

Planning & Development Committee
August 20, 2014 – 5:30 p.m.
1st Fl. Council Committee Room – City Hall
-Minutes-

Present: Chair, Councilor Greg Verga; Vice Chair, Councilor Paul Lundberg; Councilor Steven LeBlanc
Absent: None.

Also Present: Councilor McGeary; Councilor Cox; Gregg Cademartori

The meeting was called to order at 5:30 p.m. There was a quorum of the City Council. Councilor Cox sat in for Councilor Lundberg until 5:38 p.m. when he entered the meeting.

1. Special Event Application: request to hold Fishbox Derby, September 14, 2014

Barry Pett, 45 Middle Street, representing Fishbox Derby, Inc., said that this year's Fishbox Derby is once again sponsored and held with the cooperation of Gorton's Inc. This matter went through the Special Events Committee first, it was noted. The DPW gives support to paint the start and finish lines on Rogers Street and that the sweeping of the street is done by the Derby. The DPW also provides the sawhorses to close up the street. All signs are done at the Derby's expense, and there are no costs to the city. The only change is the street closure hours now from 8:00 a.m. to 4:00 p.m. **Mr. Pett** briefly explained the method of street closure and that the streets are only fully closed from 9:00 a.m. to 3:00 p.m. He also discussed communications with the Police and Fire Departments on the day of the event to ensure full disclosure of plans, and when signage is posted warning motorists when there will be no parking on a section of Main Street and on Rogers Street. He noted that with the cooperation of Gorton's that they open their parking lots for parking for neighbors in the area.

MOTION: On a motion by Councilor LeBlanc, seconded by Councilor Cox, the Planning & Development Committee voted 3 in favor, 0 opposed, to recommend that the City Council to permit Fishbox Derby, Inc. on Sunday, September 14, 2014 to hold the Fishbox Derby ("Soapbox Car" Race) closing Rogers Street from Manuel F. Lewis Street to Flanagan Square from 8:00 a.m. that day to 4:00 p.m. with the following conditions:

1. Certificate of Insurance:

A Certificate of Insurance naming the City of Gloucester as an additional insured party is on file with the City Clerk's Office.

2. Road Closure Plans:

Roads to be closed are to be marked with signage directing the public as to the duration of the closure and alternate routes. Any substantial changes, as determined by either the Police or Fire Chief or their designees to the route or related to safety issues will require Council approval.

3. Refuse and Comfort Stations:

All refuse and recycling due to this event must be removed by the organizer. Any portable toilets (with two handicap accessible) are to be provided and maintained by the organizer, placed the evening before the event or early in the morning of the day of the event and removed by 5:00 PM, September 14, 2014.

4. Emergency Services:

Emergency services shall be as determined by Emergency Medical Services Director, Sander Schultz.

5. Staffing:

Event staff is to have cell phones and be identified by the public with distinct shirts. A list of event staff and their cell phone numbers to be submitted to the Police, Fire or DPW Departments.

6. Notification of Immediate Abutters and Businesses to Race Course:

Notice shall be made by the event organizer by hand or by mail no later than 7 days in advance of the event to any businesses along the race route.

7. Responsibility of the Fishbox Derby, Inc.:

The applicant is also required to obtain any necessary approvals from the Licensing Board, the Board of Health and the Licensing Commission. It is the sole responsibility of Fishbox Derby, Inc. to ensure that all required documentation is timely filed with the appropriate City departments as indicated. Failure to comply with any conditions precedent may result in permit revocation.

Councilor Lundberg at 5:38 p.m. took his place at the Committee table during which time the Committee took a momentary recess.

2. SCP2014-009: Commercial Street #44, Map 7, Lot 17, GZO Sections 1.5.3(c), 1.8.3, 2.2.1, 2.3.4, and 5.18 re: Restaurant use (Cont'd from 08/06/14)

Attorney Adam Costa/Attorney Lisa Mead, Blatman, Bobrowski & Mead, representing Cove Harbor, LLC, Mac S. Bell, President of Cod Realty, Inc., Manager of Cove Harbor LLC, briefly reviewed that this Special Council Permit application is not for a traditional restaurant but a seafood wholesale/retail market with a food service component. Based on the Zoning Ordinance, the food service component with counter space or table seating the use qualifies as a restaurant and necessitates the Special Council Permit according to the city's Zoning Officer. **Mr. Costa** reviewed his testimony before the Committee at the previous meeting of August 6 briefly. He remarked that the primary reason for continuing the matter to this meeting was to further discuss the Mass. Department of Environmental Protection (DEP) approval or efforts with DEP to gain approval of a minor modification of the property's Chapter 91 license which has been active for some time and permits the existing use the wholesale/industrial use of the property but didn't specify any restaurant or food service component. He again pointed out at that time the applicant was in the process of seeking DEP approval. He noted the August 7 DEP letter of response (on file) received by the applicant and forwarded to the Committee relative to the process the applicant has undertaken.

