

CAPE COD COMMISSION

3225 MAIN STREET
P.O. BOX 226
BARNSTABLE, MA 02630
(508) 362-3828
FAX (508) 362-3136

E-mail: frontdesk@capecodcommission.org

DATE: January 9, 2003
TO: Jay Howland
FROM: Cape Cod Commission
RE: Development of Regional Impact
Cape Cod Commission Act, Sections 12 and 13

APPLICANT

Owner: Jay Howland
85 Astor Avenue
Norwood, MA 02062

PROJECT Dennis Filled Tidelands - TR-99019
Location: 40 West Main Street
Dennis, MA

RE: Development of Regional Impact (DRI) Decision

LOT/PLAN: Lot 1, Plan 28725-B

CERTIFICATE #: Land Court Certificate of Title #136765

DECISION OF THE CAPE COD COMMISSION

SUMMARY

The Cape Cod Commission (Commission) hereby approves, with conditions, the application of Jay Howland as a Development of Regional Impact (DRI) under Sections 12 and 13 of the Cape Cod Commission Act (Act), c.716 of the Acts of 1989, as amended for the proposed Dennis Filled Tidelands project. This decision is rendered pursuant to a vote of the Commission on January 9, 2003.

PROJECT BACKGROUND AND DESCRIPTION

The project site is located at 40 W. Main Street in West Dennis, Massachusetts. The site is located primarily within the General Commercial II (GC II) zoning district, with a small portion of the northeastern corner of the site located within the Low Density Residential (R - 40) Zoning District in the Town of Dennis. The project proposes redevelopment of a developed 2.5 acre site in Dennis, bordered by Bass River on the West and North sides, a Town of Dennis park to the

East, and Route 28 on the South. It is also abutted to the West by the Bass River Bridge, located very close to the Yarmouth Town line at the intersection of Route 28 and Old Main Street in Yarmouth.

The applicant purchased the project site in 1995. Structures and uses on the site at that time included an 18-foot high, one-story restaurant and related outdoor pavilion, a separate retail store building, a miniature golf course and related parking areas. The structures on the site in 1995 were largely in disrepair at the time the applicant purchased the property.

Due to the permitting history of this proposed project, some of the uses and structures that are proposed as part of the project have been constructed or partially constructed. As reviewed by the Commission, the proposed project includes a reconstructed, two-story 3,800 square foot restaurant (1996 Building Permit), approximately 33-feet high, with a 2 bedroom apartment (MassHighway Access Permit letter), a 4,200 square foot retail store and bait shop (MassHighway Access Permit) and several outdoor commercial uses including a boat ramp, floating piers, and onsite parking. The proposed project also includes removing a 10,400 square foot miniature golf course and replacing it with landscaping and on-site parking. The proposed project incorporates a public walkway along the shoreline, and 78 parking spaces to be utilized by patrons of businesses located within the project site or individuals seeking access to the river or associated boat ramp.

PROCEDURAL HISTORY

On September 9, 1997, an Environmental Notification Form (ENF) was published in the *Environmental Monitor* for "previously filled tidelands located at 40 Main Street (Route 28) on the Bass River Bridge in Dennis." The project site was identified by the Secretary of Environmental Affairs' October 9, 1997 Certificate on the ENF as a 2.5 acre parcel including "a partially reconstructed golf course, two-story, 44-seat restaurant (with a two bedroom apartment on the second floor), a retail store, bait shop, a boat ramp and floating piers, and parking for 87 vehicles."

The ENF Certificate determined that this project required the preparation of an Environmental Impact Report (EIR). The Secretary of Environmental Affairs issued a Certificate on the Final Environmental Impact Report on May 14, 1999.

Because of the filing of a Environmental Impact Report, the project site, including existing development on the site, was subject to review as a DRI under Section 12 and 13 of the Act.

The Commission Subcommittee held duly-noticed public hearings pursuant to Section 5 of the Cape Cod Commission Act to take testimony on the project on September 2, 1999, October 13, 1999, March 8, 2001 and March 18, 2002.

In addition, a hearing officer opened and continued the public hearing on June 24, 1999 to September 2, 1999. A hearing officer also closed the public hearing on September 21, 1999 and left the record open.

The Subcommittee held public meetings on March 9, 2000, April 13, 2000, May 16, 2002 and October 23, 2002 to deliberate on this project. On March 9, 2000, the Subcommittee discussed the project issues and voted to hold another Subcommittee meeting on April 13, 2000. On April 13, 2000, the Subcommittee discussed project issues, including a proposal by the applicant to eliminate the miniature golf course and a request by the applicant for more time to address the project issues. On May 16, 2002 the Subcommittee instructed staff to draft a DRI decision of approval, with conditions, for their review. On October 23, 2002, the Subcommittee voted to recommend approval of the project, with conditions, as reflected in the amended draft DRI decision, to the full Commission. The Subcommittee also instructed staff to make changes to the draft decision, and voted to authorize the Chair to review the final draft decision.

The Commission also entered into thirteen extensions of the DRI decision timeframe after completion of the MEPA process to allow the applicant to provide additional information to address project impacts. The first was granted in April, 2000. The most recent was granted in July, 2002 which extended the DRI decision timeframe to January 31, 2003.

At the final public hearing, held by the full Commission on January 9, 2003, the Commission voted to approve the project, with conditions, as a Development of Regional Impact.

MATERIALS SUBMITTED FOR THE RECORD

Cape Cod Commission

Copy, denial decision	7/25/96
List of MEPA projects	1/10/99
Staff Form Q, Distribution of ENF, EIR	1/19/99
MEPA comment letter on DEIR	2/9/99
Fax to MEPA	2/9/99
List of MEPA projects	2/23/99
Fax cover sheets, to LEC Environmental, Inc.	2/23/99
Fax, to Harry Ives, copy of comment letter	2/24/99
Staff Form Q, Distribution of FEIR	4/1/99
Memo, from Glenn Cannon, on transportation	4/29/99
Letter, to MEPA, comments on FEIR	5/5/99
Fax cover sheet, to MEPA	5/5/99
Notes, meeting with LEC	5/13/99
Letter, to LEC, DRI review	5/24/99
Fax to Dennis Town officials	5/25/99
Fax to Attorney Michael Ford	5/25/99
Memo to Subcommittee	5/28/99
Letter to Attorney Singer, hearing officer	6/23/99
Minutes, Hearing Officer	6/23/99
Memo to Subcommittee, hearing & site visit	8/5/99
Staff Report	8/26/99
Fax to Town officials, Attorney Singer, and Harry Ives	8/27/99
Hearing Notice	10/13/99
Memo, from Staff Counsel, procedural history	10/13/99

Extension Agreement	10/18/99
Fax to Attorney Singer	10/18/99
Memo, from Kathy Sferra, wetland buffers	11/2/99
Fax to Attorney Singer, wetland buffers	11/3/99
Memo to Subcommittee, meeting cancelled	11/10/99
Extension Agreement	12/6/99
Letter, to Attorney Singer, potential denial	2/15/00
Staff Update	3/3/00
Memo to Subcommittee on open space	3/3/00
Fax, to Robert Deane	3/3/00
Fax, to Harry Ives	3/6/00
Extension Agreement	3/9/00
Draft findings and conditions, transportation	4/2/00
Letter, to Ives, Inc., copy of latest proposed conditions plan	4/4/00
Fax, to Ives, Inc., DRI decision	4/11/00
Letter, to Attorney Singer, Extension	4/25/00
Letter, to Charleen Greenhalgh	4/26/00
Hearing Notice	4/27/00
Letter, to Singer, return of Extension Agreement	5/23/02
Letter, project update	6/28/00
Memo, to Commission staff	7/12/00
Fax, to Ives, Inc.	7/17/00
Memo, transcript of voicemail message	7/19/00
Extension Agreement	8/22/00
Extension Agreement	10/30/00
Letter, to Attorney Singer, project update	1/30/01
Extension Agreement	2/15/01
Letter, scheduling Town Hall	2/15/01
Letter, Linda Marchese, Wixon School	2/15/01
Letter, to Attorney Singer	2/15/01
Fax, E-mail, Staff Report	3/1/01
Staff Report	3/1/01
Hearing Notice	3/8/01
Hearing sign-in sheet	3/8/01
Minutes, Hearing	3/8/01
Letter, opening of restaurant at their risk	3/27/01
Letter, Attorney Singer, Extension	5/7/01
Extension Agreement	5/7/01
Letter, Attorney Singer, project issues	7/9/01
Extension Agreement	6/11/01
Extension Agreement	8/6/01
Letter, to Attorney Singer, Extension	8/6/01
Extension Agreement	9/27/01
Letter, to Attorney Singer, Extension	9/27/01
Fax, Attorney Singer, Extension	11/26/01
Fax, to Attorney Singer, Extension	12/20/01

