

## **Marblehead Conservation Commission Minutes July 9, 2020**

Meeting was held remotely in accordance with Governor Baker's March 12, 2020 Order Superseding Certain Provisions of the Open Meeting Law, G.L. c.30A, section 18 and the Governor's March 15, 2020 Order imposing strict limitation on the number of people that may gather in one place.

Meeting was called to order at 7:00 PM

Present were: Commission Members Brian LeClair, Jesse Alderman, David Depew, Michael Smith, William Colehower, and David VanHoven. Also present was Conservation Administrator and Town Engineer, Charles Quigley.

The hearings were conducted under the Massachusetts Wetlands Protection Act and the Marblehead Wetlands Protection Bylaw.

Note: The commission currently has seven members. Per the MACC Handbook, section 4.1.2, most lawyers agree that a quorum is "...a majority of commissioners currently serving". The quorum for this meeting is therefore four members.

### **APPROVAL OF MINUTES:**

Motion to approve minutes of meeting held on June 11, 2020, was made and minutes were approved.

### **DISCUSSIONS:**

- **146 Lafayette Street** –Enforcement order issued to Forest River Estates Condominium Trust III – Patricia Hart Tr. for violation of 310 CMR 10.00 making alteration in the resource area without filing a notice of intent. Tyler Ferrick of DeRosa Environmental appeared to discuss mitigation. It was noted that the enforcement order would be addressed after the NOI is submitted for the August meeting.
- **10 Surf Street** – Enforcement order issued to Lynn Nadeau for violation of 310 CMR 10.00 alteration in the resource area without filing a notice of intent. It was noted that NOI 40-1441 was filed and was discussed as a Continued Public Hearing.
- **11 Susan Road** –Enforcement order issued to Stevie G Browning for violation of 310 CMR 10.00 making alteration in the resource area without filing a notice of intent. The enforcement order and the public hearing were continued to the August meeting due to clerical error in the mail notice.
- **Doak's Lane Seawall** – Failed Seawall – preliminary discussion with DEP, further research is needed. Discussion held until the August meeting.
- **3-5 Gilbert Heights** – Landscape plan submitted for review. No issues with the plan and a copy of the plan will be filed with the order of conditions.
- **Turner Wood Conservation Area** – issue identified by Conservancy. Damage being caused by bike jumps being built. Coordinating with other Departments to relocate the activity.

### **MINOR MODIFICATION REQUESTS**

- **40-656 – 63 Naugus Ave** – Lynda Cutrell [Steve Livermore rep] – access to prior approved dock, pier and ramp. The Commission voted to approve by unanimous vote.

### **CERTIFICATE OF COMPLIANCE REQUEST**

- **40-1252 - 9 Bartlett St** - Stephen Peterson - [Hayes Eng'g. rep.] addition - The Commission voted to approve by unanimous vote.
- **40-656 - 63 Naugus Ave** - Lynda M. Cutrell - [Stephen Livermore rep.] - dock, pier & ramp The Commission voted to approve by unanimous vote.
- **40-1380 - 13 Goldthwait Rd**- Max Kley- [Curt Young] - storm cleanup The Commission voted to approve by unanimous vote.
- **40-1085 - 126 Beacon St** - Patricia Rivet et al - [Patrowicz] - house/deck additions, site work The Commission voted to approve by unanimous vote.
- **40-1106 - 425 Ocean Ave**- Peter Lynch- [Patrowicz] - house addition, landscaping The Commission voted to approve by unanimous vote.
- **40-1313 - 425 Ocean Avenue** - Peter Lynch Patrowicz]- seawall repairs, site work, landscaping The Commission voted to approve by unanimous vote.
- **40-1294 - 8 Foster St**- Pamela Castner - [Patrowicz] - new house and sitework The Commission voted to approve by unanimous vote.

### **MINOR ACTIVITY PERMIT REQUEST:**

- **9 Com Point Road** - Michael Campbell et ux- [Doug Jones] - install granite posts adjacent to ex. driveway - The Commission voted to approve by unanimous vote subject to approval by the Water and Sewer Commissioner in the field.
- **9 Bartlett Road** -Steven R. Peterson-[Hayes Engineering] - after the fact patio installation - The Commission voted to approve by unanimous vote.
- **Forest River Estates** request to remove a dead tree[s] in a resource area - The Commission voted to approve by unanimous vote and the Conservation Administrator/Town Engineer will make a determination on site if the dead tree will remain on site or be removed.