John Simpson, Waterways Information Services, South Dennis, MA, a former Chief with the DEP, briefly reviewed his qualifications with the Committee. He explained that in 1990 waterways regulations were revised which included the minor modifications revision to help Chapter 91 licensees to advance projects that have minor changes to the licenses and to shorten the time to licensure modification approval. Before the applicant submitted their minor modification to DEP, he said they spoke to DEP staff who indicated their application for a minor modification of their Chapter 91 license was likely to be accepted as they didn't appear to have objections to the elements of the minor modification proposal. He said regardless of whether the minor modification stands as approved as is or the DEP requires them to obtain a new license, they still need approval from the Conservation Commission, the Planning Board and the Council for construction on the waterfront regardless of whether they seek an amendment to the license or have approval for a minor modification of the Chapter 91 license.

He also made the following comments: that his reading of the regulations is that this is a way of utilizing existing uses and enhance them which are a different proposal from that regularly seen by the DEP. The proposed combination of uses in the application is a way to utilize the building to enhance it along with additional handicap restroom facilities, which provide a public benefit adjacent to a 10 foot walkway as required by the previous DEP Chapter 91 license. This gives additional options for seafood to come across the dock where people will be able to see waterfront activity, buy precooked meals and sit there and eat them fresh from the harbor. Under the state waterways provisions there is a provision for supporting Designated Port Area (DPA) uses, "typical such uses are storefront retail and service facilities...eating and drinking establishments with limited seating, and small scale administrative offices." Part of the minor modification issue is recognizing that there is a change in use. This is a supporting DPA use, they are saying, which allows for a small eating and drinking establishments to bring more activity to the waterfront.

Mr. Simpson noted one of the problems in historic ports is how to get properties on the waterfront with limited income to survive but to be flush, maintain the structures, and this mixed use concept with the activities as named will give a way to fill the gap which would help in the future to fill these small spaces. This is a way to provide the owner of the property a way to upgrade the site, he said.

Councilor Verga said he understood that this is a concept, and it is not Mr. Bell's plan to open a restaurant. The idea is to get permitting so that hopefully a tenant can be found. **Mr. Simpson** said the applicant did have a tenant but they withdrew.

Councilor LeBlanc said that the letter from the DEP said 33 Commercial Street which **Mr. Simpson** said that it was a typographical error. **Mac Bell**, President of Cod Realty, Inc., Manager of Cove Harbor LLC, said that any food service in Gloucester must be permitted under the zoning ordinance as a restaurant for the food service

component. For the purpose of the DEP they are referring to it as food service, he said. He compared that to a wholesale/retail market with a component of prepared food similar to what was formerly done at Intershell adjacent to his property. He said given the precarious nature of the Chapter 91 license to get that changed to include what they're talking about what he termed as a bureaucratic process. He pointed out that they need the Chapter 91 amended in addition to the local permitting. By obtaining the local permitting under the Zoning Ordinance it will benefit them in the process of continuing with the Chapter 91 license process which they will do as a matter of course, he said. **Mr. Costa** said it was correct that their focus not only of their conversations in these two meetings but also the correspondence he has submitted (on file), the restaurant component is the reason they are before the Council – they need the Special Council Permit for the restaurant piece only. He noted the submitted plan with the Special Council Permit application (on file) is identical to what the applicant submitted to the DEP which shows a small footprint of the building, less than a third, is dedicated to food preparation and that there is a lot of open space for a fish market.