Extension Agreement	12/20/01
Letter, Linda Flemming, Town Hall	2/1/02
Extension Agreement	2/5/02
Fax and Letter, to Attorney Singer, Extension	2/5/02
Staff Report	3/11/02
Fax cover sheets	3/11/02
Memo to Subcommittee	3/11/02
Hearing Notice	3/18/02
Hearing sign-in sheet	3/18/02
Minutes, Hearing	3/18/02
Letter, to Attorney Singer, project issues	4/30/02
Memo, transportation issues	5/7/02
Staff Report	5/9/02
Memo to Subcommittee	5/9/02
Fax, to Ives Inc.	5/15/02
Meeting sign-in sheet	5/16/02
Minutes, Meeting	5/16/02
Minutes, Meeting	10/23/02

Applicant

From LEC, DEIR	12/29/98
From LEC, FEIR Response to Comments (2)	3/30/99
From LEC, FEIR	4/1/99
DRI application and attachments	5/28/99
Copy of fee check	5/28/99
Letter, from Attorney Singer, DRI filing	5/28/99
Letter, from Attorney Singer, DRI filing	6/1/99
Return filing from MHC, no comments	7/16/99
From LEC, DRI supplemental information	8/11/99
From LEC, response to info. request and additional information	10/4/99
Letter, from Attorney Singer, DRI open space	2/23/00
Description of salt marsh restoration monitoring plan (draft)	8/3/99
Plans 1. Prior existing conditions plan – dated by engineers stamp 10/28/99	
2. Proposed conditions plan – dated 9/9/98, revised 3/30/99 showing buffers	
3. Proposed conditions plan – dated 9/9/98, latest revision is #4, dated 10/1/99 showing drainage	
4. Proposed conditions plan – dated 9/9/98, shown as the latest revision, #4 but drawn on “Sketch for Comments”	
Cover letter, from Attorney Singer, Extension	5/2/00
Letter, from Attorney Singer, Extension	2/10/01
Letter & plans, from LEC, landscaping	2/22/01
Letter, from LEC, <i>Phragmites</i> eradication plans	2/22/01
Fax, from GAF Engineering, sketch of drainage basin	3/5/01
Fax, from Attorney Singer	3/7/01
Letter, from LEC, vegetation on coastal bank	3/8/01

Letter, from Attorney Singer, response to Staff Report	3/12/01
Letter, from Attorney Singer, about plans	5/4/01
Letter, from Attorney Singer, Extension	5/9/01
Letter, from Attorney Singer, scheduling issues	5/10/01
Letter, from Attorney Singer, meeting	5/14/01
Fax, Carlson Consulting, transportation issues	5/25/01
Letter, from Attorney Singer, parking	6/4/01
Letter, from Attorney Singer, meeting	7/5/01
Fax, from LEC, coastal issues	7/9/01
Letter, from LEC, coastal issues	7/20/01
Letter & plans, LEC, coastal issues	8/27/01
Letter & other information, from Attorney Singer, lighting	12/3/01
Letter & plans, from Attorney Singer, building redesign	1/11/02
Letter & plans, from Attorney Singer	3/11/02
Letter, from Attorney Singer, copy of Order of Intent	3/11/02
Letter, from Attorney Singer, building drawings	3/18/02
Letter & plans, from LEC, landscaping information	3/25/02
Fax & letter, from Attorney Singer, response to Subcommittee meeting and 4/30/02 letter	5/2/02
Letter, from Attorney Singer	5/3/02
Letter & plans, from Attorney Singer, revised building redesign	5/4/02
Letter & drawings, Oman construction, sign details	5/7/02
Letter & other information, Moehrke, Mackie & Shea, Chapter 91	5/22/02
Fax, from Attorney Singer, suggested changes to draft decision	12/12/02
Draft decision as approved by Subcommittee Chair	12/12/02
Letter & drawings, Michael F. Jones, Esq., restaurant bldg	12/18/02
Plans and elevations, revised, full size and 11x17 inch	12/24/02
Fax, from Attorney Singer, corrections to draft decision	1/8/03
Plans, full size, revised	

Local, State and Federal Agencies

From MEPA, Certificate on the FEIR	5/20/99
Heidi M. Zisch, DEP, Notice of Appearance	9/7/99
DEP, Prehearing Conference Order	9/13/99
Fax, from Charleen Greenhalgh, Dennis Town Planner	10/25/99
Hard copy of 10/25/99 fax from Charleen Greenhalgh	10/27/99
Fax, from Carolyn Redfern to Dorr Fox, list of permits	4/6/00
Copy of E-mail, from Dan Fortier, Dennis Town Planner, parking	5/8/01
Letter, from Dan Fortier, Dennis Town Planner, project issues	3/18/02
Copy of E-mail, from Dan Fortier, Dennis Town Planner	5/16/02
Letter, Conservation Agent, on open space	5/21/02

Members of the Public

Letter, from Attorney Michael Ford, to Harry Ives, with attach.	6/14/96
Letter, from Janet Gibbons, comments	2/20/96
Complaint, Ives vs Howland, <u>et. al.</u>	4/3/96

Letter, from Ives, Inc., to EOE/MEPA	2/9/99
Letter, from Donald Moncevicz, PE, MEPA comments on DEIR	2/10/99
Letter, from Donald Moncevicz, PE, MEPA comments on FEIR	5/24/99
Letter, from Attorney Roger O'Day, Notice for Claim for Hearing	7/8/99
Fax, Ives, request for Minutes	10/7/99
Letter, from MidCape Ballet Co., comments	10/7/99
Letter, from Janet Gibbons Mariani, comments	10/7/99
Letter, from Ives, Inc, with attachments	10/12/99
Fax, from Janet Mariani	10/28/99
Letter, Don Moncevicz, copy of testimony	10/29/99
Fax, from Attorney Ford	10/13/99
Fax, from Janet Mariani	11/12/99
Letter, from Jerry Fitton, comments	11/15/99
Letter, from Attorney Kate Mitchell to DEP w/attachms.	11/22/99
Letter, Letter, from Donald Moncevicz, PE, comments	11/29/99
Letter, from Attorney Kate Mitchell, to Deneen Simpson, Office of Administrative Appeals, DEP, with attachments	12/17/99
Fax, from Donald Moncevicz, PE, w/attachms.	3/8/00
Fax, from Ives, Inc.	4/13/00
Fax, from Ives Inc.	4/13/00
Letter, from Ives	4/13/00
Fax, from Ives, request for copies	7/17/00
Fax, from Ives, letter	8/24/00
Fax, from Ives, ZBA meeting	10/7/00
Fax, from Attorney Mitchell	2/8/01
Newspaper article, <i>Register</i>	2/15/01
Memo, from Don Moncevicz, about walkway	2/26/01
Pink sheet, shows diagram of proposed pathway link to Yarmouth	3/8/01
Photo & "performance standards "for walkways, docks, piers	3/8/01
Fax, from Attorney Mitchell	5/3/01
Pink sheet, with concerns	5/17/01
Letter & plan, from Attorney Mitchell, about walkway	8/27/01
Letter, from Attorney Mitchell	9/6/01
Site photos, from Lisa Hendrickson	3/8/02
Fax, Ives, request for Staff Report	3/11/02
Fax, with concerns	4/25/02
Letter, with concerns	5/6/02
Fax, from Ives, request for Staff Report	5/15/02
Color Photograph of the Bass River Bridge	1993

The application and notice of the public hearing relative thereto, the Commission's staff reports, and exhibits, minutes of all hearings and meetings, and all written submissions received in the course of the proceedings on this project are incorporated into the record by reference.

TESTIMONY

Public Hearing - September 2, 1999

Attorney Myer Singer, representing Mr. Howland, the applicant, described the project history to date.

Mr. Ken Kirkey, Project Planner, presented the Commission Staff Report. Mr. Dorr Fox presented the history of the project.

