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Superior Court - Barnstable
Docket Number

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

BARNSTABLE, ss. SUPERIOR COURT DEPARTMENT

CAPE CLUB BUILDING, INC.
AND
MEGANSETT BY THE BAY, LLC

PLAINTIFFS

v.

TOWN OF BOURNE CONSERVATION COMMISSION

DEFENDANT.

PETITION FOR CERTIORARI PURSUANT TO M.G.L. c. 249, § 4; AND FOR DECLARATORY JUDGMENT, PURSUANT TO M.G.L. c. 231A, § 1

INTRODUCTORY STATEMENT

1. The Plaintiffs, Megansett By the Bay, LLC ("Megansett"), and Cape Club Building, Inc. ("Cape Club") (hereinafter collectively referred to as "Plaintiffs') bring this action pursuant to M.G.L. c. 249, § 4 in the nature of certiorari and seeking equitable relief, against the Defendant Town of Bourne Conservation Commission ("Commission"), seeking judicial review of the Commission's administrative review of a Notice of Intent ("NOI") filed by Cape Club as the applicant and Megansett as the owner of 96 Megansett Road, Bourne, MA ("Site") under the Town of Bourne Wetland Protection Bylaw (Article 3.7, "Bylaw") and associated Regulations.

2. This Complaint seeks relief from the Commission's OOC, in which the Commission issued a ruling on November 22, 2024, regarding the NOI application for construction of a seasonal walkway, dock, ramp, and float system ("Project") extending from the Site into what is known as Squeteague Harbor. The OOC approved the Project under the state Wetlands

Protection Act and its Regulations, but denied the Project under Article 3.7, the local Bourne Wetlands Protection Bylaw ("Bylaw"), and under the Bourne Wetlands Regulations ("BWR").

3. The Project is the second Notice of Intent application for a pier system at this Property and was filed in an effort to resolve the ongoing litigation over the first Notice of Intent application, see Superior Court Docket No. 2372 CV 00398.

4. The OOC finds that although the Project, modified from the design of the first application, is an improvement over the first pier application, the Commission does not believe the Project is in full compliance with the Bylaw and its Regulations, specifically BWR 1.16(1)(e)16.b and 1.16(1)(e)2, and would not comply with the Bylaw-protected interest of Recreational and/or Commercial Use of the wetland resource areas.

5. The OOC was not based on substantial evidence, is issued contrary to the expert evidence in the record, is contrary to the public statements of two of the members of the Commission who expressed during the hearing the view that the revised design complied with the Regulation that limited the length of a dock or pier to extend no more than 1/5 of the distance across the waterway; is contrary to the position stated by the Commission's agent who agreed that the design complied with that provision, and disregards the objective criteria set in the regulation for the design and location of a dock or pier.

6. At the end of the second public hearing, the Commission closed the hearing to any new testimony, leaving it open only for purposes of submittal of a revised plan to address the concerns raised by commissioners during the second hearing and for the Commission to deliberate.

7. The applicant submitted a revised plan, consistent with the Commission's rules and consistent with the Commission's vote to close the hearing to any further testimony, and did not appear at the final session of the hearing that was designated only for deliberation.
8. Notwithstanding the Commission's vote at the prior meeting to close the hearing to further testimony, and notwithstanding the Chair's admonition of that closure to new testimony to remind those who sought to testify yet again, the Chair and Commissioners voted without notice to the Applicant or seeking the Applicant's consent to reopen the hearing to additional testimony.
9. The additional testimony was presented by those same members of the public who were previously proven to have falsely staged and photographed an event to misrepresent the navigational and recreational uses of this waterbody.
10. The Commission's decision was arbitrary and capricious, as demonstrated in part by the Commission's repeated changes to its interpretation of its own Bylaw and Regulations, improper reopening of the hearing for testimony from the public, preparation of a draft denial based on an incorrect conclusion that the Project does not comply with the $1/5^{th}$ of the distance across a waterway rule, when objectively the design complies with that standard and the Agent agreed and two Commissioners stated publicly that it complied.
11. The Bylaw purports to protect interests including navigation, which is an interest already regulated and protected under M.G.L. c. 91 and its associated Regulations at 310 CMR 9.00 et seq.
12. The Bylaw and the BWR set standards for a setback from a new dock or pier to a mooring, when those standards are inconsistent with the recognized state and federal standards for setbacks to moorings.

13. The evidence in the hearing demonstrated that the proposed dock meets the generally accepted state and federal standards for a setback from a dock to any mooring.
14. To the extent that the Bylaw and BWR impose setbacks different from state and federal guidelines for setback to moorings, the Regulations are arbitrary and capricious, and an invalid enactment of a local rule or standard that fails to directly and substantially further a proper public purpose.
15. The Commission's denial is based in part on its position that it has no authority over moorings and that the proposed dock would come closer to a mooring than the Bylaw and BWR allow.
16. The mooring in question is a mooring improperly placed to serve a property on the opposite side of this waterway, nearer to the Applicant's shoreline than it is to the mooring holder's waterfront.
17. In issuing the denial based on the setback to mooring, the Commission disregarded the Applicant's proposed resolution to have the Commission issue an approval and include a condition prohibiting construction of the dock until the setback to the improperly located mooring was resolved by relocation of that mooring.
18. In Count I, Plaintiff seeks certiorari review of the OOC under the local Bylaw, and a finding invalidating the Commission's denial as ultra vires, arbitrary and capricious, as inconsistent with and not supported by substantial evidence in the record, and the result of an error of law.
19. In Count II, Plaintiff seeks Declaratory relief from the Court determining that the provisions of the local Bylaw purporting to regulate piers and other structures wrongfully infringe upon the Plaintiff's protected right to "wharf" out and have navigational access from its property.

PARTIES

20. The Plaintiff, Megansett by the Bay, LLC, is the owner of the Property at 96 Megansett Road (the "Site") and has a mailing address of 100 Cape Club Drive, Sharon, MA 02067.
21. The Plaintiff, Cape Club Building, Inc., is the Applicant for the permit and has a mailing address of 25 Tiot Street, Sharon, MA 02067.
22. The Defendant, Town of Bourne Conservation Commission ("Commission"), is the duly constituted body charged with implementing the Town of Bourne Wetland Protection Bylaw ("Bylaw"), Article 3.7, and its Bourne Wetlands Regulations ("BWR") 1.0.

JURISDICTION

23. The Superior Court has jurisdiction under M.G.L. c. 249, § 4 as this is a case involving a civil action in the nature of certiorari to correct errors in proceedings before a municipal body, where such proceedings are not otherwise reviewable by motion or appeal. The Court may enter judgment quashing or affirming such proceedings or such judgment as justice requires.
24. The Court also has jurisdiction under M.G.L. c. 231A, § 1 to issue Declaratory Judgment and grant equitable relief.
25. The Plaintiffs seek to correct errors in the proceeding before the Bourne Conservation Commission, which errors are contrary to the Bylaw and inconsistent with and contrary to the provisions set forth in the Massachusetts Wetland Protection Act and its implementing regulations that are referenced in and incorporated into the local bylaw and its regulations, as well as inconsistent with and contrary to G.L. c. 91 and its implementing regulations, 310 CMR 9.

26. There is no other appeal or review available to Plaintiffs to challenge the Commission's decision under the Bylaw, and that decision has resulted in substantial injury and manifest injustice to the Plaintiff.

FACTUAL ALLEGATIONS

27. Megansett is the owner of the Site.
28. Cape Club, as Applicant for the Project, filed the Notice of Intent ("NOI") on July 30, 2024.
29. The NOI application sought approval for the installation and maintenance of a seasonal walkway, pier, ramp, and float extending from the Site into Squeteague Harbor. The work is proposed adjacent to and within resource areas regulated under the WPA and the Bylaw, including the 100-foot Buffer Zone to a stable, non-eroding Coastal Bank, the 200-foot Riverfront Area associated with Squeteague Harbor, the 100-foot Buffer Zone to Salt Marsh, the 100-foot Buffer Zone to Coastal Beach, and within Land Subject to Coastal Storm Flowage ("LSCSF"). The work is also proposed partially within Land Under the Ocean, Salt Marsh, and Land Containing Shellfish.
30. The Site was previously developed as a summer camp running from 1946 to 2008, with several structures, hardscaping, landscaping, and septic, but is currently under construction pursuant to a separate Order of Conditions for a single-family residence with associated structures.
31. In an attempt to resolve the dispute over the first application, the Applicant modified the design to shorten and reorient the proposed structure consistent with the comments made by the Commissioners during the first application, and filed this second application.
32. The Applicant asserted that pursuant to Section 1.16(1)(g)(2), the Project was subject to Section 1.16(1)(g), not to the other provisions of Section 1.16(1).

a. Section 1.16(1)(g) requires the Commission to "accept applications and plans for small, residential (non-commercial), seasonal piers and any associated temporary supports, walkways, ramps, or floats within Velocity Zones."

b. Section 1.16(1)(g)2 states that "notwithstanding the provisions of BWR 1.16(1)(e) through (f), no new structures shall be permitted within a Velocity Zone except for small residential piers and associated walkways meeting the following requirements:...b. New SR V-zone piers must meet all other applicable performance standards herein, including the requirement to be seasonal only unless it meets the exception of BWR 1.16(1)(e)17.a."

c. The Applicant asserted that, based on the 'notwithstanding' language in Section 1.16(1)(g)2., the provisions of BWR Sections 1.16(1)(e) through (f) did not apply to the application.

d. The Commission sought guidance from Town Counsel, which provided an opinion letter on August 13, 2024, asserting that the term 'notwithstanding' was intended to add additional requirements to small residential pier applications, not an exemption from the other requirements.

e. Such an interpretation is contrary to the use of 'notwithstanding' elsewhere in the Bylaw and BWR.

f. BWR Section 1.02(1) and (2) describes the Commission's jurisdiction over wetland resource areas and activities subject to regulation under the Bylaw. BWR Section 1.02(3) then states that "Notwithstanding the provisions of BWR 1.02(1) and (2), any fresh water wetland, bank, land under waterbodies, land subject to flooding created for the purpose of stormwater management pursuant to Article

3.7 of the Town of Bourne Bylaws, shall not require the filing of a Notice of Intent or request for Determination of Applicability to maintain the stormwater management system…"

g. Section 1.02(3) creates an exception from the Commission's jurisdiction over certain resource areas and activities for specific situations, such that the Commission may not impose the requirement to seek a Notice of Intent or determination of applicability in those circumstances.

h. BWR 1.04 contains Definitions. In the "Velocity Zone" definition, the boundaries of V-zones are determined by reference to the National Flood Insurance Program data.

i. BWR 1.04 then states that "notwithstanding the v-zone delineation on the most recent Federal Insurance Rate Map (FIRM)", in specific situations the v-zone should be mapped using alternate methods.

j. This definition creates an exception from the typical procedure for determining V-Zones, such that the applicant is required to follow the alternate procedure rather than the typical method.

k. The BWR is replete with examples of the use of 'notwithstanding' to create an exception from the other provisions of the BWR.