Councilor Verga said that the relief is for the restaurant use which he said is a supporting use and is prevalent up and down the immediate area of Mr. Bell's property and is considered a supporting use. He said he wasn't necessarily opposed to it. He asked what the Council's jurisdiction is due to the fact that the building is on piles, which he added was made clear to him is not part of the 50 percent of the M/I use. He asked how the Council could move around that obstacle. He said that even if the P&D Committee puts forward a restaurant use, he said he didn't see the connection where they are able to give that kind of authority which isn't the purview of the Council. **Mr. Simpson** said the DEP and Coastal Zone Management (CZM) look to Planning Boards and City Councils as the municipal bodies that give feedback to them on such matters and take local municipal bodies decisions into consideration specifically under Section 18 of Chapter 91; the project has to be in compliance with local zoning ordinances. The DEP looks for approval from a city that this is okay with them or objections have been raised when viewing requested changes to a Chapter 91 license. He explained that if the applicant goes forward for an amendment to the Chapter 91 license it would come before the Planning Board and Council during a 45 day comment period, and the DEP would accept those as comments.

Gregg Cademartori, Planning Director, said that this was the point made at the Committee's site visit on August 12, that the application may still require the license amendment process and is different proposal depending where it is located on the site. He noted that Mr. Simpson is very familiar with the various types of jurisdiction in Chapter 91- pile supported, moving flow tidelands, filled and uplands which is the limit of the state's jurisdiction, all referencing the historic high water mark. The application, he said, as it was originally filed talked about this use being a water-dependent use and is now characterized as a supporting use which he said are important distinctions in the licensing process with the state and are mirrored in the Zoning Ordinance. He reframed the question Councilor Verga had asked by saying, how do they consider this supporting use on piles where the ordinance reflects the DEP's interpretation. He pointed out in this case, the Zoning Ordinance has a footnote in Section 2.3 that says they can use up to 50 percent of the filled uplands portion of the site, not referencing piles. He likened the matter as how one arranges chairs on a deck, on filled upland or piles that make it a viable project for permitting. He said in terms of the concept, energy, and creativeness sounds great but it would appear that it is how the proposal is arranged on the site which is at issue.

Councilor McGeary agreed that Mr. Cademartori was correct, that it is the positioning on the piles that are a problem and that even a revised city Harbor Plan which has yet to be accepted doesn't speak to that.

Mr. Cademartori, responding to a query from **Mr. Bell** said there has been a lot of discussion about supporting use on piles at the state level for the last four years. There has been recommended proposals for changing the state level regulations, and that this has been one of the issues of sometimes, depending the geometry on the site, the size of the site, enough room can't be found to have a viable supporting use on the site and whether or not there can be something integral on the site, he said. That, he noted, is a current drafted proposal but until there is a notice in the The Environmental Monitor that something is going on, it is a proposal. He said that there has been an indication that it would likely go forward with this Governor's administration, that there will be an attempt to try and to that this year. If that was enacted, depending on how it is laid out in terms of the percentage or a portion of a property, this application could be considered very differently both by the DEP as a minor modification or as allowable the licensing which is up to CZM to put those forward as well as other proposed amendments that deals with dockage.

Councilor Verga pointed out that the current Harbor Plan doesn't address this specifically and the amended Harbor Plan has yet to be approved by the state although submitted. **Mr. Bell** said if it does come to pass at the state level it would be an acceptable domain of the city. **Mr. Simpson** added that they didn't ask for supporting use from the DEP as there were potential conflicts using it that way and rather asked for a minor modification as a use that would be allowed through that process and an opportunity to move something forward.

Councilor Lundberg recalled when the applicant was last before the Committee that they had spoken about the fact that they had requested a minor modification to the Chapter 91 license. He said that the thirty days had passed and they had heard nothing, he noted, which technically says that the DEP doesn't object. **Mr. Simpson** said if the DEP doesn't object the licensing may proceed. **Councilor Lundberg** pointed out that the applicant had now received a letter from the DEP saying that they don't feel this is a minor modification as proposed. **Mr. Simpson**, he further pointed out, had written a letter dated August 20, submitted to the Committee (on file) that he stands by his first position that even though he had said to the Committee he would wait to hear from the DEP, now that the DEP has been heard from that they want to just forget about what they said what they said and go forward with a minor modification based on the 30 days lapsing. **Mr. Simpson** said that after the 30 days have passed and DEP did not object to the project, the licensing can go forward – it is an approval. They don't need any further proof from the DEP, he said, for what they proposed for the limited uses on the site in the spaces indicated on the plan. He pointed out that DEP didn't issue that letter until August 5 when he said he went to their offices to obtain a stamped letter they had submitted to them to verify the 30 days. The DEP handed him a letter saying they were not approving the minor modification, he said. He pointed out he had asked for a meeting with the DEP Chief of Waterways and at that point the DEP withdrew the letter of August 5. The DEP letter of August 7 was then sent. He said after the fact he did have his meeting with the DEP who expressed to him some of their concerns.