Mr. Deane inquired whether the project could meet the standards in the Regional Policy Plan for stormwater retention. Mr. Eichner stated that it could not.

Ms. Bebout inquired whether the applicant ever considered moving the mini-golf course over the leach field. Mr. Singer stated that this location was considered to be less desirable since it is more visible.

Lisa Hendrickson noted that the new restaurant is 220 square feet larger than the previous restaurant. She said there is a new use on the site. The two-story building is too tall and is not consistent with traditional Cape Cod design. She believed that the Commission should be assertive and not accept the second story. She believed that the mini golf course would affect marine resources, block views of the river and should be open space.

Attorney Singer made his concluding comments regarding the project and noted that the project is in compliance with zoning. He stated his belief that the current restaurant is smaller than the previous restaurant, noting that information from the assessor's office is not reliable.

Mr. Deane noted that the site is at maximum use. He inquired whether the mini-golf is necessary. He noted that former restaurant area is currently used for kayaks and the parking area is being used for trailer sales. He requested the staff determine whether the drainage area is allowed within the 100 foot wetland buffer. He also requested the staff to look into the walkway.

Public Hearing - October 13, 1999

Attorney Singer, representing the applicant, stated that the applicant has submitted a report that addresses the issues that had previously been raised. He stated that the applicant needed to retain the revenue producing businesses on the site, including the mini-golf course and the restaurant, which have both been on the site for several years. Mr. Howland believes that he is working in the right direction and that the improvements to the site have actually improved the site.

Mr. Kirkey provided an overview of the Staff Report and noted three letters submitted in opposition to the project from neighboring residents. Glenn Cannon (Transportation), Ed Eichner (Water Resources), and Steve Tucker (Coastal Resources) described the staff review of technical issues related to the project. Mr. Kirkey read a letter written by Attorney Daley, Commission Counsel, stating that the Commission had jurisdiction over the project.

Harry Ives disputed whether the building permit was valid or whether it was issued in error. Mr. Kirkey again read Attorney Daley's letter, which stated that the Commission has jurisdiction over various aspects of the project, including the restaurant, parking and the mini-golf course.

Ms. Bebout inquired the status of the project's MEPA review. Mr. Kirkey stated that the project has completed MEPA review.

Mr. Travelo inquired whether the existing restaurant building was included in the decision for the procedural denial. Mr. Singer stated that the public officials did not do anything knowingly in error. The requirement for MEPA and Commission review was determined as a result of an appeal proceeding.

Donald Moncevitiz spoke in opposition to the project. His concerns include that the site is within a flood zone, the site is a gateway into Dennis, the proposal is not a water dependent use, the project is an inappropriate use of the site, the second floor of the restaurant building should be removed, parking issues, coastal issues, no permit was issued for the mini-golf course, the applicant has landscaped the road right of way, where pedestrian access should be.

Ruth Herrell, consultant for the applicant, noted that the community character issues raised in the staff report were not required of the applicant because they were not minimum performance standards. Ms. Bebout inquired of her if that meant that the applicant did not intend to comply with the standards. Mr. Singer stated that there is an economic tradeoff and that the mini-golf course cannot be eliminated.

Mr. Ribold stated that he believes that the restaurant building should have gone before the Dennis Zoning Board of Appeals as an alteration to a pre-existing non-conforming structure. He recommends denial of the mini-golf course. He is concerned about traffic. He believed that the second floor of the restaurant building should be removed.

Mr. Travelo noted that the size of the restaurant and the mini golf course have increased. He is uncomfortable about the circuitous route the project took, eventually leading to DRI review.

Mr. Singer stated that the plans are accurate. He also emphasized that the applicant wants to retain all the uses on the site.

Public Hearing - March 8, 2001

Attorney Singer, representing the applicant, reviewed the previous and current project plans using a large color photograph and the *Drainage Area Plan* submitted to the Commission in December, 2000. He noted the landscaping had been revised, along with the parking and on-site stormwater drainage. He noted the miniature golf course had been eliminated. He said the applicant had committed to a *Phragmites* eradication program. Attorney Singer said the applicant was committed to providing the open space on site. He noted the applicant had submitted revised building elevations, and that the parking lot had been upgraded. He said some of the stone had been removed. Attorney Singer noted the only addition to the property since several years ago was the re-constructed restaurant and security apartment. He noted the number of parking spaces had been reduced.

The Subcommittee members asked questions of the applicant's representatives concerning the current and prior uses of the site, whether an Order of Conditions had been issued, whether the

mounded septic system was being counted as open space. The applicant's representatives answered the questions in part with old photos of the site, noting the parking had been approved by the Dennis Conservation Commission, and that the septic system was not included in the on-site open space.

The Subcommittee asked questions of Commission staff including how the salt marsh area had been delineated, when the project under review was first submitted for Commission review.

Commission staff responded to the Subcommittee's questions by noting that it was routine to contact the local Conservation Commission to confirm the resource delineation, that the MEPA review ended in 1999, but that the project had also been the subject of a discretionary referral in 1996.

Ms. McElroy presented the Natural Resources and Open Space section of the Report. She said the applicant's new proposal shown on the sketch plan from GAF Engineering – to remove the proposed drainage basin and stone and revegetate the Northeast corner of the site – are an additional improvement to the site. Ms. McElroy said staff was also awaiting a determination from the Dennis Conservation Commission of whether the Rivers Protection Act plays any role in this project. She said staff recommended removal of all structures and parking areas within the 100-foot wetland buffer to Bass River. She also said that removal and revegetation of the existing miniature golf course was an improvement. Based on this, Ms. McElroy questioned the need for all of the on-site parking and suggested that it could be reduced further.

Mr. Tucker presented Coastal Resources comments. He said the project no longer involves reconstruction of the revetment, which is a positive step. He also noted that the coastal bank was eroding rather rapidly, and suggested it should be further stabilized by maintenance and further vegetation. He said there was a lot of foot traffic at grade which could be mitigated by a raised walkway.

Mr. Eichner addressed Water Resources issues. He noted the site was a difficult one in that there is little separation to groundwater and has competing resource protection interests.

Ms. Adams addressed Community Character, site design and lighting. She said a revised landscape plan was needed which used more mass plantings and reduced spacing of plantings. Ms. Adams said it also appears the amount of parking proposed on the site had not been reduced to reflect the elimination of the mini-golf course. She recommended that the four flood lights on the East and Bass River sides of the restaurant building should be removed or should be equipped with a motion sensor or timer. She noted that the restaurant sign was proposed to be down-lit, and that a drawing or rendering should be submitted showing what the new sign would look like.

Mr. Don Moncevicz said the walkway is a critical part of the project. He noted he had submitted a proposal to the applicant delineating the location of the walkway. Mr. Moncevicz said it would connect up to a crosswalk across from Uncle Barney's Road. He said the applicant's proposal incorporated some parts of this proposal.

Attorney Kate Mitchell, representing Mr. Moncevicz and Mr. Ives, noted that the plan Mr. Moncevicz used to describe the walkway proposal had been sent to the applicant in June, 2000. She said it represented her clients' opinion on how to improve the project. Attorney Mitchell requested the Subcommittee hear from her clients' wetlands specialist before a final decision was made. She said the applicant's current conceptual plan was closer to her clients' June, 2000 proposals. Attorney Mitchell said her clients were not sure that the applicant needed the parking proposed, but that if some had to be replaced or recovered, it would be better if this parking was located in the area of the miniature golf course. She said the walkway was a critical part of the proposal, but recognized the need to balance access with the natural resource issues. She said with a little creativity, the walkway could be made to work. Attorney Mitchell said the walkway should be moved further away from Bass River. Attorney Mitchell stressed that putting down "bluestone" was not part of the 1979 Order of Conditions, and it is not pervious material. Gravel and 3/4-inch stone is what was warranted. She said the entire parking lot should be redone in 3/4-inch stone.

Attorney Mitchell said the restaurant/apartment building has a large impact on the site. The new building is significantly different from the old restaurant building.

Mr. Harry Ives noted Attorney Singer had provided the Commission with a copy of a 1979 plan showing parking in the Northeast part of the site. He said that plan is legitimate and the Order of Conditions going with the plan is legitimate. Mr. Ives said, however, that no Certificate of Compliance is on file at the Dennis Conservation Commission that matches the plan and Order. He said the original parking plan showed 87 spaces, dated March 26, 1996.

