>						<b>NOx Total</b>	<b>8.72</b>	<b>VOC Total</b>	<b>1.23</b>

**Horsepower Hours**

hp-hr = # of engines\*hp\*LF\*hrs/day\*days of operation

**Load Factors**

Load Factor (LF) represents the average percentage of rated horsepower used during a source's operational profile. For this worst case estimate, LF is held at 1 for all equipment. Typical is 0.4 to 0.6

**Emission Factors**

NOx Emissions Factor for Off-Road Construction Equipment is 9.20 g/hp-hr

VOC Emissions Factor for Off-Road Construction Equipment is 1.30 g/hp-hr

Emissions (g) = Power Demand (hp-hr) \* Emission Factor (g/hp-hr)

Emissions (tons) = Emissions (g) \* (1 ton/907200 g)

**APPENDIX E – SEA LEVEL CHANGE ANALYSIS**

## **Long Point Dike, Provincetown, Ma Sea Level Change (SLC) Analysis**

### **Purpose:**

The purpose of this analysis is to evaluate the predicted sea level change (SLC) at the Long Point Dike in Provincetown, Massachusetts and evaluate any impacts on the proposed project.

### **Background:**

The Long Point Dike is located on the northernmost tip of Cape Cod in Provincetown, Massachusetts, near the confluence of the Cape Cod Bay and Atlantic Ocean. See Figure 1. It is a permeable, stone-dike constructed as a breakwater to preserve the west end of Provincetown Harbor from wave action in the case that the barrier beach southwest of the dike was to breach. The project features include a 6,150-foot long dike, completed in 1914, that extends from the southern point of Provincetown harbor at Stevens Point across House Point Island Flats to Wood End and a 2,500-foot breakwater, completed in 1972, to provide wave protection adjacent to the harbor. The barrier beach was breached during the 1978 blizzard and remained open until the early 1990's.

The purpose of this study is to restore tidal exchange between Cape Cod Bay and the degraded 385 acre salt marsh, also known as West End Marsh, located inland of Long Point Dike. Research and data collected during the 1980's determined that tidal flow floods through the dike onto the landward flats through a breached barrier beach inlet (42%) and the dike (58%) and ebbs through the inlet (21%) and through the dike (79%) creating a residual drift and sediment sink that has accumulated sediment since the barrier beach was breached in 1978. The breach has since closed. Restoration includes opening a portion of the dike approximately 10-20 feet to allow full tidal flushing from the Bay and also, interior storm drainage to exit during periods of low tide. The original dike was designed to an elevation of approximately 9.2 feet NAVD88 (14.3 feet MLW, 14.7 feet MLLW).

### **Tidal Regime:**

In the study area, tides are semi-diurnal, with two high and low waters occurring during each lunar day (approximately 24 hours and 50 minutes). The resulting astronomic tide range varies constantly in response to relative positions of the earth, moon, and sun; the moon having the primary tide producing effect. Maximum tide ranges occur when the orbital cycles of these bodies are in phase. A complete sequence of astronomic tide ranges is approximately repeated over an interval of 19 years, known as a tidal epoch. Coastal storms and hurricanes can cause tides to be much higher than astronomically predicted. Although exact information of tidal characteristics are presently lacking at the site, approximate characteristics were developed from historical tide data (1931 to present).

Table 1  
Tide Frequency Chart

Provincetown, Ma/Long Point Dike			
	Elev. feet NAVD88	Elev. feet MLW	Elev. feet MLLW
100-yr	9.4	14.5	14.9
50-yr	9.1	14.2	14.6
10-yr	8.3	13.4	13.8
1-yr	6.7	11.9	12.3
MSHW	5.0	10.2	10.6
MHHW	4.8	10.0	10.4
MHW	4.3	9.5	9.9
NAVD88	0.0	5.2	5.6
MTL	-0.4	4.8	5.2
MLW	-5.2	0.0	0.4
MLLW	-5.5	-0.3	0.0

**Sea Level Rise Analysis:**

Beginning in 2009, USACE policy and guidance required that all coastal projects be evaluated with respect to changes in sea level throughout the project life-cycle. The USACE Sea Level Change Curve Calculator (2015.46) dated September 2015 uses the methodology described in ER 1100-2-8162 – Incorporating Sea Level Changes in Civil Works Programs. The tool also provides comparisons between the USACE guidance and both the National Oceanic and Atmospheric Administration (NOAA) and the National Research Council (NRC). The extreme

water levels are based on statistical probabilities using recorded historic monthly extreme water levels. The USACE method uses the same NOAA recorded monthly extreme values in a percentile statistical function. Both methods use data recorded and validated by NOAA at the tide gauges in different geographic locations and require a multiple scenario approach generating three curves: the low curve, which extrapolates the historic rate of SLC at the project area, an intermediate SLC curve, and a high SLC curve. This is critical since SLC along the coast varies due to local subsidence, uplift, water body movement, etc. The SLC equation is adjusted to include the historic Global mean sea level (GMSL) change rate of 1.7 mm/year and the start date of 1992 (which corresponds to the midpoint of the current National Tidal Datum Epoch of 1983-2001) and the most recent rate constants.

The USACE SLC scenarios are developed using the ER 1100-2-8162 and ETL 1100-2-1 (USACE 2013a, 2014) guidance. Assuming a eustatic SLC rate of 1.7 mm/year and start date of 1992, the updated values for the variable b in the 1987 NRC report, as shown in Table 1a, are applied to the SLC equation. NOAA's scenarios also begin in 1992 but produce four curves based on a rise of 2.0, 1.2, 0.5 and 0.2 meters by 2100. To fit the curves to the scenarios defined above, the constants, as shown Table 1b, are applied to the b value. The NOAA Intermediate Low Scenario is the same as the USACE Intermediate Scenario. NOAA also extrapolates the historic tide gauge rate for the NOAA Low Rate Scenario, which is the same as the USACE Low Rate Scenario.

$$E(t_2) - E(t_1) = 0.0017(t_2 - t_1) + b(t_2^2 - t_1^2)$$

Where

- E = the change in global mean sea level
- T<sub>1</sub> = the difference in time between the project's construction date and 1992.
- T<sub>2</sub> = the difference in time between a future date at which one wants an estimate, beyond t<sub>1</sub>, for sea level change and 1992.

Table 1a  
USACE Eustatic Sea Level Change Rate  
Boston, Ma

Eustatic Sea Level Change Rate	Start Date	Variable b	
		NRC Curve 1 USACE Intermed. Curve	NRC Curve II USACE High Rate Curve
1.7 mm/yr	1992	2.71E-5	1.13E-4

Table 1b  
NOAA OAR CPO-1 Sea Level Change Scenarios  
Boston, Ma

Start Date	Variable b		
	Highest Scenario	Intermediate-High Scenario	Intermediate-Low Scenario
1992	1.56E-04	8.71E-05	2.71E-05

**Sea Level Rise Analysis Results:**

The NOAA Boston gauge was used for this analysis since it is the closest NOAA station to the project site and includes historic SLC information. The results of the SLR analysis are presented in Figure 2. As Shown, the 50 year sea level rise predicts a low curve of 0.4 feet, or 5.0 inches; the intermediate curve of 0.9 feet, or 10.7 inches; and the high curve a rise of 2.4 feet, or 28.6 inches. As stated previously, the long point dike crest elevation is approximately 9.2 feet NAVD88 (14.3 feet MLW, 14.7 feet MLLW) and the current 100 year flood elevation is 9.4 feet NAVD88 (14.5 feet MLW, 14.9 feet MLLW). Applying the intermediate 50 year curve to the 100 year flood elevation would increase the 100 year flood elevation to approximately 11.1 feet NAVD88 (16.4 feet MLW, 16.8 feet MLLW) or overtop the dike by approximately 2.0 feet. Table 2 presents the USACE sea level rise predictions for the next 20 years, 50 years and 100 years.

Table 2  
USACE Sea Level Rise Prediction  
NOAA 8443970 – Boston, Ma

	Sea Level Rise Prediction (feet)		
	20 year	50 year	100 year
Low	0.2	0.4	0.8
Intermediate	0.3	0.9	2.2
High	0.7	2.4	6.6

**Sea Level Rise Impacts on Existing Condition:** The Long Point Dike was constructed as a breakwater to preserve the west end of Provincetown Harbor from wave action in the case that the barrier beach southwest of the dike, on the Atlantic Ocean, was to breach. Five years after the dike was completed in 1972, the barrier beach was breached during the 1978 blizzard. The inlet remained open until the early 1990's. Increases to sea level rise will inundate the breakwater more frequently, increasing the frequency of storm flooding and impact of wave action toward Providence Harbor.

**Sea Level Rise Impacts on Proposed Condition:** The proposed project to open the dike 10-20 feet will increase flushing during the normal tides, but will not increase the impacts of storm induced tidal floods or wave action to the landward side of the dike, which are already exposed to storm tides through the permeable dike. Increases to sea level rise will have similar consequences and impacts on interior flooding and wave action toward interior with or without the project.



Figure 1: Long Point Dike Location Map

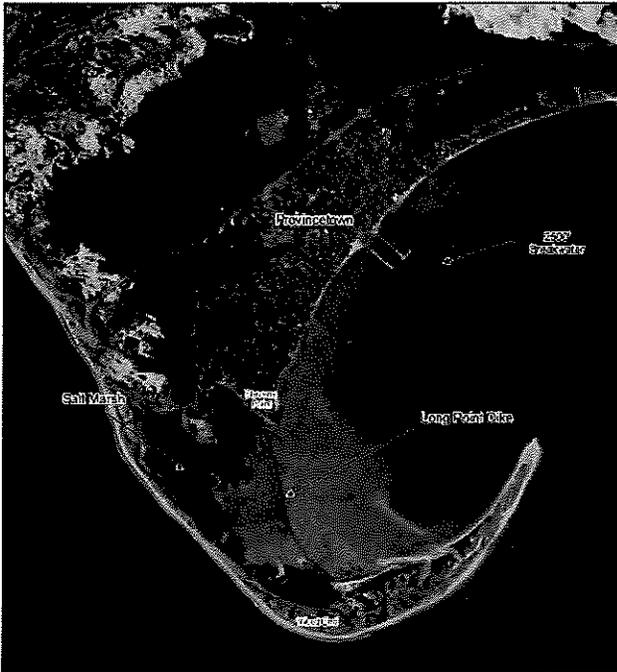


Figure 2: Long Point Dike Location Map

Long Point Dike, Provincetown, MA  
8443970, Boston, MA  
NOAA's Regional Rate: 0.00833 feet/yr

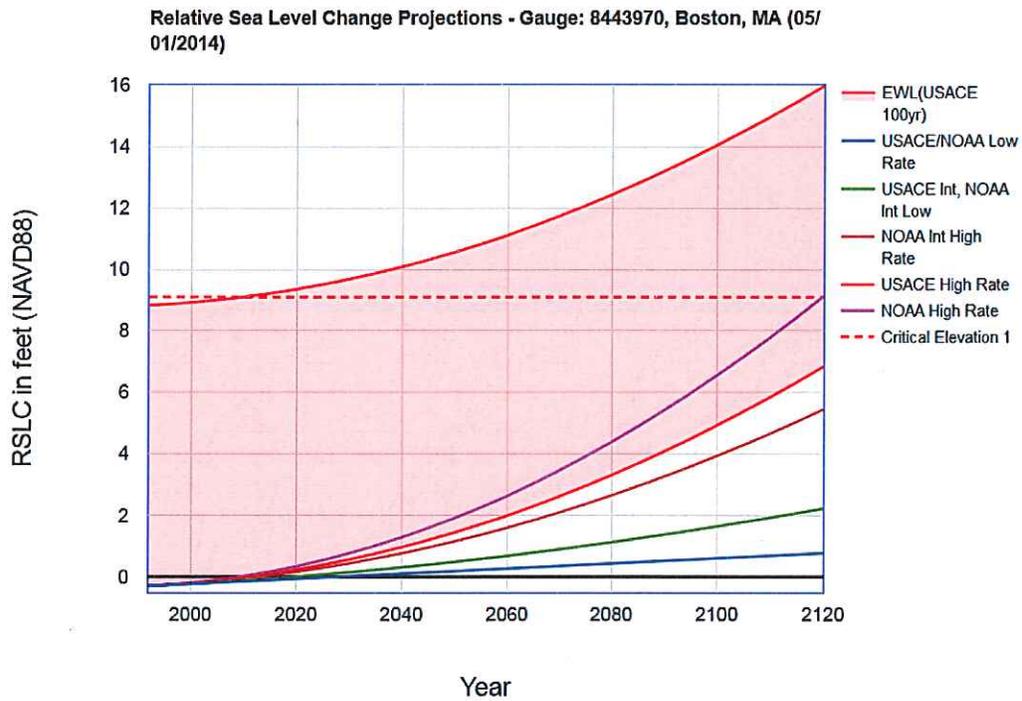


Figure 3: Long Point Dike / Boston, Ma Gauge 8443970 USACE and NOAA Sea Level Rise Curves

**APPENDIX F – REAL ESTATE PLAN**



US Army Corps of Engineers  
New England District

---

## **Long Point Dike**

### **Real Estate Plan**

**Prepared by:**

**R. Jeffrey Teller**

**New England District**

**June 28, 2015**

**U.S. ARMY CORPS OF ENGINEERS,  
New England District**

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1. RECOMMENDED PLAN
2. REAL ESTATE REQUIREMENTS
3. EXISTING FEDERAL PROJECTS
4. EXISTING FEDERALLY OWNED LANDS
5. LANDS OWNED BY THE NON-FEDERAL SPONSOR
6. NAVIGATIONAL SERVITUDE
7. INDUCED FLOODING
8. BASELINE COST ESTIMATE FOR REAL ESTATE
9. PUBLIC LAW 91-646 RELOCATIONS
10. MINERAL ACTIVITY
11. TIMBER RIGHTS
12. ASSESSMENT OF NON-FEDERAL SPONSOR ACQUISITION CAPABILITY
13. ZONING
14. ACQUISITION SCHEDULE
15. UTILITY AND FACILITY RELOCATIONS
16. ENVIRONMENTAL CONCERNS
17. ATTITUDES OF THE LANDOWNERS
18. NOTIFICATION TO NON-FEDERAL SPONSOR
19. RISK ANALYSIS

1. Project Information-Recommended Plan: Section 1135 of the Water Resources Development Act of 1986, as amended, provides the authority to modify existing Corps projects to restore the environment and construct new projects to restore areas degraded by Corps projects. A project is accepted for construction after a detailed investigation shows it is technically feasible, environmentally acceptable, and provides cost effective environmental benefits. This project will modify an existing federal project at this location i.e. modification of an existing federal project to reportedly enhance intertidal flow. The recommended plan consists of the construction of an opening in Long Point Dike with a width at the base of 10 feet with 1:1 side slopes creating an opening at the top of the dike of approximately 40 feet. The opening would be spanned by a 9-foot wide concrete slab bridge with steel hand railings. The opening would provide approximately 375 square feet of unrestricted opening in the dike for large fish to pass in and out of the site throughout the tidal cycle. The opening would be located at the low point in the exiting topography of West End Marsh. All construction activities are reported to be maritime based, with contractor accessing work site using barge, likely moored at local harbor pier. Material equipment and storage requirements are reported to be minimal and arrangements will be the responsibility of the contractor, including construction trailer for construction supervision and project management.

2. REAL ESTATE REQUIREMENTS: There are no Land, Easements, Rights-of-Way, Relocations required for this project. The Project Delivery Team (PDT) confirms that the proposed navigation improvements do not require the acquisition of any real property interests based on application of Navigation Servitude (Federal riparian rights below MHWL). Plan details depict the limits of construction (and operation) within the existing federal navigation channel. Therefore, no Temporary Work Area, Road/Access Easements, or permanent easements are required for construction or maintenance. If limited temporary access or staging areas are determined to be needed in the future, this will be a contractor requirement or we will work with non-Federal Sponsor to accomplish.

3. EXISTING FEDERAL PROJECTS Section 1135 of the Water Resources Development Act of 1986, as amended, provides the authority to modify existing Corps projects to restore the environment and construct new projects to restore areas degraded by Corps projects. A project is accepted for construction after a detailed investigation shows it is technically feasible, environmentally acceptable, and provides cost effective environmental benefits. This project will modify an existing federal project at this location.

4. EXISTING FEDERALLY OWNED LANDS: N/A project area within navigable waterway subject to federal jurisdiction.

5. LANDS OWNED BY THE NON-FEDERAL SPONSOR: N/A project area within navigable waterway subject to federal jurisdiction.

6. NAVIGATIONAL SERVITUDE: The CENAE Office of Counsel has reportedly reviewed this navigation improvement feasibility study and has determined that project improvements meet the test of legal sufficiency. Navigational servitude is the right of the federal Government under the Commerce Clause of the U.S. Constitution to use, control, and regulate the navigable waters of the United States and the submerged lands thereunder for various commerce-related purposes including navigation and flood control. In tidal areas, the servitude extends to all lands below the mean high water mark. In non-tidal areas, the servitude extends to all within the bed and banks of a navigable stream that lie below the ordinary high water level. As this project is for modification of existing federal project, the Government will exercise its rights under the doctrine of Navigational Servitude for this project for all areas below MHWL, in order to maintain and improve the channel improvements (rip-rap), to enhance tidal flow.

7. INDUCED FLOODING: There is nothing in the feasibility report to indicate that the constructed project features will induce flooding in new areas or increase flooding in existing flood prone areas. Accordingly, there will be no construction or project induced flooding.

8. BASELINE COST ESTIMATE FOR REAL ESTATE: As referenced throughout this report, based on the feasibility plan there are no real property acquisition requirements or baseline real estate costs, as all constructed improvements will be located in lands subject to Federal Navigation Servitude. In addition, the contractor will be responsible for obtaining pier access and location for temporary construction trailer if required.

9. PUBLIC LAW-646 RELOCATIONS: There are no facilities or utilities within the project boundaries requiring relocation. This will be reviewed and confirmed at PED phase.

10. MINERAL ACTIVITY: The Project Delivery Team (PDT) confirms there is no present or anticipated mining and drilling activity in the vicinity of the project that may affect project purposes and the operation thereof.

11. TIMBER RIGHTS: The Project Delivery Team (PDT) confirms that there are no timber rights required. The project lands are within the navigable waterway.

12. ASSESSMENT OF NON-FEDERAL SPONSOR ACQUISITION CAPABILITY: There are no real estate acquisition requirements.

13. ZONING: There are no real estate and/or zoning considerations associated with this project.

14. ACQUISITION SCHEDULE: There are no real estate acquisition requirements as navigation servitude applies. Upon receiving project approval from North Atlantic Division, the New England District would prepare plans and specifications prior to solicitation of bids and contract award. Construction of the restoration project could begin as soon as the fall of 2016

15. UTILITY AND FACILITY RELOCATIONS: The Project Delivery Team (PDT) confirms that there are no utility or facility relocation requirements. Confirmation will occur during PED phase.

16. ENVIRONMENTAL CONCERNS: The Project Delivery Team (PDT) confirms that there are no known or suspected contaminants (HTRW) located in the construction areas.

17. ATTITUDES OF THE LANDOWNERS: The Non-Federal Sponsor reports overall community support for this navigation improvement project. The record does not indicate any known opposition or public concerns.

18. NOTIFICATION TO NON-FEDERAL SPONSOR: The Non-Federal Sponsor will execute a feasibility cost share agreement, and if the project is approved, a Project Partnership Agreement will be required.

19. RISK ANALYSIS: Risk analysis study is not currently required in accordance with study stage.

**APPENDIX G – RESOURCE SIGNIFICANCE**

## RESOURCE SIGNIFICANCE

### *Institutional Recognition:*

Salt marshes are protected at the Federal and State levels of government in Massachusetts. Salt marshes along with other wetlands are classified as Special Aquatic Sites under the Clean Water Act, Section 404(b)(1) Guidelines. Sanctuaries and refuges, mudflats, and vegetated shallows, all of which may benefit from a restoration project at Long Point Dike, are also classified as Special Aquatic Sites affording them special protection under the Clean Water Act.

The Massachusetts Wetlands Protection Act affords special protection to: salt marshes, land under salt ponds, land containing shellfish, coastal dunes and coastal beaches.

The project will provide marine and estuarine fish, such as winter flounder, access to additional restored habitat. The fish species are institutionally recognized by the designation for Essential Fish Habitat for their protection and management.

### *Public Recognition:*

Public recognition of the value of the coastal and estuarine habitats that would be restored by a project at Long Point Dike is shown by the willingness of the town of Provincetown to support the project.

Marine and estuarine fish that will benefit from the project are important to commercial and recreational fisheries.

### *Technical Recognition:*

Marine and estuarine fish are essential components of marine and estuarine food webs.

The Massachusetts Wetlands Protection Act regulations summarize the technical significance of salt marshes and the other habitats that would be restored by a project at Long Point Dike. This information demonstrating their technical recognition is summarized below.

Salt marshes produce large amounts of organic matter. A significant portion of this material is exported as detritus and dissolved organics to estuarine and coastal waters, where it provides the basis for a large food web that supports marine organisms, including finfish and shellfish as well as many bird species. Salt marshes provide spawning and nursery habitat for several important finfish as well as important forage, shelter, breeding, and migratory and overwintering areas for many wildlife species. Salt marsh plants and substrate remove pollutants from surrounding waters. The network of salt marsh vegetation roots and rhizomes binds sediments together. The sediments absorb chlorinated hydrocarbons and heavy metals such as lead, copper, and iron. The marsh also retains nitrogen and phosphorous compounds, which in large amounts can lead to algal blooms in coastal waters. The underlying peat also serves as a barrier between fresh ground water landward of the salt marsh and the ocean, thus helping to maintain the level of such ground

water. Salt marsh cord grass and underlying peat are resistant to erosion and dissipate wave energy, thereby providing a buffer that reduces wave damage.

Coastal dunes are likely to be significant to storm damage prevention and flood control, and all coastal dunes on barrier beaches and the coastal dune closest to the coastal beach in any area are per se significant to storm damage prevention and flood control. Coastal dunes are also often significant to the protection of wildlife habitat. A number of birds, most commonly terns and gulls, nest at the base or sides of dunes.

Estuarine shallow water and intertidal areas provide important habitats for fish, shellfish, waterfowl, and other wildlife. As summarized in the Massachusetts Wetlands Protection Act regulations, land under salt ponds provides an excellent habitat for marine fisheries. The high productivity of plants in salt ponds provides food for shellfish, crustaceans and larval and juvenile fish. Salt ponds also provide spawning areas for shellfish and are nursery areas for crabs and fish. In addition to the many birds which feed on fish found in salt ponds, waterfowl also eat invertebrates such as mollusks and crustaceans, which in turn depend on bottom sediment and vegetation. Some bird species also eat widgeongrass and eelgrass which may be rooted in land under salt ponds. These values apply to all of the shallow subtidal and intertidal habitats landward of Long Point Dike.

# LONG POINT DIKE ECOSYSTEM RESTORATION PROJECT



Prepared By:  
Michael Riccio/Larry Oliver  
U.S. Army Corps of Engineers  
October 6, 2016



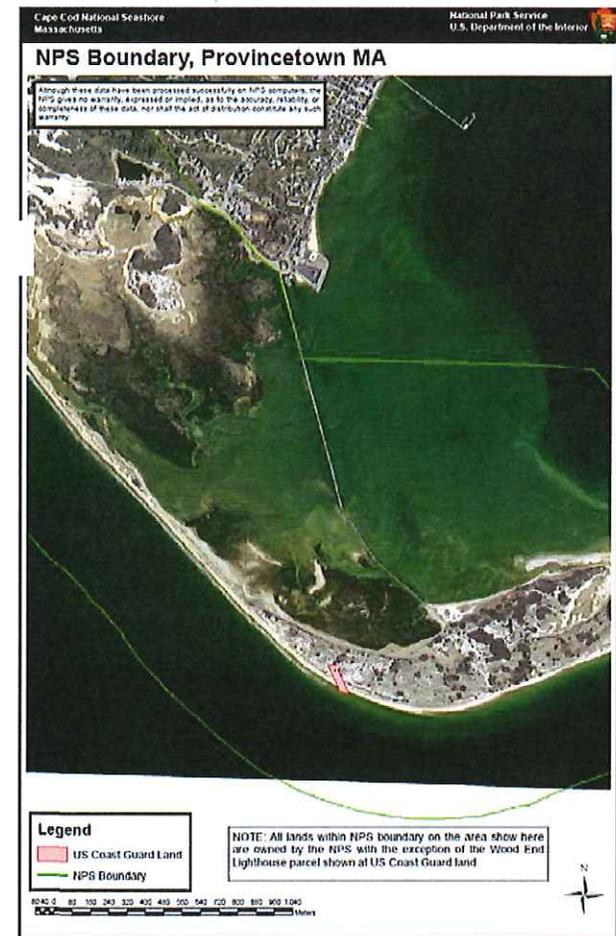
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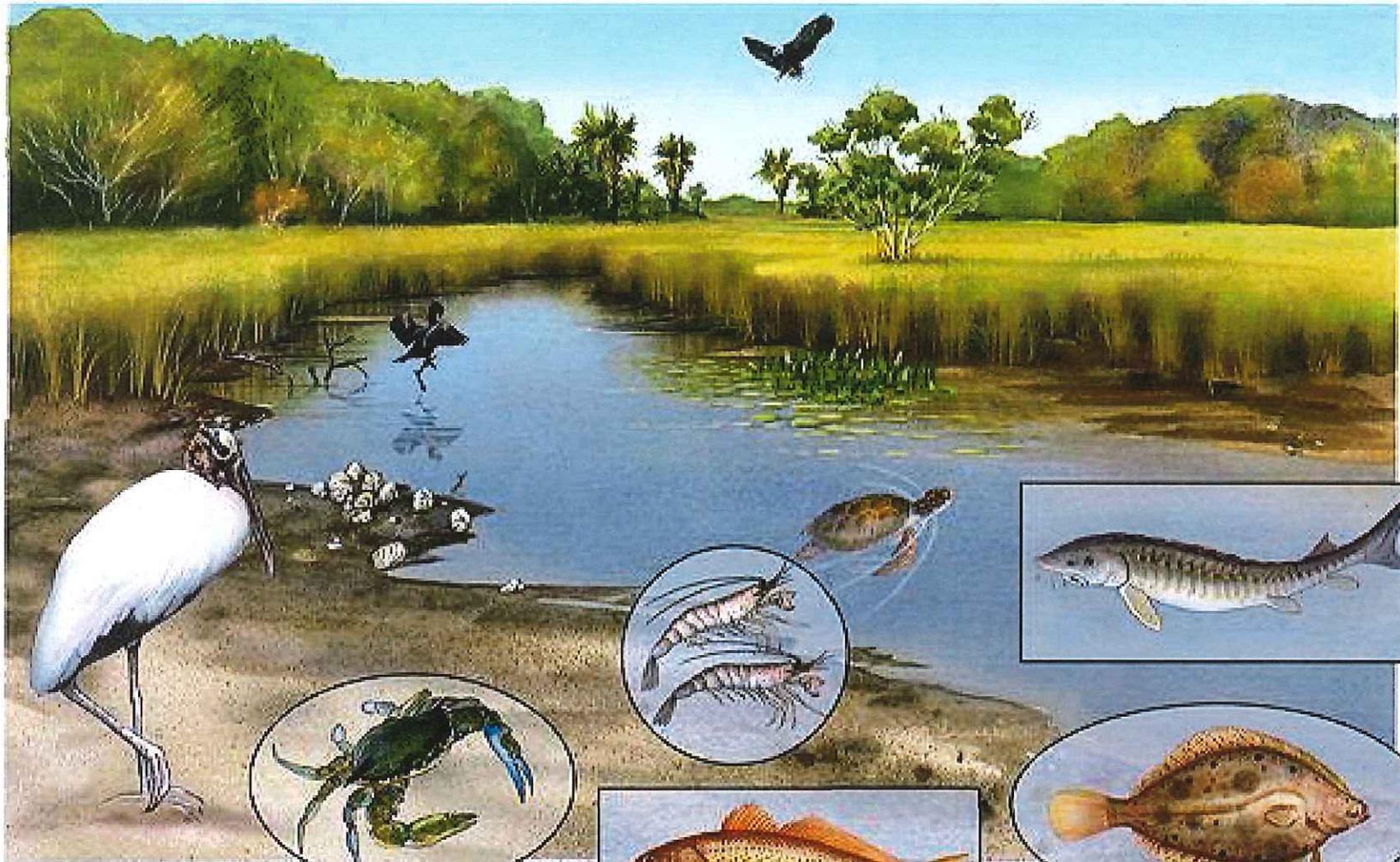


U.S. ARMY

## PROJECT PURPOSE

Restore hydraulic connectivity between Cape Cod Bay and West End Marsh in order to restore large fish and invertebrate passage to the 385 acres of estuarine habitat located behind Long Point Dike.