### **CONTINUED PUBLIC HEARINGS:**

**NOI 40-1441 - Surf St. at Spray Ave. - Rossalind Nadeau** [applicant]

Appeared: John Dick,

Proposed: Install bench and periodic clearing of encroaching vegetation surrounding the bench and provide access to the bench from the existing gate.

Letter submitted by William Walsh Regalisky, 5 Spray Avenue. One issue raised in the letter is whether the applicant has received permission from the owner of the property to perform the proposed work.

BJ Selankow of Bass Rock Lane. Vegetation removed by the applicant on her own property and this vegetation has not grown back.

All members voted to continue the hearing to the August 2020 meeting; that there will be a site visit with Commissioners at 10:00 on Friday July 10<sup>th</sup>; the applicant will sign the application; the applicant will provide a letter of permission from the Board of Selectman; and the applicant will provide a Book and Page reference that indicates this location is on a right-of-way owned by the Town.

**40-1443, 102 Harbor Avenue – Angelo Arena et ux.**

Appeared: Scott Patrowicz, Patrowicz Land Development Engineering

Proposed: Repair 145 linear feet of Pier.

Discussion of substituting the use of pressure treated wood for the deck boards. It was agreed that a material other than pressure treated wood would be used where there are sections greater than eight feet in length.

All members voted to close the hearing. All members voted to issue an OOC with the following special conditions:

33. There shall be no cleaning or rinsing of cement concrete ready-mix trucks, or cement concrete mixing equipment, such that the byproduct of the cleaning or rinsing operation finds its way to any resource area by any means, especially, but not limited to, by means of a storm drainage system (catch basins, pipes, drainage ditches, etc.).

34. To the maximum extent possible, all driveways, terraces, patios or similar ground-level surfaces shall be constructed as permeable surfaces to allow water to infiltrate through their surfaces into the ground on site.

35. All demolition debris shall be removed from the site as soon as possible and not stored within a resource area or a buffer zone. If a dumpster is used to contain debris, the dumpster shall be covered after each work day. The debris shall be properly disposed of in accordance with applicable federal, state and local regulations.

36. All construction material shall be stored outside the resource area and its buffer zone or as far back from the resource areas as possible.

37. The construction of the pier/dock and any structure over the water permanently secured to the earth shall withstand a 100-year storm without damage to the integrity of the structure. All piers/docks shall conform to the requirements of Chapter 91

38. Any pressure-treated wood proposed to be used in the construction of a structure for land - based use shall be arsenic-free. Any pressure-treated wood proposed to be used in the construction of a structure for salt water contact shall be treated with Chromated Copper Arsenate (CCA) or other preservative approved by the EPA and/or the MADEP which is less polluting and harmful to the salt water and its environment.

39. All piers, docks and floats must follow the guidelines established in the document, “Small Docks and Piers – A Guide to Permitting Small Pile-Supported Docks and Piers” dated November 2003. Float stops are permitted provided they meet the aforementioned guidelines.  
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40. By voluntary agreement with the applicant, only organic fertilizers are to be used on the property landward of the resource areas. Fertilizers should not contain pesticides or herbicides; should contain slow release nitrogen and should not contain more than 3% phosphorous. To mitigate chemical runoff, do not fertilize directly before a rainstorm and do not over fertilize. Apply fertilizer in late April and in September (refer to: A Homeowner's Guide to Environmentally Sound Lawn care published by the Massachusetts Department of Food and Agriculture and the booklet, Don't Trash Grass, published by the Massachusetts Department of Environmental Protection). **This condition shall survive this order.**

46. All gangways, docks or other items not permanently secured to the earth shall be stored during the "off season" (late fall, winter, early spring) so as to prevent them from causing any damage to other structures or resource area. **This condition shall survive this order.**

47. All gangways, docks or other items not permanently secured to the earth shall be properly secured and/or removed in the event of a major storm so as to prevent them from causing any damage to other structures or to the resource area. **This condition shall survive this order.**