33. Thus, the Applicant's design of the dock within the V-Zone was not subject to the design criteria provisions of BWR 1.16(1)(e) through (f), on which the Commission based its denial.

34. Despite this, the Applicant also designed the Project to comply with the other provisions of Section 1.16, specifically 1.16(1)(e).

35. The Project NOI proposed a seasonal structure in accordance with the Bylaw and BWR, shown on a Plan dated April 3, 2024, consisting of the following:

    a. 42-foot-long, 3.5-foot-wide walkway extending from a previously approved deck located at the upland edge of the Salt Marsh over the Salt Marsh and connecting to a

    b. 57-foot-long, 3.5-foot-wide seasonal pier extending from the seaward edge of the Salt Marsh into Squeteague Harbor and connecting to a

    c. 16-foot-long, 3-foot-wide (48 square foot) aluminum ramp connecting to a

    d. 6 feet by 20 feet (120 square foot) float.

36. The above plan depicted the dock located such that the shortest distance to a Mean Low Water Line ("MLW") was shown at 34 feet from the float to the nearest shoreline – a point on the Applicant's shoreline - and also measured a distance of 141 feet to the closest point at MLW on the opposite shore.

37. The Commission's Regulations, revised July 18, 2024, provide that "no pier shall extend more than 1/5 across a water body as measured linearly to the nearest shore line from MLW to MLW. This is intended to preserve at least 60% open water for recreational and/or commercial use. Only one measurement to the nearest shore line is required. The measurement must be displayed on the site plan.

38. The Applicant's engineer designed the pier specifically to meet the objective standards set by the Commission in its local regulations (the "BWR"), with distance setbacks to Salt Marsh, depth of water at the float and other details dictated by the BWR shown on the Plan.

39. The Commission opened its review of the NOI on August 15, 2024.

a. Although the Regulations specifically provide that only one measurement to the nearest shoreline is required, the Commission in the first hearing on the new NOI requested the Applicant to submit a revised plan with measurements to other points.

b. The hearing was then continued.

40. The Applicant revised the Project based on the August 15, 2024 hearing comments and submitted the revisions on or around October 31, 2024. The relevant revisions and responses are included below:

a. The Applicant responded to concerns about the mooring setback by noting that the Commission has the authority to either condition the construction of the Project on the relocation of the mooring or to waive the setback requirement.

b. The Applicant also noted that the mooring, in its licensed location, does not comply with the Army Corps of Engineers guidelines.

c. The location of the mooring has also shifted over the years regardless of the licensed location, usually further from the mooring owner's property and closer to the Property at issue here. Given the mooring's actual location rarely, if ever, complies with its licensed location, imposing the stringent setback of the Project from the imprecisely located mooring is unreasonable.

d. The Applicant also made minor revisions to the site plan to show additional bathymetry of the harbor and MLW details. The Applicant submitted a revised plan dated November 1, 2024. ("Rev Plan 11-24")

e. The Applicant, in response to comments from the Commission asking that the calculation of the pier length compared to the waterbody width be based on "one line from the dock to the nearest shore MLW." The Applicant revised the calculation of pier extension across the waterbody and determined that the Project, as measured in a single straight line, extends 35.1 feet into the waterbody from the nearest shore line MLW, and in a straight line then extends a distance of 169.5 feet from the float to MLW directly across the waterbody, for a total of 204.6 feet from MLW to MLW. The pier extended only 17.3% across the waterbody, measured to the nearest shore line from MLW to MLW, and thus meets the requirement to extends less than 1/5 or 20% distance across the waterbody.

f. The Applicant also provided on the November 1, Rev Plan 11-24 an alternate measurement of distance across the waterbody, based on two line segments that each go from the outermost point of the pier to the nearest MLW on each of the shorelines, and also complied with the Regulation. The pier extended 35.1 feet from MLW to MLW on the Applicant's shoreline, and 141 feet to the nearest point to MLW on the opposite shoreline, for a total waterbody width of 176.1 feet. Using those measurements, the pier extended 19.9% of the width of waterbody and thus complied with the Regulation.

41. The Commission held the second hearing on the Project on November 7, 2024.

a. At the November 7, 2024, at least one Commissioner expressly stated that in his view the plan complied with the 1/5 rule – he agreed with the manner in which the Applicant's engineer had measured the line.

b. The Agent had also expressed to the Applicant's engineer that she agreed with the measurement.

c. A member of the public, Robert Bishop, spoke and presented a written statement debunking the prior statements by John York and Joseph McGurl regarding use of the waterbody for recreational/commercial use, including Mr. Bishop's presentation of a detailed chronology of his observations over several years of the extremely limited use of this waterbody for navigation, and especially not for use by a local sailing program.

d. Bishop's statement included an affidavit by the Director of the sailing program stating that this part of the waterbody was unsuitable for use by the sailing program.

e. But another member of the public again insisted that the 1/5 measurement must be in a single straight line and rather than measure from the nearest shoreline, that it must be measured from the nearest point to MLW on the opposite shoreline.

42. The Commission voted to close the hearing for further testimony at the November 7, 2024 meeting, but left the hearing open for submittal by the Applicant of a revised plan addressing specific details from the November 7, 2024 hearing and for other written public comment, and for the Commission to deliberate at the next public hearing without the statutory 21 day deadline commencing on November 7.

43. The Applicant submitted the revised plan on November 14, 2024. The revised plan depicted the Project as follows:

a. 46.6-foot-long, 3.5-foot-wide walkway extending from a previously approved deck located at the upland edge of the Salt Marsh over the Salt Marsh and connecting to a

b. 54-foot-long, 3.5-foot-wide seasonal pier extending from the seaward edge of the Salt Marsh into Squeteague Harbor and connecting to a

c. 16-foot-long, 3-foot-wide (48 square foot) aluminum ramp connecting to a

d. 6 feet by 12 feet (72 square foot) float.

44. The revised plan included two methods of measuring the 1/5 distance across the waterbody as compared to the pier length:

a. The first method measured the width of the waterbody from MLW to MLW to the closest point of MLW on the opposite side of the waterbody with a line parallel to the corner of the pier and extending in a straight line to the point of MLW on the Applicant's shore. The dock, measured this way, extends 34.9 feet from MLW, with a total distance from MLW to MLW of 181.81 feet. Using this measurement – measuring not from the nearest shoreline (on the Applicant's side of the waterbody) but to the nearest point of MLW on the opposite shoreline, as the member of the public insisted on - the pier would extend 19.19% of the distance across the waterbody, compliant with the Regulation. (181.81/34.9 = 19.19%)

b. The plan also showed a second measurement, specifically to demonstrate that the waterway was wider along that line – 187.64 feet as compared to 181.81 feet – and that the distance using a straight line to the nearest shoreline on the applicant's shoreline was 50.1 feet as compared with 34.9 feet using the Applicant's measurement.

45. The Commission held its deliberation at the November 21, 2024 hearing.

a. In preliminary statements of their position by Commission members, the only two members who expressed their views stated that they agreed with the manner in which the Applicant had measured the width of the waterway for purposes of the 1/5th measurement.

b. Then, despite having previously closed the hearing on November 7, 2024 to further testimony, the Commission voted, without requesting the consent of the Applicant or publishing notice of the reopening, to reopen the hearing that night and accept additional public comment.

c. The Commission heard again the advocacy of those who insisted on a 1/5 measurement contrary to the clear reading of the Regulation, knowing that the single line starting where they advocated for would lead to a point where the shoreline on the Applicant's side of the waterbody curved away and inaccurately depicted the waterway as wider for navigation purposes than it is.

d. Without further deliberation or explanation of the basis for changing a previously taken position, the Commission then voted to close the hearing.

e. The Commission unanimously voted to approve the permit under the State law, the WPA, and also unanimously voted to on a motion to deny the permit under the Bylaw.

46. The Commission issued its OOC by certified mail on November 22, 2024, approving the Project under the WPA, but denying it under the local Bylaw.

47. The OOC found the following proposed resource area impacts:

a. 1.74 square feet of alteration to Land Under the Ocean;

b. 0.87 square feet of alteration to Salt Marsh;

c. 2.61 square feet of alteration to Land Containing Shellfish; and

d. 2.63 square feet of alteration to Land Subject to Coastal Storm Flowage.