## STUDY AUTHORITIES

### Request for Federal Assistance

- In 2013 Provincetown requested Corps assistance in restoring the ecosystem behind Long Point Dike, specifically under Section 1135 of the Continuing Authorities Program (CAP)

### CAP Authorities

#### Section 206:

- General Aquatic Ecosystem Restoration
- Federal Expenditure Limit \$10 Million
- Cost Shared 65/35 (Federal/Non-Federal)

#### Section 204:

- Beneficial Use of Dredged Material
- Federal Expenditure Limit \$10 Million
- Cost Shared 65/35 (Federal/Non-Federal)

#### Section 1135:

- Modifications to Existing USACE Projects
- Federal Expenditure Limit \$10 Million
- Cost Shared 75/25 (Federal/Non-Federal)



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## FEDERAL NAVIGATION PROJECT

### Long Point Dike

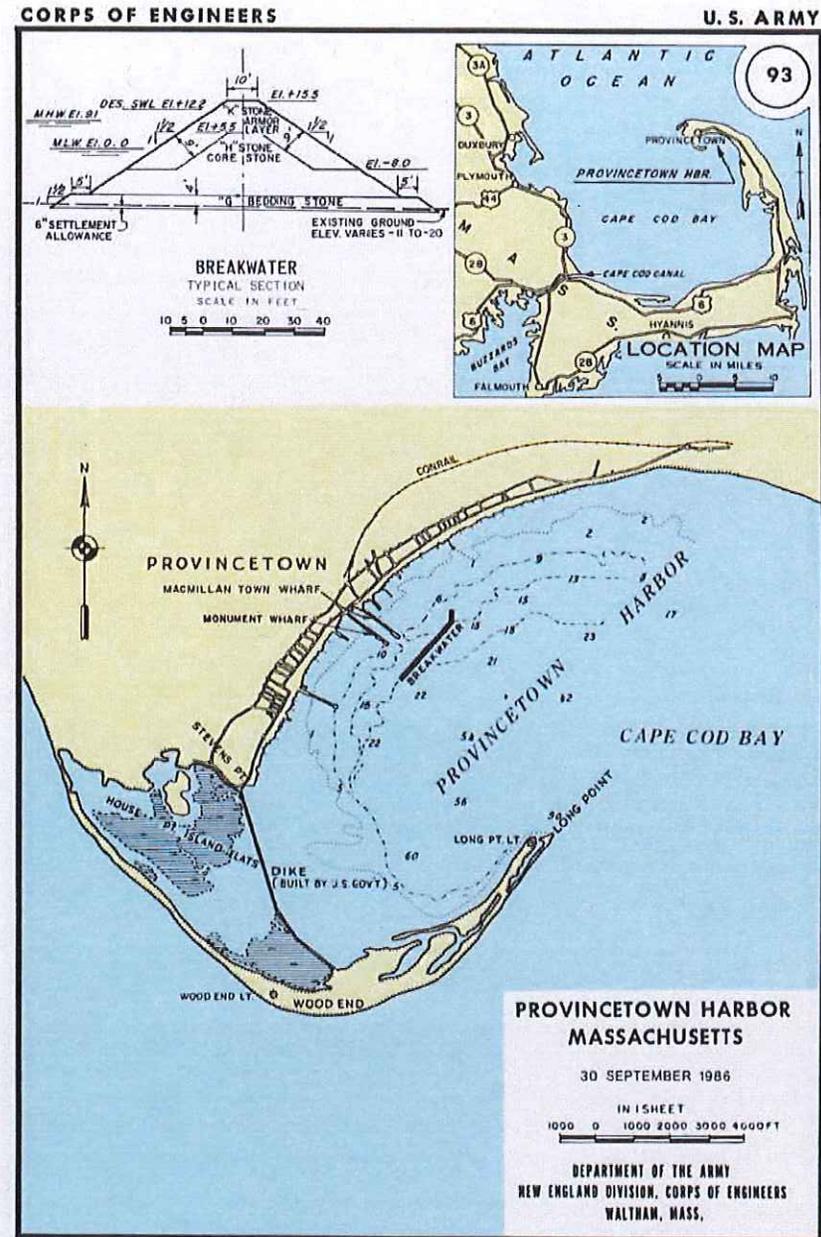
- 6,150 Linear Feet
- Constructed in 1910
- Protect Provincetown Harbor from offshore coastal hazards

### Provincetown Harbor Breakwater

- 2,500 Linear Feet
- Constructed in 1972
- Protect Provincetown Harbor from inshore coastal hazards

### Federal Navigation Channel

- 250 Feet Wide
- 2,000 Feet Long
- 13 Feet Deep
- Maintain safe navigation



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1887 TOPOGRAPHIC MAP



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Long Point Dike (8,000 Linear Feet)

Federal Navigation Channel

Provincetown Harbor Breakwater (2,500 Linear Feet)

Provincetown Harbor

Image U.S. Geological Survey  
Data SIO, NOAA, U.S. Navy, NGA, GEBCO

Google earth



Long Point Dike (6,000 Linear Feet)

West End Marsh (385 Acres)

Federal Navigation Channel

Provincetown Harbor Breakwater (2,500 Linear Feet)

Provincetown Harbor

Image U.S. Geological Survey  
Data SIO, NOAA, U.S. Navy, NGA, GEBCO

© 2016 Google

Google earth

Tour Guide 2007

Imagery Date: 5/23/2015 42°02'39.99" N 70°11'03.17" W elev -8 ft eye alt 20347 ft

LOOKING NORTH AT HIGH TIDE



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LOOKING SOUTH AT HIGH TIDE



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EXISTING PARTIAL OPENING AT HIGH TIDE



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## FEASIBILITY STUDY

### Problems

- Physical barrier to large fish and invertebrates
- Unnatural tidal inundation (semi permeable rocks vs tidal channel)
- Tidal connection is not maintained throughout tide cycle
- Unsafe pedestrian access

### Opportunities

- Restore fish/invertebrate passage to and from Cape Cod Bay
- Restore natural ebb/flow and overall health and function of the marsh
- Maintain tidal connection throughout tide cycle
- Improve recreational opportunities within the project area
  - Improve public safety (pedestrian access)
  - Enhance fishing opportunities
  - Create kayak access
- Enhance health and function of Cape Cod Bay ecosystem
  - Improve recreational fishing
  - Improve commercial fishing
  - Improve eco-tourism opportunities



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## FEASIBILITY STUDY

### Alternatives Analysis

#### No Action

- Does not achieve the project purpose

#### Remove Large Section of Dike

- Achieves the project purpose
- Compromises function of Federal Navigation Project
- Cost prohibitive

#### Create Single Breach with Culvert

- Achieves project purpose
- Creates unnatural bottom
- More maintenance/Higher cost

#### Create Single Breach with Foot Bridge

- Achieves project purpose
- Natural bottom habitat
- Least cost alternative

#### Create Multiple Breaches (culvert and/or bridge)

- Achieves project purpose
- Limited added benefit compared to single breach
- Substantial increase in cost



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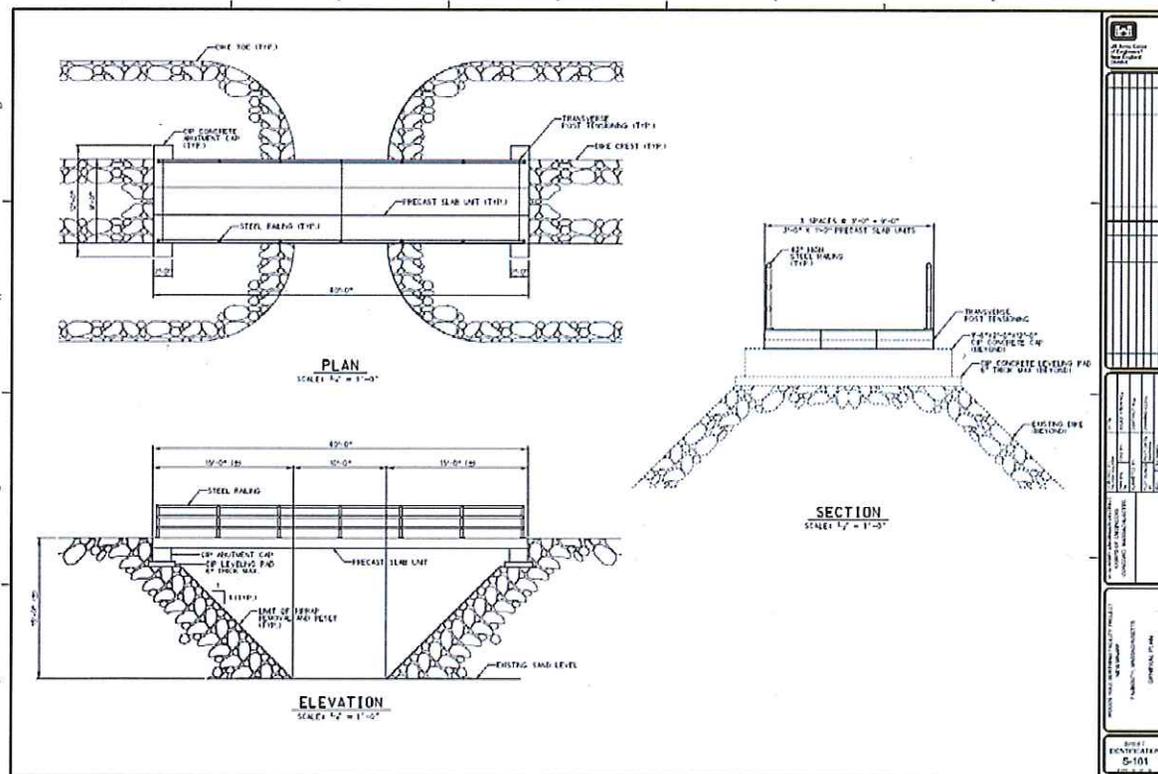


# FEASIBILITY STUDY

## Recommended Alternative

### Create Single Breach with Foot Bridge

- 10' Wide Opening at Bottom
- 40' Wide Opening at the Top
- 1:1 Side Slopes
- **\$1.6 Million** Total Project Cost
  - 75% Federally Funded (\$1.2 Million)
  - 25% Non-Federally Funded (\$400k)



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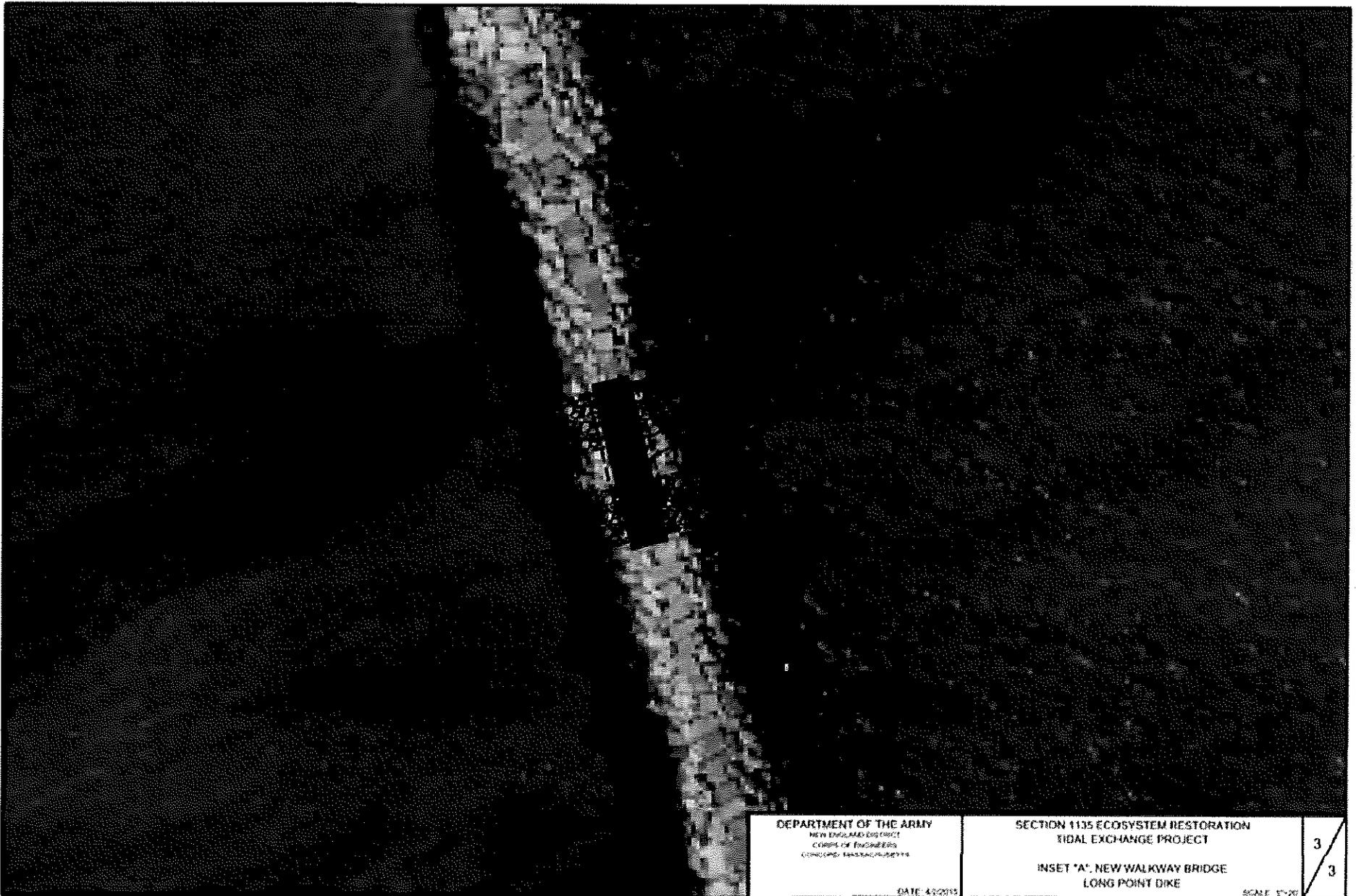




15

112

# PROPOSED BREACH



176

<p>DEPARTMENT OF THE ARMY          NEW ENGLAND DISTRICT          CORPS OF ENGINEERS          CONCORD, MASSACHUSETTS</p>	<p>SECTION 1135 ECOSYSTEM RESTORATION          TIDAL EXCHANGE PROJECT</p> <p>INSET "A". NEW WALKWAY BRIDGE          LONG POINT DIKE</p>	<p>3 3</p>
<p>DATE: 4/2015</p>	<p>SCALE: 1"=20'</p>	

# PLYMOUTH HARBOR DIKE (REPRESENTATIVE EXAMPLE)



114



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## PROJECT TIMELINE

Complete Draft Detailed Project Report (DPR)	<input checked="" type="checkbox"/>
Release Draft DPR for Public Notice	Nov 2016
Finalize Report (North Atlantic Division Approval)	Jan 2017
Design Project (Plans and Specs)	Sep 2017
Award Contract	Nov 2017
Construction	Spring 2018
Monitoring	Summer 2018

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# ENHANCED RECREATIONAL FISHING



110  
File Name



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# ENHANCED COMMERCIAL FISHING



File Name



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of Engineers®



# IMPROVED PEDESTRIAN SAFETY



File Name



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ENHANCED ECO-TOURISM



*EL*

# QUESTIONS???



Larry Oliver – 978-318-8347

Michael Riccio – 978-318-8685



Provincetown Board of Selectmen  
**AGENDA ACTION REQUEST**

Tuesday, October 11, 2016

4C

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## PRESENTATION

### Urban Land Institute Report

Requested by: Town Manager David B. Panagore

Action Sought: Discussion

Proposed Motion(s)

**Discussion dependent. Votes may be taken.**

### Additional Information

See attached ULI Report.

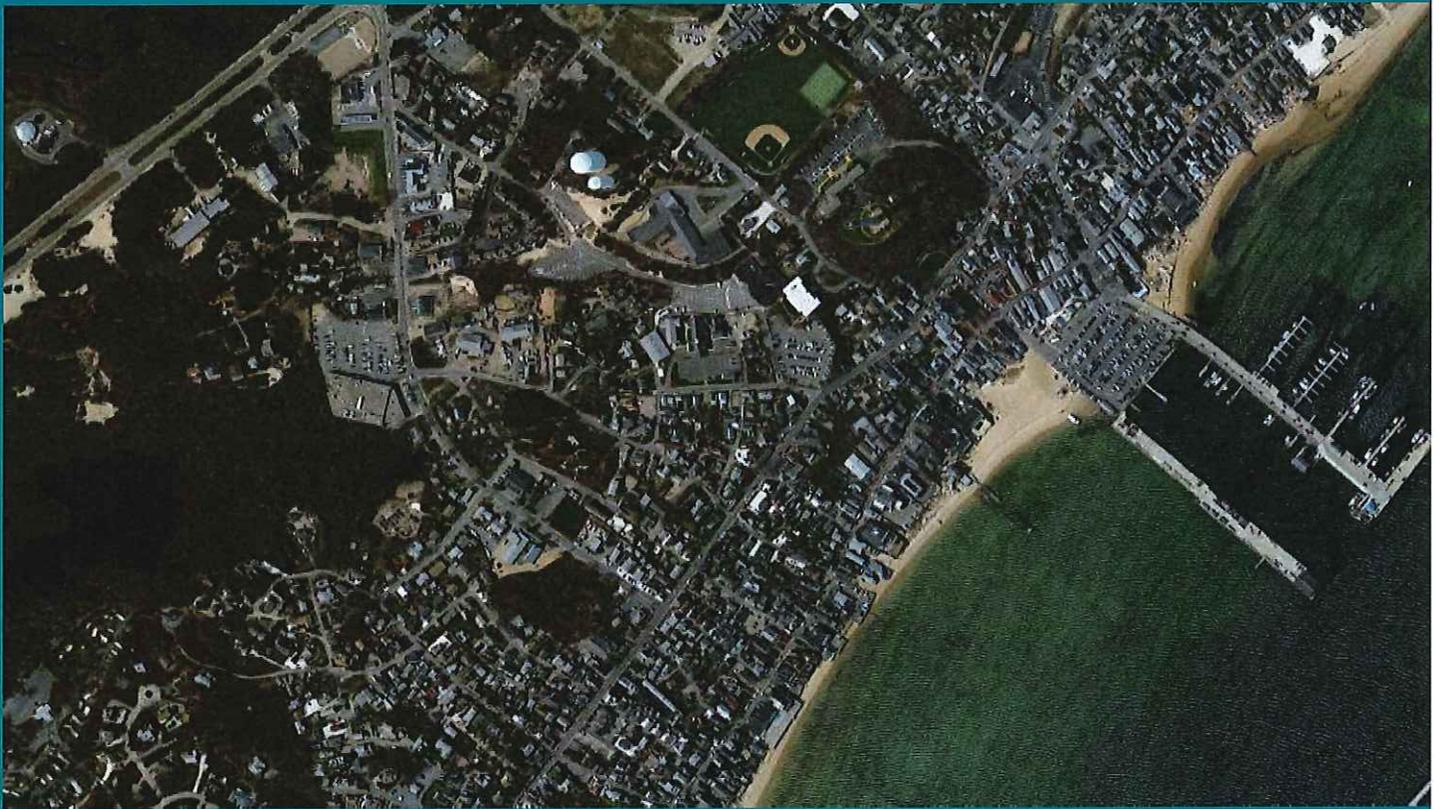
### Board Action

<i>Motion</i>	<i>Second</i>	<i>Yea</i>	<i>Nay</i>	<i>Abstain</i>	<i>Disposition</i>

# A TECHNICAL ASSISTANCE PANEL REPORT

Town of Provincetown

Provincetown, MA



June 8-9, 2016



**Urban Land  
Institute**

**Boston/New England**



**MASSDEVELOPMENT**

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# Executive Summary

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The Provincetown TAP convened at the Harbor Hotel on June 8. Under the direction of the Urban Land Institute's Boston/New England District Council, a panel of real estate professionals met over the course of two days with town leaders, community residents, developers and business owners. The charrette focused broadly on Provincetown's growing affordable housing challenge as well as efforts to create more of a year-round economy. In particular, the TAP looked at expanding the town's Housing Playbook with new ways of spurring construction of affordable rentals. The panel also examined how two existing, town-owned lots might be used to meet Provincetown's housing goals, while also exploring potential financing sources and development partners, such as the planned Year-Round Rental Housing Trust.

During the panel's discussions and interviews with residents, town leaders and business owners, one thing became crystal clear: For Provincetown, a dearth of affordable housing is having a negative impact on the town's efforts to create a year-round economy as well as on its bread and butter tourism business. A dire shortage of affordable, year-round rentals has forced many working class families out of town, leaving business owners who want to stay open in the off-season with few people to hire. And a shortage of seasonal housing has forced business owners to buy up hotel rooms and year-round rentals alike in order to ensure their summer workers have a place to live. In addition, real estate speculators are buying up hotel rooms and apartments, lured by the high-prices they can fetch when converted to condos. The result has been a decline in hotel rooms on which the town's tourist economy is based, while also cutting further into Provincetown's dwindling supply of year-round housing.

Another clear takeaway for the panel was the strong commitment on part of Provincetown leaders and residents to finding ways to address the town's housing crisis. While there are differences in opinion as to the best approaches to deal with these issues, there was strong agreement that a lack of affordable housing is a big issue for Provincetown. Yet solving the problem will take both time and persistence, with

a long-term commitment needed in order to make a significant difference. The creation of new rental housing, from initial zoning to actual proposals and town reviews to opening, can take years. It will be important for Provincetown to keep moving ahead with housing plans even when the market turns and prices level off in order to be ready when the market inevitably heats up again. Finally, Provincetown should not be afraid to take small steps to boost the amount of affordable and seasonal housing even as it works towards larger goals and projects. The need for housing in the town is so great that immediate action is needed, provided it moves the town closer to meeting its housing goals and objectives.

**Chapter 1: ULI and the TAP Process** Offers an overview of the Urban Land Institute's Boston/New England District Council and its Technical Assistance Panels (TAPs), while also detailing the panel members and stakeholders who took part.

**Chapter 2: Background and History** Provincetown has undergone a number of transformations in its long history, from fishing village and whaling port to artists' colony and internationally known tourist destination.

**Chapter 3: Challenges** Provincetown faces a number of challenges, with a significant drop in its year-round population amid a housing crisis that is driving out middle and lower-income families.

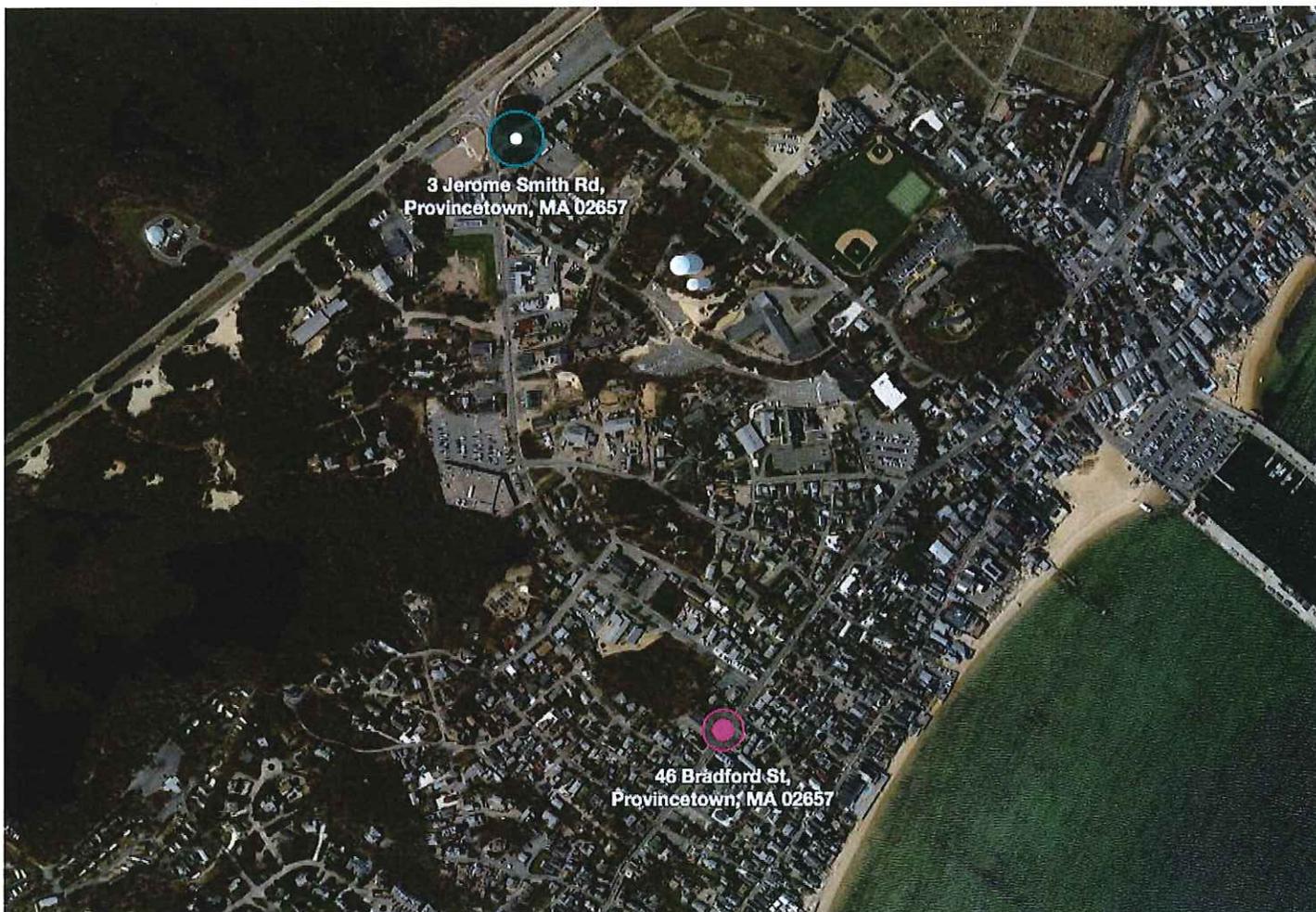
**Chapter 4: Assets and Opportunities** As Provincetown looks at ways of building affordable housing and creating a year-round economy, it has a number of strengths it can draw on, from strong community support and committed town leadership to a thriving arts community.

**Chapter 5: Short-Term Recommendations and Next Steps** There are a number of next steps and short-term solutions Provincetown can explore, from making its Housing Playbook more accessible to the public to pursuing housing development on town-

owned sites.