50. Invasive plants shall not be used nor maintained in the landscape of the project site. This applies to the existing landscape as well as to any proposed landscape. A list of invasive plants in Massachusetts can be found in the latest update of The Evaluation of Non-Native Plant Species for Invasiveness in Massachusetts (with annotated list) produced by the Massachusetts Invasive Plant Advisory Group. For most recent update, visit [www.mnla.com](http://www.mnla.com) or [www.newfs.org](http://www.newfs.org). **This condition shall survive this order.**

51. Minor maintenance repairs to the superstructure only of the pier are allowed as a surviving condition of this order. Minor maintenance repairs are, typically, replacement of occasional deck boards, sections of hand rails, etc. Complete new decking, complete new hand rails or other such large repairs require an NOI. Minor maintenance repairs do not apply to the main support structure (stringers, bents, etc.) and do require an NOI. **This condition shall survive this order.**

52. If the pilings supporting a pier have not been painted or treated with a chemical substance, the pilings may be hand scraped to remove barnacles and other marine growth. The scraped material may remain on the beach/tidal flat. However, if the state declares a state of contamination (such as Red Tide) in an area wherein the pilings have been resident, tarps or a similar containment method must be located in the work area so as to cover the entire work area where scraping is performed. Tarps are to be cleaned of scraped material at the end of each day when scraping is performed and the scrapings disposed of in a proper manner for such contaminated materials.

If the pilings supporting a pier have been painted or treated with a chemical substance, the pilings may be hand scraped to remove barnacles and other marine growth. Tarps or a similar containment method must be located in the work area so as to cover the entire work area where scraping is performed. Tarps are to be cleaned of scraped material at the end of each day when scraping is performed and the scrapings disposed of in a proper manner for materials which include paint or treatment.

For all types of pilings (painted or unpainted/treated or untreated), a protocol must be submitted to the Conservation Commission for approval in advance of the scraping. The protocol must contain: whether the pilings are painted or unpainted/treated or untreated; whether the pilings have been contaminated; if painted or treated, the exact type of paint being scraped/if treated, the exact type of treatment; the dates and times of intended scraping (start and finish); the exact location of the intended scraping; a description of the containment method; a description of the scraping method; the final location for disposal of the paint scrapings or, if applicable, contaminated scrapings. If the pilings are to be repainted/re-treated, the exact type of paint/treatment must be identified and must be approved per the latest state and federal guidelines for such applications. The person ordering the scraping/painting/treatment must sign and date the protocol and submit it to the Marblehead Conservation Commission before any work is started. **This condition shall survive this order.**

54. The control drawing/s for this project were prepared by a licensed Professional. The construction of this project shall be regularly inspected by said licensed professional to insure that the project complies with the control drawing/s. Progress reports shall be submitted by said professional at regular intervals while work is progressing on the project. The reporting interval shall be determined by the Conservation Administrator based on the scope and anticipated duration of the project. Upon completion of the work authorized by this OOC, said licensed professional shall submit a written statement to the Conservation Commission certifying that the completed work is in substantial compliance with the control drawing and setting forth any deviations that may exist between the completed work and the plan approved by the Conservation Commission

55. Upon completion of the work allowed under this Order of Conditions the applicant shall apply for a Certificate of Compliance (COC) (a) within 30 days after completion of the work or (b) thirty (30) days prior to the expiration date of the original or extended OOC, whichever time comes sooner. If no work was started under the OOC or if some of the work will not be performed, the applicant must still apply for a Certificate of Compliance at least 30 days prior to the expiration of the OOC. The Conservation Commission may require the submission of an "as built" drawing (signed and stamped by a licensed Professional Engineer or licensed Professional Land Surveyor) with the application for the COC. Failure to submit an application for a COC shall result in a fine issued against the applicant in accordance with Marblehead Bylaws Chapter 194, Section 11E. **See Attachment "C" for "Schedule of Fines".**

105. Tarps shall be spread and secured over the work area on top of the existing resource area for debris containment and collection during low to medium tides. The tarps and debris will be removed between tides and at the end of workday. At no time are the tarps to be inundated due to rain, tidal or wave action. The tarps are to be removed no less than ½ hour prior to expected inundation. At that time all work is to cease in the area near the resource area.

106. Coatings used shall be approved by the DEP.

The Manufacturer's Written Specification for curing time shall be furnished to the Conservation Agent prior to mobilization.

Coating shall be applied only as specified in the Manufacturer's written specifications.