48. The Commission held that under the Bylaw, the Project would not comply with the requirement of Section 3.7.4 to protect the ability of the wetland resource area to provide public Recreational and/or Commercial Use.

    a. The evidence supporting this finding appears primarily based on comments from members of the public asserting that the Project would impair the recreational/commercial use of the Squeteague Harbor waterway, based on a staged event that was photographed to make it appear that this was a congested waterway.

    b. The Commission ignored the evidence in the record from a direct abutter that demonstrated the false testimony of others and clearly documented that the pier would have no adverse effect on navigation or recreation.

    c. The Commission made no findings with regard to the credibility of the facts presented by the lay witnesses, and made no findings to support its disregard of the uncontested, unequivocal testimony of the only expert witness to present evidence in this matter – Mark Dibb, the Registered Professional Engineer who prepared the project plans in the manner consistent with the clear reading of the Regulations.

49. The Commission held that under the Bylaw, the Project would not comply with the requirements of BWR Section 1.16(e)16.b, requiring a 100-foot setback from moorings, and that the Bylaw did not provide for grant of a variance or waiver from the BWR as BWR 1.04 describes hardship as applicable only to a particular piece of property and not to property within Commonwealth Tidelands.

50. The Commission held that under the Bylaw, the Project would not comply with the requirements of BWR Section 1.16(1)(e)2, requiring the preservation of 60% of open water from Mean Low Water to Mean Low Water ("MLW") for recreational and/or commercial use.

    a. The Commission asserted that the provision requires that a pier not extend further than 1/5 across the waterbody "as measured linearly to the nearest shoreline from MLW to MLW" and that "only one measurement to the nearest shoreline is required."

    b. The Commission disregarded the Applicant's plan showing that the narrowest portion of the waterbody impacted by the proposed Project as measuring 181.8 feet from MLW to MLW, with the pier extending out 34.9 feet from MLW, or 19% of the waterbody.

    c. The Commission instead interpreted the Regulation to mean that the pier cannot extend greater than 1/5 across the waterbody in any direction, and so long as there was one measurement where the pier extended more than 1/5 across the waterbody, the pier did not comply.

    d. In determining this, the Commission asserted that the correction interpretation of its Regulation would be to measure the waterbody from its second narrowest measurement, 187.64 feet, and interpret the Regulation as measuring the pier length along that trajectory measuring the waterbody rather than measuring the pier length from MLW where the pier is actually proposed. This measurement locates the pier float 50.1 feet from MLW such that the pier extends more than 1/5 of the distance across the waterbody.

e. This tortured interpretation disregards that common sense, and the definition of the pier itself, determines pier length by the actual structure's location, which extends 34.9 feet into the waterbody from MLW.

f. Using common sense measurements of the pier, even with the Commission's use of the second narrowest measurement of the waterbody at 187.64 feet, the pier would comply with the Regulation and extend across 18.6% of the waterbody.

g. The OOC specifically cites to arguments by a member of the public made after the Commission had closed the hearing to testimony and then reopened it without notice or the Applicant's consent as support for the Commission's interpretation, that the Commission should interpret its Regulation "as measured linearly from the nearest shoreline" as meaning the shorelines closest to the seaward end of the pier, rather than the narrowest section of the waterbody from MLW to MLW.

51. The Commission has changed its interpretation of its own Bylaw and Regulations repeatedly throughout the first and second application hearing processes, each time modifying its interpretation to ensure that the Project as designed will not comply with the Commission's interpretation of its Bylaw and Regulations.

52. Members of the Commission repeatedly stated through the first NOI hearing and this second NOI hearing that they did not understand the correct method to measure the waterbody using the vague wording of the Regulation, yet chose a tortured interpretation clearly intended to support a denial of this project.

53. This Complaint seeks relief from the Commission's OOC under the Bylaw, on the grounds that the OOC is ultra vires, arbitrary and capricious, an error of law, an abuse of discretion, and seeks to enforce a regulation that is impermissibly vague and ambiguous.

54. The Plaintiff seeks relief from the Court as there is no alternative route for relief available under the Bylaw.

55. This Complaint is timely filed, within sixty (60) days after the issuance of the OOC.

COUNT I (Certiorari, M.G.L. c. 249, § 4)

The Commission's Decision is Ultra Vires, Exceeding Its Authority, Not Supported By Substantial Evidence in the Record, and is Arbitrary, Capricious, and an Abuse of Discretion

56. Plaintiff realleges and incorporates herein all allegations made in paragraphs 1 through 55 above.

57. The Project as proposed complies with the WPA and the Bylaw.

58. Bylaw Section 3.7.4 is the Definitions section of the Bylaw, incorporating by reference the definitions contained within the WPA and its Regulations.

    a. Section 3.7.1 defines the wetlands resource values protected under the Bylaw as public and private water supplies, groundwater supplies, flood control, storm damage prevention, pollution prevention, fisheries and shellfisheries, wildlife habitat, erosion and sedimentation control, and recreational and/or commercial uses.

    b. "Adverse effect" is defined as "any change in the quality of a wetland resource area that causes a diminishment in its ability to provide the wetland resource values protected by this Bylaw."

    c. "Impair" is defined as "to make or cause to become worse; weaken or damage. Projects must be designed so as to not significantly impair the wetland resource areas, buffer zones, and/or the wetland resource values protected under the Bylaw."

    d. "Recreational and/or Commercial Use" is defined as meaning "the purposes for which the wetland resource area are used by the public, such as navigation, fishing, hunting, shellfishing, swimming, water skiing, diving, walking, etc. A project must be designed so as not to impair the ability of the Wetland Resource Area to provide for these public recreational and/or commercial uses."

59. The Commission ruled based on public comments and speculation, that a pier extending from a private property owner's shoreline which fully complies with the dimensional requirements of the BWR and which would provide recreational access to the Squeteague Harbor waterway to that property owner, must be denied approval to protect the waterway for its value for public recreational and/or commercial use.

60. This determination disregarded the evidence in the record demonstrating that the Project as designed would not impact public recreational and/or commercial use.

61. BWR Section 1.16(1)(e)2 requires that, "notwithstanding the provisions of BWR 1.16(1)(c), no pier may extend more than 1/5 across a water body as measured linearly to the nearest shore line from MLW to MLW. This is intended to preserve at least 60% open water for recreational and/or commercial use. Only one measurement to the nearest shore line is required. The measurement must be displayed on the site plan."

62. Despite the provision explicitly stating that only one measurement to the nearest shore line from MLW to MLW is required, the Commission found that the Project does not comply with Section 1.16(1)(e)2, based on their assertion that the Applicant must prove that the pier extends less than 1/5 of the length of the water body in <u>all</u> directions.

    a. The Applicant measured the length of the pier from the nearest point of MLW on the Applicant's side of the waterway.

b. The Applicant determined that the waterbody width from the nearest shoreline from MLW to MLW was 181.81 feet, making it permissible for a pier to extend into the waterbody 36.4 feet to comply with the 1/5 requirement.

c. The Applicant designed the pier to extend into the waterbody 34.9 feet, less than 36.4 feet and thus compliant with the BWR provision.

d. Notwithstanding this, to address Commission and public comments, the Applicant provided additional measurements of the waterbody and the pier extension.

e. The Applicant provided the second narrowest width of the waterbody at 187.64 feet from MLW to MLW, with the measurement at an angle to the proposed pier's extension into the waterbody. The pier still extends 34.9 feet from MLW into the waterbody based on the actual measurements of the structure to the nearest point of MLW. This measurement complies with the 1/5 requirement.

63. The Applicant demonstrated compliance with the provision as it is written.

64. After the Applicant demonstrated that compliance, the Commission adjusted its interpretation yet again to require that the compliance be based on measurements of the waterbody width taken at multiple angles and locations and that the pier's calculated extension into the waterbody be measured in a continuous line from each point across the waterbody rather than taken from the pier's actual proposed extension from MLW.

65. This tortured interpretation lacks any common sense interpretation of how to measure the length of a pier structure and is clearly intended to ensure that the Commission could find at least one measurement that did not meet the 1/5 requirement.

66. BWR Section 1.16(e)16.b requires that no portion of the pier and floats shall be within one hundred (100) feet of a navigation channel or one hundred (100) feet from the location of any mooring anchor to the nearest edge of the float or pier if no float.
67. The Commission found that the Project would not comply with Section 1.16(e)16.b because the proposed float is not located more than 100 feet from all moorings. The Commission found that the edge of the float was located 60 feet from a mooring anchor, and determined that there were no provisions for the Commission to grant a waiver or variance from the regulations.
68. The Commission has committed an error of law regarding distance to the mooring:
    a. Although local standards may be more stringent than state standards protecting a regulated area, the local standards may not be inconsistent with or contravene a state standard.
    b. The Property has the right to "wharf" out and to navigate to and from the tidal waters, dating back to the Colonial Ordinances of 1641 and 1647, codified in G.L. c. 91 and its Regulations at 310 CMR 9.00 et seq.
    c. The state standards call for, where feasible, a setback of 50 feet, 25 feet from each side of a common lot line, between the ends of docks and piers, but impose no setback from a mooring to a fixed pier.
    d. The Project complies with the state standard for safe setbacks, and no special local conditions exist that warrant different standards.
    e. The mooring cited by the Commission as grounds for its denial was once held by the predecessor in interest to the Owner for the Property and was thus located a logical distance from the shoreline of the Property.

f. The mooring is now held by a property owner on the opposite side of the waterbody from the Property, and that owner is opposed to any use of the Property whatsoever and has positioned the mooring to interfere with the Project.

g. The mooring owner has shifted the location of the mooring closer to the Property and the location of the Project over the years and, until publication of public notice for this NOI in July 2024, had not placed a boat on the mooring ball.

h. Then, mere days later and prior to the Commission's first hearing on the new NOI, the staged event was photographed with the mooring permit holder's boat prominently shown in the foreground of the photos.

i. As documented in the Applicant's submittals, the mooring holder usually has kept his boat at his own dock, on the opposite side of the waterway, in shallower water than either where the Project's float is proposed or where the mooring is located.

j. Water deeper than the end of the mooring holder's dock is available throughout the width of the waterbody for him to place his mooring in a location where it does not interfere with the placement of the Applicant's proposed dock.

k. The Applicant would suffer hardship from the Commission's literal enforcement of the Bylaw and the BWR against the Property, given its location next to the Commonwealth tidelands and Squeteague Harbor, and the Applicant's right to 'wharf' out into the Harbor and the fact that the conditions of the Property are not the result of actions of the Applicant or its predecessors.

l. The Commission, therefore, erroneously based its denial on the lack of 100 foot setback between the pier and the adjacent mooring, rather than either determining that rule unenforceable or conditioning the permit to require the Applicant to have that mooring moved to create the 100 foot separation before construction of the dock commences.