### Chapter 6: Longer-Term Recommendations

Provincetown should explore ideas for attracting year-round businesses, such as educational institutions, while also looking at additional zoning changes to encourage new housing development.



Aerial of study site marked with locations of two town-owned parcels.

# ULI and the TAP Process

---

## Urban Land Institute (ULI)

The Urban Land Institute is a 501(c)(3) nonprofit research and education organization supported by its members. Founded in 1936, the institute now has nearly 40,000 members worldwide representing the entire spectrum of land use and real estate development disciplines, working in private enterprise and public service, including developers, architects, planners, lawyers, bankers, and economic development professionals, among others.

As the preeminent, multidisciplinary real estate forum, ULI facilitates the open exchange of ideas, information, and experience among local, national, and international industry leaders and policy makers dedicated to creating better places. The mission of the Urban Land Institute is to provide leadership in the responsible use of land and to help sustain and create thriving communities. The Boston/New England District Council serves the six New England states and has over 1,300 members.

## Technical Assistance Panels (TAPs)

The ULI Boston/New England Real Estate Advisory Committee convenes Technical Assistance Panels (TAPs) at the request of public officials and local stakeholders of communities and nonprofit organizations facing complex land use challenges who benefit from planning and development professionals providing pro bono recommendations. At the TAP, a group of diverse professionals specially assembled with expertise in the issues posed typically spends one to two days visiting and analyzing existing conditions, identifying specific planning and development issues, and formulating realistic and actionable recommendations to move initiatives forward in a way consistent with the applicant's goals and objectives.

## MassDevelopment Support

MassDevelopment is the state's economic

development and finance authority. The authority works closely with state, local and federal officials to boost housing and create jobs. With the power to act as both a lender and developer, MassDevelopment also works to fill in gaps in infrastructure, transportation, energy and other areas that may be holding back economic growth. MassDevelopment has worked with ULI since 2011 to help sponsor and support the TAP process in cities and towns across the Commonwealth. support the TAP process in cities and towns across the Commonwealth.

## The Panel

ULI Boston/New England convened a volunteer panel of experts to examine the challenges and opportunities facing Provincetown.

## Co-Chairs

Susan Connelly, Director of Community Housing Initiatives  
Massachusetts Housing Partnership  
Boston, MA

Ryan Pace, Partner  
Anderson & Krieger  
Cambridge, MA

## Panelists

Fran DeCoste, Chief Operating Officer  
TR Advisors  
Boston, MA

Michael Lozano, Senior Project Manager  
The Community Builders  
Boston, MA

Scott Pollack, Principal  
Arrowstreet  
Boston, MA

Rob Shearer, Associate  
DiMella Shaffer

### **MassDevelopment Staff**

Anthony Fracasso, SVP of Housing Finance  
MassDevelopment  
Boston, MA

### **ULI Boston/New England Staff**

Michelle Landers  
Executive Director

Ileana Tauscher  
Associate

### **Report Writer**

Scott Van Voorhis  
Natick, MA

Panelists have donated their time.

### **Stakeholders**

Rob Anderson, Business Owner, P365  
Mary-Jo Avellar, Town Moderator  
Jay Colburn, Executive Director, Community  
Development Partnership, and Town of Truro Board of  
Selectmen member  
Candy Collins-Boden, Executive Director,  
Provincetown Chamber of Commerce  
Sally Deane, Executive Director, Outer Cape Health  
Services  
Paul deRuyter, Owner/Developer, Coastal Acres  
Campground  
Patrick Flaherty, George's Path Association  
Maggi Flanagan, Program Director, Homeless  
Prevention Council  
David Garten, Provincetown 365  
Mark Hatch, Chair, Provincetown Finance Committee  
Martha Hevenor, Planner, Cape Cod Commission  
Steve Katsurinis, Business Owner, member of various  
Town boards  
Anne LeGasse, Owner/Developer, Provincetown  
Marina  
Chuck LeGasse, Owner/Developer, Provincetown  
Marina  
Bruce MacGregor, Owner/Developer, Coastal Acres  
Campground  
Ted Malone, President, Community Housing  
Resource

Sheila McGuiness, Seashore Point  
Bob O'Malley, Realtor  
Sarah Peake, MA State Representative  
Robin Reid, Attorney  
Loic Rossignon, Business Owner, P365  
Bob Sanborn, Business Owner  
Gordon Seigel  
Beth Singer, School Superintendent  
Louise Venden, Member of Finance Committee  
Chris Wise, Owner/Developer, 350 Bradford Street  
Erik Yingling, Provincetown Board of Selectmen

### **TAP Process**

The Provincetown TAP met June 8-9 at the Harborview Hotel in Provincetown. TAP members took a bus tour of the town on the afternoon of June 8, driving by or stopping at potential housing development sites, including the VFW site and the old community center. That evening, the panel met town residents and business owners at a reception downtown at the Harbor Lounge. The TAP reconvened the following morning, conducting interviews with residents, business owners and town officials. Following a working lunch, panel members spent the afternoon drafting a series of observations and recommendations. The TAP panel then made a presentation to town officials and the public that evening at Town Hall, followed by a question-and-answer session.

# Background and History

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Provincetown has reinvented itself more than a few times in its long history, which dates to 1620, when it became the first, albeit fleeting, stop for the Pilgrims. Originally part of Truro, Provincetown was incorporated in 1727. By the mid-19th century, it was one of the richest towns in America, flooded with wealth from the lucrative whaling industry and active fishing port. The discovery of oil in Pennsylvania in 1859 and the rise of kerosene led to a slow but steady decline in the whaling business.

By the early 20th century, Provincetown was well on its way to reinventing itself once again. While the town's fishing fleet continued to thrive, Provincetown became a destination for tourists and magnets for writers and artists of all types. Over the 20th century, Eugene O'Neill, Tennessee Williams, Norman Mailer, among many others, made Provincetown their home at one point or another in their careers. Provincetown also began to attract gay and lesbian vacationers and residents as early as the 1920s and 30s and by the 1970s had become known as an international mecca for the LGBT community. The town also retained much of its original character as well, with an active fishing community of Portuguese descent.

Provincetown today faces a new set of challenges. The town's year-round population has dropped, even as it balloons in the summertime. Once a year-round community, Provincetown is increasingly seasonal, with restaurants and other businesses shutting down during the off-season. The conversion of hotels, homes and apartments into vacation properties - earning far more in a few weeks during the height of the summer season than a 12-month rental would - has helped fuel this trend. Faced with a shrinking year-round housing market, middle and working class residents who staff the shops, restaurants and other businesses, have voted with their feet, moving to neighboring communities or off Cape altogether.

Provincetown now finds itself at another turning point. The town's civic and business leaders and an increasing number of residents recognize the threat the town's housing crisis poses to its long-term health

and viability. There is growing interest in spurring the development of affordable, year-round housing and badly needed seasonal housing for summer.

## Objectives and Questions for Study

The Town of Provincetown's TAP submission problem summary, repeated below, describes a real estate challenge faced by many seasonal communities across the country. This study attempts to bring an additional perspective to the problem and the three proposed questions, while recognizing that Provincetown is truly unique amongst seasonal communities. It is not just unique because of its location on the 'very tip of Cape Cod', it is unique amongst many seasonal communities because of the commitment of the year-round community to Provincetown, existing economic opportunities to create year-round interest in Provincetown, and the amount of resources, outreach and focus the Town has invested over the years to promote more affordable housing production.

Although the Town's TAP proposal did not specifically ask the ULI Panel to address the community's economic assets and opportunities, the relationship between affordable and workforce housing and the Town's economy are so entwined, the panel has included some observations about potential growth of Provincetown's year-round economy. Providing housing is key to unlocking this potential.

We have also included highlights from our interviews and conversations with community members. All of the panel participants were moved by the level of commitment and concern residents have for their community, and were grateful to the people who took the time to share their experiences, ideas and concerns.

The Town of Provincetown's problem statement:

*The severe shortage of year-round rental housing in the Town is a serious public emergency that threatens*

*the Town's tourism-based economy and is a serious threat to the public health, safety, and general welfare of the citizens of the Town as substandard housing is becoming a resort as persons desiring to locate in Provincetown cannot locate year-round rental accommodations and existing residents are being displaced and are unable to find new year-round rental accommodations.*

The panel was asked three questions:

1. What are the next steps in refining the Provincetown Housing Playbook to identify effective tools to create new housing opportunities within the community?

The Housing Playbook is a complete summary of the Town's affordable housing efforts to date, parameters of the persistent housing challenges, and tools and funding to address these challenges.

2. How may the Town develop an effective strategy for the implementation and administration of the Provincetown Year-Round Rental Housing Trust (YRRHT)?

The Town has filed special legislation to allow the Trust to support the creation of housing for a wider range of incomes than allowed under the state's Municipal Affordable Housing Trust Fund Law (MGL c.44s.55C).

3. How may the Town take advantage of two existing real estate assets to produce a housing development plan to address the critical housing needs of the community?

The Town owns two sites: the Community Center at 46 Bradford Street and the VFW site at 3 Jerome Smith Road.



Aerial of former VFW site at 3 Jerome Smith Rd.

# Challenges

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## Loss of Year-Round Population

Provincetown is fighting to maintain its viability as a vibrant, year-round community amid some powerful trends that threaten to reshape it into an exclusive summer resort. Housing prices have more than doubled in the last 11 years, with the median price jumping to \$1.3 million during the first four months of 2016 compared to \$625,000 during the same period in 2005, according to The Warren Group, publisher of *Banker & Tradesman*. Higher prices, in turn, have weighed heavily on middle and lower-income families that have traditionally been the backbone of the year-round workforce, compelling many to leave. Provincetown's year-round population fell more than 17 percent from 2000 to 2010, dropping to 2,642 from nearly 3,200 at the turn of the century. The number of restaurants and other businesses open through the year has fallen off, while school enrollment has shrunk.

## Housing, Local Economy Joined at Hip

At the heart of Provincetown's steady decline in population are two intertwined issues: (a) the cost of housing in Provincetown has become prohibitive for middle-class professionals, let alone blue collar workers (one fifty-something waitress told panelists at a reception downtown that after years of working three jobs and constantly being on the verge of homelessness, she was seriously considering leaving town and moving to Northern New England); and (b) businesses, in turn, cannot stay open because there are not enough year-round residents as customers, nor are there enough workers in the off-season. Without viable year-round housing, the year-round economy suffers and vice versa. One benefit of this link, however, is that increases in year-round housing should lead to increases in year-round economic activity. Town leaders recognize this; they also understand that because of the limit of available land that there has to be a focus on creating deed-restricted housing. Moreover, because the housing market is so skewed, the town needs the flexibility to create affordable, deed-restricted housing for those

with relatively higher-than-average median incomes who now also find themselves unable to afford to rent or buy in Provincetown. The Panel agrees with this assessment. If the town's downward housing and jobs spiral can be reversed, even if just slightly, it can be turned into an upward spiral that would result in a more vibrant year-round economy for all.

## Seasonal Workforce Housing Needs

Provincetown increasingly has a one-season economy. The town's population swells to as many as 60,000 people during the summertime compared to 2,642 in wintertime. The town is almost wholly reliant on foreign workers on H-2B visas to keep its restaurants, bars, pubs, and shops open during the high season. This was certainly evident this summer when a delay by the federal government in processing visa applications meant some businesses on the Cape, including the Lobster Pot in Provincetown, had to delay opening or operated with skeleton crews this spring.

Panelists heard in many interviews and conversations that when a business is hiring for both year-round and season, one of the first questions they often ask is, "do you having housing?"

## Communication

Faced with the housing challenges described above, town leaders have struggled to educate voters on affordable and workforce housing and to forge a consensus around possible solutions. However, these efforts have been undermined by inaccurate and skewed information on social media and a lack of trust about information coming from town hall. While Provincetown is covered by two local newspapers, local commentary on social media has emerged as a major source of information - at times misinformation and rumor - for a growing segment of the public. In addition, NIMBY-ism is also an issue, with some Provincetown residents arguing during the interview process that affordable housing should be pushed up

Cape.

This challenge is not unique to Provincetown town hall. Not many communities have the resources to be consistently providing data and research to support (or sometimes defend) its actions and/or to be clarifying misinformation. Town hall employees are also responding to the requests and concerns of elected officials.

All municipalities experience turnover or newly elected leaders, so pressures and concerns can change and momentum can be lost as a strategic approach that was once supported no longer is, causing staff to have to start again.

Still, there is a level of misinformation in the community that could make any feasible efforts to solve the town's housing challenges fail.

There is a need for a consistent and transparent communication strategy on the part of the town. We heard from numerous people that they want to be supportive and helpful to the Town's efforts. Creating partnerships between town hall and community members and gaining trust is key to a successful strategy.

### **Potential Loss of Preferential Treatment under Chapter 40B**

Provincetown has relied on the preferential zoning treatment and consolidated permitting granted to developers under the state's Chapter 40B law to get new affordable housing built. But the town is nearing the point where 1.5 percent of its land is used for affordable housing. Once that threshold is reached, the preferential zoning treatment granted to affordable housing developments under 40B (as distinguished from consolidated permitting under 40B) will no longer automatically be applicable in Provincetown. This uncertainty is a major obstacle for developers who wish to build affordable and workforce housing developments and who may fear starting the permitting approval process for a project only to lose the preferential treatment to which a 40B development would have been entitled before Provincetown reached the 1.5 percent threshold.

Town officials need to determine when Provincetown might reach that threshold, if it hasn't already, to provide clarity to developers interested in building affordable housing.

### **Permitting and Infrastructure**

Provincetown also has some significant permitting and infrastructure issues to deal with. The town now allows homeowners to add in-law apartments, but the process is criticized as overly complicated and that some of the requirements may not be reasonable given the scope of opportunities. It is important to note though that a number of people interviewed expressed interest in adding to their own properties if the zoning was amended.

New growth in Provincetown – whether it's commercial or residential – must also take into account limits in the town's water and sewer capacity, which, in turn, are reflected in the permitting process. The panel recognizes that this is a challenge, but also heard that there are viable solutions.

### **Transportation Issues**

As housing grows ever more expensive in Provincetown, seasonal and year-round workers are looking to other Cape towns for housing. But commuting to work in Provincetown is no easy task, especially if you are a seasonal worker without a car. CCRT, the regional bus system servicing the Outer Cape, has a sporadic schedule that is not beneficial for workers. This lack of frequent and reliable public transportation makes it difficult for Provincetown and other Outer Cape towns to band together to provide regional housing solutions. While expanding the search for housing sites beyond Provincetown would certainly increase the number of possibilities - barring some creative alternatives, such as van share, bike share or zip car - the lack of transportation essentially cancels many of these out.

# Assets and Opportunities

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Provincetown's biggest asset is that it's Provincetown, a one-of-a-kind, internationally known destination for tourists, artists, the LGBT community and beyond. People are drawn to Provincetown from across the world for its spectacular physical beauty, vibrant community, world class arts scene, and wide array of restaurants and shops. Provincetown has considerable strengths to build on as it explores ways to add affordable and workforce housing and bolster year-round community and commercial activity.

## Some Developable Sites

While available land for new housing production can be hard to come by, there are a handful of town-owned sites as well as a few privately-owned sites that could be used for new housing and other development. Provincetown also benefits from a commitment on the part of town government and community leaders to attempt to tackle some of the key challenges the town faces, particularly in housing. The town is also fortunate to have a proactive business community that is attempting to address some of these issues as well.

## Thriving Arts Community

Provincetown has an arts community that most resort towns – and even fair-sized cities – would envy. Provincetown Art Association and Museum – affectionately known as PAAM – is the center of Provincetown's arts community. Launched in 1914 to provide a showcase for the work of artists on the Outer Cape, PAAM recently celebrated its 100th anniversary. It is the most visited museum on the Cape and holds a steady series of exhibitions, workshops and lectures throughout the year.

In addition to PAAM, Provincetown is home to the Fine Arts Work Center, a thriving nonprofit organization dedicated to "encouraging the growth and development of emerging visual artists and writers and to restoring the year-round vitality of the historic art colony of Provincetown." The Fine Arts

Work Center is flourishing, and interest currently outstrips capacity. That interest, if tapped, would bring more year-round visitor activity and residents to town.

Provincetown also boasts well more than 40 different galleries and museums, showcasing painting, photography, arts and crafts, tiles and other artistic mediums. The town is home to a thriving theater and cabaret scene as well.

As impressive as it is, Provincetown's arts community has the potential to be an even greater draw, particularly during the off-season, for art lovers, collectors, aspiring artists, art students, writers and even chefs.



Provincetown Arts Association and Museum.

## Center for Coastal Studies

The Center for Coastal Studies is expanding on Provincetown's waterfront as it pursues an ambitious goal of becoming the "leading center for coastal/marine science and education." The Center's research and education programs are focused on the "marine mammals of the western North Atlantic and on the coastal and marine habitats and resources of the Gulf of Maine." The Center has added staff in recent years, has an exciting new partnership with the University of Massachusetts Boston and is revamping its marine lab to include public meeting space and expanded exhibit areas. The Center has also added a large research vessel to its resources program.

## Tourism

Tourism is a key economic driver for Provincetown. The town's population balloons to as many as 60,000 in the summertime, not counting the steady flow of vacationers and tourists coming in for a week, a weekend, or just the day.

That wide ranging interest can be seen in the number of hits the website of the town's tourism office receives – 15.65 million during the first ten months of 2015 alone.

Tourism, in turn, helps support dozens of restaurants, shops and galleries while playing a big role in financing town services as well. The room occupancy tax brought in nearly \$2 million in fiscal 2015, up from just over \$1.5 million in 2011.

Meal tax revenue rose 5 percent in fiscal 2015 from the year before, to \$553,326. It has also increased substantially from 2011, when it was \$339,548. Parking revenue is also crucial, with the town taking in over \$2 million in fiscal 2015, up from just under \$1.6 million four years before.

But the long-term health of Provincetown's tourism sector may ultimately depend on whether the town can find ways to increase the amount of affordable housing – both seasonal and year round. The number of hotel rooms in Provincetown has dropped by

10 percent over the past few years as developers convert hotels and motels to condos or seasonal housing for workers.

## Committed Town Leadership

Provincetown civic and business leadership has been exploring ways to ease the town's housing crunch and promote year-round commercial activity. There is an awareness of the interplay between housing and economic activity, with a lack of affordable housing creating a shortage of year-round workers for Provincetown restaurants, shops and galleries. The difficulty in addressing housing issues seems to be finding ways to build consensus around both the need for additional housing and what and where new housing should be built. Further complicating these decisions is the need for seasonal housing to support the more than 1,000 seasonal jobs necessary to support the summer economy.



Provincetown Town Hall.

## Business Community Leadership

The housing shortage is a major issue for local businesses, who face the prospect of not having enough help during the crucial summer months if seasonal workers are unable to find a place to live. Businesses have stepped up to buy buildings around town for conversion into temporary housing,

demonstrating a willingness to participate in finding solutions to this significant problem.

### **Committed Residents**

Panelists heard time and time again that residents are uniquely and deeply committed to Provincetown. Many people who live in Provincetown make a deliberate decision to move there, rather than just casually putting down roots. They come to the town because of its special qualities and offerings, and they generally want to see it succeed. One resident explained that he and his partner spent months deciding where to relocate to from New York City. They created spreadsheets with all of the qualities that they were looking for in the location for their new home, they crunched data and Provincetown came out on top. He stated that he wants the town to flourish, and that he wants to help with that goal now that he has committed to make it his home. Another resident, who is a key business owner, explained that Provincetown truly is a special place for him and the gay, lesbian and transgender community. He lives in Provincetown because it is the only place that he has

ever visited where he can be comfortable being who he is, without reservation. This type of dedication and commitment to a town is rare, and it is a special resource that could help to solve the housing challenges in town if it is channeled correctly.

### **Fisherman's Wharf Revival**

There is justifiable excitement over the development plans put forth by the new owners of Fisherman's Wharf. Developer Chuck Lagasse is expanding the wharf so that it can accommodate a range of boats up to large yachts, while also building a pair of two-bedroom apartments for employees. The redevelopment is expected to create 25 to 30 jobs. There are also plans for a 10-foot-wide harbor walkway to connect the pier with downtown.

### **Aquaculture**

There is the potential to expand aquaculture in Provincetown, with shellfishing growing in Provincetown, Wellfleet and Truro.

# Short-Term Recommendations and Next Steps

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Provincetown faces some significant challenges when it comes to its severe shortage of affordable and workforce housing and its shrinking, year-round workforce. However, as Provincetown looks to grapple with its increasingly urgent housing crisis, it may not have the luxury of waiting until all new zoning plans or larger strategic property plans are in place before taking action. The danger is letting the perfect get in the way of the good. A key question related to each new housing proposal, zoning change or development should be, "Does this proposal, change or development move us closer to our goal of providing more housing for year-round residents and seasonal workers in the town?" If the answer to that question is "yes," the town should seriously consider moving ahead with the proposal, change or development, even if one particular proposal, change or development does not solve all the town's housing problems. Baby steps are productive, as long as they are steps in the right direction.

There are steps Provincetown's municipal leadership can take in relatively short order to improve the way new housing proposals are debated and vetted. For instance, the town can improve communication related to major projects and initiatives. A more deliberate communications strategy combined with an online platform for getting reliable information out to the public on new projects and proposal will help build consensus. There are also changes that could be made to the Housing Playbook to make this important and foundational document more accessible to the public.

In addition, there are more concrete steps Provincetown can take to help ease its housing crunch and ensure local businesses have the workers they need to thrive. Provincetown has an opportunity to start making a dent in its housing shortage with two significant town-owned properties, the VFW site and the old community center. There are also potential short-term measures the town, in conjunction with the business community, may want to consider to ease the housing crunch for seasonal workers.

## Making Playbook More Accessible

The Provincetown Housing Playbook is an excellent start by the town to put in one place the problem, history, and resources; previous efforts; and the potential solutions to the town's housing challenges. It is a strong, initial communication approach. To quote:

*This Housing Playbook begins our work on a more comprehensive approach. It's a roadmap that builds upon the existing data and the work (283 units so far) that has already been accomplished. It establishes a one stop reference for all the programs, efforts and financial sources and tools currently available. It takes into consideration new opportunities, public and private properties and new initiatives identified since the 2014 Housing Summit.*

The Playbook gives the Town a great opportunity to share a comprehensive strategy with short- and long-term goals.

It's a very dense document. It would be worthwhile to create a more accessible electronic format where the different sections can be divided by tabs for easy access, with links to other sources of data and information that are updated regularly. Also, we would suggest that the complete action item section (for all housing goals) be at the front to track short- and long-term goals.

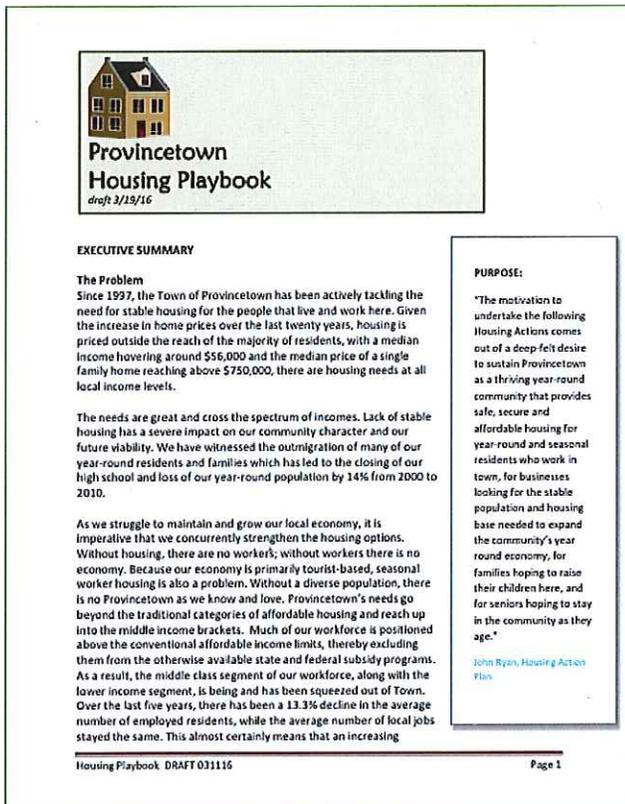
Specific action items to be included at the front of the Playbook include:

Short-term priorities:

- Disposition of the two town-owned sites to support affordable housing production
- Support for the evaluation of Provincetown Housing Authority property for expansion

- Passage of an inclusionary zoning by-law

officers, teachers, public works employees and the town clerk.



There was some discussion with community members that a possible action item for the Year-Round Rental Housing Trust would be to purchase housing on the market and hold it. This housing could then be rented out, generating income which could then fund further activity by the housing trust. At a surface level this does not appear to be the most effective use of funds and would have a very limited impact given the cost of housing. The housing trust public procurement requirements would also need to be taken into consideration and can be onerous when a municipal entity is managing a residential property. Any third-party management party would also be subject to MGL Ch. 30B since the requirement is triggered by the public status of the owner. With limited funds, the trust may have more success purchasing deed restrictions to preserve some rentals for year-round use. A third-party analysis, based on the economics of the community is recommended to help determine the best business plan for the Year-Round Rental Housing Trust.

The Provincetown Housing Playbook can be found online at <http://www.provincetown-ma.gov/>.

### Rethink Communications Strategy

### Push Ahead with Housing Trust

The town's elected officials and professional staff should review the process under which major proposals – such as land purchases for housing – are presented to the general public. Proposals need to be thoroughly aired and questions and concerns need to be addressed in a variety of public forums – online and off – before a Town Meeting vote. In today's increasingly digital world, where people are getting information from a variety of sources, the town's municipal leadership can no longer rely primarily on traditional methods, such as public meetings and coverage in local newspapers, to do the job.

Town Meeting voters in 2015 approved plans to create a Year-Round Rental Housing Trust. Voters also agreed to seed it with an initial investment of \$1 million. The proposal is now pending at the State House, where it must be approved in order to take effect. The housing trust is designed to provide support for middle-income renters without regard to income, but targeted for households between 80 and 200 percent of area median income. Currently most subsidy programs top out at 80 percent AMI. A number of town employees currently fall through the cracks, making too much money to qualify for affordable housing programs but not earning enough to pay for an apartment in the super-heated Provincetown rental market where seasonal rentals bring in the biggest profits. These include patrol

The town manager's radio show is one method of reaching out to an expanded audience outside of the traditional meeting and newspaper approaches. The town should also explore ways to share information about major projects online. One possibility is a platform called coUrbanize, where local officials and developers can share information and answer questions about new projects and initiatives. The website's mission is to fill the void in

public information about projects in an age when most people have difficulty attending the myriad government hearings and meetings where key details are hashed out.

### **Ongoing Public Education**

There also needs to be an ongoing effort, maybe through workshops and forums, to remind the public of the close relationship between housing availability and the health of the local economy. Town leaders must make clear that confronting the housing challenge requires community support for a long-term effort and town leaders should make an effort to build on the community support that was clearly evident during the panel's meetings and discussions with residents. Identifying and fostering community partners is also important. For some communities these are business chambers, religious organizations, and different advocacy groups. The goal is to include groups that recognize community housing needs as part of their agenda and to encourage their input on potential strategies and opportunities.

### **Move Ahead with Housing on Town-Owned Sites**

Provincetown is densely developed, and that is one of its many charms. The downside is that buildable lots are hard to come by, but the panel was actually surprised by the amount of opportunities that exist for additional development. The town has the opportunity to begin to address some of its housing needs on two sites, the former VFW hall and parking lot at 3 Jerome Smith Road and the town's old community center at 46 Bradford Street.

Provincetown voters agreed to acquire the VFW site for \$900,000 in October, 2013. In one scenario sketched out by the TAP panel, 29 Provincetown-style, two-bedroom cottages could be built on the VFW site. The cottages, in turn, could provide housing for 54 seasonal workers. The new housing, including land costs, weighs in at roughly \$120,000 to \$150,000 per "cottage." These would be less expensive, modular micro-units.