Councilor Lundberg said if the city buys into **Mr. Simpson's** argument that the 30 days have lapsed, and therefore, the minor modification request is approved, then what they have to decide is the Special Permit and whether it fits in those five criteria under the Zoning Ordinance for Marine/Industrial (M/I). **Mr. Cademartori** said there is still a footnote that still cross-references the uses in the city's Harbor Plan which identifies what are water-dependent uses and what are potentially supporting commercial/industrial uses. He pointed out that the city also follows the course of where that can be accomplished on the site. The footnote to the use table is in the Zoning Ordinance Section 2.3 (1) and was adopted in 2010, he noted.

The Committee paused briefly to obtain a copy of the referenced footnote.

Mr. Cademartori continued that because of the cross referencing, the city expects that an application filed locally is set up to be approved by the DEP. That process is being done again through the current submitted Harbor Plan which has a new approach. But the current footnote, he pointed out, talks about 50 percent of the filled tidelands and uplands on the site. He observed that the next iteration of the Harbor Plan focuses on the filled tidelands on a site and whatever might be on pile supported structures and is cutting into the discussion of really what is their jurisdiction which is wherever that historic high water line was filled. They still mirror the uses of what is allowed to be on piles, he said, and is where regardless of having a clear indication of approval or denial full evaluation of a proposal from the state, or inaction by the state, there is still an ordinance that says these are the standards, these are the uses that they agree are water dependent or supporting and where they can be located on the site.

Councilor Verga said should the Council vote to give the relief as an allowable supporting use of a restaurant, that from the city's viewpoint they are only referring to the filled tidelands and the uplands, and is up to the applicant to get the state to say differently, or would the city's Building Inspector be prohibited from doing anything other than those two areas. **Mr. Cademartori** indicated that the issue is if it is not permitted on piles, and the ordinance says that the Council can't permit it, it is not a strong decision by the Council. He pointed out there isn't a physical proposal for a building that outlines the use on the site other than what is proposed now.

Councilor McGeary said even if the Committee accepts the argument that the state as de facto given approval by not saying anything, the city is still stuck because incorporated into the Zoning Ordinance is the state regulations. It would be violating the city's own laws. **Councilor Verga** observed that no response from the DEP doesn't remove the burden from the city to not overstep its bounds. **Councilor McGeary** agreed that then the Council would be violating its own laws. **Mr. Bell** said if looking at the three restaurants on Rocky Neck, the Gloucester House, and Latitude 43, all are pile supported. He said he has a property without a tenant for several years with less than two feet of water at low tide. He noted that the property surrounded by similar uses as he proposed. He said that when they started the process they considered picking up the building up and move onto the land and use the dock for some other use and do this entire project on the land. That, he pointed out, becomes another area of Chapter 91 which says they can't touch the building. He said they are only trying to seeking the support of the Council to create productivity in the form of employment and activity around the waterfront. In the final analysis if they can't do what they propose on the piles they will pick the building up and move it onto the land. He said is seeking the advice, support and vote of the Council to enable this piece of property to get to something that could be functional. He said he understood there is a way to go with the DEP but it would be extremely helpful for an endorsement of the project by the Council.

Councilor Verga said he had no problem with a plan. The concern is because the building is on pilings. They can only approve the use change on the site where it is on filled tideland or upland, and it is up to someone else to get the pile use, he pointed out. He said he agreed it is appropriate that the space be available for M/I use, but the “For Lease” sign has been up for years. This, he observed, is back to what the Council can do. They can only take a vote that would allow restaurant use on that site, but the hands of the Building Inspector would be tied when it comes time to issue a building permit on the actual building.

Councilor Lundberg pointed out that right now they only have a plan that shows the building on the pilings and the restaurant is in that building, and they don’t have anything else.

