



**Provincetown Public Pier Corporation (PPPC)  
Town Hall Auditorium  
Meeting Minutes of Thursday, March 14, 2013**

**Members Present:** Lee Ash (LA), Carlos Verde (CV) and Rich Wood (RW)  
**Members Absent:** Scott Fraser (excused) and Ginny Binder  
**Other Attendees:** Rex McKinsey (RM), Pier Manager/Harbormaster  
and Doug Allen, Administrative Asst.

Chair Lee Ash called the Public Meeting to order at 5:04 P.M.

***AGENDA***

***Public Statements***

No public statements.

***Special Agenda Items***

None.

***Review of Minutes***

LA referred to the February 28, 2013 public meeting minutes.

***A motion was made to approve the minutes of the Public Meeting on 2/28/13 as written.***

***Motion:*** Rich Wood                      ***2nd:*** Carlos Verde

***Vote:***

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

***Motion passes.***

LA referred to the March 5, 2013 work group meeting minutes.

***A motion was made to approve the minutes of the Work Group Meeting on 3/05/13 as written.***

***Motion:*** Carlos Verde                      ***2nd:*** Rich Wood

***Vote:***

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

***Motion passes.***

### ***Directors' Statements***

**Rich Wood:** Said good information and participation are coming out of the floating dock repair work group meetings. He thought it worth discussing at this meeting, the role of the PPPC going forward with the rebuild.

**Carlos Verde:** Agreed with RW's assessment of the work group meetings and looked forward to having decisions made that would best serve the Town.

**Lee Ash:** Said there is lots of expertise within the group and it is being very cautious as it solicits engineering and other professional input to help present the information at Town Meeting in the best possible way. She is attentive to the fact that the normal course of pier business not be overlooked and has kept up to date with RM relative to those matters.

### ***Working Group Reports***

RW said the work group has met twice so far. The group is comprised of the Town Manager, Harbormaster/Pier Manager, PPPC Board members, Board of Selectmen (BOS), Harbor Committee, Finance Committee and pier tenants. Data going back to 2003 has been reviewed as well as storm and damage history. Various vendor quotes for float alternatives from the last 3-5 years have also been discussed. The Town Manager also has suggested bringing a marine engineering firm into the work group to assess and determine best options which the Town can then address.

LA said the public is welcome to sit in on any of the work group meetings which are posted on the Town website. Meeting minutes are also available on the website.

As to regular pier business, RW said the maintenance budget work group continues to rework and revise the budget, including a timeline of how expenses will unfold over the next five years.

### ***Pier Manager Report***

RM discussed floating dock repair progress to date. Seven finger piers have had pile guide reinforcements added on the south dock to support installation of steel braces and will be completed soon. Late next week the crew will move to the north dock to begin putting braces on that. They will then try to re-establish the missing 50' and four berths that represent the damaged section on the south.

RM with the Town Manager and DPW, have been working on a waiver of procurement rules to be submitted next week. They will apply to DCAMM, the asset management arm of State government, for a waiver of the advertising aspect of a public bid in the *Environmental Monitor*

which can lengthen the bid process a month or more. Contractor bids, prevailing wage insurance and performance bonds are all still required. Critical time would be saved to replace and reestablish over fifty fender piles on the main pier across from the Harbormaster's office and Tee area in time for the summer season.

CV asked if there were fishing vessels tied up at the pier during the February 8-9 winter storm.

RM said vessels from the New Bedford fleet were docked at the pier at that time.

RW said approximately 75 fender piles are in 'E' condition (to be replaced) and approximately 88 fender piles in 'D' condition. The storm turned some 'D's' into 'E's'. The fifty piles to be replaced are only meant to be viewed as worst case scenario, and the rest would be incorporated into the overall maintenance plan.

RM said different types of piles are being considered for replacement such as composite and green heart piles. Costs could become prohibitive for the higher-end piles due to the number of piles that need to be replaced.

LA asked if RM had any information that local harbors used one kind of pile versus another.

RM said most use untreated oak as fender piles which have to be replaced more often.

RM and Town Manager spoke to Russell Titmuss at Bourne Consulting Engineering (BCE) and their subcontractor, Applied Coastal Research and Engineering (ACRE). BCE has been the engineer of record for the pier over the last several years. ACRE will conduct a wave study, a computer model which simulates real-time conditions in the harbor based on historical weather data such as wave forms, frequency, etc. They can then introduce other elements into the model to see how they are going to act (fixed wave attenuators, timber piles, concrete floats, etc.). The study's focus can be limited to the facility itself or address the larger needs of the harbor as proposed by the members of the Harbor Committee, such as beach nourishment. BCE will put forth a proposal to prepare the Town for bid-ready documents. The Town will then decide what it wants to apply for. The goal is to have the process ready for presentation at the Fall Town Meeting. RM and the Town Manager have asked BCE to have the initial proposal ready for the March 25, 2013 BOS meeting in order to be ready for the April Town Meeting.

RM said other issues need to be addressed. There is a much greater demand for floating dock berthing slips than are currently available. If the size of the facility is increased for recreational usage to address the Outer Cape's boating needs, this in turn becomes an additional revenue source which may possibly remove the need for a commercial boating rate.

LA said there is no place where people can come in to Town for the day on a boat.

CV asked if the PPPC will be paying BCE for the proposal?

LA said BCE is the engineer of record, but it doesn't mean they are being hired for the project.

RM said BCE has been asked to get a proposal in order that would allow for bid-ready documents to be prepared for the Fall Town Meeting.

CV asked if there was another company that could be considered in addition to BCE so as to compare bids?

LA said the PPPC has asked BCE to compile numbers that can be used to submit for Town Meeting. When it comes to the actual work to be done, several bids will be secured.