The town has owned the community center since it

acquired the property for \$125 in 1892, and there is the potential for new construction at the community center site as well. A new, two-story workforce housing apartment building might include 16 rental units at a cost to build of \$275,000 each.

The town should seriously consider combining the two sites as part of a single RFP package. This would create an economy of scale, and the TAP panel was told that this would make the development effort more attractive to developers. Combined, as many as three or four dozen housing units could be built on the two properties.

See proposed schematics on the next page.

### **Seasonal Workforce Housing**

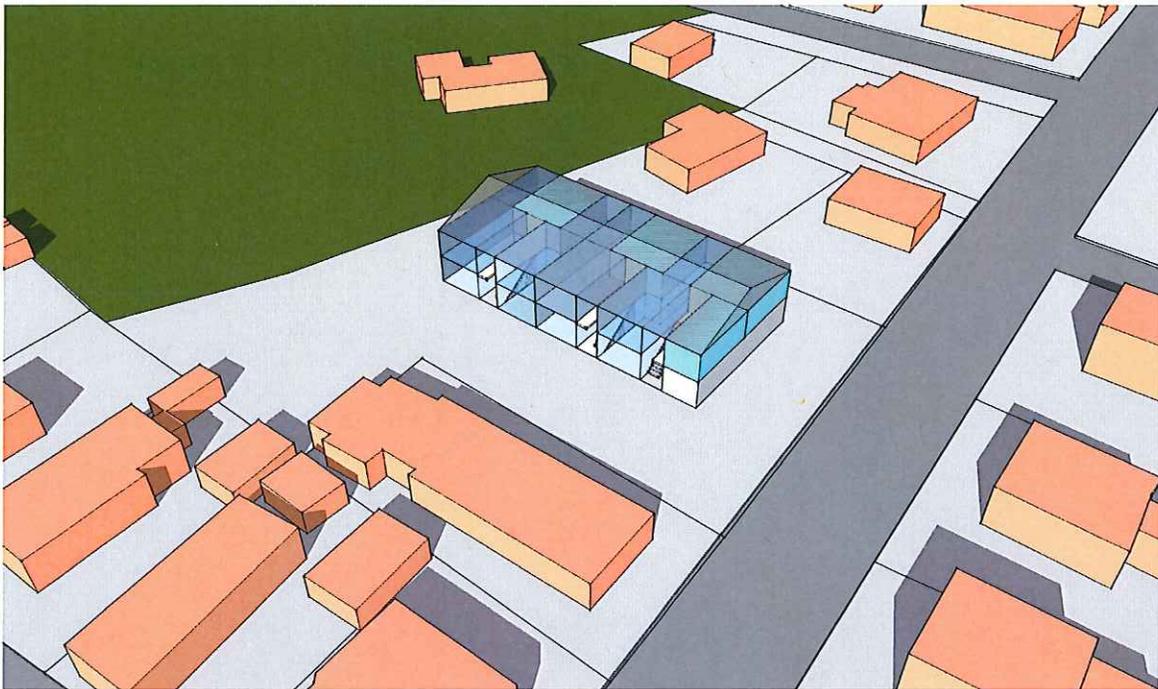
It will take time to build sufficient numbers of new, year-round apartments and homes. However, there are some steps town officials and local businesses can take relatively quickly to address the housing needs of seasonal workers. Faced with housing challenges, a number of Provincetown businesses have taken the initiative to provide housing for their seasonal workers by buying old homes and guest houses and housing workers at these sites. Provincetown officials should work closely with local businesses as they seek housing for their summer workers, encouraging solutions that work for both the businesses and the town. That might include assisting businesses that wish to team up on a larger project that could provide housing at one or two central locations for workers at a number of local establishments. The town might also consider licensing some parking lots to local businesses who want to bring modular micro-units or other forms of quick temporary housing to address immediate needs.

### **Inclusionary Zoning By-Law**

The town should try again to present an inclusionary zoning by-law at town meeting. Inclusionary zoning, particularly in home ownership developments, may be one of the most effective ways to address the community housing needs. Requiring deed-restricted for-sale housing at 120% or 150% of AMI would have



A schematic of the VFW site sketched out by panelists showing Provincetown-style two-bedroom cottages. These would be less expensive, modular micro-units.



A schematic of the Community Center site sketched out by panelists showing a potential for new construction. A two-story workforce housing apartment building might include 16 rental units at a cost to build of \$275,000 each.

less of a fiscal impact on a project's economics so it would be more tolerable to developers and may work better with smaller scale developments. It also allows the town to focus using public funds towards standard levels of affordability (less than 100% AMI).

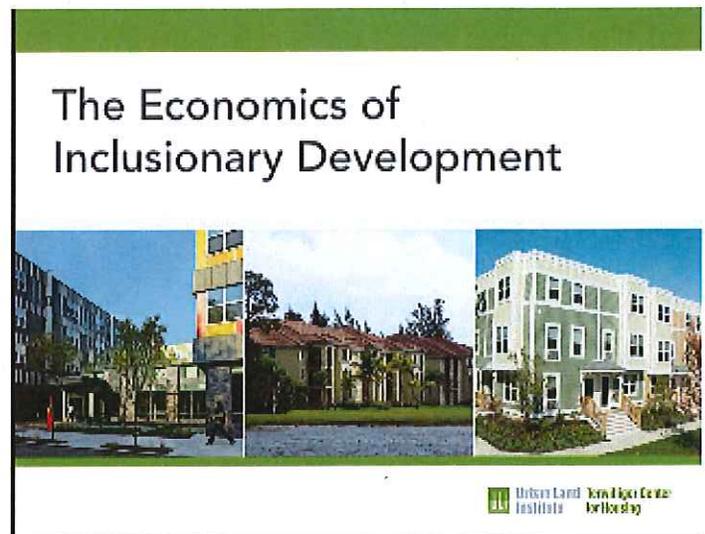
There are consultants that provide fiscal impact analyses of inclusionary zoning who can help structure a zoning by-law that is feasible and doesn't create loop holes for developers. There are also great resources that provide examples and good data about the long-term successes of inclusionary zoning that can help inform the community outreach to support this effort.

The ULI Terwilliger Center for Housing recently published *The Economics of Inclusionary Zoning* ([uli.org](http://uli.org)).

The Lincoln Institute of Land Policy published a report last year on inclusionary zoning:

*Through a review of the literature and case studies, this report details how local governments are realizing the potential of inclusionary housing by building public support, using data to inform program design, establishing reasonable expectations for developers, and ensuring long-term program quality.*

*Inclusionary housing is likely to play a more significant role in our national housing strategy in the coming decade. Faced with declining federal and state resources for affordable housing and growing populations, communities need to take full advantage of every potential tool. The evidence summarized here suggests that inclusionary housing programs produce a modest yet steady supply of new affordable housing resources. Because programs generally preserve long-term affordability, the pool of local inclusionary units can grow steadily into a significant share of an area's housing stock.*



ULI Terwilliger Center for Housing's new report, *The Economics of Inclusionary Zoning*, can be found online at [uli.org](http://uli.org).

# Longer-Term Recommendations

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## Potential for Expanding Year-Round Economy

As its year-round population has dropped, Provincetown has also suffered from decline in the number of businesses open throughout the year as well. But of any community on the Cape, Provincetown may be uniquely equipped to rebuild a local economy that stays active throughout the year. In particular, Provincetown, with its impressive arts community, is well positioned to become a campus during the winter and spring months for aspiring artists, writers, filmmakers and other creative types. A similar idea was explored 15 years ago, but the timing now may be riper now for such an endeavor. Interest in the Fine Arts Work Center, for example, is outstripping its capacity.

The Center for Coastal Studies partnership with the University of Massachusetts Boston could provide yet another template for future endeavors.

## Land Use Master Plan and Corresponding Zoning Changes

The panel is aware that the best solution is the most difficult one to accomplish. A master plan for the community, identifying parcels for housing development and increased density would create predictability and avoid a parcel-by-parcel approach to creating a long-term solution for housing needs. It would also help with the planning and management of infrastructure, in particular, water. The town could also create design guidelines to address aesthetic concerns that the community has about new development.

If this does not seem feasible, Provincetown may also want to consider creating a zoning overlay district to help spur new development in prime areas, such as the two town-owned properties that it is currently considering options for. The zoning overlay can function on top of all or a large portion of the underlying zoning in the town, and it can benefit any project/property that meets specified development

criteria. This would allow the town to seek a greater percentage of affordable and workforce housing units in a project in exchange for allowing the developer to create more density, such as by adding more apartments. A zoning overlay district would also allow the town the opportunity to craft guidelines to spell out clearly what it wants and does not want with new development in the new district. This thoughtful and proactive approach to new development should encourage new private and public proposals that were previously not considered. It should also provide developers, worried about the possibility Provincetown may soon no longer fall under 40B regulations, with certainty about the rules of the road that will enable them to move forward with new projects.

## Other Zoning Items

Accessory Dwelling Unit - Assess why the accessory dwelling unit zoning hasn't produced more units. The Panel heard from a number of residents that the rules didn't reflect the physical realities of many potential opportunities and that the process was cumbersome. Now that the rules have been on the books for a while it could be a good moment to assess if there's an opportunity to relay the rules and streamline the accessory dwelling unit approval process.

Artist Live/Work Space - A number of artists are now living in their gallery space, something quite common in other arts centers, such as Boston's Fort Point neighborhood. However, since it is not an allowed use under the town's zoning rules, these key contributors to the town's vital arts scene are not able to convert part of their gallery space for residential living. The town should consider making artists live/work an acceptable use under its zoning code.

Mixed-Use – Assess the opportunity for upper floors of commercial buildings to be converted into new apartments.

## Permitting

The town should consider the designation of a single point of contact for new housing developments. This person would help to facilitate the permitting process for developers who wish to build housing in Provincetown. While developers say that many town officials are helpful and accommodating with respect to permitting requests, a single point of contact will provide a clear chain of communication and accountability that should result in even better communication between developers and town officials.

The town should also consider the creation of an expedited permitting process for housing developments that will provide affordable and workforce housing as well as seasonal worker housing. In the development world, time is money, and an expedited permitting process should encourage more developers to look hard at creating new housing stock in Provincetown.

## Think Regionally

Provincetown and other Outer Cape communities to varying degrees share similar challenges. All face shortages of both seasonal and year-round workers amid years of steadily increasing real estate prices and a rental market in which seasonable demand trumps all. Through regional collaboration, Provincetown and its neighbors may be able to identify more and larger sites for new seasonal and year-round housing than they would otherwise. The Outer Cape towns also confront similar transportation challenges as well. A regional effort could help towns bring greater resources to bear on the issue. While expanding the existing bus service may not be realistic, there may be ways to creatively use services such as Van Share, Zip Car and Bike Share to achieve the same goals.

## Expand Financing Sources

Provincetown is fortunate to have the Community Preservation Act, and have funding to launch the year-round market rate rental housing trust, when

approved. There is also the potential for a significant boost should the Legislature at some point approve long-standing home-rule petitions that would enable Provincetown to extend the hotel room tax to short-term rentals.

# Conclusion

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Provincetown is uniquely positioned to address its housing and year-round economic challenges. The town has a thriving arts community and budding aquaculture sector that could be leveraged to attract new investment and more year-around jobs. The town, through public purchases of land and changes in ownership in key privately-owned sites, has a number of potential development sites to work with as well as it looks to spur construction of additional affordable housing. Crucially, there is a growing consensus among town officials and residents as well that Provincetown's dearth of affordable housing is a keystone issue, one that threatens the very viability of the town's thriving tourism sector and the ability to maintain a vibrant, year-round economy.

However, in order to meet its goals, Provincetown's elected leaders and municipal officials will need to rethink the process of winning approval for major

housing proposals. That means finding ways to more effectively communicate major new initiatives and what's at stake for the town as well as building public support and consensus before a make-or-break Town Meeting vote. Yet that said, these are challenges municipal leaders are grappling with everywhere now and certainly not unique to Provincetown. As it moves forward with plans to deal with its growing affordability problem, Provincetown can count on some significant advantages as well, from dedicated local leadership to a committed citizenry. And that only bodes well for the town's efforts to ensure it has the housing it needs to continue to thrive and prosper for years to come.



Provincetown Board of Selectmen  
**AGENDA ACTION REQUEST**  
Tuesday, October 11, 2016

5A

## BOARD OF SELECTMEN APPOINTMENT

Licensing Board Member – Breton Alberti

Requested by: Town Clerk Doug Johnstone

Action Sought: **Approval**

### Proposed Motion(s)

**Move that the Board of Selectmen vote to appoint Breton Alberti, as an Alternate member to the Licensing Board with a term to expire on December 31, 2017.**

### Additional Information

See attached application.

### Board Action

<i>Motion</i>	<i>Second</i>	<i>Yea</i>	<i>Nay</i>	<i>Abstain</i>	<i>Disposition</i>



**Licensing Board**

	<b>First</b>	<b>Last</b>	<b>Position</b>	<b>Term End</b>	
1	Michelle	Foley	Regular, Vice Chair	12/31/17	
2	Frank	Thompson	Regular, Chair	12/31/16	
3	Zachary	Luster	Regular	12/31/16	
4	Shawn	Byrne	Regular	12/31/18	
5	Guy	Barbarulo	Regular	12/31/17	
Alt	ZL 9/27/16		Alternate	12/31/17	*
Alt	Regina	Binder	Alternate	12/31/17	

## Loretta Dougherty

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**From:** Doug Johnstone  
**Sent:** Tuesday, September 27, 2016 10:28 AM  
**To:** David Panagore  
**Cc:** Loretta Dougherty; Aaron Hobart  
**Subject:** Application to Join Licesning Board  
**Attachments:** Alberti Application to Licensing Board.pdf; lb.xls

FYI – Attached please find an application to join the Licensing Board submitted by Breton Alberti. Currently there is one alternate member vacancy, which the Selectmen have the authority to appoint until 11/27/16 (highlighted in yellow on the roster attached) should they choose to do so.

Please add to the Selectmen's agenda when possible.

Thank you.  
dj



Provincetown Board of Selectmen

**AGENDA ACTION REQUEST**

Tuesday, October 11, 2016

5B

## BOARD OF SELECTMEN APPOINTMENT

Building Committee Member – Paul Kelly

Requested by: Town Clerk Doug Johnstone

Action Sought: **Approval**

### Proposed Motion(s)

**Move that the Board of Selectmen vote to appoint Paul Kelly, as an Alternate member to the Building Committee with a term to expire on December 31, 2018.**

### Additional Information

See attached application.

### Board Action

<i>Motion</i>	<i>Second</i>	<i>Yea</i>	<i>Nay</i>	<i>Abstain</i>	<i>Disposition</i>



# TOWN OF PROVINCETOWN

## Application for Town Board Membership

Name: Paul Kelly

Resident Address: 22 Brewster St Please type or print Provincetown, MA 02657

Mailing Address (if different): \_\_\_\_\_

Telephone #: 617.571.8063 Work # (\_\_\_\_) \_\_\_\_\_

Email address: PK@manitouarchitects.com

Please consider this as my application for [ ] membership [ ] reappointment on the following Town Board(s).  
(Please list order of preference.)

1. Building Committee
2. \_\_\_\_\_
3. \_\_\_\_\_

Listed below are the applicant's skills, experience, background, or other factors which would contribute to these committees:

- architecture & planning background
- BUILDING Committee & Inarts Work Center
- Knowledge re. town buildings, police station program and various location options.

I hereby certify that I am a resident of the Town of Provincetown.

Paul Kelly 9.29.16  
Signature of Applicant Date

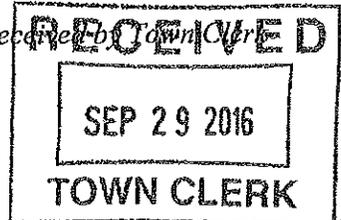
**TO THE APPLICANT: FILE COMPLETED FORM WITH THE TOWN CLERK**

Town Clerk Certification: Applicant is a registered voter:  
 Yes  No  
D. Johnston  
Name of Town Clerk

This application will remain on file in the Town Clerk's Office for 364 days from the date received.  
Application Termination Date: 9.28.17

Date Received by Board of Selectmen

Date Received by Town Clerk



**Building  
Committee**

	<b>First</b>	<b>Last</b>	<b>Position</b>	<b>Term End</b>	
1	Donald	Murphy		12/31/18	
2	Sheila	McGuinness		12/31/18	
3	Thomas	Coen	Chair	12/31/17	
4	Leif	Hamnquist		12/31/17	
5	Richard	Murray	V. Chair	12/31/16	
Alt	SM 8/22/16			12/31/18	*

## Loretta Dougherty

---

**From:** Doug Johnstone  
**Sent:** Friday, September 30, 2016 8:12 AM  
**To:** David Panagore  
**Cc:** Loretta Dougherty  
**Subject:** Application to Join Building Committee  
**Attachments:** Kelly Application.pdf; bc.xls

FYI – Attached please find an application to join the Building Committee submitted by Paul Kelly. Currently there is one alternate member vacancy, which the Selectmen have the authority to appoint until 10/22/16 (highlighted in yellow on the roster attached) should they choose to do so.

Please add to the Selectmen's agenda when possible.

Thank you.

dj



## WASTEWATER CONTRACT AMENDMENT

Requested by: DPW Director Richard J. Waldo, P.E.

Action Sought: Discussion & Approval

### Proposed Motions

**Move that the Board of Selectmen vote to approve Contract Amendment #14-1 with AECOM in the amount of \$45,000 to cover costs associated with the installation of sewer stubs at various locations within the Commercial Street Phase 3 Reconstruction area.**

### Additional Information

Commercial Street Reconstruction Phase III is in full swing and the finished product will hopefully lead to an undisturbed surface for many years to come. In order to do so, it is important that we install sewer stubs from the sewer main to the property line of abutting properties. By installing these service lines a private contractor can connect these properties to the sewer system without disturbing the roadway surface. Of course given that the sewer system is in a state of limited capacity these properties would need approval from the water & sewer board before connection.

Please see additional contract information attached.

### Board Action

<i>Motion</i>	<i>Second</i>	<i>In favor</i>	<i>Opposed</i>	<i>Disposition</i>



CONTRACT AMENDMENT	
CLIENT: Town of Provincetown, MA	SERVICE AGREEMENT DATE: June 29, 2001
POINT OF CONTACT: Richard J. Waldo	PROJECT: Wastewater Treatment Plant and Sewer Collection System
CONTRACTOR: AECOM Technical Services, Inc.	CHANGE AMENDMENT NO: 14-1
POINT OF CONTACT: Rob Adams	DATE: September 30, 2016

EXCEPT AS OTHERWISE EXPRESSLY STIPULATED, AECOM AGREES TO PERFORM THE WORK DESCRIBED HEREIN IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF THE ABOVE MENTIONED SERVICE AGREEMENT.

**TASK DESCRIPTION:**

In accordance with AECOM's proposal, dated September 30, 2016, including all attachments (Exhibit 1), provide construction of sewer service connections associated with the Phase 3 Commercial Street Reconstruction Project.

**SCHEDULE:** The above work shall commence on the date the contract amendment is executed. The proposed work will be performed in coordination with the Commercial Street Phase 3 Reconstruction Project currently scheduled to begin in the Fall of 2016.

**FUNDING:** \$45,000.00

The work will be performed on a lump sum basis. Progress invoices shall be submitted on a monthly basis based on the percentage of work completed to date. All payments are due within 30 days of invoice dates.

**TERMINATION:**

Either party may terminate the work of this contract amendment for their convenience provided that they provide the other party with at least 10 days written notice. AECOM will be compensated for all services properly provided prior to the termination date.

**THIS CONTRACT AMENDMENT SERVES TO AUTHORIZE WORK WHICH WAS ENVISIONED IN THE SCOPE OF THE SERVICE AGREEMENT. ALL TERMS AND CONDITIONS NEGOTIATED UNDER THE BASE SERVICE AGREEMENT REMAIN IN FORCE AND ARE APPLICABLE TO THIS CONTRACT AMENDMENT.**

AECOM Technical Services, Inc.:

Robert B. Adams, Associate Vice President

9/30/16

Date

**TOWN OF PROVINCETOWN, MA:**

*Board of Selectmen:*

\_\_\_\_\_  
Raphael W. Richter, Chair

\_\_\_\_\_  
Date

\_\_\_\_\_  
Erik P. Yingling, Vice Chair

\_\_\_\_\_  
Date

\_\_\_\_\_  
Robert Anthony

\_\_\_\_\_  
Date

\_\_\_\_\_  
Thomas N. Donegan

\_\_\_\_\_  
Date

\_\_\_\_\_  
Cheryl Andrews

\_\_\_\_\_  
Date

*Town Manager:*

\_\_\_\_\_  
David Panagore

\_\_\_\_\_  
Date

In accordance with M.G.L. Chapter 44, Section 31C, this is to certify that an appropriation in the amount of this contract amendment is available therefore and that the Board of Selectmen has been authorized to execute the contract amendment and approve all requisitions.

\_\_\_\_\_  
Ruth Lewis, Interim Finance Director

\_\_\_\_\_  
Date



AECOM  
250 Apollo Drive  
Chelmsford, MA 01824  
www.aecom.com

978.905.2100 tel  
978.905.2101 fax

Exhibit 1; CA No. 14-1

September 30, 2016

Mr. Richard J. Waldo, P.E.  
Department of Public Works - Director  
Town of Provincetown  
2 Mayflower Street  
Provincetown, MA 02657

**SUBJECT: AECOM Contract Amendment No. 14-1**  
Sewer Connections – Phase 3 Commercial Street Reconstruction  
Provincetown, MA

Dear Mr. Waldo:

Per your request, we are pleased to provide the Town with a construction cost proposal in the amount of \$45,000.00 to provide additional sewer service connections for properties associated with the Phase 3 Commercial Street Reconstruction Project.

#### **BACKGROUND**

At the Special Town Meeting held on April 6, 2015, voters approved \$3 million in borrowing authorization under Article 10 to provide additional optimization and expansion of the Town's wastewater treatment and collection system. The intent was that this borrowing authorization would provide for several years' worth of planning, engineering and construction funding so that the voters are not required to consider a wastewater funding article every year. Several sewer connections have been identified in the area of the planned Phase 3 Commercial Street Reconstruction. These sewer connections would provide the ability for properties to connect to the sewer in the future without significant disturbance to the future reconstructed Commercial Street.

#### **SCOPE OF WORK**

The scope of work for this contract amendment includes sewer service connections and associated temporary road restoration for properties associated with the Phase 3 Commercial Street Reconstruction. A summary of the work is provided below:

1. 409A Commercial Street – Install 3" vacuum sewer stub (approx. 20').
2. 416 Commercial Street – Install 6" gravity sewer stub (approx. 30').
3. 448 Commercial Street (Bangs Court) – Tap existing 10" vacuum main and install 4" vacuum stub with gate valve at the intersection of Commercial Street and Bangs Court (approx. 25').
4. 466 Commercial Street – Install 6" gravity sewer stub (approx. 25').
5. 477 Commercial Street – Install 3" vacuum sewer stub (approx. 20').

Mr. Richard J. Waldo  
September 30, 2016  
Page 2 of 2

A detailed pricing breakdown is provided in Attachment B.

#### **PRICING**

The basis of our costs is provided in Attachment A. A detailed pricing breakdown is provided in Attachment B. The scope of this work is shown on the attached drawings prepared by AECOM titled *AECOM CA No.14-1*, dated September 30, 2016, as annotated (Attachment C).

This proposal is based on the execution of a mutually acceptable contract amendment. All work will be performed in accordance with the terms and conditions of AECOM's existing contract with the Town.

Should you find this proposal acceptable, we have enclosed two (2) copies of the Contract Amendment for your execution. Upon execution, please return one copy for our records. In the meantime, should you have any questions please do not hesitate to contact us.

Very truly yours,



Robert B. Adams, P.E.  
Associate Vice President

#### **Attachments (4)**

- 1 – Contract Amendment No. 14-1 (2 pages)
- 2 – Attachment A – Basis of Cost (1 pages)
- 3 – Attachment B – Detailed Cost Breakdown (1 pages)
- 4 – Attachment C – Drawings (5 Pages)

**ATTACHMENT A**  
**BASIS OF COST**  
**Sewer Connections – Phase 3 Commercial Street Reconstruction**  
**Town of Provincetown, MA**  
**September 30, 2016**

1. All work is based on the plans prepared by AECOM, titled *Sewer Connections – Phase 3 Commercial Street Reconstruction (as annotated)*, dated September 30, 2016 (Attachment C).
2. This proposal/contract amendment addresses the capital costs associated with construction only, and does not include any additional operation & maintenance (O&M) costs associated with this work.
3. This work will be performed in coordination with Phase 3 Commercial Street Reconstruction Project, however it is anticipated that the work will be substantial complete by October 31, 2016.
4. Sewer stubs will be provided for only those properties identified on the Contract Drawings (5 total).
5. Gravity sewer stubs will be installed from the sewer main in the street to the edge of the existing roadway. Each property owner will be responsible for making the final connection between their existing plumbing or soil pipe and the sewer stub furnished by AECOM.
6. Vacuum sewer stubs are being provided to accommodate adding additional vacuum structures in the future. However, these vacuum structures (i.e. valve pits and buffer tanks) have not been included as part of this work. The vacuum structures associated with these stubs will need to be installed at a later date as part of a separate contract amendment.
7. AECOM has located the sewer stubs for each property to receive a connection based on available information, as well as, site inspections for each property. For those properties where existing information was not available, and/or it was not evident on where to locate the stub based on our site inspection, AECOM will attempt to coordinate the final stub location during construction with the property owners with assistance from the Town.
8. Costs for providing Police Details for traffic control are not included and will be paid for separately by the Town.
9. It is understood by both parties that many of the existing water mains in Provincetown are constructed old asbestos-concrete (AC) pipe. AECOM has attempted to design the new sewers to impact the existing water mains as little as possible. However, it is understood that old AC water mains are delicate and can be easily disturbed/damaged during construction. This work (if encountered) would be considered an unforeseen condition and handled separately.
10. Costs for any drainage replacement and paving are not included. All drainage and paving work will be addressed under a separate contract (Phase 3 Commercial Street Paving Project).