69. Although not discussed in the Commission's OOC, the Applicant filed the second application pursuant to BWR Section 1.16(1)(g)2., governing applications for small residential piers within Velocity Zones.

70. The NOI and Plan fully comply with the standards applicable to small docks in V-Zone under BWR Section 1.16(1)(g)2, which have no standards for width of the waterbody or for separation from a mooring.

71. The Commission's decision is not based on the substantial evidence in the record demonstrating the Project's compliance with the Bylaw and BWR, it is instead based on arbitrary and capricious reinterpretations of the meaning and interpretation of the Commission's own rules in an attempt to find the most onerous and tortured interpretation possible to block this project.

72. The Commission bowed to public pressure and speculation and the obviously manufactured allegations from the public about impacts to recreational/ commercial uses of Squeteague Harbor, and disregarded without explanation the competent, technical expert evidence presented in support of the project.

73. The Applicant demonstrated with substantial evidence that the Project was designed to comply with the objective Bylaw standards and to protect the wetland resource values, including that the Project met the Commission's shifting interpretations of its standard calculating the distance a proposed pier extends across a waterbody.

74. The Commission ignored the evidence submitted by the Applicant despite not having reliable evidence in the record demonstrating otherwise.

75. The Commission has relied on personal opinion and speculation in issuing the OOC finding that the Project would interfere with the protected wetland resource value of recreation and/or commercial use of Squeteague Harbor.

76. The Commission's re-interpretation of its Bylaw and BWR on several occasions during the hearing process for the first application and this second application was arbitrary and capricious and intended to ensure that the Applicant could not comply with the requirements of the Bylaw and BWR.

77. The Commission's interpretation of its Bylaw and BWR so as to prohibit the Project is arbitrary and capricious, pretextual, ultra vires, and an error of law.

78. The Commission gave no basis for disregarding the substantial evidence in the record and substituted its own views and arbitrary standards to support its OOC findings.

79. The Commission's OOC is inconsistent with its obligation to make a fact-based ruling guided by the substantive standards of the WPA, its Regulations, and the Bylaw.

80. The Commission's OOC was an error of law under the state statute and state regulatory standards that it incorporated by reference into the Bylaw's review standards.

COUNT II (Declaratory Judgement, M.G.L. c. 231A, § 1)

Where the Bylaw Purports to Protect the Recreational and/or Commercial Uses, Including Navigation, the Provisions of the Bylaw are Inconsistent With the Governing State Statutes and are Preempted by Such Statutes

81. Plaintiff realleges and incorporates herein all allegations made in paragraphs 1 through 80 above.

82. Plaintiff seeks declaratory relief pursuant to M.G.L. c. 231A, § 1.

83. The Commission has used the Bylaw protected interest of "navigation" as a pretext to block navigation from the Plaintiff's property and its exercise of its rights to "wharf" out and navigate to and from its property.

84. The local Bylaw, because it has been used to block navigation by creating unreasonable setbacks to the proposed pier that otherwise meets the national and State standards, is inconsistent with and contrary to a State law standard and therefore beyond the authority of the Town under the Home Rule Amendment.

85. Under the Home Rule Amendment and G.L. c. 43B, Section 13 a municipality shall not enact a local rule that is "inconsistent with the constitution or any laws enacted by the general court."

86. There is actual controversy with respect to which the Plaintiff is entitled to a declaration of its rights against the Commission.

WHEREFORE, the Plaintiff hereby respectfully requests this Court, pursuant to M.G.L. c. 249, § 4 and M.G.L. c. 231A, § 1, to:

1. Review the record of the proceedings and rule that the Commission's OOC denying the Project pursuant to the Bylaw and the BWR was unsupported by substantial evidence in the record and an error of law, and therefore reversed; and
2. Rule that the Commission's OOC was ultra vires, arbitrary and capricious, and therefore unenforceable; and
3. Declare that the Bylaw as it purports to protect and regulate recreational and/or commercial navigation within Commonwealth waters and as it was applied to this proposed pier is not a valid exercise of the Commission's power and thus such provisions are stricken; and
4. Declare that the Plaintiff has complied with all reasonable performance standards under the Bylaw; and
5. Enter judgment reversing the Commission's OOC denial of the Project;
6. Enter judgment issuing an OOC approving the project under the local Bylaw; and

7. For such other and further relief as the Court shall deem, meet and just.

Respectfully submitted,
Plaintiffs Megansett By the Bay, LLC, and
Cape Club Building, Inc.,
By their attorneys,

Dated: January 21, 2025

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Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands

WPA Form 5 – Order of Conditions

Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

Provided by MassDEP:
SE7-2320
MassDEP File #

eDEP Transaction #
Bourne
City/Town

A. General Information

Please note: this form has been modified with added space to accommodate the Registry of Deeds Requirements

Important: When filling out forms on the computer, use only the tab key to move your cursor - do not use the return key.

1. From: Bourne
   Conservation Commission

2. This issuance is for (check one): a. ■ Order of Conditions b. ☐ Amended Order of Conditions

3. To: Applicant:

   a. First Name: | b. Last Name:
   c. Organization: Cape Club Building, Inc.
   d. Mailing Address: 25 Tiot Street
   e. City/Town: Sharon | f. State: MA | g. Zip Code: 02067

4. Property Owner (if different from applicant):

   a. First Name: | b. Last Name:
   c. Organization: Megansett By The Bay, LLC
   d. Mailing Address: 100 Cape Club Drive
   e. City/Town: Sharon | f. State: MA | g. Zip Code: 02067

5. Project Location:

   a. Street Address: 96 Megansett Road | b. City/Town: Bourne
   c. Assessors Map/Plat Number: 54.0 | d. Parcel/Lot Number: 15

   Latitude and Longitude, if known: d m s | d m s
   d. Latitude | e. Longitude
   41.66057N | 70.61658W

Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands
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A. General Information (cont.)

6. Property recorded at the Registry of Deeds for (attach additional information if more than one parcel):

Barnstable	
a. County	b. Certificate Number (if registered land)
34264	153
c. Book	d. Page

7. Dates:

7/30/2024	11/21/2024	11/22/2024
a. Date Notice of Intent Filed	b. Date Public Hearing Closed	c. Date of Issuance

8. Final Approved Plans and Other Documents (attach additional plan or document references as needed):

Proposed Pier Plan
a. Plan Title

Cape & Islands Engineering	Matthew C. Costa, P.L.S. & Mark D. Dibb, P.E.
b. Prepared By	c. Signed and Stamped by
11/14/2024	1"=60'
d. Final Revision Date	e. Scale
f. Additional Plan or Document Title	g. Date

B. Findings

1. Findings pursuant to the Massachusetts Wetlands Protection Act:

Following the review of the above-referenced Notice of Intent and based on the information provided in this application and presented at the public hearing, this Commission finds that the areas in which work is proposed is significant to the following interests of the Wetlands Protection Act (the Act). Check all that apply:

a. ☐ Public Water Supply
b. ☒ Land Containing Shellfish
c. ☒ Prevention of Pollution
d. ☐ Private Water Supply
e. ☒ Fisheries
f. ☒ Protection of Wildlife Habitat
g. ☒ Groundwater Supply
h. ☒ Storm Damage Prevention
i. ☒ Flood Control

2. This Commission hereby finds the project, as proposed, is: (check one of the following boxes)

Approved subject to:

a. ☒ the following conditions which are necessary in accordance with the performance standards set forth in the wetlands regulations. This Commission orders that all work shall be performed in accordance with the Notice of Intent referenced above, the following General Conditions, and any other special conditions attached to this Order. To the extent that the following conditions modify or differ from the plans, specifications, or other proposals submitted with the Notice of Intent, these conditions shall control.

Massachusetts Department of Environmental Protection
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B. Findings (cont.)

Denied because:

b. ☐ the proposed work cannot be conditioned to meet the performance standards set forth in the wetland regulations. Therefore, work on this project may not go forward unless and until a new Notice of Intent is submitted which provides measures which are adequate to protect the interests of the Act, and a final Order of Conditions is issued. **A description of the performance standards which the proposed work cannot meet is attached to this Order.**

c. ☐ the information submitted by the applicant is not sufficient to describe the site, the work, or the effect of the work on the interests identified in the Wetlands Protection Act. Therefore, work on this project may not go forward unless and until a revised Notice of Intent is submitted which provides sufficient information and includes measures which are adequate to protect the Act's interests, and a final Order of Conditions is issued. **A description of the specific information which is lacking and why it is necessary is attached to this Order as per 310 CMR 10.05(6)(c).**

3. ☐ Buffer Zone Impacts: Shortest distance between limit of project disturbance and the wetland resource area specified in 310 CMR 10.02(1)(a) ______ a. linear feet

Inland Resource Area Impacts: Check all that apply below. (For Approvals Only)

Resource Area	Proposed Alteration	Permitted Alteration	Proposed Replacement	Permitted Replacement
4. ☐ Bank	a. linear feet	b. linear feet	c. linear feet	d. linear feet
5. ☐ Bordering Vegetated Wetland	a. square feet	b. square feet	c. square feet	d. square feet
6. ☐ Land Under Waterbodies and Waterways	a. square feet	b. square feet	c. square feet	d. square feet
	e. c/y dredged	f. c/y dredged		
7. ☐ Bordering Land Subject to Flooding	a. square feet	b. square feet	c. square feet	d. square feet
Cubic Feet Flood Storage	e. cubic feet	f. cubic feet	g. cubic feet	h. cubic feet
8. ☐ Isolated Land Subject to Flooding	a. square feet	b. square feet		
Cubic Feet Flood Storage	c. cubic feet	d. cubic feet	e. cubic feet	f. cubic feet
9. ☐ Riverfront Area	a. total sq. feet	b. total sq. feet		
Sq ft within 100 ft	c. square feet	d. square feet	e. square feet	f. square feet
Sq ft between 100-200 ft	g. square feet	h. square feet	i. square feet	j. square feet

Massachusetts Department of Environmental Protection
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B. Findings (cont.)