Mr. Travelo suggested that his recollection of the 1996 project was that before the Commission had finished its review of the project, construction on the restaurant building had been completed.

Mr. Fox responded that as had been stated, the building permits for the building were issued after it was referred but prior to the full Commission vote to accept the referral. He said there were two separate submissions – one that went to the Zoning Board of Appeals that was referred to the Commission, and one to the Building Inspector that did not require going to the ZBA, which was actually constructed. Mr. Fox said the Commission ultimately denied the project which was accepted by the Commission for review. He said the project proposed was substantially the same as this project, but it was technically different in that what was built did not have to go to the ZBA.

Mr. Lelito, LEC Environmental, consultant for the applicant, addressed coastal resources issues. He submitted a letter to the Subcommittee addressing the issue of an eroding bank.

Mr. Moncevicz said it was important that the applicant recognize the public access component of the project. He said encouraging public access to the site is key – removing vegetation in the area of the old fence as recommended by the staff is important.

Ms. Paula Bacon said she had positive feelings about what was happening to encourage public access. She said things could be worked out to have the public access and protect key natural resources.

Attorney Singer said the public walkway is part of the proposal. He said Mr. Lelito's concern was that the bank not be further destabilized. He said the Commission needs to recognize that construction of the walkway would be subject to ongoing discussion and balancing of the public access and natural resources concerns.

Mr. Broidrick asked if any provision had been made for public restrooms. Attorney Singer said there were bathrooms on site, for patrons' use. He noted the site was not a public park – it was providing a public walkway. Attorney Singer said the applicant committed to providing a walkway or benches.

Mr. Broidrick asked Attorney Mitchell what the status was with the independent lawsuit. Attorney Mitchell said negotiations connected to this suit were proceeding. She said there has been a substantial amount of discussion in June, 2000 but that things stalled until January, 2001. She said the communication broke down, but that it now seemed to be coming back on track. She said the applicant's latest concept plan seemed to be coming closer to resolving the issues. At the same time, she said there were still outstanding issues, like the building. Attorney Mitchell said the original building was 18 feet high, and now it is 33 feet high. She said the applicant had proceeded to redo the restaurant at his own risk. She said the building should be 18 feet high, look more Cape Cod-like, and that an architect should work to improve the building.

Public Hearing - March 18, 2002

Attorney Singer, representing the applicant, reviewed the history of the site.

Mr. Brian Grady, GAF Engineering, noted the crosswalk shown on the most current plan across Route 28, and discussed its connection to the proposed pedestrian walkways on the site.

Ms. Megan Raymond, LEC Environmental Inc., discussed the revegetation of the area where the mini-golf course would be removed. She discussed the applicant's proposed *Phragmites* eradication program.

Mr. Michael Jones, applicant's architect, discussed proposed changes to the restaurant building. He noted the roof on one part of the building would be lowered. He said it would be changed to a gambrel roof line. Mr. Jones said other changes would be made to the existing peaked window bays on the side of the building facing Route 28.

Mr. Richard Johnson, applicant's landscape architect, presented a detailed revised landscape plan. He noted additional plantings had been added along Route 28. He said the species mix had been adjusted, including both native and non-native plants. Mr. Johnson said the non-native species had been suggested by Commission staff.

Mr. Erich Oman, applicant's site engineer, discussed exterior lighting. He said no parking lot lights were proposed. He noted that there were 13 post lights on site that had "onion" style

fixtures. He said these would be replaced with 7 proposed post lights on 9 foot posts. He said the flood lights on the restaurant would be removed.

Ms. Michelle O'Brien, applicant's attorney, discussed the natural resources issues. She said the project was exempt from the Rivers Act because it was under Chapter 91. Attorney O'Brien said the applicant had come to a resolution of issues with the neighbors. To this end, she noted that much of the site would be revegetated.

Attorney Singer addressed the parking and traffic issues. He noted the existing traffic would decrease with the removal of the mini-golf course. He noted the existing curb cuts on the site would be consolidated to one central entrance/exit.

Mr. Grady discussed the water resources issues. He noted there were existing constraints on the site, including the fact that groundwater was relatively close to the ground surface. He noted the catch basin at the foot of the boat ramp closest to the revetment would be retained, but that the detention basin that had been proposed in the Northeast corner of the site would be eliminated. Mr. Grady said the applicant had also agreed to remove the existing gravel and bluestone on the site and replace it with a larger crushed rock to assist with stormwater management.

Attorney Singer noted again that all but one driveway onto the site would be eliminated. He noted that the applicant would work with Commission staff to insure the lighting design met the Technical Bulletin. He said the applicant had talked to the Dennis Conservation Commission about holding a conservation restriction on the property. Attorney Singer also said the applicant was willing to commit to a maintenance contract for the landscaping materials. Attorney Singer stressed, however, that the applicant could not commit to a specific timeframe to complete the project. He said this was based on permitting required at the local level, as well as pending litigation.

The Subcommittee asked questions of the applicant's representatives, concerning Chapter 91 issues, whether site signs would be internally illuminated, what the walkway would be made of, and whether the second floor apartment was one or two units.

The applicant's consultants responded that the Chapter 91 licensing of the property had been put on hold, that the intention was to comply with the Commission's exterior lighting regulations, and that the security apartment was one unit.

Ms. Andrea Adams, the Commission's staff Planner for the project, summarized the Staff Report. Ms. Adams provided a brief procedural history of the project, noting that it was subject to Commission jurisdiction as a DRI in its present configuration based on the filing of an Environmental Impact Report in 1999. She noted that confirmation was needed that an entity was willing to hold a conservation restriction on the property to provide the required open space. On Coastal issues, confirmation was needed as to final elevations and design elements for the proposed walkway and viewing platform, as well as work to further stabilize the area behind the revetment. She noted that on Water Resources issues, staff recommended that the applicant be required to remove the hardening/bluestone on the site. Ms. Adams said the design as proposed in the current site plans does not completely meet the 1996 RPP, but represents a compromise

based on the fact that significant undevelopment of the site would be needed to achieve complete conformance with the RPP. She noted that staff had discussed with the applicant re-designing the existing restaurant building to change the roof from a gable to a gambrel design. However, final architectural drawings were needed for all four facades and possibly roof cross sections to insure that the design was implemented. On landscaping and lighting issues, Ms. Adams noted that additional plantings were provided, and that situating them outside the Route 28 layout as much as possible was an improvement over previous designs. She noted further discussion with the applicant was needed on lighting to confirm items that the applicant had agreed to, and to bring the internally-illuminated sign in conformance with the Commission's Technical Bulletin. On transportation issues, she noted the consolidation of the existing site access into a single defined site drive was an improvement. She also noted the final location of the proposed crosswalk would be worked out in discussions with MA Highway. Ms. Adams said it was important to keep the project moving forward, particularly so that the site issues could be addressed in a timely manner.

The Subcommittee asked questions of Commission staff concerning the landscaping and invasive/non-native plant species.

Commission staff responded that the buffer to Route 28 had been enhanced, and said the proposed plant list would be checked to insure it did not use non-native and/or invasive species.

Mr. Daniel Fortier, Town Planner in Dennis, stressed to the Subcommittee that the Dennis Planning Department had not received any correspondence, plans or other information from the applicant in over a year. He said the project is not consistent with local zoning. Mr. Fortier gave a history of permitting on the project. He said the applicant's proposal does not meet the town's open space requirement in the commercial district. Mr. Fortier also said the project as currently configured does not meet the parking requirements, and may need variances, including a use variance. He also said the project may need a Special Permit for expansion of a non-conforming use. Mr. Fortier said he believed the site was being used too intensively.

Mr. Don Moncevicz spoke in favor of the walkway proposal. He said he had originally opposed the project, but now believed that the plans could be approved. He said he thought the proposed landscaping was an improvement. Mr. Moncevicz also spoke in favor of removing the bluestone and hardening across the site and replacing it with larger crushed rock, as well as moving the parking area out of the Northeast corner of the site.

Mr. Jim O'Neil said he knows Mr. Howland. He said Mr. Howland was a responsible businessman. He expressed a positive feeling towards the restaurant.

Mr. William Baker discussed the sight-seeing boat. He said it uses the docks on the site. He questioned what would happen to the boat. Mr. Baker said it is responsible for a significant amount of site traffic. He said the location of the proposed crosswalk on the current site plan is dangerous, and should be moved further East, away from the end of the Bridge.