**ATTACHMENT B - CONTRACT AMENDMENT NO. 14-1**

**AECOM**

**Detailed Cost Breakdown**

Provincetown, Massachusetts

Design-Build-Operate

Wastewater Collection System, Treatment Plant, & Disposal System

Sewer Connections - Phase 3 Commercial Street Reconstruction

250 Apollo Drive  
Chelmsford, MA 01824

September 30, 2016

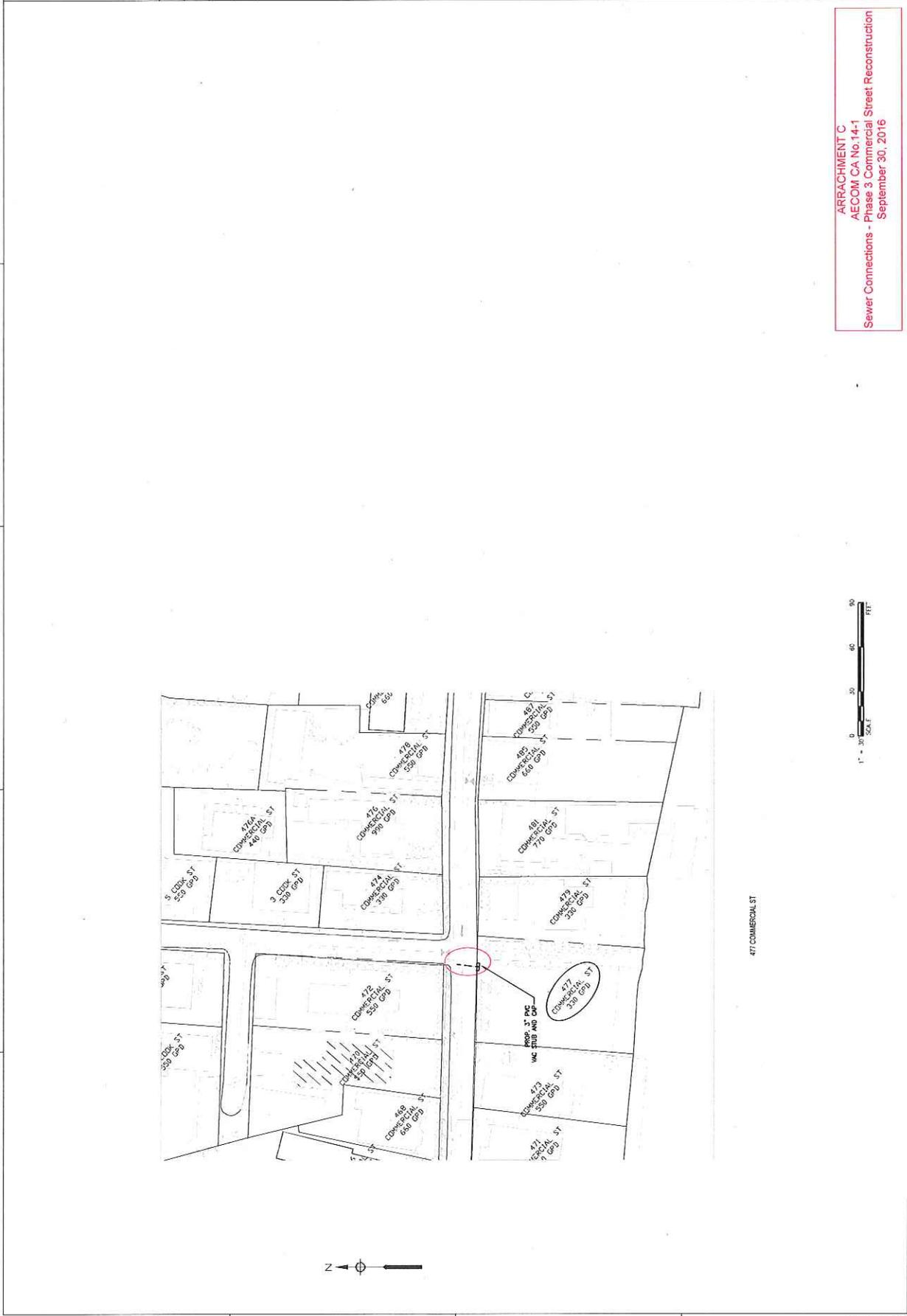
ITEM	DESCRIPTION OF WORK	QTY	UNIT	UNIT PRICE	SCHEDULED VALUE
1	<b>GENERAL ITEMS</b>				
2	Contractor General Conditions	1	LS	\$2,500.00	\$2,500.00
3	Project Mgmt, Admin, & Field Services	1	LS	\$5,000.00	\$5,000.00
4	<b>SUBTOTAL - GENERAL ITEMS</b>				<b>\$7,500.00</b>
5					
6	<b>ADDITIONAL SEWER CONNECTIONS</b>				
7	409A Commercial Street				
8	3" PVC Vacuum Sewer Stub	1	LS	\$5,500.00	\$5,500.00
9	Temporary Road Restoration - Gravel	1	LS	\$1,500.00	\$1,500.00
10	416 Commercial Street				
11	6" PVC Gravity Sewer Stub	1	LS	\$5,500.00	\$5,500.00
12	Temporary Road Restoration - Gravel	1	LS	\$1,500.00	\$1,500.00
13	448 Commercial Street (Bangs Court)				
14	Tap Existing 10" Vac Main	1	LS	\$1,500.00	\$1,500.00
15	4" PVC Vacuum Sewer Stub	1	LS	\$5,500.00	\$5,500.00
16	4" Gate Valve	1	LS	\$1,000.00	\$1,000.00
17	Temporary Road Restoration - Gravel	1	LS	\$1,500.00	\$1,500.00
18	466 Commercial Street				
19	6" PVC Gravity Sewer Stub	1	LS	\$5,500.00	\$5,500.00
20	Temporary Road Restoration - Gravel	1	LS	\$1,500.00	\$1,500.00
21	477 Commercial Street				
22	3" PVC Vacuum Sewer Stub	1	LS	\$5,500.00	\$5,500.00
23	Temporary Road Restoration - Gravel	1	EA	\$1,500.00	\$1,500.00
24					
25	<b>SUBTOTAL - ADDITIONAL CONNECTIONS</b>				<b>\$37,500.00</b>
26					
27	<b>TOTAL - AECOM CA# 14-1</b>				<b>\$45,000.00</b>





PERSONS		<b>AECOM</b> 100 FEDERAL STREET, SUITE 200 BOSTON, MASSACHUSETTS 02110 PHONE: (617) 552-1100 FAX: (617) 552-1101 WWW.AECOM.COM	TOWN OF PROVINCETOWN, MASSACHUSETTS WASTEWATER COLLECTION SYSTEM SEWER CONNECTIONS 2016 COMMERCIAL STREET PAVING III		PROJECT NO. 000000 CAD DRAW FILE DESIGN BY: MJE DRAWN BY: MJE DATE PLOTTED: 09/30/2016 DATE PRINTED: 09/30/2016 SCALE: AS SHOWN	SHEET <b>SK-102</b> OF
NO.	NAME		DATE	DESCRIPTION		

ARRACHMENT C  
 AECOM CA No. 14-1  
 Sewer Connections - Phase 3 Commercial Street Reconstruction  
 September 30, 2016

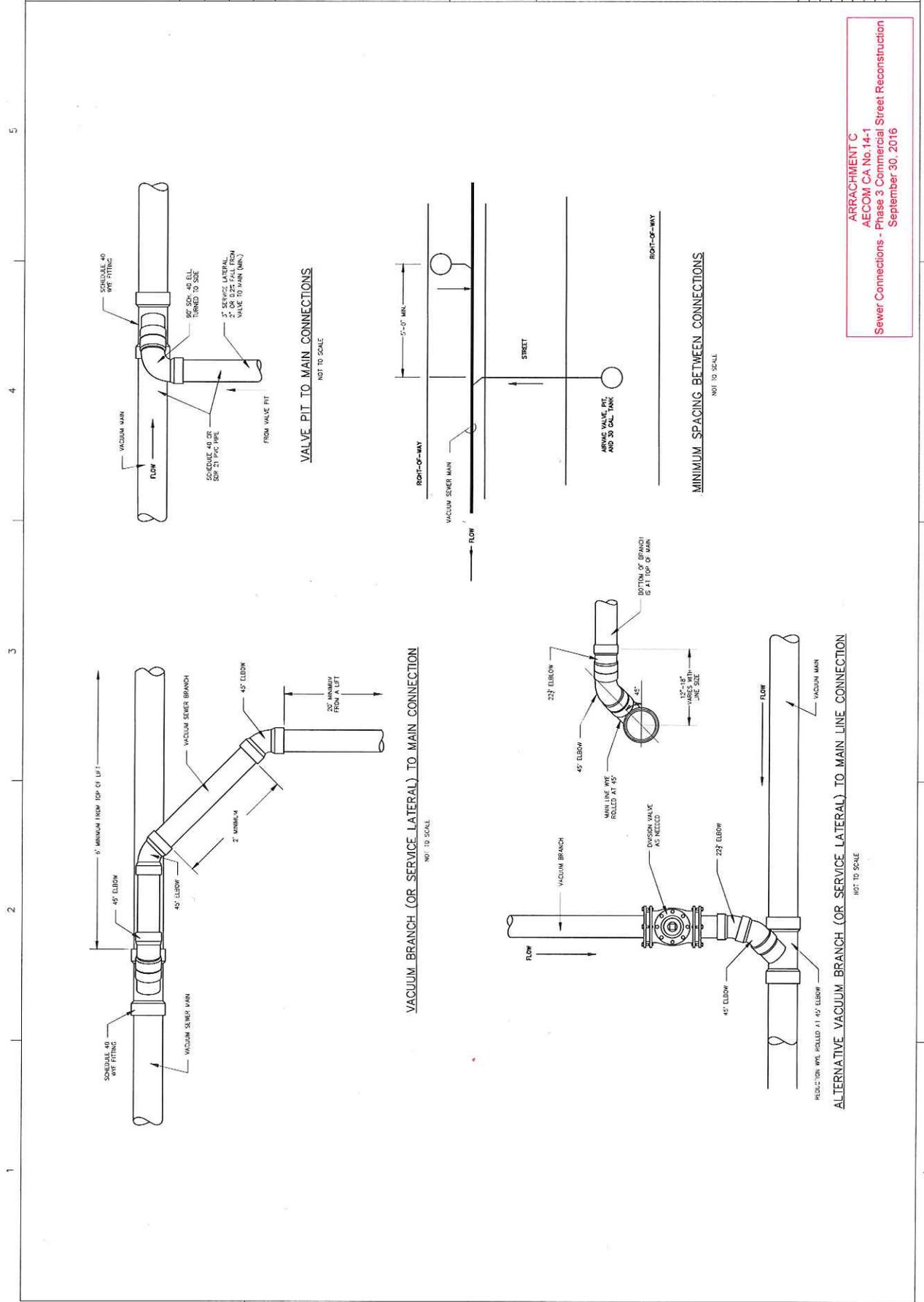




ARRACHMENT C  
 AECOM CA No.14-1  
 Sewer Connections - Phase 3 Commercial Street Reconstruction  
 September 30, 2016

TOWN OF PROVINCETOWN, MASSACHUSETTS  
 WASTEWATER COLLECTION SYSTEM  
 SEWER CONNECTIONS  
 DETAILS II  
 COMMERCIAL ST PHASE 3 PAVING

PROJECT NO.	0000000
DATE	09/30/16
DESIGN BY	ME
DRAWN BY	ME
CHECKED BY	ME
DATE	09/30/16
SCALE	AS SHOWN
SK-104	
SHEET -- OF --	



1 2 3 4 5

1 2 3 4 5

ANSI 9-21-25-18



Provincetown Board of Selectmen  
**AGENDA ACTION REQUEST**

6B

Tuesday, October 11, 2016

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## HOUSE BILL NO. 4216

### Approval of Language

Requested by: Chairman Raphael W. Richter & Town Manager David B. Panagore

Action sought: Discussion/Approval

#### Proposed Motion(s)

Move that the Board of Selectmen vote to approve the language contained in H.4216, as amended in SECTION 1, by striking out, in line 5, the figure "20" and inserting in place thereof the following figure: "35"; and in SECTION 2, by striking out, in lines 24 and 25, the words "within 3 months after the date on which the bill or notice of assessment was sent" and inserting in place thereof the following words: "not later than April 1 of the year to which the tax relates or within 3 months after the bill or notice of assessment was sent, whichever is later."

#### Additional Information

See attached.

#### Board Action

<i>Motion</i>	<i>Second</i>	<i>Yea</i>	<i>Nay</i>	<i>Abstain</i>	<i>Disposition</i>

SECTION 1. Notwithstanding section 5C of chapter 59 of the General Laws or any other general or special law to the contrary, with respect to each parcel of real property classified as class one, residential, in the town of Provincetown as certified by the commissioner of revenue to be assessing all local property at its full and fair cash valuation, and with the approval of the board of selectmen, there shall be an exemption equal to not more than ~~20~~ 35 per cent of the average assessed value of all class one residential parcels within the town; provided, however, that the exemption shall be applied only to (1) the principal residence of the taxpayer as used by the taxpayer for income tax purposes or (2) a residential parcel occupied by a resident of the town of Provincetown, other than the taxpayer, occupied on a year-round basis and used as his or her principal residence for income tax purposes; provided that the town may adopt and amend criteria to determine who qualifies as a resident under this act. This exemption shall be in addition to any exemptions allowable under section 5 of said chapter 59; provided, however, that the taxable valuation of the property, after all applicable exemptions, shall not be reduced to below 10 per cent of its full and fair cash valuation, except through the applicability of section 8A of chapter 58 of the General Laws and clause eighteenth of said section 5 of said chapter 59. Where, pursuant to said section 5 of said chapter 59, the exemption is based upon an amount of tax rather than on valuation, the reduction of taxable valuation for the purposes of the preceding sentence shall be computed by dividing the amount of tax by the residential class tax rate of the city and multiplying the result by \$1,000. For the purposes of this paragraph, "parcel" shall mean a unit of real property as defined by the board of assessors of the town in accordance with the deed for the property and shall include a condominium unit.

SECTION 2. A taxpayer aggrieved by the failure to receive the residential exemption authorized under this act may apply for the residential exemption to the board of assessors of the town of Provincetown in writing on a form approved by the board ~~within 3 months after the date on which the bill or notice of assessment was sent~~ not later than April 1 of the year to which the tax relates or within 3 months after the bill or notice of assessment was sent, whichever is later. For the purposes of this act, a timely application filed under this section shall be treated as a timely filed application pursuant to section 59 of said chapter 59 of the General Laws.

SECTION 3. This act shall take effect as of July 1, 2016 and shall apply to taxes levied for fiscal years beginning on or after July 1, 2016.



**Board of Selectmen**  
Town Hall, 260 Commercial Street  
Provincetown, Massachusetts 02657  
Telephone (508) 487-7003  
Facsimile (508) 487-9560

October 12, 2016

The Honorable Representative Sarah K. Peake  
Massachusetts State House, Room 163  
Boston, MA 02133

Re: H4216 – An Act Increasing the Exemption for Residential Property in the Town of Provincetown

Dear Representative Peake:

On Tuesday, October 11, 2016, the Provincetown Board of Selectmen voted to approve Senator Daniel A. Wolf's amendment to the above mentioned Bill as follows:

**"Move that the Board of Selectmen vote to approve the language contained in H.4216, as amended in SECTION 1, by striking out, in line 5, the figure '20' and inserting in place thereof the following figure: '35'; and in SECTION 2, by striking out, in lines 24 and 25, the words 'within 3 months after the date on which the bill or notice of assessment was sent' and inserting in place thereof the following words: 'not later than April 1 of the year to which the tax relates or within 3 months after the bill or notice of assessment was sent, whichever is later.' "**

Enclosed is a certified copy of the vote. Please let us know if there is anything else that may be needed. The Board wishes to express our thanks to you and Senator Wolf for all of the hard work you continue to do for the Town of Provincetown.

Sincerely,

Raphael W. Richter, Chairman  
Provincetown Board of Selectmen

David B. Panagore, Town Manager  
Town of Provincetown

RWR/DBP:ld  
Enclosure

cc: The Honorable State Senator Daniel A. Wolf



Provincetown Board of Selectmen  
**AGENDA ACTION REQUEST**

Tuesday, October 11, 2016

7A

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## TOWN MANAGER'S REPORT

### Administrative Updates

Requested by: Town Manager David B. Panagore

Action Sought: Discussion

Proposed Motion(s)

**Discussion dependent – votes may be taken.**

### Additional Information

- i. Discussion on possible Joint Meeting topics with VSB, and
- ii. Fall Town Forum.

### Board Action

<i>Motion</i>	<i>Second</i>	<i>Yea</i>	<i>Nay</i>	<i>Abstain</i>	<i>Disposition</i>

## DRAFT AGENDA FOR THE NOVEMBER TOWN FORUMS

Nov. 16	Nov. 19	
		Survey, Process, Topic and Other Handouts Available
5:30 PM		Food available for the Wednesday Town Forum
6 PM	10 AM	Welcome and Agenda for the Town Forum
		Overview Presentation by the Town Manager
		The purpose of the pre-Town Meeting Forum is...
		Year-long process with an Advisory Committee
		Earlier information for Town Meeting voters
		A lot of topics at Town Meeting are important, but.....
		Focus today on a few issues that need more dialogue
		Issue presentations (10 minutes each, with Handouts)
		Housing: Inclusionary By-Law
		Infrastructure: New Police Station
		Financial: Forecast
		Town Meeting: Civic Engagement Process
7 PM	11 AM	Instructions for Facilitated Small Group Discussions
		1 <sup>st</sup> Small Group – Each participant chooses an issue group
		2 <sup>nd</sup> Small Group if time - Participants assigned to an issue
	Noon	Food available for the Saturday Town Forum
8 PM	12:30 PM	Brief Reports by Discussion Group Facilitators
		Questions and Comments from the Participants
~9 PM	~1:30 PM	Closing Remarks
		Reminder to Complete the Survey
		Invitation to remain engaged
		What topics do you want to know more about?
		Encourage others to watch the PTV replays
		Encourage all voters to come to Town Meeting
~1/2 hour following Forum		Staff available to answer individual questions

*For discussion at the October 11<sup>th</sup> Board of Selectmen Meeting*



Provincetown Board of Selectmen  
**AGENDA ACTION REQUEST**

Tuesday, October 11, 2016

7B

## OTHER

Requested by: Town Manager David B. Panagore

Action Sought: Discussion

Proposed Motion(s)

**Discussion Dependent – votes may be taken.**

Additional Information

### Board Action

<i>Motion</i>	<i>Second</i>	<i>Yea</i>	<i>Nay</i>	<i>Abstain</i>	<i>Disposition</i>



Provincetown Board of Selectmen

**AGENDA ACTION REQUEST**

Tuesday, October 11, 2016

8

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## MINUTES OF BOARD OF SELECTMEN'S MEETINGS

Requested by: BOS Secretary Loretta Dougherty

Action Sought: Approval

### Proposed Motion(s)

**Move that the Board of Selectmen approve the minutes of:**

- September 21, 2015 (Special)             as printed     with changes so noted
- September 26, 2016 (Special)        as printed     with changes so noted
- September 26, 2016 (Regular)        as printed     with changes so noted

### Additional Information

See attached minutes.

### Board Action

<i>Motion</i>	<i>Second</i>	<i>Yea</i>	<i>Nay</i>	<i>Abstain</i>	<i>Disposition</i>

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**TOWN OF PROVINCETOWN – BOARD OF SELECTMEN  
MONDAY, SEPTEMBER 21, 2015 @ 6 p.m.  
SPECIAL MEETING  
TOWN HALL – JUDGE WELSH ROOM  
DRAFT**

Chairman Tom Donegan called the open meeting to order at 6:14 p.m. noting the following Board of Selectmen members: Tom Donegan, Erik Yingling, Cheryl Andrews, and Robert Anthony.

Excused: Raphael Richter

Other attendees: Town Manager David Panagore, Asst. Town Manager David Gardner, School Superintendent Dr. Beth Singer, School Committee Chair Anthony Brackett, and Police Chief Jim Golden.

Recorder: Loretta Dougherty

**1. Approve Articles and Vote to Insert in the October 26, 2015, Special Town Meeting**

**Warrant:**

A brief discussion was held for clarification purposes on the terms "approve and insert" contained in the language of the motion to be made. It was determined that only the language of the articles was being approved this evening. Also discussed was the need for the Board to review Articles bearing its name, as having requested the articles, prior to their being brought before the Board for approval.

Tom asked to take Article 4 by itself as Dr. Singer and Mr. Brackett were in the audience and available for discussion.

**Article 4 - High School HVAC and Roof Replacement Project:**

School Superintendent **Dr. Beth Singer** and School Committee Chairman **Anthony Brackett** appeared before the Board. The School Committee has reviewed the language contained in Article 4 as has the MSBA and MSBA legal counsel.

**Cheryl** was concerned about the Board of Selectmen being listed as requesting this article and questioned being a presenter. She feels that a presenter should be able to answer any questions the public may have concerning an article and she just recently received this to review.

**David G.** clarified that all articles are inserted by the Board of Selectmen and if the Board chooses not to insert it the School Committee may insert it and sponsor it themselves. However, the MSBA grant is with the Town and we are the ones who apply for that grant and are taking it to Town Meeting. The Board agreed to keep their name on the article.

**Dr. Singer** reviewed the article with everyone. The MSBA legal department has come back with a couple of changes which are included in the document before the Board tonight. She stated that some of the Board of Selectmen has done a walk through already. The heating portion of this project was in the renovation plan in 2001. The town did not fund this project. The cost to maintain the system has grown over time. It is a steam system and it is very difficult to maintain and is not efficient. As we must comply with ADA we have to include these costs in this budget even though we do not plan to spend the money. The budget amount will be \$400,000 more than we will actually spend. It also includes a power generator; roofing for the gymnasium and eight windows for the

gym building. If we put in skylights it will save us a lot of money. As the bills come in the town pays them and within 15 days the state reimburses the town. There are some ineligible costs if you exceed certain limits. The use of this heating system is the biggest consumer of energy in Town; more than Town Hall and the Library combined. In terms of energy savings, there will be 1.2 to 1.4 billion BTUs saved annually with a savings in oil consumption of \$21,000-\$24,000 annually. There is a contingency included; some is eligible for reimbursement and some is not. Warranties vary on the type of equipment. There are no general contractors or sub-contractors. The people doing the HVAC are strictly HVAC personnel and the people doing the roof will be roofers.

**Tony B.** stated that they almost did not get this grant. They have no guarantee they could avail themselves of this grant again in the future, if they pass this up now.

**Robert** asked about skylights and leakage.

**Dr. Singer** stated these are built into the rubber roof and do not leak. There would be a savings of about \$100,000. The engineers told them that the skylight would absolutely not leak.

**Tom motioned without objection Article 4 as approved, as presented.**

**Tom** asked to take item 3 out of order so Chief Golden could give the police report before the Board continued with the review of the Articles for the warrant.

### **3. Police Report for the Month of August 2015:**

**Chief Golden** gave the Police Report.

**Robert** asked about the alarms and whether we had issued any citations as yet.

**Chief Golden** stated that they are following the guidelines, as they have been outlined, and citations are being issued.

A brief discussion was held on the appointing process for the Community Engagement Committee which was identified as an ad hoc committee that just uses the town's facility for their meetings.

**David G.** stated that the original appointments had been made by Rick Murray, Peter Petas, and himself. He did not recall how new members were to be handled but will check into the process.

**Chief Golden** told everyone that there will be a community policing training held on Friday, October 16<sup>th</sup> which will follow the same format as the one held this past March. No arrangements have been made yet as to where the training will be held in October.

Without objection the Board continued with the Articles. (See Addendum 1 - Draft with Town Counsel's comments presented to the Board at this meeting.)

### **Article 1 – Prior Year Bills.**

**Article 1 was approved.**

### **Article 2 – Cape Cod Greenhead Fly Control District Assessment:**

**Article 2 was approved.**

### **Article 3 - New Parking Lot Equipment:**

**David G.** stated that this Article completes the last phase of the replacement of the equipment at the MPL; the software for the transponder system. This cost was not covered in the CIP, in the spring.

**Article 3 was approved.**

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**Article 5 - DPW Equipment-Sidewalk Maintenance Tractor:**

This new equipment is for blowing and plowing the snow on the town's sidewalks. This gives us the capability to do it in-house. The town had to hire a contractor last year and have the snow trucked away.

Erik asked about the sidewalks being cleared by the business owners. He would like to see shared responsibility.

Cheryl is happy to see the town do this.

**Article 5 was approved.**

**Article 6 - Design Services Contract for a New Police Station:**

The language was amended to remove, "...site plan for 3 Jerome Smith Road (formerly the Veterans of Foreign Wars Lewis A. Young Post 3152 Property) for housing...".

**Article 6 was approved, as amended.**

**Article 7 – Mental Health/Substance Abuse Case Work:**

**Article 7 was approved.**

**Article 8 – Adoption of Small Personal Property Exemption:**

**Article 8 was approved.**

**Article 9 – General Bylaw Amendment-Smoking Ban on Town Beaches:**

Add to the language, "... town-owned beaches".

**Article 9 was approved, as amended.**

**Article 10 – General Bylaw Amendment-Chapter 4, Town Meeting and Town Elections:**

**Article 10 was approved, as presented.**

**Article 11 – General bylaw Amendment-Condominium Conversion Bylaw:**

A discussion was held on different approaches that can be taken in presenting Article 11. It was agreed that, after any necessary revisions by Town Counsel and the Town Manager are made, we present this article.

**Article 11 was approved with revisions by Town Counsel and the Town Manager, as amended.**

**Article 12 – An Act Authorizing the Provincetown Condominium and Cooperative Conversion Bylaw:**

**Article 12 was approved, as amended.**

**Article 13 – Zoning Bylaw Amendment-Article 2, §2440, Use Regulations Articles:**

**Article 13 was approved, as amended.**

**Article 14 – Zoning Bylaw Amendment-Article 2, §2440, Use Regulations Articles:**

**Article 14 was approved, as amended.**

**Article 15 – Zoning bylaw Amendment-Article 2, §2440, Use Regulations Articles:**

**Article 15 was approved, as amended.**

**Article 16 – Zoning Bylaw Amendment-Article 1, Definitions:**

**Article 16 was approved, as amended.**

**Article 17 – Zoning Bylaw Amendment-Article 4, §4028, Special Regulations:**

Article 17 was approved, as amended.

**Article 18 – Zoning bylaw Amendment-Article 2, §2320 High Elevation Protection District Regulations:**

Article 18 was approved, as amended.

**Article 19 – Zoning Bylaw Amendment-Article 4, §4810 Inclusionary Housing Bylaw:**

It was decided not to bring this article forward at the fall Town Meeting. There still needs to be some work done on the Article, and it will be brought forward at the spring Town Meeting.

Without objection Article 19 was removed.

**MOTION:** Move that the Board of Selectmen vote to approve Articles 1, 2, 3 and 5; Article 6 (as amended); Articles 7 and 8; Article 9 (as amended); Article 10; Article 11 (as amended); Article 12 (as amended), and Articles 13, 14, 15, 16, 17, and 18 (all as amended).

**Motion:** Tom Donegan

**Seconded:** Erik Yingling

4/0/0 Motion passed.

The Board requested the following Articles be placed on the Consent Agenda: Articles 1, 2, 15, 16, 17, and 18.

**2. Insert Ballot Question for Special Town Election to be held on Tuesday, October 27, 2015:**

The Ballot Question voted on stated, "Shall the Town of Provincetown be allowed to exempt from the provisions of Proposition two-and-one-half, so called, the amounts required to pay for the bonds issued in order to pay costs of the replacement of the heating system, gymnasium roofs, gymnasium windows, and the installation of an emergency generator, at the Provincetown High School building located at 12 Winslow Street, Provincetown, MA, including the payment of all costs incidental or related thereto".

**MOTION:** Move that the Board of Selectmen vote, pursuant to MGL C.59, §21C(g), to insert the attached ballot question onto the October 27, 2015, Special Town Election, as presented by the Town Manager

**Motion:** Cheryl Andrews

**Seconded:** Erik Yingling

4/0/0 Motion passed.

4. **Other**  
None

There being no further motions the meeting was adjourned at 8:05 pm.

**Minutes transcribed by:** Loretta Dougherty

(Addendum 1)

## **DRAFT (K&P Comments)**

### **Town Warrant**

**Special Town Meeting – Monday, October 26, 2015**

**Commonwealth of Massachusetts Barnstable, ss.**

To either of the Constables of the Town of Provincetown, Greetings:

In the Name of the Commonwealth of Massachusetts and in the manner prescribed in the Charter and Bylaws of said Town, you are hereby directed to notify the inhabitants of the Town qualified by law to vote in Town affairs to meet and assemble at **Provincetown Town Hall, 260 Commercial Street, Provincetown, Massachusetts on Monday the twenty-sixth day of October, A.D. 2015 at 6:00 in the evening**, then and there to act on the following articles, to wit:

**Article 1. Prior Year Bills.**

To see what sum the Town will vote to raise and appropriate or transfer from available funds for the purpose of paying prior year unpaid bills; or to take any other action relative thereto.