Coastal Resource Area Impacts: Check all that apply below. (For Approvals Only)

	Proposed Alteration	Permitted Alteration	Proposed Replacement	Permitted Replacement
10. ☐ Designated Port Areas	Indicate size under Land Under the Ocean, below			
11. ☒ Land Under the Ocean	1.74 a. square feet	1.74 b. square feet		
	c. c/y dredged	d. c/y dredged		
12. ☐ Barrier Beaches	Indicate size under Coastal Beaches and/or Coastal Dunes below			
13. ☐ Coastal Beaches	a. square feet	b. square feet	cu yd c. nourishment	cu yd d. nourishment
14. ☐ Coastal Dunes	a. square feet	b. square feet	cu yd c. nourishment	cu yd d. nourishment
15. ☐ Coastal Banks	a. linear feet	b. linear feet		
16. ☐ Rocky Intertidal Shores	a. square feet	b. square feet		
17. ☒ Salt Marshes	0.87 a. square feet	0.87 b. square feet	c. square feet	d. square feet
18. ☐ Land Under Salt Ponds	a. square feet	b. square feet		
	c. c/y dredged	d. c/y dredged		
19. ☒ Land Containing Shellfish	2.61 a. square feet	2.61 b. square feet	c. square feet	d. square feet
20. ☐ Fish Runs	Indicate size under Coastal Banks, Inland Bank, Land Under the Ocean, and/or inland Land Under Waterbodies and Waterways, above			
	a. c/y dredged	b. c/y dredged		
21. ☒ Land Subject to Coastal Storm Flowage	2.83 a. square feet	2.83 b. square feet		
22. ☐ Riverfront Area	a. total sq. feet	b. total sq. feet		
Sq ft within 100 ft	c. square feet	d. square feet	e. square feet	f. square feet
Sq ft between 100-200 ft	g. square feet	h. square feet	i. square feet	j. square feet

B. Findings (cont.)

* **#23**. If the project is for the purpose of restoring or enhancing a wetland resource area in addition to the square footage that has been entered in Section B.5.c (BVW) or B.17.c (Salt Marsh) above, please enter the additional amount here.

23. ☐ Restoration/Enhancement *:

a. square feet of BVW
b. square feet of salt marsh

24. ☐ Stream Crossing(s):

a. number of new stream crossings
b. number of replacement stream crossings

C. General Conditions Under Massachusetts Wetlands Protection Act

The following conditions are only applicable to Approved projects.

1. Failure to comply with all conditions stated herein, and with all related statutes and other regulatory measures, shall be deemed cause to revoke or modify this Order.
2. The Order does not grant any property rights or any exclusive privileges; it does not authorize any injury to private property or invasion of private rights.
3. This Order does not relieve the permittee or any other person of the necessity of complying with all other applicable federal, state, or local statutes, ordinances, bylaws, or regulations.
4. The work authorized hereunder shall be completed within three years from the date of this Order unless either of the following apply:
   a. The work is a maintenance dredging project as provided for in the Act; or
   b. The time for completion has been extended to a specified date more than three years, but less than five years, from the date of issuance. If this Order is intended to be valid for more than three years, the extension date and the special circumstances warranting the extended time period are set forth as a special condition in this Order.
   c. If the work is for a Test Project, this Order of Conditions shall be valid for no more than one year.
5. This Order may be extended by the issuing authority for one or more periods of up to three years each upon application to the issuing authority at least 30 days prior to the expiration date of the Order. An Order of Conditions for a Test Project may be extended for one additional year only upon written application by the applicant, subject to the provisions of 310 CMR 10.05(11)(f).
6. If this Order constitutes an Amended Order of Conditions, this Amended Order of Conditions does not extend the issuance date of the original Final Order of Conditions and the Order will expire on _____ unless extended in writing by the Department.
7. Any fill used in connection with this project shall be clean fill. Any fill shall contain no trash, refuse, rubbish, or debris, including but not limited to lumber, bricks, plaster, wire, lath, paper, cardboard, pipe, tires, ashes, refrigerators, motor vehicles, or parts of any of the foregoing.

C. General Conditions Under Massachusetts Wetlands Protection Act

8. This Order is not final until all administrative appeal periods from this Order have elapsed, or if such an appeal has been taken, until all proceedings before the Department have been completed.

9. No work shall be undertaken until the Order has become final and then has been recorded in the Registry of Deeds or the Land Court for the district in which the land is located, within the chain of title of the affected property. In the case of recorded land, the Final Order shall also be noted in the Registry's Grantor Index under the name of the owner of the land upon which the proposed work is to be done. In the case of the registered land, the Final Order shall also be noted on the Land Court Certificate of Title of the owner of the land upon which the proposed work is done. The recording information shall be submitted to the Conservation Commission on the form at the end of this Order, which form must be stamped by the Registry of Deeds, prior to the commencement of work.

10. A sign shall be displayed at the site not less then two square feet or more than three square feet in size bearing the words,

    "Massachusetts Department of Environmental Protection" [or, "MassDEP"]

    "File Number SE7-2320 "

11. Where the Department of Environmental Protection is requested to issue a Superseding Order, the Conservation Commission shall be a party to all agency proceedings and hearings before MassDEP.

12. Upon completion of the work described herein, the applicant shall submit a Request for Certificate of Compliance (WPA Form 8A) to the Conservation Commission.

13. The work shall conform to the plans and special conditions referenced in this order.

14. Any change to the plans identified in Condition #13 above shall require the applicant to inquire of the Conservation Commission in writing whether the change is significant enough to require the filing of a new Notice of Intent.

15. The Agent or members of the Conservation Commission and the Department of Environmental Protection shall have the right to enter and inspect the area subject to this Order at reasonable hours to evaluate compliance with the conditions stated in this Order, and may require the submittal of any data deemed necessary by the Conservation Commission or Department for that evaluation.

16. This Order of Conditions shall apply to any successor in interest or successor in control of the property subject to this Order and to any contractor or other person performing work conditioned by this Order.

C. General Conditions Under Massachusetts Wetlands Protection Act (cont.)

17. Prior to the start of work, and if the project involves work adjacent to a Bordering Vegetated Wetland, the boundary of the wetland in the vicinity of the proposed work area shall be marked by wooden stakes or flagging. Once in place, the wetland boundary markers shall be maintained until a Certificate of Compliance has been issued by the Conservation Commission.

18. All sedimentation barriers shall be maintained in good repair until all disturbed areas have been fully stabilized with vegetation or other means. At no time shall sediments be deposited in a wetland or water body. During construction, the applicant or his/her designee shall inspect the erosion controls on a daily basis and shall remove accumulated sediments as needed. The applicant shall immediately control any erosion problems that occur at the site and shall also immediately notify the Conservation Commission, which reserves the right to require additional erosion and/or damage prevention controls it may deem necessary. Sedimentation barriers shall serve as the limit of work unless another limit of work line has been approved by this Order.

19. The work associated with this Order (the "Project")
    (1) ☐ is subject to the Massachusetts Stormwater Standards
    (2) ☒ is NOT subject to the Massachusetts Stormwater Standards

    If the work is subject to the Stormwater Standards, then the project is subject to the following conditions:

    a) All work, including site preparation, land disturbance, construction and redevelopment, shall be implemented in accordance with the construction period pollution prevention and erosion and sedimentation control plan and, if applicable, the Stormwater Pollution Prevention Plan required by the National Pollution Discharge Elimination System Construction General Permit as required by Stormwater Condition 8. Construction period erosion, sedimentation and pollution control measures and best management practices (BMPs) shall remain in place until the site is fully stabilized.

    b) No stormwater runoff may be discharged to the post-construction stormwater BMPs unless and until a Registered Professional Engineer provides a Certification that:
    i. all construction period BMPs have been removed or will be removed by a date certain specified in the Certification. For any construction period BMPs intended to be converted to post construction operation for stormwater attenuation, recharge, and/or treatment, the conversion is allowed by the MassDEP Stormwater Handbook BMP specifications and that the BMP has been properly cleaned or prepared for post construction operation, including removal of all construction period sediment trapped in inlet and outlet control structures;
    ii. as-built final construction BMP plans are included, signed and stamped by a Registered Professional Engineer, certifying the site is fully stabilized;
    iii. any illicit discharges to the stormwater management system have been removed, as per the requirements of Stormwater Standard 10;

C. General Conditions Under Massachusetts Wetlands Protection Act (cont.)

iv. all post-construction stormwater BMPs are installed in accordance with the plans (including all planting plans) approved by the issuing authority, and have been inspected to ensure that they are not damaged and that they are in proper working condition;

v. any vegetation associated with post-construction BMPs is suitably established to withstand erosion.

