

PROVINCETOWN CONSERVATION COMMISSION
JUDGE WELSH ROOM
AUGUST 23, 2016
6:30 P.M.

Members Present: Dennis Minsky, Barbara Prato, Mark Irving and Alfred Famiglietti.

Members Absent: Lynne Martin (excused).

Others Present: Attorney Gregg Corbo (Town Counsel), Gloria McPherson (Town Planner), Deb Albenberg (Conservation Agent) and Ellen C. Battaglini (Permit Coordinator).

PUBLIC HEARING

Chair Dennis Minsky called the Public Hearing to order at 6:31 P.M.

1) **PUBLIC COMMENTS:**

None.

2) **PUBLIC HEARINGS:**

a) **Request for a Determination of Applicability**

Request for Determination of Applicability application by David Kelley to determine whether commercial fishing operations for surf clams utilizing hydraulic fishing gear is subject to the Massachusetts Wetlands Protection Act (M.G.L. c. 131, s. 40). The proposed operation is located on land under the ocean seaward of Herring Cove within the geographical jurisdiction of the Town of Provincetown.

Presentation: Attorney William Henchy, representing David Kelley, appeared to present the application. He stated that he is aware of the Town's position on this issue given the on-going legal matters related to Mr. Kelley's fishing vessel and his previous endeavors in hydraulic clamming off Herring Cove Beach. However, he is unaware of any action by the Department of Environmental Protection on this issue. His purpose in filing the RDA application is not to get the Commission's decision on the matter, but ultimately the DEP's decision. He will be requesting a superseding Determination of Applicability after the Commission rules this evening.

Attorney Henchy said that his client operates a commercial fishing vessel wherein he tows a hydraulic clam dredge behind his boat. He has operated within the geographical jurisdiction of the Town of Provincetown off Herring Cove Beach. The actions of his vessel result in the alteration of the resource area where it operates. His client's position is that those alterations are ephemeral, transitory in nature and not subject to regulation under the Wetlands Protection Act. And, in fact, the action of his client's vessel falls within the DEP's standard for *de minimis* alteration that results in no adverse impact on the resource area and his client is therefore seeking a negative determination from the Commission.

In response to a question from Mr. Minsky, Ms. Albenberg said that she had not received any plans from the applicant.

Attorney Corbo stated that given that no plans have been submitted with the application depicting where that work is proposed to take place, when it will take place and what will be done, he assumes that the work is of the same nature and in the same location as the work that is currently being adjudicated in Barnstable Superior Court. That legal matter is related to the challenge to three Enforcement Orders issued by the Commission in 2015. In two instances, the Court has ruled that this activity, when it is conducted within the jurisdictional resource of the Town is subject to the WPA. He said that the two questions pending before the Commission with respect to this RDA are; is the area described in the plan subject to protection under the WPA and does the work described in the plan constitute an action that will remove, fill, dredge or alter the resource area. He added that currently the Commission has no information as to those questions and the proposed work. If the Commission were to assume it's the same work as was the subject of the two decisions by the Court, in his opinion, the Commission has sufficient information to issue a positive determination.

He addressed the claim by Attorney Henchy that the work will have a *de minimis* impact on the resource area. In his opinion, that doctrine does not apply to the question before the Commission. DEP has found that certain *de minimis* actions are not subject to regulation under the WPA. He said that at the RDA stage, the impact of an action is not relevant, rather the impact of the action is to be determined at the Notice of Intent stage. The question before the Commission now is not how invasive the action is or how much of an alteration will take place. He said that as the Commission will recall, in the definition of dredge under DEP regulations, any temporary alteration of a resource is subject to regulation. Attorney Corbo concluded that the Commission not only doesn't have enough information to determine whether the proposed work will be *de minimis*, but that this was not the proper forum in which to make that decision.

Attorney Henchy said that he did not agree with Attorney Corbo's interpretation of the *de minimis* standard that has been articulated by DEP. He cited case law to support his interpretation of the standard. He said that ultimately, it will be up to the DEP to tell the public how it construes its regulations. To date, he admitted, the decisions out of the Barnstable Superior Court have found that, in the absence of any interpretation by the DEP, RDA applications to perform this activity in this resource area will result in a positive determination. His client would like to test that proposition.

The Commission discussed the issue and a draft RDA form filled-out by Attorney Corbo for its consideration. On the form, the Commission would be making the determinations that the area and the work described are subject to protection under the WPA and that removing, filling, dredging or altering of the area requires the filing of a Notice of Intent. Attorney Corbo also proposed adding a narrative, which Mr. Minsky read into the record, to the RDA form and advised that the two Court decisions be attached to it before submission.

Dennis Minsky moved to issue a Positive Determination, checking off boxes 1 and 3 on the WPA Form2 – Determination of Applicability, and include the narrative read into the record

and the two legal decisions relevant to this matter, Barbara Prato seconded and it was so voted, 4-0.

3) ADMINISTRATIVE MATTERS:

a) Vote to appoint Alfred Famiglietti to Regular Conservation Commissioner:
Dennis Minsky moved to appoint Alfred Famiglietti to Regular Conservation Commissioner, Barbara Prato seconded and it was so voted, 4-0.

ADJOURNMENT: *Barbara Prato moved to adjourn the Public Meeting at 6:53 P.M. and it was so voted unanimously.*

Respectfully submitted,

Ellen C. Battaglini

Approved by _____ on _____, 2016
Dennis Minsky, Chair