Ms. Paula Bacon endorsed the "riverwalk" pedestrian connection.

Ms. Lisa Hendrickson passed out color photographs of the restaurant building before and after the reconstruction. She said the Commission needed to consider steps to further open the view to the water. Ms. Hendrickson noted the height of the restaurant building is a major issue. She commended the Commission for its review of the project. Ms. Hendrickson also noted the restaurant had been built without a permit, and questioned how the town and Commission would enforce their decisions.

Ms. Adams responded, through the Chair, that the current proposal to remove part of the restaurant building was a compromise on the design. She noted that the Commission was taking additional steps to help insure that DRI decisions were complied with. Mr. Fox said the Commission could also enforce its decisions through the courts.

Mr. Cliff Smith, the tour boat operator said it usually accounted for only 15 - 20 cars in the parking lot, and that there was little overlap in the timing of boats, so spaces are usually free for people to park.

Mr. Oman noted the proposed 77 parking spaces on the current site plan took account of patrons using the tour boat.

Mr. Harry Ives said the expansion on the restaurant building should be removed. He said the building was too close to the water. He also noted that groundwater was less than 6 feet below ground level. Mr. Ives said the site was environmentally sensitive. For these reasons, he recommended the second floor of the restaurant building should be removed. He suggested it could be replaced with a dining "open air deck."

Mr. Graham Flynn, part owner of the restaurant, said he was interested in growing the business. He said it was important therefore to keep the internally-illuminated sign. He said he thought this met the town's requirements. Attorney Singer said the applicant would discuss this with Mr. Fortier.

JURISDICTION

The Dennis Filled Tidelands Project was referred to the Commission by the applicant on May 28, 1999 because the project required the filing of an Environmental Impact Report (EIR) under Sections 61-62h of M.G.L.c.30. Projects requiring the filing of an EIR are mandatory Developments of Regional Impact as required by Section 12(i) of the Act and by Section 2(a)(ii) the DRI *Enabling Regulations*.

FINDINGS

The Commission has considered the application of Jay Howland for the Dennis Filled Tidelands, and based on consideration of such application, and upon the information presented at the public hearings, makes the following findings pursuant to Sections 12 and 13 of the Act:

General

G1. According to correspondence from the Dennis Town Planner, the proposed project as depicted on the Proposed Conditions Plan/Open Space Plan, drawn by GAF Engineering, revision date May 1, 2002, meets the zoning requirements and development regulations of the

Town of Dennis as long the two docks shown on the North side of the Proposed Conditions Plan/Open Space Plan drawn by GAF Engineering, revision date May 1, 2002, within the R-40 Zone are used for residential purposes. Also, according to the Town of Dennis Planner, modification of the restaurant building may trigger a Special Permit review. The granting the a DRI approval, with conditions, for this proposed project by the Commission is in no way intended to support or oppose the grant of permits at the local level.

G2. The Town of Dennis does not have a certified Local Comprehensive Plan (LCP). Therefore consistency of this project with an LCP is not required.

G3. The applicant has made several commitments as part of the proposed project that benefit the Town of Dennis and natural resources, in addition to providing mitigation measures required by the RPP for the project's impacts. These are: providing access to the coast for the general public, reducing the visual impacts of the site and improving a "gateway" to Dennis, removing an invasive plant species from the site, providing open space in excess of the required amount, and implementing a trip reduction program.

G4. This project was reviewed under the 1996 Regional Policy Plan.

G5. The project is not located in a District of Critical Planning Concern (DCPC).

G6. Economic development, solid waste and hazardous waste were not issues of concern for this project.

G7. The project reviewed as a Development of Regional Impact by the Cape Cod Commission includes uses and/or structures on the project site that have been constructed or partially constructed. The applicant purchased the 2.5 acre project site in 1995. Structures and uses on the site at that time included an 18-foot high, one-story restaurant and related outdoor pavilion, a separate retail store building, a miniature golf course, a boat ramp and related parking areas. The structures on the site in 1995 were largely in disrepair at the time the applicant purchased the property.

As reviewed by the Commission, the proposed project includes a reconstructed, two-story 3,800 square foot restaurant (1996 Building Permit), approximately 33-feet high, with a 2 bedroom apartment (MassHighway Access Permit letter), a 4,200 square foot retail store and bait shop (MassHighway Access Permit) and several outdoor commercial uses including a boat ramp, floating piers, and onsite parking. The proposed project also includes removing a 10,400 square foot miniature golf course and replacing it with landscaping and on-site parking. The proposed project incorporates a public walkway along the shoreline, and 78 parking spaces to be utilized by patrons of businesses located within the project site or individuals seeking access to the river or associated boat ramp for the launching of non-motorized boats.

Land Use

LU1. The proposed project consists of the redevelopment of an already developed site which was in the form of strip development. The applicant reduced the strip development nature of the

site through a reduction in the number of curb cuts, additional buffer landscaping to the front of the site, and removal of the existing miniature golf course from the proposal.

Water Resources

WR1. The proposed project is located in an impaired area within the watershed to the lower portion of the Bass River coastal system. As a redevelopment project within an impaired area, the 1996 RPP requires that the project improve existing nitrogen loading on the site. The proponent has installed a denitrifying septic system and has improved nitrogen loading on the site from 12.3 ppm to 7.3 ppm. The project's improvement in nitrogen loading and use of a denitrifying septic system meet Minimum Performance Standard (MPS) 2.1.1.2.E.1.

WR2. The critical nitrogen load for the lower Bass River coastal system has not been determined. DRIs within Marine Water Recharge Areas where the critical nitrogen load has not been determined are required to make a monetary contribution toward the determination of a tidal flushing rate in order to determine the critical nitrogen load (MPS 2.1.1.2.C.1). The monetary contribution is based on wastewater flow (\$0.15 per gallon per day of wastewater flow). For this project, the monetary contribution would be \$435.

WR3. Stormwater MPS 2.1.1.6 includes the following requirements: management and disposal of stormwater on site, use of best management practices (BMPs), development of a drainage system maintenance schedule, and no direct discharge of untreated stormwater into surface waters and wetlands. The MPS also states that stormwater system designs should be based on a 25 yr/24 hr storm. The Massachusetts Department of Environmental Protection's (DEP's) stormwater management policies are used by the Commission as guidance for the review of best management and treatment considerations required under MPS 2.1.1.6.

WR4. Among the key features of the DEP's policies is better stormwater treatment in areas discharging to "critical areas," such as shellfish beds. The Dennis Tidelands site is adjacent to shellfish beds. In these critical areas, the best management practice is to design stormwater systems to treat the first inch of runoff and use of appropriate system components.

WR5. During DRI review, a number of stormwater treatment designs were considered by the applicant, including a treatment design to treat the first 0.5 inch of runoff, a design to treat the first inch of runoff and a 25 yr/24 hr storm design. All of these conventional designs failed to meet either a portion of MPS 2.1.1.6 or state guidelines because of the natural characteristics of the site (groundwater 1-3 ft below the land surface, adjacent to surface waters) and the amount of existing development already on the site. Even with the removal of all existing development on the site, the relatively high groundwater limits the ability of any conventionally designed systems to meet MPS 2.1.1.6.

WR6. Following a review of the RPP Goal for water resources ("preserve and restore the ecological integrity of marine and fresh surface waters") and in recognition of the stormwater design constraints caused by the natural characteristics of the site and its pre-existing development, an alternative approach was developed that maximizes natural buffers between Bass River and the development on the site, maximizes the separation between the groundwater and any stormwater recharged from the site, and minimizes potential impacts on the adjacent

shellfish bed. This alternative design includes: 1) provisions to remove existing underlying impervious materials and to install stone materials over all parking areas; installation of stone over all parking areas to allow maximum separation to the groundwater, 2) removal of the parking area in the northeastern portion of the site to create a wider natural buffer between the Bass River and parking areas, thereby minimizing potential direct runoff into the river and creating a natural treatment area for any overland flow off the site due to large stormwater events, and 3) retaining the existing catchbasin at the head of the boat ramp to prevent any parking lot stormwater from discharging directly into the River by flowing down the boat ramp. This stormwater design is indicated on the *Proposed Conditions Plan*, drawn by GAF Engineering, revision date December 23, 2002 and received by the Commission on December 24, 2002.