c) The landowner is responsible for BMP maintenance until the issuing authority is notified that another party has legally assumed responsibility for BMP maintenance. Prior to requesting a Certificate of Compliance, or Partial Certificate of Compliance, the responsible party (defined in General Condition 18(e)) shall execute and submit to the issuing authority an Operation and Maintenance Compliance Statement ("O&M Statement) for the Stormwater BMPs identifying the party responsible for implementing the stormwater BMP Operation and Maintenance Plan ("O&M Plan") and certifying the following:

i.) the O&M Plan is complete and will be implemented upon receipt of the Certificate of Compliance, and

ii.) the future responsible parties shall be notified in writing of their ongoing legal responsibility to operate and maintain the stormwater management BMPs and implement the Stormwater Pollution Prevention Plan.

d) Post-construction pollution prevention and source control shall be implemented in accordance with the long-term pollution prevention plan section of the approved Stormwater Report and, if applicable, the Stormwater Pollution Prevention Plan required by the National Pollution Discharge Elimination System Multi-Sector General Permit.

e) Unless and until another party accepts responsibility, the landowner, or owner of any drainage easement, assumes responsibility for maintaining each BMP. To overcome this presumption, the landowner of the property must submit to the issuing authority a legally binding agreement of record, acceptable to the issuing authority, evidencing that another entity has accepted responsibility for maintaining the BMP, and that the proposed responsible party shall be treated as a permittee for purposes of implementing the requirements of Conditions 19(f) through 19(k) with respect to that BMP. Any failure of the proposed responsible party to implement the requirements of Conditions 19(f) through 19(k) with respect to that BMP shall be a violation of the Order of Conditions or Certificate of Compliance. In the case of stormwater BMPs that are serving more than one lot, the legally binding agreement shall also identify the lots that will be serviced by the stormwater BMPs. A plan and easement deed that grants the responsible party access to perform the required operation and maintenance must be submitted along with the legally binding agreement.

f) The responsible party shall operate and maintain all stormwater BMPs in accordance with the design plans, the O&M Plan, and the requirements of the Massachusetts Stormwater Handbook.

C. General Conditions Under Massachusetts Wetlands Protection Act (cont.)

g) The responsible party shall:
1. Maintain an operation and maintenance log for the last three (3) consecutive calendar years of inspections, repairs, maintenance and/or replacement of the stormwater management system or any part thereof, and disposal (for disposal the log shall indicate the type of material and the disposal location);
2. Make the maintenance log available to MassDEP and the Conservation Commission ("Commission") upon request; and
3. Allow members and agents of the MassDEP and the Commission to enter and inspect the site to evaluate and ensure that the responsible party is in compliance with the requirements for each BMP established in the O&M Plan approved by the issuing authority.

h) All sediment or other contaminants removed from stormwater BMPs shall be disposed of in accordance with all applicable federal, state, and local laws and regulations.
i) Illicit discharges to the stormwater management system as defined in 310 CMR 10.04 are prohibited.
j) The stormwater management system approved in the Order of Conditions shall not be changed without the prior written approval of the issuing authority.
k) Areas designated as qualifying pervious areas for the purpose of the Low Impact Site Design Credit (as defined in the MassDEP Stormwater Handbook, Volume 3, Chapter 1, Low Impact Development Site Design Credits) shall not be altered without the prior written approval of the issuing authority.

l) Access for maintenance, repair, and/or replacement of BMPs shall not be withheld. Any fencing constructed around stormwater BMPs shall include access gates and shall be at least six inches above grade to allow for wildlife passage.

Special Conditions (if you need more space for additional conditions, please attach a text document):

See attached text.

20. For Test Projects subject to 310 CMR 10.05(11), the applicant shall also implement the monitoring plan and the restoration plan submitted with the Notice of Intent. If the conservation commission or Department determines that the Test Project threatens the public health, safety or the environment, the applicant shall implement the removal plan submitted with the Notice of Intent or modify the project as directed by the conservation commission or the Department.

Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands

WPA Form 5 – Order of Conditions

Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

Provided by MassDEP:
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Bourne
City/Town

D. Findings Under Municipal Wetlands Bylaw or Ordinance

1. Is a municipal wetlands bylaw or ordinance applicable? ☒ Yes ☐ No

2. The Bourne (Conservation Commission) hereby finds (check one that applies):

   a. ☒ that the proposed work cannot be conditioned to meet the standards set forth in a municipal ordinance or bylaw, specifically:

      Bourne Wetland Protection Bylaw — 1. Municipal Ordinance or Bylaw
      Article 3.7 — 2. Citation

      Therefore, work on this project may not go forward unless and until a revised Notice of Intent is submitted which provides measures which are adequate to meet these standards, and a final Order of Conditions is issued.

   b. ☐ that the following additional conditions are necessary to comply with a municipal ordinance or bylaw:

      1. Municipal Ordinance or Bylaw — 2. Citation

3. The Commission orders that all work shall be performed in accordance with the following conditions and with the Notice of Intent referenced above. To the extent that the following conditions modify or differ from the plans, specifications, or other proposals submitted with the Notice of Intent, the conditions shall control.
   The special conditions relating to municipal ordinance or bylaw are as follows (if you need more space for additional conditions, attach a text document):

   See attached reasons for denial.

Massachusetts Department of Environmental Protection
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E. Signatures

This Order is valid for three years, unless otherwise specified as a special condition pursuant to General Conditions #4, from the date of issuance.

NOV 22 2024
1. Date of Issuance

Please indicate the number of members who will sign this form.
This Order must be signed by a majority of the Conservation Commission.

4
2. Number of Signers

The Order must be mailed by certified mail (return receipt requested) or hand delivered to the applicant. A copy also must be mailed or hand delivered at the same time to the appropriate Department of Environmental Protection Regional Office, if not filing electronically, and the property owner, if different from applicant.

Signature	Printed Name
Robert M. Gray	ROBERT M. GRAY
Susan J. Weston	Susan J. Weston
Melvin P. Holmes	MELVIN P. HOLMES SR
Joseph M Soares	Joseph M. Soares

☐ by hand delivery on

Date

☑ by certified mail, return receipt requested, on NOV 22 2024

Date

F. Appeals

The applicant, the owner, any person aggrieved by this Order, any owner of land abutting the land subject to this Order, or any ten residents of the city or town in which such land is located, are hereby notified of their right to request the appropriate MassDEP Regional Office to issue a Superseding Order of Conditions. The request must be made by certified mail or hand delivery to the Department, with the appropriate filing fee and a completed Request for Departmental Action Fee Transmittal Form, as provided in 310 CMR 10.03(7) within ten business days from the date of issuance of this Order. A copy of the request shall at the same time be sent by certified mail or hand delivery to the Conservation Commission and to the applicant, if he/she is not the appellant.

Any appellants seeking to appeal the Department's Superseding Order associated with this appeal will be required to demonstrate prior participation in the review of this project. Previous participation in the permit proceeding means the submission of written information to the Conservation Commission prior to the close of the public hearing, requesting a Superseding Order, or providing written information to the Department prior to issuance of a Superseding Order.

The request shall state clearly and concisely the objections to the Order which is being appealed and how the Order does not contribute to the protection of the interests identified in the Massachusetts Wetlands Protection Act (M.G.L. c. 131, § 40), and is inconsistent with the wetlands regulations (310 CMR 10.00). To the extent that the Order is based on a municipal ordinance or bylaw, and not on the Massachusetts Wetlands Protection Act or regulations, the Department has no appellate jurisdiction.

Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands
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G. Recording Information

Prior to commencement of work, this Order of Conditions must be recorded in the Registry of Deeds or the Land Court for the district in which the land is located, within the chain of title of the affected property. In the case of recorded land, the Final Order shall also be noted in the Registry's Grantor Index under the name of the owner of the land subject to the Order. In the case of registered land, this Order shall also be noted on the Land Court Certificate of Title of the owner of the land subject to the Order of Conditions. The recording information on this page shall be submitted to the Conservation Commission listed below.

Bourne
Conservation Commission

Detach on dotted line, have stamped by the Registry of Deeds and submit to the Conservation Commission.

To:

Bourne
Conservation Commission

Please be advised that the Order of Conditions for the Project at:

96 Megansett Road
Project Location

SE7-2320
MassDEP File Number

Has been recorded at the Registry of Deeds of:

Barnstable
County

Book

Page

for:

Property Owner

and has been noted in the chain of title of the affected property in:

Book

Page

In accordance with the Order of Conditions issued on:

Date

If recorded land, the instrument number identifying this transaction is:

Instrument Number

If registered land, the document number identifying this transaction is:

Document Number

Signature of Applicant

Applicant's Name: Cape Club Building, Inc. DEP #: SE7-2320

Address: 96 Megansett Road Bourne #: NOI-24-44

This Order of Conditions is being issued based upon strict accordance with the information submitted in the Notice of Intent filed on 7/30/2024 and the Revised Plan of Record dated 11/14/2024 and stamped by Matthew C. Costa PLS and Mark D. Dibb PE.
Additional materials reviewed included:

In addition to the GENERAL CONDITIONS referenced in the Order of Conditions, the Commission has found it necessary to impose the following Special Conditions pursuant to M.G.L. Ch. 131, s.40.

THE SPECIAL CONDITIONS CHECKED BELOW APPLY TO YOUR PROPOSAL. NOTE THAT THE ABOVE-LISTED GENERAL CONDITIONS ARE AUTOMATICALLY PART OF THIS ORDER OF CONDITIONS.

SPECIAL CONDITIONS Pursuant to M.G.L. C. 131, s. 40.

Pre-Construction

☒ 1. This Order of Conditions shall apply to any successor in interest or successor in control of the property.

☒ 2. NO WORK SHALL BEGIN until General Condition #9 has been complied with. The Commission must be in receipt of the Registry information certificate BEFORE work begins. An Enforcement Order will be issued if work is prematurely begun without compliance with this condition.