*[Requested by the Town Manager]*

**Article 2. Cape Cod Greenhead Fly Control District Assessment.**

To see if the Town will vote to raise and appropriate an amount not to exceed \$1,438.75 for Greenhead Fly Control as authorized by Section 24, Chapter 252 of the General Laws; and authorize the Town Treasurer to pay said appropriation into the State Treasury; or to take any other action relative thereto.

*[Requested by the Board of Selectmen and the Town Manager]*

**Note:** This article was approved as part of the consent agenda at the April Annual Town Meeting. Unfortunately it did not have an amount included. It needs to be approved with an amount listed.

**Article 3. New Parking Lot Equipment.**

To see if the Town will vote to transfer an amount not to exceed \$32,418.75 from the Parking Fund to be expended under the direction of the Town Manager for the upgrade of parking lot equipment, and all costs incidental and related thereto; or take any other action relative thereto.

*[Requested by the Board of Selectmen and the Town Manager]*

**Article 4. High School HVAC and Roof Replacement Project.**

To see if the Town will vote to appropriate, borrow or transfer from available funds, an amount not to exceed \$7,310,550 under the direction of *the School Building Committee* for the Provincetown High School building located at 12 Winslow Street, Provincetown, MA., for the purpose of replacement of the heating system, gymnasium roofs, gymnasium windows, and the installation of an emergency generator, which proposed repair project would materially extend the useful life of the school and preserve an asset

that otherwise is capable of supporting the required educational program and for which the Town may be eligible for a school construction grant from the Massachusetts School Building Authority ("MSBA"). The Town acknowledges that the MSBA's grant program is a non-entitlement, discretionary program based on need, as determined by the MSBA, and any project costs the Town incurs in excess of any grant approved by and received from the MSBA shall be the sole responsibility of the Town. Any grant that the Town may receive from the MSBA for the Project shall not exceed the lesser of (1) 50.68 percent (%) of eligible, approved project costs, as determined by the MSBA, or (2) the total maximum grant amount determined by the MSBA, provided that the appropriation shall be contingent on a Proposition 2½ Debt Exclusion ballot question; or to take any other action relative thereto.

*[Requested by the Board of Selectmen and the School Committee]*

**Note: language provided by MSBA, 2 ½ language inserted**

**Article 5. DPW Equipment – Sidewalk Maintenance Tractor.**

To see if the Town will vote to raise and appropriate, transfer from available funds, or borrow an amount not to exceed \$40,000 to be expended under the direction of the Town Manager for the purchase of a sidewalk maintenance tractor and all costs incidental and related thereto, for the purpose of sidewalk snow plowing, sweeping and cleaning; or to take any other action relative thereto.

*[Requested by the Board of Selectmen and the Town Manager]*

**Article 6. Design Services Contract for a New Police Station.**

To see if the Town will vote to raise and appropriate, transfer from available funds, or borrow an amount not to exceed \$39,000 to be expended under the direction of the Town Manager for the design and project management services, and all costs incidental and related thereto, in connection with site plan for 3 Jerome Smith Road (formerly the Veterans of Foreign Wars Lewis A. Young Post 3152 Property) for housing, siting and finalizing the conceptual design of a new police station, or to take any action relative thereto.

*[Requested by the Board of Selectmen and the Town Manager]*

**Article 7. Mental Health/Substance Abuse Case Work.**

To see if the Town will vote to raise and appropriate, transfer from available funds, or borrow an amount not to exceed \$50,000 to be expended under the direction of the Town Manager for a grant to support case work to advocate for those with Mental Health and/or Substance Abuse issues and all costs incidental and related thereto; or to take any other action relative thereto.

*[Requested by the Board of Selectmen]*

**Article 8. Adoption of Small Personal Property Exemption.**

To see if the Town will vote to accept the provisions of Massachusetts General Laws Chapter 59 section 5 Clause 54 by establishing a tax exemption for small personal property and to further establish a valuation threshold of \$2,500; or to take any other action relative thereto.

*[Requested by the Board of Assessors and Board of Selectmen]*

**Article 9. General Bylaw Amendment - Smoking Ban on Town Beaches.**

*(Deletions shown in strike through and new text shown as underlined)*

To see if the Town will vote to amend the General Bylaws of the Town of Provincetown by inserting as the new subsection 13-2-23 the following: "13-2-23. Smoking is prohibited in all places designated in Massachusetts General Laws Chapter 270, Section 22, and on all beaches."; or to take any other action relative thereto.

*[Requested by the Board of Health]*

**Article 10. General Bylaw Amendment – Chapter 4 Town Meeting and Town Elections.** *(Deletions shown in strike through and new text shown as underlined)*

To see if the Town will vote to amend the General Bylaw Section 4-3-2 as follows:  
**4-3-2. Limitation on duration of speeches.** No person shall speak for more than ten ~~(40)~~ five (5) minutes on any question unless the time shall be extended by vote of the meeting; or to take any other action relative thereto.

*[Requested by the Board of Selectmen]*

**CONDO CONVERSION COMBINED OPTION 1 AND 2**

**Article 11. General Bylaw Amendment – Condominium Conversion Bylaw**

*(Deletions shown in strike through and new text shown as underlined)*

To see if the Town, under St. 1983, c.527, §2, will vote to adopt the following general by-law to control and regulate condominium conversions through a conversion permitting process:

**Chapter 17. CONDOMINIUM AND COOPERATIVE CONVERSION PERMIT BY-LAW**

**SECTION 1. PURPOSE.**

The Town declares, under St. 1983, c.527, §2, that local conditions constitute an acute rental housing emergency that requires local action, on account of the aggravating impact of the facts set forth in section one of c.527 (including lack of sufficient new rental housing production, prolonged increases in housing costs at a rate substantially exceeding increases in personal income, housing abandonment, increased costs of new housing and construction and finance and the effect of conversion of rental housing into condominiums or cooperatives) and unless the available rental housing stock and the tenants who reside in them receive further protection from the consequences of conversion, the rental housing shortage will generate serious threats to the public health, safety and general welfare of the citizens of the Town, including, particularly, the elderly, the handicapped and persons of low and moderate income and employees in the tourism and other service industries and for municipal employees.

The Town has approximately 4383 housing units and approximately 50% of the housing units are condominium units, 20% are single-family dwellings, and 30% are multi-family units.

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The Town estimates that the vacancy rate for year-round round rental accommodations is less than 1%, creating a severe housing crisis that threatens the Town's economy.

Market conditions encourage conversion of existing housing units to condominiums in the Town, to serve the second home ownership demand and this has caused a shortage of year round rental housing. The desirability of the Town as a second home market, combined with the high density that is allowed by the Town's zoning regulations and the limited amount of land available to develop new housing, has driven up the value of housing accommodations and resulted in the conversion of single-family, multi-family and guest units into condominium units, thereby eliminating year-round rental housing. The rapid conversion to the condominium form of ownership and the increase in the value of those condominiums on the second home ownership market is making it difficult to the point of impossibility for low, moderate and median income families, which includes service industry and municipal employees, as well as elderly residents, who have limited and fixed incomes, to obtain or maintain year-round rental housing in the Town.

The severe shortage of year round rental housing is a serious public emergency that threatens the Town's tourism-based economy and is a serious threat to the public health, safety and general welfare of the citizens of the Town as substandard housing is becoming a resort as persons desiring to locate in Provincetown cannot locate year-round rental accommodations and existing residents are being displaced and are unable to find new year-round rental accommodations.

The effects of condominium conversion cannot be dealt with solely by the operation of the private housing market, and unless the removal of year-round rental units from the market is regulated and controlled, the housing emergency which presently exists in the Town and the inflationary pressures and displacement on residents, the service industry work force, elderly, handicapped and those living on limited and fixed incomes resulting therefrom will continue to produce serious threats to the public health, safety, and general welfare of the citizens of the Town.

In order to protect the public health, safety and general welfare of the citizens of the Town, and to prevent the worsening of the current severe shortage of year round housing that is available to service industry and municipal employees and the elderly and the public emergency resulting therefrom, it is necessary to regulate and control the conversion of housing units to the condominium or cooperative form of property ownership and the removal of housing from the rental market while the Town studies, plans and then develops and implements programs to regulate and manage the housing crisis.

## **SECTION 2. DEFINITIONS.**

As used in this By-law the following terms shall have the following meanings:

- a) "Board": The Board of Selectmen for the Town of Provincetown.
- b) "Condominium Unit": a unit of a condominium, as defined in G.L. c. 183A.

- c) "Cooperative Unit": a residential dwelling space in a building owned by a corporation, the shareholders of which have organized on a cooperative basis for the purpose of leasing such dwelling space to themselves.
- d) "Condominium Conversion": the conversion of a housing unit to a condominium form of ownership.
- e) "Cooperative Conversion": the execution of a lease, of a cooperative unit in a building, with an owner of shares of stock in the corporation which owns the building.
- f) "Removal from market" as applied to a housing unit, shall include, but not be limited to:
- (1) The filing of a condominium master deed, pursuant to G.L. c.183A, for any housing accommodation any part of which was most recently occupied as a rental unit;
  - (2) The demolition of a rental unit;
  - (3) The rehabilitation, repair, or improvement of a rental unit, other than as required by the laws of the Commonwealth or by the Town, in such a way as to prevent residential occupancy during the course of the rehabilitation, repair, or improvement;
  - (4) The conversion of all or part of any building to a cooperative.
- g) "Town": the Town of Provincetown.

### **SECTION 3. APPLICABILITY.**

This By-law shall apply to all buildings or properties, of four units or more, located within the Town which contain four or more units of housing, whether or not said units are occupied, unless otherwise exempted under St. 1983, c.527 (i.e., housing accommodations previously lawfully converted, housing accommodations constructed or converted from a non-housing to a housing use after November 30, 1983, housing accommodations constructed or substantially rehabilitated under a federal mortgage insurance program and housing accommodations financed through the Massachusetts Housing Finance Agency, with an interest subsidy attached thereto).

### **SECTION 4. TWO YEAR PROHIBITION ON CONVERSIONS.**

No condominium or cooperative conversion and no removal from market of a rental housing unit shall be permitted in the Town for two years from the effective date of this By-law, to allow the Town time to study, plan and then develop and implement programs, including but not limited to the regulations in Section 5, to deal with the year round rental housing crisis in the Town.

### **SECTION 5. REGULATIONS.**

A) No condominium or cooperative conversion and no removal from market of a housing unit that is subject to this By-law shall be permitted in the Town, except pursuant to a permit granted under subsections 4(B) and 4(C) hereof.

B) When the Vacancy Rate for year round market rate rental units in the Town exceeds 5%, a building owner may apply to the Board for a permit to convert said building to condominiums or cooperatives. When the Vacancy Rate is equal to or lower than 5%, a building owner may not apply for a permit to convert said building to condominiums or cooperatives unless the financial or other circumstances for the owner are such that prohibition of a conversion would constitute unconstitutional confiscation of the owner's

property. When such an application is made, the Board, before granting a permit, shall be required to make an explicit finding that denial of a conversion permit would constitute such confiscation.

C) The Board shall consider at least the following factors in determining whether to grant or deny a conversion permit.

1) the impact of the proposed conversion upon the tenants sought to be protected by this By-law and upon the availability of year round market rate rental housing of comparable type, quality and cost in the town and upon the overall availability of year round rental housing in the town;

2) the ease or difficulty with which the affected tenants could find alternative year round market rate rental housing in the town of comparable type, quality and cost;

3) any efforts to mitigate the impact of the proposed conversion upon the affected tenants, including but not limited to, guaranteed rights to remain as tenants for a fixed period, full or partial reimbursement of moving expenses and other costs of finding alternative year round rental housing, and the procurement by the building owner for the tenants of alternative year round rental housing in the town of comparable type, quality and cost;

4) the physical condition of the housing involved, and the financial viability to maintain the building as year round market rate rental housing;

5) whether and for how long and why a unit or units in the building have been vacant; and

6) the age, financial status, and health of the affected tenants, and the length of their tenancies.

D) The Board shall have the power to issue such orders and enact such regulations as it may deem necessary to effectuate the purposes of this By-law, and to prescribe the procedure for filing applications for conversion permits, giving notice of applications, holding public hearings upon applications, and rendering decisions upon applications. The Board may impose a reasonable filing fee for applications.

E) The Board shall determine the Vacancy Rate for year round rental units in the Town, using what source or sources of statistical data the Board determines to be appropriate and shall declare a state of public emergency if the Vacancy Rate is equal to or lower than 5% of the overall housing stock. Once a declaration is made, an applicant may ask the Board to reconsider the determination by providing the Board with data that demonstrates, to the Board's satisfaction, that the Vacancy Rate exceeds 5%.

F) Tenants shall have all of the rights provided for under St. 1983, c.527; and, in addition, those rights shall not begin to run until the date of the granting of a conversion permit.

G) It shall be unlawful to commit any acts of harassment against tenants, to fail to make necessary repairs or provide required services, or to seek unreasonable increases in rents, for or during said period for the purpose of seeking to induce tenants to vacate units.

H) An application for a conversion permit shall be accompanied by a written plan setting forth an orderly process for the conversion, and a description of the governing process by which the owners' association or cooperative corporation shall exercise its responsibilities during and after the conversion.

I) An application for a conversion permit shall cover all units in a building; however, the Board may in the exercise of its discretion hereunder condition the grant of the conversion permit upon the building owner making special provisions for certain units and tenants thereof.

J) No conversion permit shall be granted unless the building has been certified by an independent licensed engineer or architect to meet all applicable building and health codes of the Town and Commonwealth.

K) This section shall not be in effect during the any moratorium as provided hereunder.

#### **SECTION 6. SEVERABILITY.**

Should any provision of this By-law or its application to any person or circumstance, be determined to be invalid, that invalidity shall not affect the validity of any other provision or application hereof.

#### **SECTION 7. PENALTIES AND ENFORCEMENT.**

Any person who violates this By-law shall be punished by a fine of three hundred dollars (\$300) per offense. Each day during which a unit is illegally converted or occupied and each day after which an illegal conversion takes place, shall constitute a separate offense, and the conversion of multiple units in a building shall constitute multiple offenses. The Board may enforce this By-law in a court of competent jurisdiction, and may obtain appropriate injunctive relief to enforce the By-law in a civil action.

#### **SECTION 8. EFFECTIVE DATE.**

This By-law shall take effect as provided for under G.L.c.40, §32.

#### *CONDO CONVERSION OPTION 3*

**Article 12. An Act Authorizing the Provincetown Condominium and Cooperative Conversion Bylaw.** To see if the Town will vote to authorize the Board of Selectmen to file a petition with the General Court to authorize the Condominium and Cooperative Conversion Bylaw set forth below; provided, however, that the General Court may make

clerical and editorial changes of form only to the petition, unless the Board of Selectmen votes to approve the amendments to the petition prior to enactment of the special legislation by the General Court; provided further that the Board of Selectmen shall be authorized to approve such amendments to the petition as are within the public purposes of the petition, or to do or act in any manner relative thereto.

### **An Act Authorizing the Provincetown Condominium and Cooperative Conversion By-law.**

Notwithstanding any general or special law to the contrary, including, but not limited to the provisions of St. 1983, c.527, the following Provincetown General By-law, as approved by the Provincetown Town Meeting, is hereby authorized by the General Court:

### **Chapter 18. PROVINCETOWN CONDOMINIUM AND COOPERATIVE CONVERSION BY-LAW**

#### **SECTION 1. PURPOSE.**

The Town declares, under St. 1983, c.527, §2, that local conditions constitute an acute rental housing emergency that requires local action, on account of the aggravating impact of the facts set forth in section one of c.527 (including lack of sufficient new rental housing production, prolonged increases in housing costs at a rate substantially exceeding increases in personal income, housing abandonment, increased costs of new housing and construction and finance and the effect of conversion of rental housing into condominiums or cooperatives) and unless the available rental housing stock and the tenants who reside in them receive further protection from the consequences of conversion, the rental housing shortage will generate serious threats to the public health, safety and general welfare of the citizens of the Town, including, particularly, the elderly, the handicapped and persons of low and moderate income and employees in the tourism and other service industries and for municipal employees.

The Town has approximately 4383 housing units and approximately 50% of the housing units are condominium units, 20% are single-family dwellings, and 30% are multi-family units.

The Town estimates that the vacancy rate for year-round round rental accommodations is less than 1%, creating a severe housing crisis that threatens the Town's economy.

Market conditions encourage conversion of existing housing units to condominiums in the Town, to serve the second home ownership demand and this has caused a shortage of year round rental housing. The desirability of the Town as a second home market, combined with the high density that is allowed by the Town's zoning regulations and the limited amount of land available to develop new housing, has driven up the value of housing accommodations and resulted in the conversion of

single-family, multi-family and guest units into condominium units, thereby eliminating year-round rental housing. The rapid conversion to the condominium form of ownership and the increase in the value of those condominiums on the second home ownership market is making it difficult to the point of impossibility for low, moderate and median income families, which includes service industry and municipal employees, as well as elderly residents, who have limited and fixed incomes, to obtain or maintain year-round rental housing in the Town.

The severe shortage of year round rental housing is a serious public emergency that threatens the Town's tourism-based economy and is a serious threat to the public health, safety and general welfare of the citizens of the Town as substandard housing is becoming a resort as persons desiring to reside in Provincetown cannot locate year-round rental accommodations and existing residents are being displaced and are unable to find new year-round rental accommodations.

The effects of condominium conversion cannot be dealt with solely by the operation of the private housing market, and unless the removal of year-round rental units from the market is regulated and controlled, the housing emergency which presently exists will continue to produce serious threats to the public health, safety, and general welfare of the citizens of the Town.

In order to protect the public health, safety and general welfare of the citizens of the Town, and to prevent the worsening of the current severe shortage of year round housing that is available to service industry and municipal employees and the elderly and the public emergency resulting therefrom, it is necessary to regulate and control the conversion of housing units to the condominium or cooperative form of property ownership and the removal of housing from the rental market while the Town studies, plans and then develops and implements programs to regulate and manage the housing crisis.

## **SECTION 2. DEFINITIONS.**

As used in this By-law the following terms shall have the following meanings:

- a) "Board": The Board of Selectmen for the Town of Provincetown.
- b) "Condominium Unit": a unit of a condominium, as defined in G.L. c. 183A.
- c) "Cooperative Unit": a residential dwelling space in a building owned by a corporation, the shareholders of which have organized on a cooperative basis for the purpose of leasing such dwelling space to themselves.
- d) "Condominium Conversion": the conversion of a housing unit to a condominium form of ownership.
- e) "Cooperative Conversion": the execution of a lease, of a cooperative unit in a building, with an owner of shares of stock in the corporation which owns the building.
- f) "Removal from market" as applied to a housing unit, shall include, but not be limited to:
  - (1) The filing of a condominium master deed, pursuant to G.L. c.183A, for any housing accommodation any part of which was most recently occupied as a rental unit;
  - (2) The demolition of a rental unit;

(3) The rehabilitation, repair, or improvement of a rental unit, other than as required by the laws of the commonwealth or by the Town, in such a way as to prevent residential occupancy during the course of the rehabilitation, repair, or improvement;

(4) The conversion of all or part of any building to a cooperative.

g) "Town": the Town of Provincetown.

### **SECTION 3. APPLICABILITY.**

This By-law shall apply to all buildings or properties located within the Town, as of the effective date of this bylaw, which contain two or more units of housing, whether or not said units are occupied; however, this By-law shall not apply to any housing accommodation lawfully converted before the effective date of this By-law, to any housing accommodation constructed or substantially rehabilitated under a federal mortgage insurance program or any housing accommodations financed through the Massachusetts Housing Finance Agency, with an interest subsidy attached thereto.

### **SECTION 4. REGULATIONS.**

A) No condominium or cooperative conversion and no removal from market of a housing unit subject to this By-law shall be permitted in the Town, except pursuant to a permit granted under subsections 4(B) and 4(C) hereof.

B) When the Vacancy Rate for year round market rate rental units in the Town exceeds 5%, a building owner may apply to the Board for a permit to convert said building to condominiums or cooperatives. When the Vacancy Rate is equal to or lower than 5%, a building owner may not apply for a permit to convert said building to condominiums or cooperatives unless the financial or other circumstances for the owner are such that prohibition of a conversion would constitute unconstitutional confiscation of the owner's property. When such an application is made, the Board, before granting a permit, shall be required to make an explicit finding that denial of a conversion permit would constitute such confiscation.

C) The Board shall consider at least the following factors in determining whether to grant or deny a conversion permit.

1) the impact of the proposed conversion upon the tenants sought to be protected by this By- law and upon the availability of year round market rate rental housing of comparable type, quality and cost in the town and upon the overall availability of year round rental housing in the town;

2) the ease or difficulty with which the affected tenants could find alternative year round market rate rental housing in the town of comparable type, quality and cost;

3) any efforts to mitigate the impact of the proposed conversion upon the affected tenants, including but not limited to, guaranteed rights to remain as tenants for a fixed period, full or partial reimbursement of moving expenses and other costs of finding alternative year round rental housing, and the procurement by the building owner for the

tenants of alternative year round rental housing in the town of comparable type, quality and cost:

4) the physical condition of the housing involved, and the financial viability to maintain the building as year round market rate rental housing;

5) whether and for how long and why a unit or units in the building have been vacant; and

6) the age, financial status, and health of the affected tenants, and the length of their tenancies.

D) The Board shall have the power to issue such orders and enact such regulations as it may deem necessary to effectuate the purposes of this By-law, and to prescribe the procedure for filing applications for conversion permits, giving notice of applications, holding public hearings upon applications, and rendering decisions upon applications. The Board may impose a reasonable filing fee for applications.

E) The Board shall determine the Vacancy Rate for year round rental units in the Town, using what source or sources of statistical data the Board determines to be appropriate and shall declare a state of public emergency if the Vacancy Rate is equal to or lower than 5% of the overall housing stock. Once a declaration is made, an applicant may ask the Board to reconsider the determination by providing the Board with data that demonstrates, to the Board's satisfaction, that the Vacancy Rate exceeds 5%.

F) Tenants shall have all of the rights provided for under St. 1983, c.527; and, in addition, those rights shall not begin to run until the date of the granting of a conversion permit.

G) It shall be unlawful to commit any acts of harassment against tenants, to fail to make necessary repairs or provide required services, or to seek unreasonable increases in rents, for or during said period for the purpose of seeking to induce tenants to vacate units.

H) An application for a conversion permit shall be accompanied by a written plan setting forth an orderly process for the conversion, and a description of the governing process by which the owners' association or cooperative corporation shall exercise its responsibilities during and after the conversion.

I) An application for a conversion permit shall cover all units in a building; however, the Board may in the exercise of its discretion hereunder condition the grant of the conversion permit upon the building owner making special provisions for certain units and tenants thereof.

J) No conversion permit shall be granted unless the building has been certified by an independent licensed engineer or architect to meet all applicable building and health codes of the Town and commonwealth.

**SECTION 5. SEVERABILITY.**

Should any provision of this By-law or its application to any person or circumstance, be determined to be invalid, that invalidity shall not affect the validity of any other provision or application hereof.

**SECTION 6. PENALTIES AND ENFORCEMENT.**

Any person who violates this By-law shall be punished by a fine of three hundred dollars (\$300) per offense. Each day during which a unit is illegally converted or occupied and each day after which an illegal conversion takes place, shall constitute a separate offense, and the conversion of multiple units in a building shall constitute multiple offenses. The Board may enforce this By-law in a court of competent jurisdiction, and may obtain appropriate injunctive relief to enforce the By-law in a civil action.

**SECTION 7. EFFECTIVE DATE.**

This By-law shall take effect when approved by the General Court.  
Or to take any other action relative thereto.

*[Requested by the Board of Selectmen]*

***Article 13. Zoning Bylaw Amendment – Article 2 Section 2440 Use Regulations***

**Articles:** *(Deletions shown in strike through and new text shown as underlined)*

To see if the Town will vote to amend the Provincetown Zoning Bylaws, Article 2, Districts and District Regulations, Section 2440, Permitted Principal Uses, to allow for accessory dwelling units in the Res2 Zoning District, as follows:

Add a footnote to Principal Use, A1a3, Single Family Dwelling, three or more per lot, as follows:

A1a	Single Family Dwelling	Res 1	Res 2	Res 3	TCC	GC	S	M
3.	three or more per lot							
	<del>(each separate structure)</del>	NO	NOPB <sup>20</sup>	YES <sup>8</sup>	YES <sup>8</sup>	YES <sup>8</sup>	NO	NO

Footnote: 20. One accessory dwelling unit may be allowed in the Res1 Zoning District, for a total of two dwelling units per lot, and in the Res2 Zoning District for a total of three dwelling units, only if the following criteria are met: it the accessory dwelling unit is for year-round rental only; it is limited in size to 600 square feet if it is a free-standing dwelling unit or 40% of the gross floor area if it is located within the principal residence.

Or to take any other action relative thereto.

*[Requested by the Planning Board]*

***Article 14. Zoning Bylaw Amendment – Article 2 Section 2440 Use Regulations***

**Articles:** *(Deletions shown in strike through and new text shown as underlined)*

To see if the Town will vote to amend the Provincetown Zoning Bylaws, Article 2, Districts and District Regulations, Section 2440, Permitted Principal Uses, to make the

Planning Board, rather than the ZBA, the Special Permit Granting Authority for two dwelling units on a single lot in the Res2 Zoning District, as follows:

A1a Single Family Dwelling	Res 1	Res 2	Res 3	TCC	GC	S	M
2. two per lot (each separate structure)	PB <sup>20</sup>	<u>BAPB</u>	YES <sup>8</sup>	YES <sup>8</sup>	YES <sup>8</sup>	NO	NO

or take any other action relative thereto.

[Requested by the Planning Board]

**Article 15. Zoning Bylaw Amendment – Article 2 Section 2440 Use Regulations**

**Articles:** (Deletions shown in strike through and new text shown as underlined)

To see if the Town will vote to amend the Provincetown Zoning Bylaws, Article 2, Districts and District Regulations, Section 2440, Permitted Principal Uses, as follows:

A1a Single Family Dwelling	Res 1	Res 2	Res 3	TCC	GC	S	M
3. three or more per lot (each separate structure)	NO	<del>NOPB</del> <sup>20</sup>	YES <sup>8</sup>	YES <sup>8</sup>	YES <sup>8</sup>	NO	NO
4. four or more per lot	NO	NO	<u>PB</u>	<u>PB</u>	<u>PB</u>	NO	NO

A1b Two Family Dwelling	Res 1	Res 2	Res 3	TCC	GC	S	M
3. three or more per lot	NO	NO	YES <sup>8</sup>	YES <sup>8</sup>	YES <sup>8</sup>	NO	NO
4. four or more per lot	NO	NO	<u>PB</u>	<u>PB</u>	<u>PB</u>	NO	NO

A2 Multi Family Dwelling	Res 1	Res 2	Res 3	TCC	GC	S	M
<u>Three units</u>	NO	NO	YES <sup>8</sup>	YES <sup>8</sup>	YES <sup>8</sup>	NO	NO
<u>Four units or more</u>	NO	NO	<u>PB</u>	<u>PB</u>	<u>PB</u>	NO	NO

B13 Large-scale Ground-Mounted Solar Photovoltaic Installation	Res 1	Res 2	Res 3	TCC	GC	S	M
	<u>BAPB</u>	<u>BAPB</u>	<u>BAPB</u>	<u>BAPB</u>	<u>BAPB</u>	YES	YES

D7 Medical Marijuana Treatment Center	Res 1	Res 2	Res 3	TCC	GC	S	M
	NO	NO	<u>BAPB</u>	NO	<u>BAPB</u>	NO	NO

Footnotes:

1. Except "YES" in ~~W-B-ResB~~ for banks and for professional offices including real estate, insurance, and accounting, without stock in trade, with no more than one firm or 2,000 square feet per building and no more than one building per lot.