WR7. The proposed stormwater design described in Findings WR3, WR4, WR5 and WR6 and referenced on the *Proposed Conditions Plan*, drawn by GAF Engineering, revision date December 23, 2002, received by the Commission on December 24, 2002, is not consistent with MPS2.1.1.6. However, based on the unique conditions associated with this project (see Finding WR5), the Commission finds that it is appropriate to use the Flexibility Clause of the Regional Policy Plan to allow an alternate mitigation method. In considering the mitigation proposed in Finding WR6 and below, the proposed use would not be more detrimental to the protected resource than would be allowable under MPS 2.1.1.6. The following factors, taken together, are essential components of this Finding:

- a) Because of the natural characteristics of the site (groundwater 1-3 feet below land surface, and adjacent to surface waters), even with the removal of all development on the site, there are no feasible conventional alternatives to the proposed stormwater design that would completely address the impacts to water resources.
- b) The stormwater management methods selected during the review of this project will reduce the impact of discharging untreated stormwater to "critical areas," such as shellfish beds, by maximizing natural buffers between the Bass River and the development on the site and maximizing the separation between the groundwater and any stormwater recharged from the site.

Coastal Resources

CR1. The project site lies on filled tidelands adjacent to the Bass River as determined by the Massachusetts Department of Environmental Protection. Because the project locus is within filled tidelands, a Chapter 91 license is required and other statutory requirements must be reflected in the site design. Docks and piers located onsite also require licensing under Chapter 91, and may require additional local permits. Chapter 91 also requires the provision of public access to the coast.

CR2. Other Development Review Policy (ODRP) 2.2.1.6 states that redevelopment of water dependent facilities should provide access benefits to the general public. ODRP 2.2.1.7 states that coastal engineering structures should be designed so as to allow the public to pass along the shore (either above or below the structure) in the exercise of its public trust rights to fishing, fowling and navigation. RPP Goal 2.2.1 identifies protection of public interests and expansion of public access to the shoreline as desirable outcomes. In an effort to address these provisions,

the applicant has offered to provide public access in the form of pedestrian walkways over the revetment and across the property, access to the boat ramp for the launching of non-motorized boats, and to install appropriate signage indicating that free public access to these features by non-patrons is allowed. While Chapter 91 stipulates the provision of public access to the coast as noted in Finding CR1, given the constraints of the site, the extent to which the applicant's proposal provides this access, including pedestrian walkways, is a benefit of the project.

CR3. The project consists of extensive redevelopment within the one hundred-foot buffer to mean high water and wetland resources. Wetland restoration projects and water dependent uses may be allowed within buffer areas, and the construction of elevated pedestrian walkways, where environmentally acceptable, is encouraged to enhance public access. Since the walkway is the only new feature in the one hundred-foot buffer to mean high water, and it uses an environmentally sensitive design, and it provides a component of public access, it is consistent with MPS 2.3.1.2 and 2.2.3.7. Other disturbance within the one-hundred foot buffer is prohibited by MPS 2.3.1.2 and (by reference) 2.2.3.7.

CR4. The proposed project is within the recharge area to the lower Bass River, an impaired water quality area. Increases in nutrient loading that degrade water quality and negatively impact shellfish habitat are contrary to Goal 2.2.3 of maintaining and improving coastal water quality. The project review resulted in the design of a stormwater management system as outlined in Finding WR6 that addresses Goal 2.2.3.

CR5. Shellfish resources exist in the substrate on the property and without adequate safeguards may be negatively impacted by debris, vehicle traffic, construction impacts, and water quality degradation from sediments and nutrients. The applicant's submittal "Cape Cod Commission Staff Report Response to Requests for Information" dated October 4, 1999 describes the use of siltation curtains and other erosion control measures to protect estuarine waters to meet these requirements.

Natural Resources/Open Space

NR1. The proposed project consists of redevelopment of a developed site that is located within a Significant Natural Resources Area as mapped by the 1996 RPP. According to the Natural Heritage Atlas, 2000 – 2001 Edition, the site is located within priority rare species habitat and estimated rare wildlife habitat for the Northern diamondback terrapin. The Massachusetts Natural Heritage and Endangered Species Program has commented that impacts to rare species habitat are not anticipated from this project given the developed nature of the site.

NR2. The project is located bordering the Bass River estuary just north of Route 28 in Dennis. Resources found on the site include land under the ocean, land containing shellfish, salt marsh, coastal dune, coastal bank, coastal beach, salt marsh, land subject to tidal action, land subject to coastal storm flowage, and riverfront area, all established through a Superceding Determination of Applicability issued by DEP on 1/9/02. A small area subject to the Wetlands Restriction Program is also located on the northeast section of the property. Existing development on the site has resulted in significant alteration of the buffers to these wetland resources. Based on an Order of Conditions and site plan for the work issued by the Dennis Conservation Commission in 1979, development presently located within wetland buffers on the site is determined to be an existing condition which the Commission has considered toward evaluation of the project's compliance

with MPS 2.3.1.2. The project appears to be exempt from the Riverfront Act due to pre-existing conditions and the requirements for a Chapter 91 permit.

NR3. MPS 2.3.1.2 requires protecting a 100-foot buffer to wetlands, though impacts to previously disturbed buffers may be allowed where the proposed use does not increase adverse impacts, *and* where there is no feasible alternative. The project proposes removing the existing mini-golf and gravel and bluestone parking lot located within the 100-foot buffer to wetlands. Portions of the mini-golf site and the existing parking lot will be revegetated with native plants, and portions will be resurfaced with washed stone, as detailed on the plan titled *Proposed Conditions/Open Space Plan, Route 28, Dennis, MA, prepared for Jay Howland, drawn by GAF Engineering, dated September 9, 1998 and revised May 1, 2002*. These proposed activities within the 100-foot wetlands buffer will reduce existing adverse impacts to the buffers, including improving wildlife habitat, as well as stormwater management and infiltration. There is no viable alternative to the proposed site configuration that accommodates the necessary parking for the proposed site uses. In addition, one of the proposed site uses, the mini-golf, has been removed from the site.

NR4. Proposed walkways through the site have been designed to provide for public access along the coast, and to connect with existing and proposed trails located on the Town of Dennis Conservation Land and across the Bass River bridge, respectively. The walkway at this location, in addition to meeting in part the requirements for public access on filled tidelands, may provide a link for a proposed Cape Cod Pathways route between the towns of Dennis and Yarmouth.

NR5. The proponent has agreed to remove a fence and a patch of the invasive plant species (Asiatic bittersweet) located in the southwest corner of the site prior to site restoration. Proposed revegetation of the site within the 100 foot buffer to wetlands is shown on the landscape plan titled *Dennis Filled Tidelands, Main Street, Dennis, MA dated 4/12/01 and revised 2/28/02*. The proponent has agreed to additional plantings on the coastal bank above the revetment, including *Myrica pensylvanica*, *Panicum virgatum*, and *Ammophila breviligulata*. The revegetation includes native species appropriate to coastal environments and which may improve wildlife habitat on the site.

OS1. The open space requirement for this project is 28,765 square feet, or approximately 30% of the total upland area on the site, as required by MPS 2.5.1.4. The 30,038 square feet area, shown on the plan titled *Proposed Conditions Plan/Open Space Plan, Route 28, Dennis, MA Prepared for Jay Howland, drawn by GAF Engineering, Inc, dated September 9, 1998 and revised May 1, 2002*, exceeds the required open space, and will be permanently protected through a conservation restriction held by the Dennis Conservation Commission. The proposed open space protects the most sensitive portions of the site, including undisturbed buffers to wetlands, restored/revegetated areas within wetland buffers, rare species habitat, and land restricted under the state Wetlands Restriction Program, and is located adjacent to land held by the town of Dennis for conservation purposes. The open space proposal also protects the view of the Bass River from Route 28, an important viewshed at this gateway location between Dennis and Yarmouth. Consequently, the open space proposal is consistent with the requirements of MPS 2.5.1.2, 2.5.1.3, 2.5.1.5, and 2.5.1.6. Also, provision of open space in excess of the amount required by the RPP constitutes a benefit of this project.

Transportation

T1. The proponent has razed and reconstructed a 42-seat restaurant within the existing footprint, added one, two-bedroom apartment above the restaurant and abandoned plans to reconstruct an eighteen-hole miniature golf course at 40 Main Street (Route 28) in West Dennis. The existing motor vehicle access for the facility is provided from three curb cuts on Main Street (Route 28), which is a Regional Roadway as defined in the RPP.