☒ 3. ALL CONSTRUCTION MUST COMPLY WITH THE ABOVE-REFERENCED PLANS AND THE CONDITIONS OF THIS ORDER. ANY CHANGES INTENDED TO BE MADE IN THE PLANS OR IN THE WORK, SHALL REQUIRE THE APPLICANT TO FILE A NEW NOTICE OF INTENT, OR TO INQUIRE OF THE COMMISSION IN WRITING WHETHER THE CHANGE IS SUBSTANTIAL ENOUGH TO REQUIRE A NEW FILING. NO CHANGE IN PLAN OR WORK, UNDER THIS FILING IS PERMISSIBLE WITHOUT A NEW NOTICE OF INTENT, OR PERMISSION FROM THE COMMISSION. FAILURE TO COMPLY WITH THIS CONDITION WILL RESULT IN THE ORDER OF CONDITIONS (PERMIT) BEING REVOKED.

☐ 4. The Plan of Record shall be in full compliance with 780 CMR Massachusetts State Building Code and the requirements the Federal Emergency Management Agency (FEMA). Specific design requirements for construction in flood zones shall be determined by the Town of Bourne Building Inspector. The final foundation design APPROVED by the Building Inspector shall automatically become a part of the Plan of Record. Noncompliance with any of the requirements of 780 CMR or those of the Building Inspector shall constitute a violation of the Order of Conditions and will be grounds for Enforcement Action and/or the non-issuance of the Certificate of Compliance. Upon requesting a Certificate of Compliance the applicant must present PROOF that his/her project has been designed according to the Plan of Record and to the satisfaction of the Building Inspector.

☐ 5. Prior to the installation of the subsurface sewage disposal system, you are advised of the necessity to comply with, or receive a variance from, the local Board of Health Regulations & Bylaws and obtain a valid health permit. The Order of Conditions re-emphasizes this requirement and prohibits any construction prior to obtaining a Board of Health permit. A leaching facility must be 150' from any wetland resource area (including the top of the coastal bank) unless a variance or other approval has been granted by the Board of Health.

☐ 6. Since the building was or is to be constructed after August 10, 1978, and is or will be within 100' of the top of an eroding coastal bank, (310 CMR, 10.30), this Order and the Certificate of Compliance incorporate 310 CMR 10.30(5) which states: "no coastal engineering structure, such as a bulkhead, revetment, or seawall shall be permitted on an eroding bank at any time in the future to protect the project allowed by this Order of Conditions."

☒ 7. The applicant as a condition of this Order, grants to the Commission members, and agents of the Commission the right to enter, inspect, and sample the premises to evaluate compliance with the conditions and performance standards stated in this Order, the Act, and 310 CMR 10.00 and the Town of Bourne Wetlands Protection Bylaw Article 3.7, and may require the submittal of any data deemed necessary by the Commission for that evaluation.

☒ 8. An on-site pre-construction inspection meeting must be held between the Bourne Conservation Commission and/or agent, the contractor responsible for implementing the project, and if applicable, the outside consultant/representative responsible for permitting. The Bourne Conservation Commission must be contacted in writing at least two weeks prior to the scheduled meeting. All erosion controls must be installed at the location of the project prior to the pre-construction meeting, unless otherwise agreed upon by the applicant and the Bourne Conservation Commission.

☒ 9. The landowner and/or his contractor will notify the Commission in writing 5 days prior to the start of work. The letter shall state the name, address, telephone number (business & home phone) of the project supervisor who will be responsible for insuring on-site compliance with this Order. All sedimentation/erosion control devices shall be installed BEFORE the start of work.

☒ 10. This document shall be included in all construction contracts and subcontracts dealing with the work proposed and shall supersede other contract requirements.

☐ 11. No underground petroleum product storage tanks are allowed within 100' of any wetland or within any velocity (V) floodzone as indicated on the most recent FEMA floodzone maps.

<u>Construction</u>

☒ 12. The project engineer and contractors (and all subcontractors) must be informed of the conditions of this Order. A copy of this Order of Conditions must be available at all times at the construction site for reference. The Applicant is held responsible for compliance with this Order of Conditions.

☐ 13. Whatever erosion control measures are indicated on the plan, they shall consist of at least a double row of staked hay-bales and these must be maintained throughout the construction period. It is the applicant's responsibility to take additional appropriate measures to control sedimentation/erosion into the wetland areas.

☐ 14. The Applicant must employ and maintain suitable erosion control measures such as staked hay bales, siltation curtains, bark mulch, jute netting, etc. as shown on the Plan of Record and/or addressed in the Notice of Intent. This siltation control shall be maintained until all disturbed areas are successfully revegetated. Additional erosion controls shall be kept on-site in order to respond to unforeseen circumstances.

☐ 15. The applicant, owner, successors or assignees shall be responsible for maintaining any on-site drainage structures and out falls, assuring the lasting integrity of vegetative cover on the site and site activities so as to prevent erosion, siltation, sedimentation, chemical contamination or other detrimental impact to the on-site wetland resource area(s) and/or off-site wetland resource area(s). The maintenance activities specified in this Order shall not expire with the issuance of the Certificate of Compliance and shall continue in perpetuity. It is the responsibility of the property owner of record to see that maintenance conditions are complied with as required by this Order.

☐ 16. Gutters, downspouts and drywell must be installed to collect all roof runoff.

☐ 17. Pool water must be drained into the approved drywell. No pool water can be discharged into any wetland resource areas.

☐ 18. All drainage must be directed into a leaching type catch basin before being discharged towards or into any wetland or surface water body. All catch basins must incorporate measures to insure the removal of pollutants such as oil and gas and must provide for adequate sediment retention. The basins and oil absorbent material shall be regularly cleaned and maintained.

☒ 19. Any refuse material generated through the project construction will be removed to an approved landfill, and in no case will these materials be allowed to be buried or disposed of on site or on abutting property. REMOVAL MUST BE DONE WEEKLY DURING THE CONSTRUCTION PHASE OF THE PROJECT. REFUSE MUST NOT BE ALLOWED TO ENTER ANY WETLAND AREAS.

☐ 20. Used petroleum products from the operation or maintenance of construction equipment and construction debris shall be collected weekly and disposed of off-site at an approved landfill. No on-site disposal is permitted.

☒ 21. Only rubber tired or tracked vehicles utilizing swamp mats/planks will be permitted to traverse the following resource areas: beaches, dunes, and saltmarshes.

☒ 22. Installation of saltmarsh walkway must occur during salt marsh dormant season which is typically October through end of March.

☐ 23. Use of heavy equipment shall be confined to inside the limit of work as shown on the Plan of Record. All work shall be accomplished from the UPLAND side of the limit of work line.

☐ 24. The use of heavy equipment upon the saltmarsh, dunes or coastal beach is PROHIBITED. All work within these resource areas must be done by hand or with suitable equipment approved by the Commission

☐ 25. The proposed stairs shall be elevated __ feet above the existing grade. All pilings should be supported by SONO tube footings. Excavated materials shall be removed from the coastal bank.

☐ 26. Driveway must be constructed out of pervious material in perpetuity.

☐ 27. A landscaping plan including the size, quantity, species and location of plantings including square footage of lawn, mulch, etc. must be submitted and approved by the Conservation Agent and/or the Commission prior to receiving the occupancy permit.

☐ 28. All vegetation must be predominantly native and non-invasive. All plants must be allowed to grow to maturity before pruning. All plantings will be monitored for a minimum of two growing seasons and any plants that do not survive must be replaced.

Post Construction

☒ 29. Upon completion of your project you must apply for a Certificate of Compliance. This Order will not be considered complied with until the Certificate of Compliance has been requested, granted and RECORDED at the Registry of Deeds in Barnstable. To insure timely issuance of the Certificate of Compliance you must request the Certificate within 30 days of the completion of your project.

☒ 30. Prior to the issuance of a Certificate of Compliance, the project engineer or consultant shall certify that the project has been completed in compliance with this Order and the original Plan of Record. Any variations from the approved plan should be clearly noted and reasons given to justify the noncompliance. (see Bylaw condition/requirement also)

☒ 31. An as-built plan, signed and stamped by a registered professional engineer or land surveyor in the Commonwealth of Massachusetts shall be submitted to the Commission at the same time as a written request for a Certificate of Compliance and shall specify how the completed plan differs from that shown on the plans referred to in the Order of Conditions. The as-built plan shall include, but not be limited to the following:

- All pipe/culvert inverts for inflow and outfalls, pipe slope, size and composition; location of other drainage structures; limits of fill or alteration; location of any structure and pavement within 100' of any wetland resource area (including the top of the coastal bank); the edge of each wetland resource area; the grade contours within 100' of the wetland resource areas

Docks, Piers, Floats, Dredging, etc.

☒ 11. The contractor shall develop a spill management plan for any hazardous materials that may be Employed during work in any coastal resource area or over the water. Specifically, the plan must address how to effectively deal with spillage of fuel or hydraulic fluids from equipment. A spill kit must be stored on every project-related vessel for use in the event of a fluid spill or leak.

☒ 12. Any activities requiring a barge must be restricted to 2 hours before and after high tide. The barge cannot anchor in the eel grass growing area as shown on the site plan of record.

☒ 13. Any area that is disturbed during construction is to be revegetated immediately, or as soon thereafter as the growing season commences, with appropriate native vegetation.

☒ 14.The structure shall be continuously maintained in a manner that will insure safe use and shall be subject to inspection by the Harbormaster at anytime.

☒ 15. The public shall not be hindered from free access over or under the proposed structure for the purposes of fishing or fowling between the tide lines.

☐ 16. The structure shall be subject to annual review and approval by the Harbormaster in accordance with M.G.L. Chapter 91, Section 10A and/or current Town of Bourne Waterways Regulations.

☒ 17. No ramps, floats or other parts of the proposed structure are to be stored upon the saltmarsh, coastal dune, coastal bank or any other wetland resource area except the flood zone. If stored in the flood zone, floats and ramps must be anchored to resist wind loads and to resist flotation that may occur even under relatively shallow flood depths. All floats and other seasonal structures must be removed from the waterways from October 15 to April 1st and stored in a suitable UPLAND AREA.