(Sharon Lynn (SL) was invited to join the discussion.)

SL said BCE, as the engineer of record, completed a study in 2011 which was resurrected after the February 8-9, 2013 storm. They visited the site after the storm to assess the damage and added information to what was originally proposed in 2011, so as to help define on paper a picture for what is needed now and in the future, depending on what the footprint of the marina may be. BCE and ACRE have worked together before, and she does not see any reason to look elsewhere. The emergency waiver will allow the Town to spend monies from the PPPC's capital reserve along with monies requested from Town Meeting. The proposal itself is not generally associated with the cost factor, which may be a few thousand dollars. The proposal will cover a design and engineering function including a wave study by ACRE in conjunction with BCE. The funds being requested at Town Meeting will include capital cost replacements being spent since the storm.

SL said she could not see the project moving forward without the inclusion of a wave attenuator, whether fixed, floating or a combination of both, which the wave study will help determine.

RW asked if the relationship with BCE has been looked at by way of the application of the Town's bidding rules?

SL said yes, that Town Counsel was consulted.

CV said he was in agreement that BCE gather the information now as long as there was going to be some bidding process in the future.

SL said it would be done correctly.

LA asked SL if, by placing the article on the warrant and the Town hopefully voting at Town Meeting to move forward with the work, does that conclude discussion of wave attenuation or will there be a need to hold a special Town Meeting?

SL said they will try to get across the idea that the project cannot move forward without wave attenuation and will ask the Town to vote for funds to move forward. The design and waiver processes will then occur and moving forward ultimately becomes a timing issue. Her concern was that the floating docks and finger piers were compromised so much and the concrete docks so severely damaged, that the slightest storm could wreak havoc again.

LA suggested caution in explaining to the Town what the wave attenuation would look like since it has not yet been decided.

RM said the permitting process is the part of the public process that ultimately determines what decision will be made. The Work Group, Board and Town will put forth its recommendations and proposals which will then go through the public process including hearings, as well as State and Federal government, mariner and environmentalist input. Given the risk of delay due to process, he expressed concern that a new set of floats be installed by Spring, 2014.

LA said one of the better arguments for wave attenuation can be found along the waterfront at the east end of town which has sustained severe damage, particularly in the areas where there has been beach nourishment.

RM said changing the definition of the problem may help address more issues such as this.

LA said she would draft an overview to bring before Town Meeting which would include information provided by SL.

RW asked SL what would be the role of the PPPC moving forward?

SL said the PPPC is the business aspect of the Pier which will make recommendations to the Board of Selectmen as to its vision of the pier. Both the PPPC and the BOS need to make recommendations to bring to Town Meeting. In that light, the BOS postponed consideration of Article 11 of the Town Warrant until their March 25, 2013 meeting in hopes of having the opportunity to review the BCE proposal.

### ***New Business***

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

LA said the life rings need to be installed and suggested that RM hire someone to do the work.

CV asked RM to make the necessary phone calls before the PPPC loses the ability to recoup the money from the flagpole damage, as there are time limits to consider in placing a claim.

RW asked RM for a status report on the Marine Patrol (MPO) summer program.

RM said Det. Chovanec returns to duty April 28-29, and second shift coverage (3 p.m. to 11:00 p.m.) begins April 10, 2013.

RW said it was his understanding there would be different seasonal officers this year.

RM said only Summer Ofcr. Jim Hughes was returning to cover the second shift, and only until Memorial Day weekend. Summer Ofcr. Jarrod Kosky will cover the second shift on Ofcr.

Hughes' days off. The PPPC will pay their salaries until Memorial Day weekend. RM said he should have a good idea who the seasonal Asst. Harbormasters will be by mid-May.

RM also said Det. Chovanec will complete work on the training manual upon his return.

LA asked RM if independent auditor Chief Robert Pomeroy had completed his investigation?

RM said he had one map to provide to Chief Pomeroy, but other than that, all materials requested have been provided to him.

LA asked if Chief Pomeroy intended to interview PPPC Board members, Det. Chovanec or Chief Jaran?

RM said he did not know.

CV asked for a status report on Marine 1.

RM said Nauset Marine completed repairs and the boat was ready to go. Asst. HM Ribas asked that delivery of the boat be delayed while he worked on dock repairs.

*A motion was made to adjourn at this time.*

**Motion:** Rich Wood            **2<sup>nd</sup>:** Carlos Verde

**Vote:**

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

*Motion passes.*

Meeting adjourned at 6:26 p.m.

Respectfully submitted,  
Doug Allen  
PPPC Administrative Asst.

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Lee Ash, Chair

## ATTACHMENTS

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

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

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

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

Thank you,

Captain Rich Wood  
[www.BethAnnCharters.com](http://www.BethAnnCharters.com)  
[www.NelsonsBaitandTackle.com](http://www.NelsonsBaitandTackle.com)  
508-487-0034 shop  
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## PROVINCETOWN PUBLIC PIER CORPORATION

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### OFFICE OF THE HARBORMASTER

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

**Article XXX:**

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

February 28, 2013

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

Respectfully submitted,  
Lee Ash, chair  
Provincetown Public Pier Corporation

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

**Article XX:**

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

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

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

Respectfully submitted,  
Lee Ash, chair  
Provincetown Public Pier Corporation

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

Dear Sharon;

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

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

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

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

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

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

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

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

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

Finally, the fee must be calculated to reimburse the Town for the services provided, rather than to raise revenues. “In order for a monetary exaction to be a fee, however, the equivalence between the cost of providing the services and the revenue collected need not be

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

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

Please let me know if you have any questions.

John

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