T2. Estimates of project traffic from the redevelopment were provided by the proponent's traffic engineer, and were agreed to by Commission staff during the project review. These estimates indicated that expected traffic will be less than the traffic generated by the site's prior uses (a restaurant and mini-golf course). Since no net increase in traffic would occur as a result of the redevelopment, the vehicle trips generated by the development are below the threshold of 25 vehicle trips requiring analysis and mitigation under MPS 4.1.1.1.

T3. MPS 4.1.1.5 requires that *measured sight distances at access/egress locations with public ways for all DRIs shall, at a minimum, meet Massachusetts Highway Departments (MHD) and American Association of State Highway Transportation Officials (AASHTO) standards for safe stopping sight distance*. Staff conducted a field inspection at the existing site driveways and the proposed site driveway on Main Street. Based on field observations, staff concluded that the existing and proposed driveways meet or exceed safe stopping sight distances based on AASHTO standards.

T4. MPS 4.1.1.6 states *regardless of project size or traffic generation access/egress onto public ways shall follow accepted access management practices, guidelines and policies. All new driveways on the regional road system for Developments of Regional Impact shall operate at Level-of-Service C (or Level-of-Service D in certified growth/activity centers) or better as defined in the Highway Capacity Manual, based on the appropriate design hour traffic volume as described in Minimum Performance Standard 4.1.1.9*. MPS 4.1.1.17 states *internal site circulation and access/egress shall be designed to minimize impacts on the adjacent road system*. Prior to DRI review, three driveways located on the north side of Main Street provide vehicular access for the site. The main driveway is located just east of the Bass River Bridge and two driveways serving the retail store/bait shop are located further east on Main Street. The proposed access to the development is to be provided at one centralized driveway location. The proposed access management plan for the facility meets MPS 4.1.1.6 and 4.1.1.17.

T5. MPS 4.1.1.7 states *regardless of project size or traffic generation, there shall be no degradation in public safety as a result of a Development of Regional Impact*. The applicant has agreed to install a crosswalk and signage on Route 28 to provide safe pedestrian access to the site. The crosswalk is to be placed on Route 28 east of Uncle Barney's Road. To accommodate the crosswalk and wheelchair ramp, the proponent must remove sixteen feet of existing guardrail along the north side of Route 28. Removal of the existing guardrail will require MassHighway approval. Alternative pedestrian access may be required if MassHighway will not allow the guardrail removal.

T6. Goal 4.1.2. states *to decrease dependence on private automobiles, address demonstrated public needs for convenient, accessible, economical alternatives to private automobiles, and*

promote energy efficiency and reduced pollution by developing and integrating alternative modes (e.g., rail, bus, ferry air, bicycle and pedestrian) into the transportation system and by promoting substitutes for transportation such as telecommunications. As stated above, the redevelopment project will not result in any new vehicle trips added to the roadway, therefore trip reduction under the 1996 RPP is not required of this project. However, to support the trip reduction goals of the RPP, the proponent has proposed the following trip reduction support services which constitute a benefit of the project:

- Provide secure bicycle storage areas.
- Designate trolley drop-off/pick-up area near the site.
- Advertise the trolley stop in a published public transportation guide.

Community Character

CC1. The proposed project is unlikely to impact significant historical or archaeological resources as determined by the Massachusetts Historical Commission based on their return to the applicant of a May 17, 1995 letter stamped "unlikely to affect significant historic or archeological resources."

CC2. Goal 6.2 of the RPP encourages redevelopment of existing structures as an alternative to new construction, and seeks to ensure that development and redevelopment respect the traditions and character of historic village centers and outlying rural areas so as to protect and improve, where necessary, the visual character of Cape Cod consistent with the Commission's design manual. The proposal involves re-development of an existing strip development.

CC3. The project site serves as a gateway for pedestrians and vehicles entering the town of Dennis from Yarmouth along Route 28, a regional roadway under the RPP. The site is highly visible along the Bass River and scenic Horse Foot Cove, and abuts town-owned Memorial Park directly east of the project site. Redevelopment of the site will have a significant impact on these regional views. During DRI review, the applicant revised the site plan to eliminate a proposed expansion of the existing miniature golf course located directly adjacent to Route 28 and the Bass River, and replaced a portion of this area with open space. Removal of the miniature golf course from the project helped to reduce the visual impact of the proposed development.

CC4. MPS 6.2.4 prohibits expansion or creation of strip development and requires redevelopment of existing strip development to provide adequate buffers between parking areas and the street, and significant improvement to interior parking lot landscaping, as well as facade improvements and frontage buildings, as necessary to improve the visual character of the site. The applicant's revised landscape plan provides the maximum buffer possible, between Route 28 and the project site, given the requirement to maximize the undisturbed buffer to Bass River, and other site limitations. This buffer serves to mitigate off-site visual impacts of proposed structures and uses on the site by filtering views from Route 28 and the Bass River.

CC5. MPS 6.2.5 and 6.2.6 require submission of a landscape plan that integrates buildings with their environment and which addresses the functional aspects of landscaping, such as drainage, screening and buffering. Proposed plant materials are suitable to the harsh conditions likely to

be found in this coastal location. The proposed plan as reviewed during the DRI process increased the amount of on-site buffering and screening.

CC6. The applicant has agreed to execute a landscape maintenance contract for three full growing seasons to ensure the viability of proposed plantings.

CC7. The existing restaurant/apartment building was re-constructed in 1996 (based on issuance of a demolition permit in March, 1996, an occupancy permit for the restaurant issued in November, 1996, and an occupancy permit for the apartment issued in February, 1998). It does not comply with the RPP in that the mass and scale of the building is not consistent with traditional Cape Cod architectural styles and the building is located such that it obstructs scenic views and vistas of Bass River. As such, it is not consistent with MPS 6.2.1. The applicant has agreed to lower the existing roof structure, as well as revise the front and rear facades to bring the project into compliance with MPS 6.2.1 that states, in part, that *the height and scale of a new building or structure and any addition to an existing building shall be compatible and harmonious with its site and existing surrounding buildings.*

CC8. Proposed revisions to the existing building are shown in draft roof plans and section drawings entitled *Roof Plan and Section, Jay Howland, Route 28, Dennis, MA*, drawn by M. Jones, dated March 18, 2002, received by the Commission December 24, 2002, and in draft elevation drawings entitled *Renovations to Restaurant & Apartment for Jay Howland, Lot #1, Route 28, West Dennis, MA*, dated December 1, 2002, and received by the Commission on December 24, 2002. They involve alterations to the roof structure, as well as some changes to the front and rear façade. The existing ridge height will be maintained on the eastern two-thirds of the building, but the ridge height will be lowered by 6 to 8 feet on the western third of the building (an area approximately 35 feet long). This will reduce the silhouette of the building by approximately 240 square feet, focusing in the area closest to the riverfront. The revised draft plans also change the roof form from a gable roof to a gambrel roof, eliminating the three large gable dormers on the front façade above the second floor windows and changing the windows to inset them within the roof structure.

CC9. The building revisions will reduce the actual and apparent height of the building by eliminating the top 6 to 8 feet of the building in the area closest to the river, and by removing the high window gables which effectively draw the eye upward, and accentuate the height of the building. In addition, the central section of the front façade will be stepped forward several feet, breaking the existing large mass into three separate components. Changes to the rear of the building involve extending the roof material to a lower point, aligning doors on the first and second floor, and shortening the second floor balcony.

CC10. Given that the building is already constructed and was issued an occupancy permit prior to the Commission's review, the cost of completing the building and site improvements will be secured by an escrow agreement provided by the applicant to insure that the required improvements are made.

CC11. M.P.S. 6.2.10 requires that parking be located to the rear or the side of a building or commercial complex in order to promote traditional village design in commercial areas unless

such location would have an adverse or detrimental impact on environmental or visual features on the site, or is completely infeasible. Approximately one-third of the proposed parking spaces are located behind the existing bait shop. During DRI review, the remainder of the proposed parking spaces were relocated outside of the 100 foot buffer zone to the Bass River. These remaining parking spaces are to the side of the bait shop, but in front of the existing restaurant. The site's riverfront location and existing buildings made it infeasible to locate all of the parking spaces to the side or rear of buildings.