Coating shall not be applied if the surface is expected to undergo exposure to rain or seawater within the manufacturer's specified curing time plus ½ hour.

109. Petitioner shall not place stones or other materials on the property of others without the prior written permission of the relevant property owner.

110. Coatings shall not be applied to any surface that may be subject to wetting from rain, or seawater, within the coating manufactures specified curing time plus ½ hour.

111. Invasive plants shall not be used nor maintained in the landscape of the project site. This applies to the existing landscape as well as to any proposed landscape. A list of invasive plants in Massachusetts can found in the latest update of The Evaluation of Non-Native Plant Species for Invasiveness in Massachusetts (with annotated list) produced by the Massachusetts Invasive Plant Advisory Group. For most recent update, visit [www.mnla.com](http://www.mnla.com) or [www.newfs.org](http://www.newfs.org). The applicant may act to control any developing invasive plant species by either mechanical or chemical controls following, in the case of herbicide treatment, that applicable application procedures and controls. Only DEP approved chemicals may be used. Only a licensed firm may apply the chemicals.

112. A davit shall be placed at the end of the pier for use in raising and lowering the ramp.

XX. Where there are sections of contagious deck boards greater in length than eight (8) feet, a material other than pressure treated wood that is approved by the Division of Marine Fisheries will be used.

#### **40-144x, 11 Susan Road – Stevie G. Browning**

Hearing was removed from the agenda because of a clerical error in the mailing of the notice.

#### **PUBLIC HEARING ON PROPOSED REGULATIONS –**

Adoption of Regulation - The Town of Marblehead Conservation Commission will hold a public hearing and take public comment on the adoption of a regulation establishing performance standards pursuant to Town of Marblehead Bylaw § 194-2 for land under the ocean. A copy of the proposed regulation is on file with the Town Clerk at Abbott Hall, 188 Washington Street, Marblehead.

Prior to the start of the hearing, Commission Member David Depew recused himself and left the meeting.

Proposal from Chair to give the public an opportunity to speak at this meeting and members of the commission will consider these comments and discuss a draft regulation at the September 2020 meeting.

Commission Member Jessie Alderman provided a brief overview of the environmental concerns within the Conservation Commission's jurisdiction in Salem Harbor that have prompted the discussion of creating a regulation that establishes regulations outlining performance criteria for location of moorings.

Public comments

- Bill McHugh, 38 Gingerbread Hill; Takes exception to the use of the term Salem Harbor; the Harbormaster is the one with jurisdiction of mooring locations under 10A; the moorings from the head of Salem Harbor to the Lead Mills have never been an issue; any reference to Salem Harbor outside the jurisdictional waters of Marblehead should be stricken from the record; it is his opinion that the Conservation Commission does not have any jurisdiction over moorings or 10A permits.; Taking of shellfish for consumption or bait is prohibited; Is the Commissioner aware of the Army Corp preconstruction regulations – has consulted with the foremost consultants on eel grass and they indicate the water quality and temperature are the biggest factors impacting eel grass. Recommend that Harbormaster be responsible for this concern and not the Conservation Commission.
- Chairman LeClair noted that the Conservation Commission has jurisdiction on land under the ocean and there may be overlap between the jurisdictions of the Harbormaster and the Conservation Commission.
- Jim Zission – a kayaker who finds it difficult to use the areas in the Salem Harbor area because of all the boats and moorings and supports the proposed regulation.
- Patrick Noonan – as a swimmer in the area impacted by moorings and boats he supports the proposed regulation.
- John McIver – the proposed regulation appears to only impact three moorings where there is no eel grass and asked what makes the area in question so important. Should the regulation look at the entire jurisdictional waters of Marblehead? Why does the regulation not include floats that bottom out? Are there studies that look at trends for eel grass, shell fish and bird habitat? Recommends that there be closer review of the area delineated in the proposed regulation. Don't understand how the moorings in this location are making things worse.
- Chairman LeClair noted the regulation will apply to all the Marblehead Jurisdictional waters and that the Conservation Commission is very interested in floats that bottom out on the mud flats.
- Lloyd Michaud 41 Willow Road – wrote a letter and showed photographs of multiple floats in the area that are resting on the bottom. Concerned about the ambiguous language boats located in areas where they will bottom out in predicted storms leaves a lot of room for interpretation. This will have significant impacts for the entire Marblehead area. The process has not been well publicized and there are many homeowners that don't know about these regulations. When there is a regulation that will have such a significant impact, the homeowners along the harbor should be notified by certified mail. He does not feel that people have been well informed and the language is ambiguous.
- Chairman LeClair does accept the point of financial impact on property values unless all the people without a morning think that the inability to put a shallow water mooring off their beach. The point of boats bottoming out in storms, it is highly advisable that boat owners would remove their boats from the water if they would bottom out in a storm. The intent of this
- Martha Fernandez – 20 Ridge Road - supports the regulation, as it will provide good