8. Except "BA" pursuant to Article 4 if the total number of dwelling units on a lot will result in ~~four (4) or more dwelling units.~~

12. After March 1, 1983, for any new construction, any substantial increase in intensity or use or any renovation of an existing structure to include the defined use, a Special Permit as specified in Sec. 5300 may be granted by the Board of Appeals: (a) only upon its written determination that the proposed fast food establishment does not create any

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adverse effect due to hazard or congestion especially including traffic impacts as determined by a traffic impact assessment prepared by the applicant according to Institute of Transportation Engineers guidelines regarding carrying capacity/level of service of the affected streets and any proposed mitigation sufficient to offset those impacts; (b) only if the applicant can demonstrate that the proposed use will not overburden public water, septage or solid waste facilities; (c) only if the applicant provides and enforceable plan for the mitigation and control of trash and litter generated by the proposed establishment; (d) anyonly if the architecture and signage conforms to traditional Cape Cod style; and (e) only if, in order to assure that the concerns of the abutters and residents will be considered as a significant factor in the determination of the benefits or adverse effects of the proposed fast food establishment on the neighborhood and the Town, the Board of Appeals shall make a specific Finding of Significance regarding the response to the proposed use.  
or to take any other action relative thereto.

*[Requested by the Planning Board]*

**Article 6 Zoning Bylaw Amendment – Article 1 Definitions** (*Deletions shown in strike through and new text shown as underlined*)

To see if the Town will vote to amend the Provincetown Zoning Bylaws, Article 1, Definitions, as follows:

**Manufactured Home** means a structure transportable in one or more sections, which is built on a permanent chassis and is designed for use with or without a permanent foundation when connected to the required utilities.

For flood plain management purposes the term "manufactured home" also includes park trailers, travel trailers, and other similar vehicles placed on a site for greater than 180 consecutive days. For insurance purposes the term "manufactured home" does not include park trailers, travel trailers, and other similar vehicles. See Section ~~3400~~4300 Manufactured Homes and Campers.

or to take any other action relative thereto.

*[Requested by the Planning Board]*

**Article 17. Zoning Bylaw Amendment – Article 4 Section 4028 Special Regulations** (*Deletions shown in strike through and new text shown as underlined*)

To see if the Town will vote to amend the Provincetown Zoning Bylaws, Article 4, Special Regulations, Section 4028, as follows:

**4028.** The Planning Board may require the following information in connection with site plan review. In deciding which requirements will apply to a specific application, the review authority shall consider the size and intensity of the use, and the unique circumstances of each application.

*(No change to items sections a. through i.)*

- j. Grading Plan with existing and proposed topography at two-foot contour intervals, only if new, or expanded parking and/or drainage structures are proposed, including the volume and area of graded or excavation material if expected to exceed greater than 2000~~750~~ cubic yards or an area greater than the minimum lot size in the zone in which the parcel is located;

(No further changes to this section)  
or to take any other action relative thereto.

[Requested by the Planning Board]

**Article 18. Zoning Bylaw Amendment – Article 2 Section 2320 High Elevation Protection District Regulations** (Deletions shown in strike through and new text shown as underlined)

To see if the Town will vote to amend the Provincetown Zoning Bylaws, Article 2, Districts and District Regulations, Section 2320, High Elevation Protection District, as follows:

C. Special Regulations for HEP Districts A and B. All new construction or additions and expansions, including but not limited to decks and other non-enclosed structures, even if the overall footprint is not being enlarged or any excavation, land removal or earth moving of more than 2500 cubic feet that will alter the topography from natural grade, whether or not subject to a building permit shall be subject to Site Plan Review as specified in Section ~~4160~~4000 with additional requirements as specified herein.  
or to take any other action relative thereto.

[Requested by the Planning Board]

**Article 19. Zoning Bylaw Amendment – Article 4 Section 4810 Inclusionary Housing Bylaw** (Deletions shown in strike through and new text shown as underlined)

To see if the Town will vote to amend the Provincetown Zoning Bylaws, by inserting as a new Section 4810 the following:

**Section 4810 Inclusionary Housing By-Law**

**1. Purpose and Intent**

The primary purpose of this bylaw is to:

1. Encourage the creation of a range of housing opportunities for households of all incomes, ages and sizes in order to support a strong, stable and diverse year round community and a viable and healthy local workforce and to prevent the displacement of Provincetown residents;
2. Mitigate the impact of condominium conversions and residential development on the availability and cost of housing;
3. Provide a mechanism by which condominium conversions can contribute in a direct way to increasing the supply of affordable and middle income housing;
4. Provide a mechanism by which residential development can contribute in a direct way to increasing the supply of affordable and middle income housing in exchange for a greater density or intensity of development than is otherwise permitted as a matter of right;
5. Support the goals of Provincetown's December 2006 Affordable/Community Housing Action Plan and its January 2014 Update.

A secondary purpose is to create dwelling units eligible for inclusion in the Town's Subsidized Housing Inventory.

**2. Applicability**

This inclusionary by-law shall apply in all zoning districts to the following uses:

- (a) Except as identified under Section 2(c) below, any development that results in an increase in the number of dwelling units, whether by new construction or alteration, expansion, reconstruction, or change of existing residential or non-residential space or use; and
- (b) The conversion to condominiums of two or more dwelling units, even if there is no increase in the total number of dwelling units; (can this apply to two units or does it have to be three units or more? – question for Ilana)
- (c) Any subdivision of land resulting in at least one additional lot;
- (d) Any health care-related development that includes 6 (?) or more independent living units.

(Delete Section 4170 - appropriate sections were rolled into this bylaw; Roll section 4800 into this bylaw; Align Section 8 of this bylaw with definitions in 4800(2) with Article 1, Definitions.)

### **3. Special Permit**

The development of any project as identified in Section 2(a)-(d) above shall require the granting of a Special Permit from the Planning Board. The application procedure and requirements for the special permit shall be as defined in Section 5300 of the zoning bylaw.

Additionally, the project must comply with the provisions of Article 4, Sections 4000 and 4100.

None of the above shall relieve the applicant of complying with other provisions of these Bylaws.

### **4. Mandatory Provision of Affordable Units for all Development**

As a condition of approval for a Special Permit, the applicant shall contribute to the local stock of affordable, median and middle income housing in accordance with the following requirements:

(a) For projects consisting of a total of 5 dwelling units or more, at least 20% of the units created shall be established as affordable housing units in any one or combination of methods provided for below. For the purpose of calculating the 20% affordable housing contribution, all numbers shall be rounded to the nearest whole number. (Or take a payment-in-lieu for a percentage of a unit?)

(1) The affordable housing units shall be constructed or rehabilitated on the locus subject to the special permit (see Section 5); or

(2) The affordable housing units shall be constructed or rehabilitated on a locus other than the one subject to the special permit (see Section 6); or

(3) In lieu of providing such units as specified above, an applicant may provide a payment of equivalent value to the Housing Trust Fund in accordance with Section 4b.

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below (providing a payment-in-lieu of providing affordable units on site does not allow an applicant to increase the number of market rate units on site);

(4) Land dedication (or land dedication with permitting in place for affordable units)

(b) For projects consisting of between 1 and 4 dwelling units, a Housing Contribution to the Housing Trust Fund in the form of a payment in-lieu of creating a partial unit shall be made accordance with the following:

1 unit 20%

2 units 40%

3 units 60%

4 units 80% of the average cost of a dwelling unit (containing the average number of bedrooms for the units in the particular development) in Provincetown in the calendar year prior to the date the first building permit is pulled, the average cost to be determined on an annual basis in January by the Provincetown Assessor based on the average sale price of all 1BR, 2BR, 3BR, 4BR dwelling units that sold in Provincetown in the previous year.

## **5. Provisions Applicable to Affordable Housing Units On-Site**

(a) Siting of affordable units: All affordable units constructed under this by-law shall be situated within the development so as not to be in less desirable locations than market rate units in the development and shall, on average, be no less accessible to public amenities as the market-rate units.

(b) Minimum design and construction for affordable units: Affordable housing units within market rate developments shall be integrated with the rest of the development and shall be compatible in exterior design and interior features, appearance, construction and quality of materials with other units. The number of bedrooms in each affordable unit shall be made a part of the Special Permit and shall be based on local need as determined in consultation with the Community Housing Counsel for each project.

(c) Timing of construction or provision of affordable units or lots: The development of affordable housing units shall take place at the same rate and timeframe as the development of market rate units.

1) Building permits for any phase shall be issued at a ratio of 4 (four) market rate units to 1 (one) affordable unit. Building permits for subsequent phases will not be issued unless all the required affordable units in the preceding phase are constructed and the affordable housing restrictions recorded. The last unit permitted, constructed and occupied shall be a market rate unit.

2) The project may also be constructed in its entirety with all permits issued at once provided that the occupancy permits are issued at a ratio of 4 (four) market rate units to 1 (one) affordable unit. The last occupancy permit to be issued shall be for a market rate unit and shall not be issued unless all affordable units are occupied and the affordable housing restrictions recorded. (Tighten up/combine 1 and 2)

3)The Building Commissioner may grant a modification to the rate and timeframe requirements so long as the last unit permitted, constructed and occupied is a market rate unit.

### **6. Provision of Affordable Housing Units Off-Site**

In lieu of providing such units on site, an applicant subject to the bylaw may develop, construct or otherwise provide affordable units equivalent to those required by Section 4 off-site. All requirements of this bylaw that apply to on-site provision of affordable units shall apply to provision of off-site affordable units. In addition, the location of the off-site units to be provided shall be approved by the Planning Board as an integral element of the special permit review and approval process. Providing affordable units off-site does not allow an applicant to increase the number of market rate units on site.

(If affordable units are not provided on site, maybe 2 times the number required if provided on site. That multiplier could then also be applied to payment-in-lieu/Housing Contribution to the Housing Trust Fund, perhaps 1.5 times the number required.)

### **7. Distribution**

Distribution of affordability for rental or ownership units as Low Income Community Housing or Moderate Income Community Housing or Middle Income Community Housing shall be set as determined by the Planning Board in consultation with and recommendation of the Provincetown Community Housing Council, and made a condition of the Special Permit under this Bylaw.

### **8. Maximum Incomes and Selling Price; Affordable Housing Inventory**

Maximum incomes and sales prices and rents are set forth in Article 1 Definitions. (The Affordable Housing definition currently doesn't have anything about Middle Income Community Housing, which will have to be added to be consistent with revisions to Section 7. However, Middle Income units will not count toward the SHI).

### **9. Preservation of Affordability; Use Restrictions**

(a) Affordable housing units created in accordance with this by-law shall use affordable housing restrictions that are recorded at the Barnstable County Registry of Deeds and that require the units to remain affordable in perpetuity. Such affordable housing restriction shall grant, among other things, the Town's right of first refusal to purchase the property in the event that a subsequent qualified purchaser cannot be located.

(b) The Planning Board shall require, as a condition for special permit under this bylaw, that the applicant comply with the mandatory set-asides and accompanying restrictions on affordability, including the execution of the affordable housing restriction noted in Section 9(a) above.

### **10. Segmentation**

Developments may not be phased or segmented to avoid compliance with conditions or provisions of this by-law.

### **11. Conflict with Other Bylaws**

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The provisions of this bylaw shall be considered supplemental of existing zoning bylaws. To the extent that a conflict exists between this bylaw and others, the more restrictive bylaw, or provisions therein, shall apply.

**12. Severability**

If any provision of this bylaw is held invalid by a court of competent jurisdiction, the remainder of the bylaw shall not be affected thereby. The invalidity of any section or sections or parts of any section or sections of this bylaw shall not affect the validity of the remainder of Provincetown's zoning bylaw.  
or to take any other action relative thereto.

*[Requested by the Planning Board]*

**TOWN OF PROVINCETOWN - BOARD OF SELECTMEN  
MEETING MINUTES - REGULAR MEETING  
MONDAY – SEPTEMBER 26, 2016 – 5:00 p.m.  
JUDGE WELSH ROOM - 260 COMMERCIAL STREET  
DRAFT**

Vice Chairman Erik Yingling convened the open meeting at 5:00 p.m. noting the following attendees:  
Board of Selectmen members: Erik Yingling, Tom Donegan, Cheryl Andrews, and Robert Anthony.

Excused: Raphael Richter-Recused

Other attendees: Town Manager David Panagore; Asst. Town Manager David Gardner, Airport Manager Butch Lisenby, Airport Commission members: Chair Michael Valenti, Stephen Katsurinis, and John Reed, and Jacobs Aviation Consultant Bill Richardson.

Recorder: Loretta Dougherty

**1. Joint Meeting with the Airport Commission – Update on Airport Capital Projects:**

Bill Richardson gave a brief background of the Airport Projects Map. There were 12 original Airport Improvement Projects when first started and they have already built projects listed as #3 [Reconstruct Terminal Apron with the Same Footprint] and #4 [Reconstruct Easterly End of Parallel Taxiway within the same Footprint] because they were already paved. Project #11 [Expand Terminal Building] was deferred at the advice of the Cape Cod Commission until a later date. Attached to these minutes is the complete Update on the Airport Capital Projects that was presented to the Board which lists the 12 projects. [See Addendum 1] There are \$10.52 million in projects awaiting variance. The Department of Environmental Protection (DEP) Water Quality Certification with Variance is pending final review by the DEP. The 404 Corps Individual Permit with Mitigation Plan will be issued as soon as the Water Quality Certification has been approved. The FAA grant deadline of December 1<sup>st</sup> requires that all permits must be in hand before the first project design. The environmental details will be put out in bid documents by March and by April they will know what it is going to cost. This is assuming that the variance is issued by December 1<sup>st</sup>. Future CIP Projects are listed in Addendum 1 in their entirety starting in 2017 running through 2022. In 2022, the second phase of the building project comes before the Cape Cod Commission which includes raising the building up about four feet. Over \$4 million in projects has been completed since 2008. These projects did not require DEP variances.

Robert asked for clarification on what was meant concerning the water quality.

Bill stated that there is a small bay for the parking lot; it is drainage only. The DEP now wants to know about the vegetation surrounding that area.

Cheryl has a concern about the response time of the DEP and she asked Town Manager David P. to confer with fellow Town Managers for their thoughts as to the timeliness of the DEP.

David P. knows that there has been a good deal of changes happening at the DEP and there may be some lag in staff response time. He will make a couple of calls. The DEP has been a bit slower than usual over the last two years.

Cheryl spoke about the past meteor shower not being able to be viewed as the lights were on at the airport. She asked if they would look into this sometime in the future the next time they are looking at the lighting at the airport.

Tom wants to make sure we get the local 5% share that is approximately \$500,000 put into the CIP. [FAA 90%; + MassDOT 5% + Local 5%]

Butch stated it should only be approximately \$380,000 because we will get money from Cape Airways.

Michael stated that they would start looking for the money from the town in year one or when they run out of money in year three.

Tom suggested asking for it as close to the end as possible. Our Charter states that we have a 5-year CIP but perhaps we can look at a 10-year CIP for the projects. He wanted to know if the building of the terminal has been cancelled.

Michael stated that the designs have been reviewed and now they have floodplain issues. It is a part of the project, but they want to continue to move forward with those things that can be done over the next five years and then come back to the terminal. He told the Board that the parking project has been deferred also.

**2. Executive Session Meeting with the Airport Commission:**

**MOTION: Move that the Board of Selectmen vote to go into Executive Session pursuant to MGL c30A, Section 21(a), Clauses 1, 2, 3, 4, 6, 7 & 8 for the purposes of:**

**Clause 3 – To discuss strategy with respect to collective bargaining or litigating position of the public body and the Chair so declares (Chair declared). (Upcoming Contract with Provincetown Airport-Cape Air).**

**Motion: Tom Donegan**

**Seconded: Robert Anthony**

**(Roll Call Vote)**

**Erik Yingling: Yea**

**Tom Donegan: Yea**

**Cheryl Andrews: Yea**

**Robert Anthony: Yea**

**Yea: 4 Nay: 0 Motion passed.**

The Airport Commission voted on entering into Executive Session by a motion from Stephen Katsurinis and seconded by John Reed. A roll call vote was taken with Yeas: 3 Nays: 0 Motion passed.

Both the Board of Selectmen and the Airport Commission members entered into Executive Session at approximately 5:27 p.m.

**3. Others:**

Without objection the meeting was adjourned at 6:02 p.m.

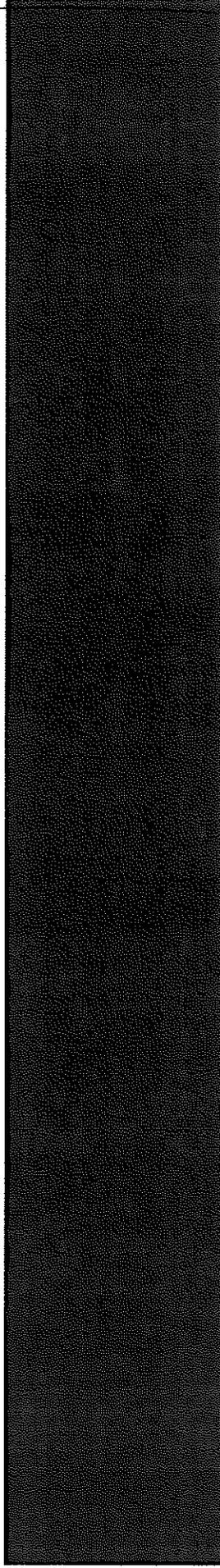
Minutes transcribed by: Loretta Dougherty

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**Selectmen's Briefing  
Permits Status/ Future Timeline  
Provincetown Municipal Airport**

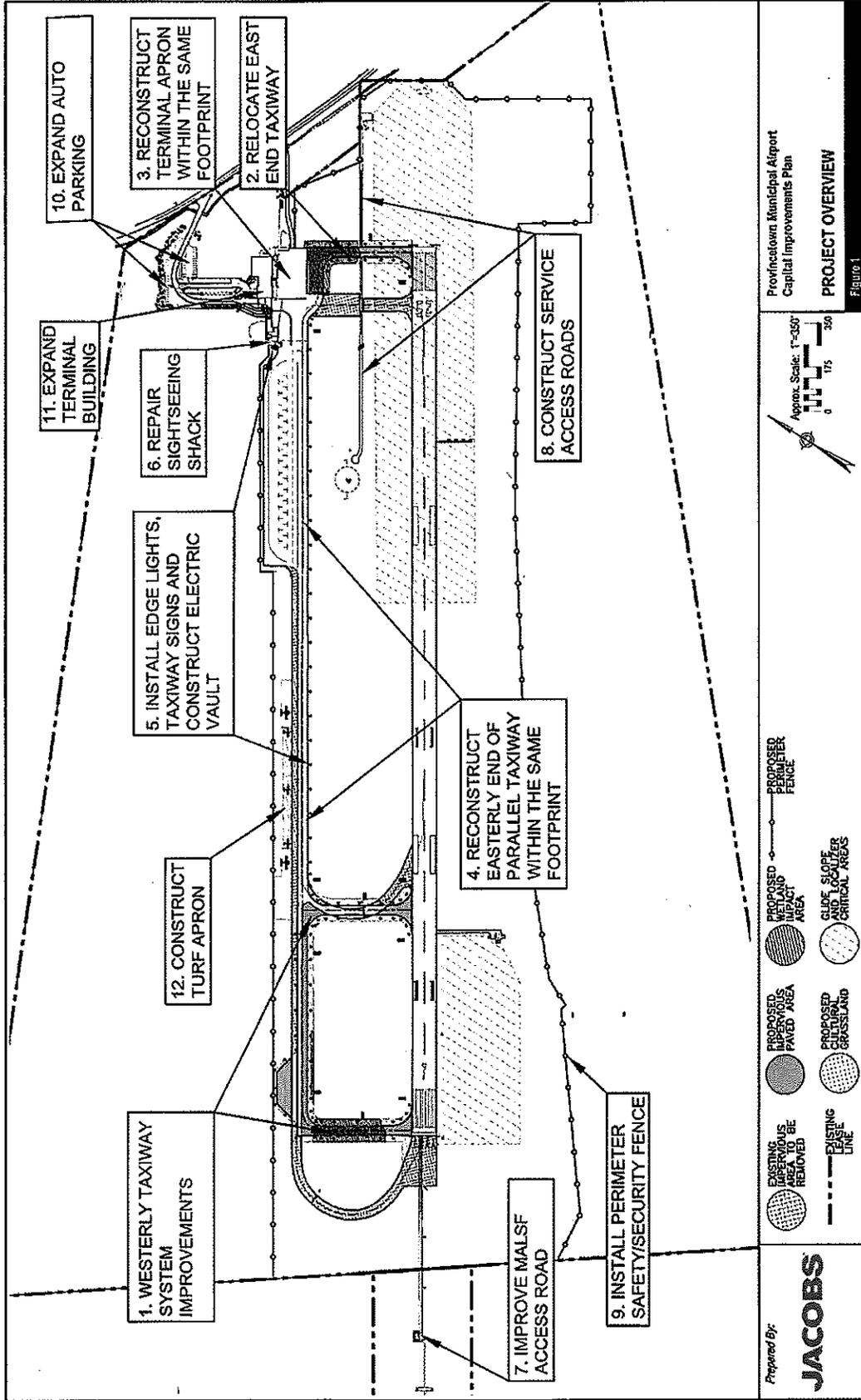
September 26<sup>th</sup>, 2016

(Addendum 1)



- Airports Projects Map
- Permits Status
- DEP WQC/Variance Milestones
- \$10.52m Projects Awaiting Variance
- Projects Completed to Date

# 12 Original Airport Improvement Projects (Projects #3 and #4 Already Built / Project #11 Terminal - Deferred)



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# Permitting Status

## ( 10 Remaining Projects)

### NOTICE OF INTENT – NOI (State WPA)

Filed 5/12/15

Issued 8/3/15

### DEVELOPMENT OF REGIONAL IMPACT – DRI (w/Flexibility Clause)

Filed 7/28/15

Issued 12/3/15

### NOTICE OF INTENT – NOI (Local ByLaw Only)

Filed 1/11/16

Issued 3/15/16

### ZONING BOARD OF APPEALS FILING - ZBA

Filed 2/3/16

Issued 7/14/16

### MESA PROJECT REVIEW

Filed 7/10/14

Issued 08/08/14

### DEP WATER QUALITY CERTIFICATION (w/Variance)

Filed 8/31/15

Issued... Pending final review by DEP

### 404 CORPS INDIVIDUAL PERMIT (w/Mitigation Plan)

Filed 8/31/15

Issued... dependent on Water Quality Cert (6) issuance.

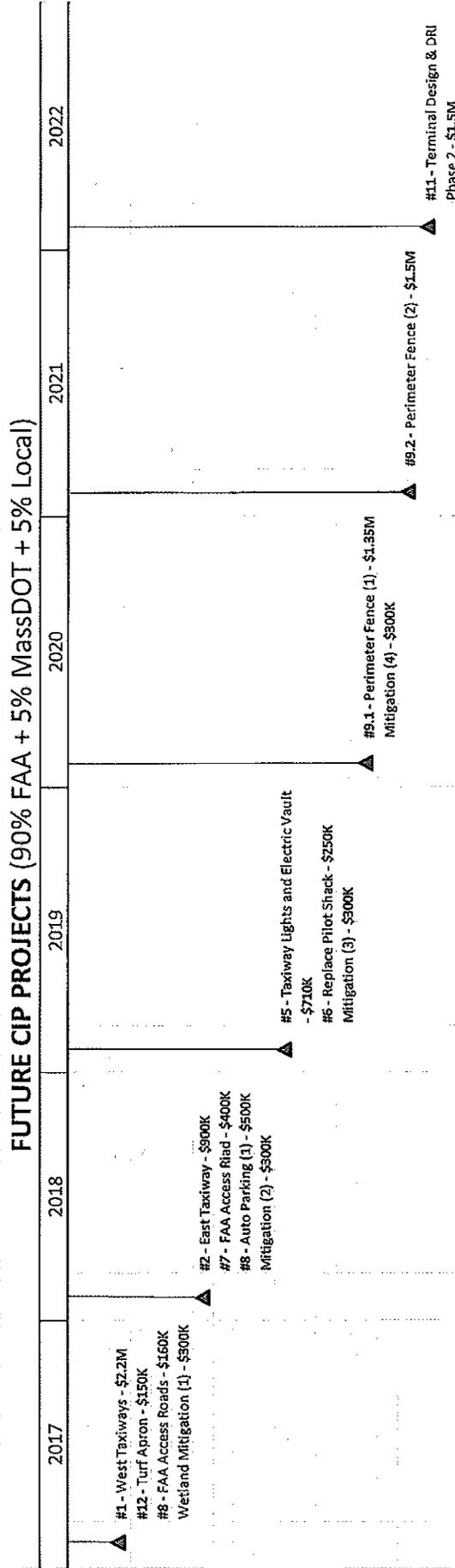
# DEP WQC/ Variance Milestones

( 10 Remaining Projects = \$10.52 M)

<p><b>Submitted WQC w/Variance Request</b> ( Anticipated DEP response time 96 days, per legislation)</p>	<p><u>August 31, 2015</u></p>
<p>Technical Request #1 from MassDEP</p>	<p>January 14, 2016</p>
<p><b>Response to Comments #1</b></p>	<p><b>March 31, 2016</b></p>
<p>Technical Request #2 from MassDEP</p>	<p>April 28, 2016</p>
<p><b>Response to Comments #2</b></p>	<p><b>May 18, 2016</b></p>
<p><b>Email exchange between HW and MassDEP:</b> "no further information needed at the moment" (Expected 96 Days for DEP to finish review)</p>	<p><b>June 6, 2016</b></p>
<p>Email from MassDEP to FAA re: "vegetation management"</p>	<p>June 16, 2016</p>
<p>Email from MassDEP to FAA "we are working on it"</p>	<p>July 13-14, 2016</p>
<p><b>Update conversation with MassDEP</b></p>	<p><b>August 16, 2016</b></p>
<p>o MassDEP "nearly done" with draft WQC-Variance</p>	<p>(within a week or so)</p>
<p>o Draft goes to Office of General Council (OGC)</p>	<p>(a few weeks)</p>
<p>o OGC sends to DEP Commissioner for review and approval</p>	<p>(a few more weeks)</p>
<p><b>FAA December 1 funding deadline reminder email sent to MassDEP</b></p>	<p><b>September 7, 2016</b></p>

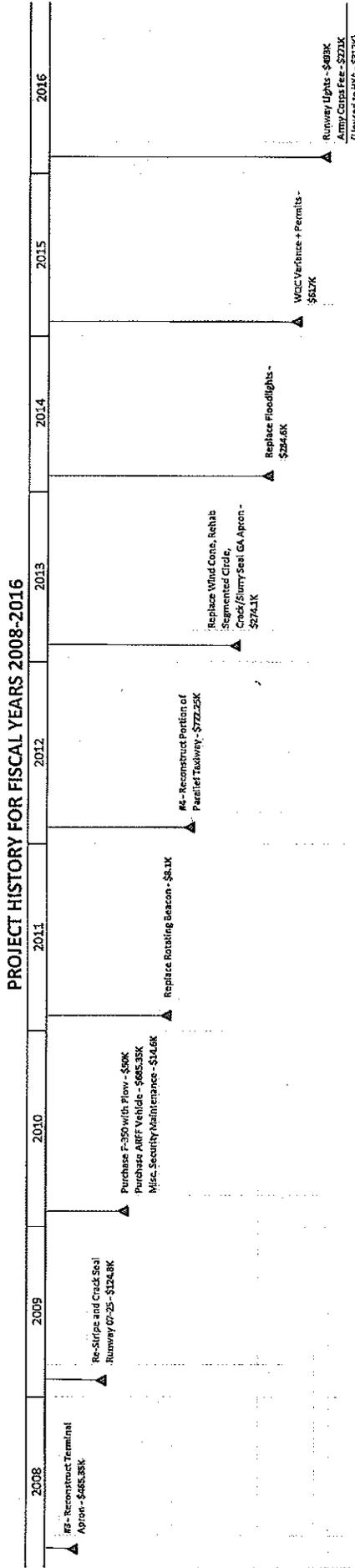
# 10 Airport Projects (\$10.52M) await DEP/WQC Variance

(Anticipated Schedule, assuming December 1 Variance)



# Airport Projects (\$4.06M) Completed Since 2008

## (NO DEP Variance Required)



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September 23, 2016

**TOWN OF PROVINCETOWN - BOARD OF SELECTMEN  
MEETING MINUTES - REGULAR MEETING  
MONDAY – SEPTEMBER 26, 2016 – 6:00 p.m.  
JUDGE WELSH ROOM - 260 COMMERCIAL STREET  
DRAFT**

Chairman Richter convened the open meeting at 6:05 p.m. noting the following attendees:

Board of Selectmen members: Raphael Richter, Erik Yingling, Tom Donegan, Cheryl Andrews, and Robert Anthony.