☒ 18. Any changes in the configuration of the proposed structure would require an additional filing with the Commission and/or approval of the Harbormaster.

☐ 19. Applicants for docks, piers, and walkways must pay a shellfish mitigation fee when building in areas of

Land Containing Shellfish. The fee shall be calculated using the Bourne Conservation Commission Policy 24-6 Shellfish Mitigation Calculation Sheet and the data provided in the shellfish report required in BWR 1.16(1)(d)7, as well as any additional data the Shellfish Constable may provide. The fee shall be collected after the applicant obtains all local, state and federal permits required for the proposed work and prior to the start of construction.

☒ 20. Should the proposed float(s) and/or other parts of the proposed structure break loose it will be the responsibility of the applicant to recover same and repair any damage to property of other parties that occurred due to the loose structure.

☐ 21. If it should be determined at a later date that this structure is an interference to navigation, the applicant will be required to down size the structure accordingly under the direction of the Harbormaster.

☒ 22. Piles must be driven, not jetted into the substrate.

☒ 23. Only non-leaching treated lumber/piles or galvanized steel piles will be permitted for use on structures that will be placed into the water. No creosote or chromated copper arsenate (CCA) is allowed.

☒ 24. Deck spacing must be spaced at 3/4 - 1" apart to allow for light penetration to the vegetation below the decking.

☐ 25. If ice damage or extreme weather conditions cause piling(s) to be damaged, an RDA must be filed to restore the stability, safety and function of the structure. The Conservation Commission may use discretion for cases that may disturb the wetland resource areas to a point that may require the filing of a Notice of Intent.

☒ 26. Prior to commencement of construction and after consultation with the local shellfish officer, any shellfish in the immediate vicinity of the pier shall be moved and replanted in a suitable location approved by the DMF [310 CMR 10.34(6)].

General condition Number(s) 14, 15, 17, 18, and 20 above shall continue in perpetuity beyond the limitations of this Order and with the sale of the property to others.

<u>The Applicant is reminded of his/her right to Appeal this Order or any part herein. This Appeal must be a dual appeal to both DEP within 10 days and to Superior Court pursuant to M.G.L c. 249 s. 4 within 60 calendar days of the issuance of this Order of Conditions.</u>

96 Megansett Rd, Bourne MA
File Number SE7-2320

Reason for Denial under Bourne Wetland Protection Bylaw Article 3.7

The application for a walkway, dock, ramp and float system at 96 Megansett Rd, Bourne MA (map 54, parcel 15) was originally filed with the Bourne Conservation Commission (BCC) by Cape and Islands Engineering on behalf Cape Club Building, Inc. on July 30, 2024. Public hearings were held on August 15, 2024, November 7, 2024 and November 21, 2024. This is the second application for a pier system at this location. The initial application for a walkway, dock, ramp and float system at this property under SE7-2172 currently has an appeal pending at Barnstable Superior Court under case No. 2372CV00398. Although this proposed pier system is an improvement compared to SE7-2172, the BCC still does not believe it is in full compliance with the Bourne Wetland Protection Bylaw Article 3.7 (BL) and the Bourne Wetlands Regulations (BWR).

The hearing was closed and a vote was taken on November 21, 2024.

The BCC voted unanimously (5-0-0) to approve the proposed project (file number SE7-2320) under the Massachusetts Wetlands Protection Act, MGL C. 131, s. 40 and issue an Order of Conditions.

The BCC voted unanimously (5-0-0) to issue a denial under the local Bourne Wetland Protection Bylaw, Article 3.7. A vote was taken to move the draft denial under Bourne Wetland Protection Bylaw Article 3.7 (BL) and the Bourne Wetlands Regulations (BWR) to the final and thus issue a denial Order of Conditions on November 21, 2024. The reasons for the denial are based on noncompliance with the local Bylaw (BL) and the Bourne Wetlands Regulations (BWR). The specific reasons for denial are listed below:

Failure to meet BWR 1.16(1)(e)16.b - 100' mooring setback.

The proposed float is not located the requisite distance (100') from all mooring anchors. The site plan of record dated November 14, 2024 shows a mooring located 60' from the edge of the float. BWR 1.16(1)(e)16.b specifies the required setback of "100' from the location of any mooring anchor to the nearest edge of the float, or pier if no float." Both the Bourne Harbormaster and Cove master for Squeteague Harbor reference the project's inability to meet this regulation in the comments dated August 15, 2024, November 7, 2024, and August 25, 2024.

As discussed during the public hearing on August 15, 2024, the BCC would consider issuing an OOC if the applicant could produce the attestation of the mooring holder that they would move the mooring once all permits (local, state, and federal) for the pier were obtained. The applicant was unable to produce any documented communication to that effect.

The BL contains no provisions for a waiver or variance from the BWR. The "hardship" referenced at BWR 1.04 applies to a "particular piece of property" and not to property within the Commonwealth Tidelands, as is the case here.

Failure to meet BWR 1.16(1)(e)2- preserving 60% open water from MLW to MLW for recreational and/or commercial use

BWR general performance standards for piers requires that a pier not extend further than 1/5 across the waterbody "as measured linearly to the nearest shoreline from MLW to MLW". The regulation specifies that "only one measurement to the nearest shore line is required." On the plan of record dated November 14, 2024, the applicant shows the narrowest portion of the waterbody impacted by the pier as measuring 181.8' from MLW to MLW with the pier extending out 34.9' from MLW (19% of the waterbody). The engineer believes this design meets the requirement of the regulation.

The BCC interprets the regulation to mean that the pier cannot extend greater than 1/5 across the waterbody in any direction. Under the BCC's interpretation, the revised plan still does not meet BWR 1.16(1)(e)2 because the second narrowest measurement across the waterbody is 187'and the pier extends 50' from MLW (26.7% of the waterbody) along that trajectory (represented by the gray dashed line on the plan of record). Therefore, the proposed pier does not meet BWR 1.16(1)(e)2.

Similar to the BCC's interpretation, Mr. Joseph McGurl argued at the hearing on November 21, 2024 and via written public comment that the phrase in the regulation, "as measured linearly from the nearest shoreline," should be interpreted to mean the shoreline closest to the seaward end of the pier, as opposed to the narrowest section of the waterbody from MLW to MLW. This interpretation is represented by the dashed gray line on the plan of record, which shows that the pier does not meet BWR 1.16(1)(e)2. During the public comment period on November 21, 2024, Mr. John York also argued that the pier fails to meet BWR 1.16(1)(e)2. He stated that the seaward-most point of the pier to MLW across water, as represented by the gray line, is the appropriate measurement for the Bourne regulation.

Failure to design the project in a manner that protects one or more of the *wetland resource values* listed in BL Section 3.7.4.

The BL requires that a proposed project not impair the ability of the Wetland Resource Areas to provide public *Recreational and/or Commercial Use*. BL section 3.7.4(i) explains that "Recreational and/or Commercial Use means, but is not limited to, the purposes for which the Wetland Resource Area are used by the public such as navigation, fishing, hunting, shellfishing, water skiing, diving, walking, etc." During the public hearing process many public comments, both verbal and written, addressed the adverse effect this proposed dock would have on the wetland resource value of *Recreational and/or Commercial Use*. Several comments highlighted the narrowness of the waterbody, particularly due to the existence of a substantial sand bar and its proximity to the proposed location of the float, and how that would negatively impact navigation and recreation within the waterbody. Abutters submitted evidence that the float is proposed in the deepest section of the waterbody, significantly impacting navigation in the harbor especially at low tide. Examples of recreation and navigation that were brought up during the public hearing include the Cataumet Club sailing program, commercial kayak tours, and shellfishing. At the time of the hearing's closure, the BCC had received close to one hundred emails from concerned citizens urging the BCC to deny the project based on the expected adverse effects of the pier on navigation, recreation and commercial kayaking, as well as the pier's environmental impact. Conversely, the BCC also received written public comment (dated November 5, 2024) and verbal public comment (provided at the public hearing on November 7,

2024) by direct abutters to the proposed project disputing many of the public claims against the project.

Although navigation in the harbor was not highlighted as an issue by the Town of Bourne Harbormaster or the Cove master beyond the pier's inability to meet the 100' mooring setback, the BCC did take into the consideration the Cove master's comments on August 25, 2024 about water depth and the negative impact a boat can have when grounded at extreme low tides. Although the proposed pier meets the requisite 18'' based on the water depths shown on the plan of record, the harbor is notoriously shallow and it is very likely that the boat will be grounded in Land Containing Shellfish during moon low tides. This can have an adverse impact on shellfish habitat, and consequently, on recreational shellfishing.

While the BCC believes the final plan of record is an improvement compared to the site plan denied under SE7-2172 and the project will have less adverse effect on the wetland resource values protected under BL 3.7, it was still determined that the applicant failed to meet the "Burden of Proof" as defined in BWR 1.03(1)(a) and 1.03(1)(b) and did not properly demonstrate that the proposed project area, which is partially within publicly protected Commonwealth Tidelands, does not play a role in the protection of any wetland resource values or that the proposed work would contribute to the protection of the wetland resource values. Instead, the BCC determined that the project would likely have an adverse effect and/or a cumulative adverse effect upon the wetland resource value of *Recreational and/or Commercial Use* protected under BL 3.7.

Appeals:

The procedure for appealing this decision is outlined in the BL section 3.7.10 and BWR 1.10 (a) and (b).

Bourne Wetlands Protection Bylaw (BL) and Bourne Wetland Regulations (BWR):

The Bourne Wetland Protection Bylaw (BL) was initially passed at the Annual Town Meeting on May 11, 1987 (Article 58) and updated through May 2024 (Article 19).

The Bourne Wetland Regulations (BWR) were issued on August 31, 2000, and last revised on July 18, 2024.