Councilor LeBlanc agreed as a Committee their hands are tied, not only the Building Inspector because the Zoning Ordinance is clear. He asked if this is a linchpin for developing the property. **Mr. Bell** said it is a problem. He asked how to get the support of the Council to say they want to see productivity. He said he understood this is just the beginning, that there is months of work ahead with the DEP. **Mr. Simpson** reiterated his stand that the 30 days is not a loophole and that the DEP’s retraction of their August 5 letter and sending their letter of August 7 speaks to the DEP’s process.

Councilor McGeary said this sounded like black letter law. He cited Section 9.51.E3 of 3b of the state Waterways Regulations which says that, “Non-water dependent facilities of private tenancy shall not be located on any pile-supported structures on flow tidelands...” He pointed out that the state Waterways Regulations also says they can be exempted if it conforms to the municipal Harbor Plan, but the submitted Plan has yet to be approved. The start has to be something that can be approved and so the applicant’s project plan should be redrafted so that it conforms to the city’s Harbor Plan. **Mr. Bell** inquired what he could draft that the Council would consider approving. **Councilor McGeary** said the Council can’t consider something that is a restaurant on piles and would be a place to begin. Even if the Council says it is a swell idea, **Councilor Verga** added, the Council doesn’t have the authority to approve it.

Mr. Costa said it is a matter of the Chapter 91 standards and the city’s zoning requirements. He said any other forum they wouldn’t even be using the term “restaurant”. He said he understood that this is putting the Committee and the Council in a difficult spot as they understand the issues and that this is more complicated than a traditional proposal.

Mr. Cademartori added that the point he was making with the footnote is not to say that the Council doesn’t have jurisdiction on the piles supporting it but rather it doesn’t allow these uses in this area. He said it isn’t that the city’s jurisdiction stops at that point but that those particular uses are not allowable. It was the point that the state is limited in their jurisdiction. The frustration is shared when they go through a Harbor Plan they can only promote and do certain things but the change then needs to be at the state level, he observed.

Councilors Verga and **Lundberg** discussed with Mr. Bell and Mr. Costa how the Council might lend its support if not through a Special Council Permit process.

Mr. Cademartori, responding to an inquiry by **Councilor Lundberg** said this is a mixing of policy with the Special Permit approval process. He said if it isn’t permitted because of what is on the application, the question is what support can be lent by the Council. No one says the applicant’s proposal is a bad idea and no one is saying they don’t want to see a productive site, but it is a difference of harbor policy and Special Permit. **Mr. Bell** said they would like to do it with a permit and see a process of respectful dialog to create productivity.

Councilor Lundberg said one thing they could do is find that the concept of the project falls within the six standards of a Special Council Permit and the five M/I standards, but the underlying standards can’t be met. **Mr. Costa** expressed his concern there may be a vote by the Committee with a negative recommendation. He asked should there be policy changes to the Harbor Plan the applicant would like to be able to come back with a modified application and didn’t want to be prohibited from returning in two years should the requirements change. **Mr. Costa** asked that they have the opportunity to withdraw the Special Council Permit application without prejudice.

Councilor McGeary agreed that the best way was to allow the applicant to withdraw the Special Council Permit from consideration without prejudice.

Mr. Costa asked if there could be resolution for a level of support from the Council. **Councilor Lundberg** said it was possible as it was done with the Fisheries matter.

The Committee recessed at 6:30 p.m. and reconvened at 6:37 p.m.

Mr. Costa then formally requested the withdrawal of the current Special Council Permit without prejudice. He also requested a form of a letter of support or resolution from the Council that would pass muster with the DEP.

Councilor Verga suggested that Mr. Costa submit draft language for a resolution and the P&D Committee would review it, amend it as necessary and forward it to the Council for its consideration and vote.

MOTION: On a motion by Councilor LeBlanc, seconded by Councilor Lundberg, the Planning & Development Committee voted 3 in favor, 0 opposed, to permit the withdrawal of SCP2014-009 Commercial Street #44, Map 7, Lot 17, GZO Sections 1.5.3(c), 1.8.3, 2.2.1, 2.3.4, and 5.18, Restaurant use without prejudice.

A motion was made, seconded and voted unanimously to adjourn the meeting at 6:40 p.m.

Respectfully submitted,

**Dana C. Jorgensson
Clerk of Committees**

DOCUMENTS/ITEMS SUBMITTED AT MEETING: None.