Other attendees: Town Manager David Panagore; Asst. Town Manager David Gardner, Town Planner Gloria McPherson, DPW Director Richard Waldo, and GHD Representatives James Fosdick & Jessica Janney.

Recorder: Loretta Dougherty

*Consent Agenda – Approval without objection required for the following items:*

- A. *Treasurer Transfer – Library Gift Fund – to pay invoices from Staples Credit Plan, Inc. for office supplies and printing purchases, in the amount of \$565.42.*

**MOTION:** Move that the Board of Selectmen vote, as Commissioners of the Library Gift Fund – (#1107), pursuant to MGL C44 § 53A, to approve the use of the funds in the Library Gift Fund (#1107) to pay \$565.42 for the attached invoices from Staples Credit Plan, Inc.

- B. *Treasurer Transfer – Historic Gift Fund – to pay an invoice from Conservation Framing for print reframing and restoration, in the amount of \$600.00.*

**MOTION:** Move that the Board of Selectmen vote, as Commissioners of the Town of Provincetown Historical Commission Gift Fund – (#1132), pursuant to MGL C44 § 53A, to approve the use of the funds in the Historical Commission Gift Fund (#1132) to pay \$600.00 for the attached invoice from Conservation Framing.

Raphael waived the reading of the Consent Agenda and without objection the Consent Agenda was unanimously approved.

**1. Public Hearings/Public Forums:**

- A. **Request from NStar d/b/a Eversource to install one FO pole labeled 33/1 in Law Street to supply service to customer at 386B Commercial Street, Provincetown, MA 02756:**

The request was withdrawn by Eversource as the consumer is taking a different avenue to acquire service.

- B. **Discussion on the Commercial Street Re-Paving Parking Plan associated with the Phase 3 Reconstruction Project (Howland Street to Johnson):**

Erik read the Public Hearing Notice. DPW Director Rich Waldo and Jessica Janney GHD Project Engineer appeared before the Board. The PowerPoint presentation may be viewed in its entirety on the town's website in the Board's agenda packet. After this meeting, they will have a public session on Phase 3 at St. Mary's of the Harbor Church on October 4<sup>th</sup> at 5:30 p.m. to get feedback and input from the public before bringing it to the traffic hearing.

Jessica read their agenda. The Parking Plan Development proposes no removal of any pre-existing parking areas; painted spots will be 18 feet by 8 feet; there will be a turning radius at side streets for emergency vehicles; they will maintain handicap parking areas; there will be 18 foot by 2 foot stop bars at driveways to prevent "blocking-in," and they will accommodate resident concerns within the limits of the design standards. They had copies of the plans outside the Judge Welsh room and asked that the public take one and mark up the plans as to how they would like them to look and bring them to the October 4<sup>th</sup> meeting at St. Mary's. GHD personnel will look at them and bring the final plan before the traffic hearing.

Rich stated that they are looking for feedback on parking space delineation.

There were no public comments.

Erik was concerned that painting the parking spots would create a loss of spaces, as a legal spot is quite large. If we use compact cars without marked areas we get more parking.

**David P.** stated to delineate solves the question of whether you should have gotten a ticket or not. **Rich** stated 59 new spaces have been proposed in the plan. If you delineate you get those cars parked into the curb on a very narrow road so you are not blocking traffic.

**Cheryl** does not want to delineate unless there is a good reason to do so.

**Rich** stated that Phase 2 and Phase 3 are different, as we do not have metered parking in Phase 3. If the Board thinks we will have metered parking we would want to get the Board's input.

**Raphael** stated that more people would be able to fit if it is not delineated. He wants us to see it done for a specific reason. Before the traffic hearing he would like to find out how many cars actually park there to get a better idea. In general, he supports the turning bar and the marking at the end of driveways. He does not support delineation now.

**Rich** will look back at a previous policy set by a prior Board of Selectmen of not painting on the sidewalk.

**No action taken.**

## **2. Public Statements:**

**John Derian** at 396 Commercial Street came before the Board and was not in favor of Eversource putting a pole in the backyard on Commercial Street. **Raphael** and **David G.** let him know that the request had been withdrawn earlier in the meeting. There were no other public statements.

## **3. Selectmen's Statements:**

**Erik, Tom** and **Robert** had no statements.

**Cheryl** stated that her swearing-in as a member of the Governor's Plymouth 400 Commission was taken care of in Boston last Tuesday. She attended the Stable Path ribbon cutting last week. It is a very wonderful achievement and **Ted Malone** deserves congratulations. She also congratulated **Jenny Ross** for the Wounded Warrior event held again this year. She asked if the Chair would consider underling those items added to any Revised Agenda Meeting Notices and striking through items that are removed from the notice. It was agreed that this would be done on all future revised notices.

**Raphael** thanked the Board members for attending the Joint Meeting with the Truro Board of Selectmen last week. He was not able to make it. He congratulated **Cheryl** and **Representative Peake** on their appointment as members of the Governor's Plymouth 400 Commission. He and **Cheryl** also attended the Provincetown 400 meeting at Town Hall last week. Working with Plymouth is going to be a great opportunity to collaborate with each other. Stable Path was a great event; they toured the units and he offered kudos to **Community Housing Resources** and **Ted Malone**. He thanked the people of Provincetown for helping to support the budget at Town Meeting for this project. The project was 13 years in the making and it was very satisfying to be able to cut the ribbon.

## **4. Joint meeting / Presentations:**

### **A. Joint Meeting with the Planning Board – Update on the Inclusionary Housing Bylaw and other Potential Zoning & General Bylaws:**

**David P.** asked that the Planning Board be brought back before the Board at another time, as there was not a quorum present due to a conflict in times posted for the Joint Meeting.

**Erik** asked Town Planner **Gloria McPherson** for a quick update.

**Raphael** asked that the Planning Board be heard on Tuesday, October 11<sup>th</sup> at 5:00 p.m.

**Gloria** gave a brief overview of things that were different from the last bylaw presented to the Board. The payment-in-lieu has been updated and they are looking at the Boston model for a figure rather than using the cost of constructing the whole unit to determine what the payment-in-lieu should be. She is looking at different ways of calculating it. They are also working on additional bonuses based on the number of bedrooms able to be served by a non-variance septic system contained on the same parcel, so that the project may have up to as many dwelling units as bedrooms that can be supported. Other new bonuses being considered are a building height bonus, a growth management bonus and a fee reduction bonus. The Planning Board is trying to stress community housing rather than affordable housing such as 40B which allows waiving all zoning regulations.

**Erik** asked if any of the developers have been working with their Board.

**Gloria** stated that there had been six or seven developers at one meeting. Some are more interested than others are and she does send them updated drafts. There are few that are very interested.

**Erik** wanted clarity on the payment-in-lieu of fee. He believes that flat fees would be interesting.

**Gloria** feels that a flat fee is too easy to have an argument that it is a tax. The flat fee has to make sense.

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**Cheryl** asked about the discussion topics on other potential Zoning Bylaw amendments.

**Gloria** stated that some of those are just housekeeping, and went over the list with the Board.

**Tom** went to the Planning Board meeting last week and felt that it was a great meeting. He believes that the power of a good Inclusionary Bylaw helps everyone to win.

**Erik** asked how seasonal housing overlays density.

**Gloria** stated that there is a difference between affordable and community housing. Seasonal workers live in affordable housing subsidized by the town. It is hard to get people to work seasonal jobs and it is really hard to build the housing unless you build dormitory style housing. You cannot have them in high elevation areas and the historic district. They will do a mapping exercise for seasonal housing. She believes this would be very controversial at Town Meeting and wants to discuss it further with the Board of Selectmen.

**Cheryl** is concerned that we make the effort to build all this new housing and then have to tell them they have to leave at the end of the season.

**Gloria** stated that seasonal housing is cheaper to build. It is good for three seasons as it is not heated or insulated. Details for having a kitchen or not would be left to the developer if they wanted to do it.

**Cheryl** does not see anything attractive about that versus having temporary housing.

**Gloria** stated we cannot have temporary housing now in Town.

**No action was taken.**

**5. Appointments:** None.

**6. Requests:**

**A. Update on Cape Light Compact and Potential Fiscal Sponsor Opportunities:**

**Tom** represents the Town of Provincetown to the Cape Light Compact (CLC). Barnstable County has acted as the "Fiscal Agent" for CLC as a result of an Agreement executed by the County Commissioners and CLC in April of 2002 but at present it also includes the employees of CLC as County employees for employee benefits and retirement purposes. Barnstable County is looking at converting it to a county department. Massachusetts General Law (MGL) gives the municipal aggregation to the municipalities not the county. He believes that Provincetown could be the fiscal agent taking care of the accounts payable and receivable and the front office could be in Barnstable. This would be great for our economic development creating new jobs. It would be a good thing for both the Town and the taxpayers. The CLC has proposed a "First Amended and Restated Administrative Services Agreement between Barnstable County and Cape Light Compact" that includes additional provisions relating to employee benefits and liabilities related to CLC's operations and other issues.

**David P.** is meeting with the County Administrator this week and will discuss this. The CLC and Administrator will be meeting next week. Provincetown would be the bank; none of the revenue would come from the town it would come from ratepayers. It is an opportunity to bring jobs to Provincetown without any burden to the taxpayers.

**Erik** believes it is a great idea.

**Tom** will keep the Board posted.

**No action taken.**

**B. Discussion on Province Road Paving Request:**

**Tom** recused himself and left the meeting at 7:08 p.m.

**Jay Gurewitsch** and **DPW Director Rich Waldo** came before the Board to present this request. Jay thanked all the staff members who were helpful in forming this presentation. He has 12 homeowners abutting Province Road, Ships Way and Ships Way Extension who have voluntarily raised funds to help pay for paving Province Road. This is a unique situation as this is the only private road where the town owns 40% of the property abutting the road. Ten percent belongs to NStar which might pay for their portion that would reduce the town's cost. There is a history of using this private road by the town for the old burn dump many years ago. He asked for all of us to work together to solve this. They are asking the town to help them solve this problem with a long-term solution so they do not need to come back again. Dirt Works gave them a bid which is a high-end amount. The work should actually cost less. It is imperative to have this solved as senior citizens, bicyclists and people with disabilities are not able to navigate the potholes. The road is truly beyond repair. The DPW did a wonderful job when they last graded but with the rain the potholes are returning. It will be a much bigger mess when it starts freezing.

**Erik** asked staff if we have paid for work on a private road in the past.

Rich stated they have not taken care of any private roads to his knowledge. Private roads can be owned in many different ways. Developers may keep the road. It depends on how the deeds are written and the land is divided. David G. stated that Town Counsel has done a title search and we do have ownership rights to this road. Cheryl knows that there is no homeowners association in this neighborhood. She is interested in seeing the town help fix it. She wants to make sure everything is done correctly if we are using public funds. She asked staff for a written opinion on how this will be dealt with financially.

David P. will get back to her. He wanted to know if this is something the Board wants to do.

Robert gave a brief history of the road. It was a Town road since he was 12 years old and has always been an access and open forever.

Erik knows this is a unique circumstance but is concerned about other private road owners who would come forth. Jay stated that there are no other private roads that the town owns. He will do whatever the town wants them to do to get the work done regarding competitive bids.

Raphael wanted the Board to acknowledge how we would move forward. Outside of our regular budget for doing projects, we would need to go to Town Meeting to get the funds. He would like to see the town be the partner to the neighborhood and bring it to Town Meeting.

**MOTION: Move that the Board of Selectmen direct staff to investigate this issue and bring back recommendations to the Board within four weeks.**

**Motion: Cheryl Andrews**

**Seconded: Erik Yingling**

Robert is in favor of this. He agrees with the Chair regarding the funding aspect. Take it to Town Meeting, if we cannot find the funds and look for a long-term solution.

Cheryl looks for staff's creative recommendation.

Raphael knows that the town does not do things fast so that public interest and money is protected. He believes that taking this to Town Meeting is best for this project.

David G. wants to make sure that we have an agreement to identify and answer any questions regarding ongoing maintenance before we move forward.

David P. will pen a memo that will outline numbers for the Board. There are many options and he now has clear enough direction with which to start. He will have something formulated and look at the legal issues.

**4/0/0 Motion passed.**

Tom returned to the meeting at 7:40 p.m.

#### **7. Town Manager / Assistant Town Manager:**

##### **A. Review and Sign the Grace Hall Parking Lot Lease Agreement with the Roman Catholic Bishop of Fall River, a Corporation Sole.**

**MOTION: Move that the Board of Selectmen vote to approve the Grace Hall Parking Lot Lease Agreement between the Town of Provincetown and The Roman Catholic Bishop of Fall River, Massachusetts for a term commencing December 19, 2016 and ending on December 18, 2026 as presented.**

**Motion: Cheryl Andrews**

**Seconded: Robert Anthony**

Erik wanted to know where this was located.

David P. stated it is behind St. Peter's Catholic Church in the Grace Hall Parking Lot.

Tom stated that this was a swap so we could build Seashore Point. We traded them land it.

**5/0/0 Motion passed.**

##### **B. Town Manager's Report – Administrative Updates:**

###### **i. RFQ Update on former Community Center, 46 Bradford Street:**

The RFQ is due on October 3<sup>rd</sup> at 4:00 p.m. There have been a number of inquiries from interested parties for seasonal worker housing to entrepreneurial. Clarification was sent out last week with new information added. We extended it by a week. There has been no comment on whether it is a good idea or not. He asked the Board for an Executive Session be held to discuss the criteria for a selection process to establish a panel committee prior to the issuance of the second phase of the RFP.

Raphael requested it be set for late October in Executive Session.

###### **ii. Proposed Process for Civic Engagement and Fall Town Forum:**

David P. reported:

- The town is moving forward in using 30% recycled paper. It is \$5 more per carton and we use approximately 15 cases per year.
- Provincetown 400 was successful in raising funds to cover one-half of the cost for an Executive Director for one year. Provincetown is entering into negotiations with the perspective Executive Director. The organization will be up and running when the new director is in place.
- He would like to discuss Tax Titles at an upcoming Board of Selectmen meeting.
- There will be two upcoming Town Forum's held in November to encourage a two-way dialogue and to draw more voters into the process of building consensus to solve the important and controversial issues in Provincetown. One meeting will be held during the week in the evening and the other on a Saturday during the day so a larger number of people can attend.

Tom would like to see it done on two nights because we have tradesmen and waiters/waitresses working during the day and we should accommodate both a week night and Saturday night.

Erik believes that weekends do not go over well.

Robert and Cheryl can attend both of the forums.

Raphael believes having two meetings at different times will work best.

David P. wants to do the forums at different times to maximize engagement and see if it works. If it does not work we will not do it again. More work now will create less work later.

Raphael asked for specific dates.

David P. wants to consider having one on Tuesday, November 15<sup>th</sup> at 6:00 p.m. & the other on Saturday, November 19<sup>th</sup> at 10:00 a.m.

Cheryl would like to have a survey designed with questions.

Raphael asked staff to draft something to put in the survey.

David P. talked about possibly having software online asking such questions as did you go to Town Meeting, what did you like about it, and how you would vote today on Winslow Farms, etc. If you are looking to build trust, outcomes get derived from the answers given. He asked what kind of survey the Board would like to see.

Raphael asked to have an agenda item: survey at or after the forum.

Tom suggested online chats. Surveys can produce a, b, c answers.

Robert stated that we have received positive input from surveys done in the past.

Tom wanted to know about mentioning in the survey about renting or buying comfortable chairs for the auditorium.

Cheryl asked for a copy of the results from the survey regarding chairs that was done by Town Clerk Doug Johnstone be sent to the Board.

Tom asked about the status of hiring an Economic Development person.

David P.'s focus has been on hiring a Finance Director.

Raphael asked staff to find out what the cost for a staff person in Economic Development is in similar and larger communities and then look at it when developing a budget for the next year.

David P. believes that an Outer Cape Development person for Provincetown, Truro & Wellfleet might be a possibility. Their time would be fully utilized, as the economy is regional. We do have a grant line for a contract service for an initial period.

iii. **Other Town Manager updates and administrative matters:** None.

C. **Others:** None.

8. **Minutes:** Cheryl asked that the word (Special) on the cover sheet be changed to (Regular).

**MOTION:** Move that the Board of Selectmen approve the minutes of: August 22, 2016 (Regular), as revised.

**Motion:** Cheryl Andrews

**Seconded:** Erik Yingling

5/0/0 Motion passed.

9. **Closing Statements/Administrative Updates - Closing comments from the Selectmen:**

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Tom participated in the Sober House Meeting that was recently held. He attended a Planning Board meeting and it thought it went very well. However, the Historic District Commission meeting he attended was a bit of a falafel. It was difficult for the staff and applicants to understand each other and even between Commission members themselves they appeared to not understand each other. It was a difficult meeting.

A letter sent to Senator Wolf was reviewed by the Board.

A. Letter to Senator Daniel A. Wolf regarding House Bill No. 3742 – An Act Establishing a Year-Round Market Rate Rental Housing Trust, to make changes to language.

**MOTION:** Move that the Board of Selectmen vote to go into Executive Session pursuant to MGL c30A, Section 21(a), Clauses 1, 2, 3, 4, 6, 7 & 8 for the purposes of:

**Clause 3** – To discuss strategy with respect to collective bargaining or litigating position of the public body and the Chair so declares (Chair declared). (Collective Bargaining – Police & ASFCME).

**Clauses 1, 2, 3, 4, 6, 7, & 8** – To consider the approval and/or release of Executive Session Minutes for September 19, 2014, February 29, 2016, April 11, 2016, and June 27, 2016. Votes may be taken.

and not to convene in open session thereafter.

**Motion:** Erik Yingling  
(Roll Call Vote)

**Seconded:** Robert Anthony

Raphael Richter: Yes

Erik Yingling: Yes

Tom Donegan: Yes

Cheryl Andrews: Yes

Robert Anthony: Yes

Yea: 5 Nay: 0 Motion passed.

Without objection motion to adjourn at 8:20 p.m.

The Board went into Executive Session at approximately 8:20 p.m.

Minutes transcribed by: Loretta Dougherty

Addendum I

Allan Cosimi

Dear Provincetown Selectmen;

September 25, 2016

I am the property owner of 32 Ship's Way Rd and am writing this letter to express my support of the proposal presented to you regarding the paving project of Province Road. I agree to pay my full share as described in the proposal and hope you can assist in funding 50% of the total project.

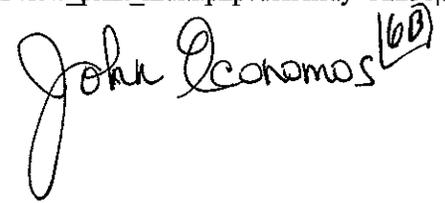
The paving of the road would be an enormous benefit to my elderly mother who regularly walks to the supermarket and downtown. It would also bring comfort to know that the road will be regularly plowed by the town's professionals and therefor always passable in case of emergency.

I would like to thank you sincerely for your time in reviewing this request for your support, and hope that you will find that it is a fair and beneficial proposal for the entire community.

Sincerely,

Allan Cosimi

Allan Cosimi

[Print](#) | [Close Window](#)

**Subject:** Letter of support for Province Road paving proposal  
**From:** "Economos, John" <JEconomos@TCBINC.ORG>  
**Date:** Mon, Sep 26, 2016 1:01 pm  
**To:** "ldougherty@provincetown-ma.gov" <ldougherty@provincetown-ma.gov>  
**Cc:** "jay@arcadianyc.com" <jay@arcadianyc.com>  
**Attach:** image001.jpg

To: Provincetown Board of Selectman  
Date: September 26, 2016

I am writing on behalf of Province Landing, LP as an abutter of Province Road and as a lessee of 90 Shankpainter Road. Province Landing fully supports the proposal from Mr. Jay Gurewitsch to pave Province Road. The unpaved condition of Province Road causes significant issues for us as the owners of Province Landing. Our residents, especially the people living in the 10 apartments abutting Province Road, have to tolerate the jarring noise from vehicles hitting the numerous pot holes and the significant amount of dust generated by vehicles driving on the road. Many of these residents suffer from chronic illnesses which are exacerbated by the dust. It is one of the most frequent complaints we get.

Building 4 which has 8 apartments directly abuts Province Road. We have had 7 residents move out of the apartments in that building in our first four years which is more than have moved out of the remaining 42 apartments. Not all residents left because of the road noise or dust but it was a factor in several of those move-outs.

I strongly recommend that the Board of Selectman support and approve this worthwhile proposal which will benefit many people.

Respectfully,  
John Economos

John Economos  
District Manager  
Northeast Region  
1 Wampanoag Drive  
Mashpee, MA 02649  
Main: 508-477-2000 Direct: 774-353-9030  
[jeconomos@tcbinc.org](mailto:jeconomos@tcbinc.org) [www.tcbinc.org](http://www.tcbinc.org)

**THE COMMUNITY  
BUILDERS**

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Thomas O'Grady  
John Stafford

To whom it may concern,

We are writing seeking your support for a plan to pave Province Road.

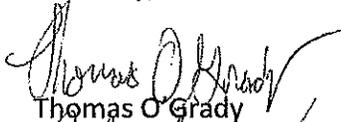
As you know from the proposal being submitted, the conditions of Province Road and Ship's Way roads are a significant concern for the residents who live along the roads. Both roads are in serious disrepair and as an abutter to at least part of the road, we hope you would share our concerns and participate in the proposal being submitted.

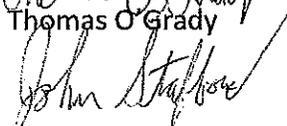
We understand that the legal status of these roads make this proposal unique. However, the town's participation in this project, funding 50% of the cost to improve the road and provide future snow plowing, is a reasonable accommodation given the property owners along these roads pay full tax rates while receiving reduced services (limited mail delivery, no trash pick-up, and lower priority snow removal).

Improvements to the road would enhance the living conditions for all residents along the road, including those living in the Province Landing development. From the dust and dirt kicked up by delivery trucks and the mosquitoes that breed in the frequent pooling of water to the reduced wear and tear to the resident's vehicles, this investment is a great opportunity to address a problem using a combination of both public and private funding.

We hope you agree to participate.

Sincerely,

  
Thomas O'Grady

  
John Stafford

11 Ships Way Road

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Mark Pedersen  
Rod Howe

September 22, 2016

Mark Pedersen and Rod Howe  
43 Province Road  
Provincetown, MA 02657  
607-592-3456

Dear Selectmen:

Over the past twenty years we have been property owners (and full tax payers) for three different homes, our current residence being situated at 43 Province Road. When we purchased our home three years ago we had hoped that the deplorable condition of the road would soon be addressed by the Town. Learning that we owned a home on Province Rd did not fully impact us until we couldn't avoid the huge potholes and constant dust that was being generated by traffic on the road. When our neighbors asked us if we would be interested in paying for road improvements we were very interested as long as the solution was longterm. Since we all pay our taxes, we would like to have the same advantages as other Provincetown residents by having our roads maintained and plowed by the Town. If that involves an initial additional cost on our part, so be it.

Thank you for considering our case which we believe to be a well warranted one.

Sincerely,

Mark Pedersen and Rod Howe

HJ

David Sanford

Monday, September 26, 2016

Dear Provincetown Selectmen,

I am the property owner at 52 Ships Way Road. We utilize this building as "workforce housing" for our staff for Crowne Pointe and The Brass Key. The current road condition is unsafe for our staff who have to walk and ride bikes on this road. The crater size pot holes that develop make it almost impossible for even cars to navigate. This road is also heavily trafficked by large trucks that come from J&E Produce which contribute to the poor road conditions.

We hope you see this as a worthy infrastructure investment that will have a positive impact for many Provincetown residents.

Cordially,

David M. Sanford

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*Charles Silva* 

[Print](#) | [Close Window](#)

**Subject:** Board of Selectmen Meeting September 26, 2016

**From:** Charles Silva <charlessilva38@hotmail.com>

**Date:** Mon, Sep 26, 2016 11:25 am

**To:** "jay@arcadianyc.com" <jay@arcadianyc.com>

To Provincetown Board of Selectmen:

Dear Members,

Unable to attend your meeting this evening, as residents since the early 1970's we write to urge you all to vote the town's financial share in paving Province Road, joining all of the other abutters along with residents of Ships Way Road who have also committed to share.

Paving this road is a matter of public health, safety and welfare for all residents. The safety for Mothers and children who use this road along with bicyclists and pedestrians will be enhanced by this project. The dust clouds of summer and ice and snow moguls of winter will disappear with this project.

Finally, the Town will recapture this small amount by taxes on the increased property values to this whole neighborhood.

Thank you for your attention.

Charles W. and Helen T. Silva

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*HH*

Shaun B. Sutcliffe [63]

Dear Provincetown Selectman:

9/22/16

We are writing seeking your support for a plan to pave Province Road.

Province Road and Ship's Way roads have both fallen into severe disrepair over the years and can become quite impassable several times throughout the year. For this reason town support of the paving project would be very useful.

For our family, the impact would be great. Potential guests to our home may use a wheelchair. When they visit our family, they would find it difficult to get to and from our home when we walk downtown to go shopping. With the paved road, they will find it much easier to get around our community. I know that other residents in our beloved and unique neighborhood would benefit from this project as well, including children with bikes, families with small children in strollers, and other residents and visitors who use a wheelchair.

My family and fourteen others on the street are hoping there is Selectman support for the project. I hope that you will support our efforts. Our neighborhood has been in frequent communication to discuss the best way to make our case to the Board of Selectman. We hope you can assist in the funding of 50% of the total project, as well as maintaining/plowing the road.

Sincerely,

Shaun B. Sutcliffe, RN

Shaun B. Sutcliffe, BSN, RN, OCN

Research Nurse Coordinator

Massachusetts General Hospital Cancer Center

PROPERTY OWNER 71 SHIP'S WAY

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Provincetown Board of Selectmen  
**AGENDA ACTION REQUEST**

Tuesday, October 11, 2016

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## CLOSING SELECTMEN'S STATEMENTS

### Administrative Updates

Requested by: Town Manager David B. Panagore

Action Sought: Discussion

#### Proposed Motion(s)

*Motions may be made and votes may be taken.*

**Tom Donegan**

**Cheryl Andrews**

**Robert Anthony**

**Erik Yingling**

**Raphael Richter**

#### Additional Information

#### Board Action

<i>Motion</i>	<i>Second</i>	<i>Yea</i>	<i>Nay</i>	<i>Abstain</i>	<i>Disposition</i>

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