public access to the water. The moorings and their benefit to individuals should not outweigh the public access to the water.

- Robert Pascal – 32 Crestwood – why is the conservation commission not focused on the boats and the prop wash in the Lead Mills instead of the three moorings, noted a conflict because one of the commission members has a property with a dock in the impacted area.

Statement from the Marblehead Harbormaster Department and Harbors Water Board in opposition to the proposed regulation was read.

Statement of Opposition  
To

Adoption of Regulation

Pursuant to Town of Marblehead By-Law 194-2

The Harbormaster department and Harbors and Waters Board would like to state that it is opposed to the Regulation request by the Conservation Commission. The Regulation is unnecessary, given the already agreed policy attached hereto. In addition, Town Counsel has already rendered an opinion (also attached) that "... regulation of a mooring field through a local wetlands regulation is problematic at best and, at worst, may conflict with and/or be inconsistent with State law which already occupies this field." Clearly, Town Counsel believes that the Harbormaster has jurisdiction in this issue, not the Conservation Commission.

A circulated petition claims that the Harbormaster wants to put moorings in the area of concern. This claim is not true as the previously mentioned policy demonstrates. This policy was the result of discussions between the Town Counsel, Conservation Board Chairman Brian LeClair and the Harbormaster last fall. The policy was established by the Harbormaster and agreed to by the Harbors and Waters Board.

Your proposed regulation would adversely impact the orderly regulation of mooring fields throughout Marblehead and cause needless confusion with the boating public. The existing regulations, policies and procedures are well understood and are sufficient to balance the various recreational, commercial, and environmental interests of the Marblehead harbor. Your members and the public are encouraged to bring any concerns forward to the Harbors and Waters Board, which conducts posted public meetings generally the first non-holiday Monday of every month in the Harbormaster's office starting at 7:30 PM.

Thank You

Harbormaster Department

Harbors and Waters Board

- Gregg Thibodeau – 14 Nonantum Road - support that we need to keep the area in question free from moorings. Will this cover the entirety of all Marblehead Waters? The areas of impacted are confusing – will this apply to Little Harbor and boats on outhauls? There are many unintended consequences of the proposed regulation. The Conservation Commission has not made the proposed regulations as public to all the impacted parties. The Commission should find another way to protect these areas.
- Chairman LeClair - It would apply to areas that don't have 2' of water at lower low tide and said he is willing to add to the list of exemptions the boats on outhauls.
- Mark Souza – Issue on the three moorings in the area of was an issue with the contractor placing the mooring put it in the incorrect location and this was immediately corrected. The Harbormaster has given the Aquatic Site policy to mooring contractors, but the Harbormaster could not control if the contractors follow the policy. Last year



there was a meeting with Town Council and the Chair of the Conservation Commission, Jason Silva and the Harbormaster worked out a policy to address the areas of concern. A petition distributed by a member of the Conservation Commission stated incorrectly that the Harbormaster was looking to place moorings in the back of Salem Harbor. This regulation will impact every pull line in the Harbor.

- Commission Member Alderman asked we could avoid these regulations if we had an interagency agreement on where moorings would be placed in the future. Mark Souza said he would need to discuss this with his Board and the town council on the question.
- Kara Pascal – 32 Crestwood Road – exemption 6, “Emergency Anchorage Area.” Will the Commission restrict anchorage in these areas. Chairman LeClair stated that anchorage areas are under the Harbormaster’s control.

End of public hearing

All members voted to approval the request from Conservation Administrator and Town Engineer, Charles Quigley to pay the dues for the Massachusetts Association of Conservation Commissioners Dues – total cost is \$897.

Meeting was adjourned at 9:00 PM.