CC12. Technical Bulletin #96-001, "Design Guidelines for Cape Cod," recommends that *sign materials, color, lettering, style, and shape should be compatible with surrounding building materials, colors, and textures*. The applicant proposes replacement of existing internally lighted plastic signs with externally illuminated hand-carved signs, which are consistent with Technical Bulletin #96-001. The existing free-standing wooden ladder sign will be relocated on the project site.

CC13. Existing lighting on the restaurant building at a site visit in early 2001 indicated that three decorative lights, each using an incandescent bulb, illuminate the South wall facing Route 28. On the East wall, toward the park, one decorative incandescent light and two flood lights illuminated the boat ramp. No lights are used on the West wall of the restaurant, closest to the revetment. On the North wall that faces onto Bass River, two flood lights and one decorative light were being used. The upper level of the restaurant is the security apartment. On the North wall, facing Bass River, three decorative coach lights provide light to the apartment.

CC14. MPS 6.2.7 states that *exterior lighting in new development and redevelopment shall comply with standards including design, light source, total cutoff and foot-candle levels as defined in the Exterior Lighting Design Standards, Technical Bulletin 95-001*. This project was reviewed under Technical Bulletin 95-001 prior to its February 21, 2002 revision. According to a December 3, 2001 lighting plan, the project will involve seven walkway lights and no parking lot lighting. The narrative included with the December 3, 2001 lighting plan shows three (3) lighting schemes, using Nostalgia series fixtures from Lumec. This type of fixture uses visible lamping, which is not consistent with Standard 2.4 of Technical Bulletin 95-001. However, the applicant subsequently agreed that lamps will be metal halide or incandescent which is consistent with Technical Bulletin Standard 2.3.

CC15. In terms of pole height, a December 3, 2001 narrative states an intent to "utilize a standard 9 foot 0 inch...post top luminaire...". So long as the total fixture height (base, pole and lamp) is not greater than 12 feet, the proposed lights are consistent with Technical Bulletin Standard 2.6.

CC16. Based on a site visit of February 27, 2001, lighting for the retail store/bait shop was provided by several broken "jelly jar" lights using incandescent bulbs. The DEIR/DRI application states these lights are used 4:00 PM to 11:00 PM. The DEIR/DRI information states the boat shop lighting has been removed, so there is no outside lighting for this structure. Therefore, MPS 6.2.7 did not apply to the bait shop.

CC17. Standard 2.8 of the Technical Bulletin sets a maximum foot-candle level of 8.0. Based

on the December 3, 2001 point-to-point plan, the walkway lights will conform to this standard. No information was submitted on foot-candle levels for other fixtures.

CC18. The applicant is proposing to eliminate the miniature golf course use from the site. As such, any remnants of the lights for the mini-golf use are expected to be removed.

CONCLUSION

Based on the findings above, the Cape Cod Commission hereby concludes:

1. That the benefits of the proposed project, based on Findings CC4, CR2 (in part), NR4, NR5, OS1 (in part) and T6, outweigh the detriments based on Findings CR3, WR6, NR3 and CC3.
2. As noted in Finding G2, the Town of Dennis does not have an approved Local Comprehensive Plan (LCP), so consistency with the LCP is not applicable.
3. As noted in finding G7, the project is not located in a District of Critical Planning Concern, therefore, consistency with implementing regulations is not required.
4. Provided that the applicant obtains all permits required by the Town of Dennis, the project would be in compliance with local development by-laws. This conclusion is supported by Finding G1.
5. As conditioned below, the project is consistent with the Minimum Performance Standards of the 1996 Regional Policy Plan, except where indicated in Finding WR7. Under the Flexibility Clause in the 1996 Regional Policy Plan, the applicant was able to demonstrate that an alternate approach to a conventional stormwater management system, including appropriate mitigation, will not be more detrimental than would be allowed under MPS 2.1.1.6.

The Commission hereby approves, with conditions, the application of Jay Howland for the proposed Dennis Filled Tidelands as shown on the plans entitled *Proposed Conditions Plan*, drawn by GAF Engineering, revision date December 23, 2002 and received by the Commission on December 24, 2002 (except that part of the note on the Plan that reads "crosswalk and walkway to be constructed as part of Packet's Landing link when completed" is not valid), and *Proposed Conditions/Open Space Plan, Route 28, Dennis, MA, prepared for Jay Howland, drawn by GAF Engineering, dated September 9, 1998 and revised May 1, 2002*, as well as changes to the existing restaurant building as shown on draft roof plans and section drawings entitled *Roof Plan and Section, Jay Howland, Route 28, Dennis, MA*, drawn by M. Jones, dated March 18, 2002, received by the Commission December 24, 2002, and in draft elevation drawings entitled *Renovations to Restaurant & Apartment for Jay Howland, Lot #1, Route 28, West Dennis, MA*, dated December 1, 2002, and received by the Commission on December 24, 2002, as a Development of Regional Impact, provided the following Conditions are met:

CONDITIONS

General

G1. This DRI decision is valid for 7 years, and local development permits may be issued pursuant hereto for a period of 7 years from the date of the written decision.

G2. 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 decision.

G3. The applicant shall obtain all state and local permits for the proposed project.

G4. No development work, as the term "development" is defined in the Cape Cod Commission Act, shall be undertaken until all appeal periods have elapsed or, if such an appeal has been filed, until all judicial proceedings have been completed.

G5. Prior to issuance of a building permit for any phase of construction, the applicant shall obtain a preliminary Certificate of Compliance from the Commission which states that all conditions in this decision pertaining to issuance of a building permit for such phase have been met.

G6. Prior to issuance of a preliminary Certificate of Compliance by the Cape Cod Commission, the applicant shall submit final plans as approved by local or state boards for review by Commission staff to determine their consistency with this decision and/or information submitted as part of the DRI review. If the final plans approved by local or state boards are inconsistent with this decision and/or information submitted as part of the DRI review, then they shall be reviewed subject to Section 7 of the Cape Cod Commission *Administrative Regulations, Modifications to Approved DRIs*, and as amended from time to time.

G7. The proposed Dennis Filled Tidelands project shall be constructed and/or revised in accordance with the following final plans, elevation drawings, concept drawings and other documents:

Site Plan: *Proposed Conditions Plan*, drawn by GAF Engineering, revision date December 23, 2002 and received by the Commission on December 24, 2002, except part of the note on the Plan that states "crosswalk and walkway to be constructed as part of Packet's Landing link when completed."

Open Space Plan: *Proposed Conditions/Open Space Plan, Route 28, Dennis, MA, prepared for Jay Howland, drawn by GAF Engineering, dated September 9, 1998 and revised May 1, 2002*

Restaurant Design: Concept drawing and reduced size elevations, dated 1/4/02, provided by applicant's architect, Michael Jones.

Walkway Cross-section: *Proposed Elevated Walkway*, dated 5/3/02, drawn by GAF Engineering, submitted to the Commission on 5/16/02.

Landscaping: *Landscape Planting Plan*, revision date 2/28/02, drawn by Stephen Stinson Associates, submitted to the Commission on 3/11/02.

G8. The applicant agrees to allow Cape Cod Commission staff to enter onto the property which is the subject of this decision for the purpose of determining whether the conditions contained in the decision are met.

G9. Prior to issuance of a preliminary Certificate of Compliance, or a building permit, the applicant shall ensure the removal of the partially constructed miniature golf course, reconstruction of the existing restaurant building, and all other associated site work, including but not limited to exterior lighting and landscaping, by executing an escrow agreement of form and content satisfactory to Commission Counsel. The amount of the escrow agreement shall be equal to 150% of the cost of completing all such work, including labor and materials, which shall be an amount of at least \$270,000. The escrow agreement shall allow for partial release of escrow funds upon partial completion of work. The check for the escrow funds shall be payable to Barnstable County with the work approved by Commission staff prior to release of the escrow funds. In the event that the applicant fails to comply with this decision, the escrow funds shall be used by the Commission to complete the removal of the partially constructed miniature golf course, reconstruction of the existing restaurant building, and all other associated site work, including but not limited to exterior lighting and landscaping. All funds shall be distributed upon approval of the Executive Director of the Cape Cod Commission. Unexpended escrow funds shall be returned to the applicant, with interest, upon completion of the required work.

G10. The applicant shall be responsible for providing proof of recording of the decision prior to issuance of a preliminary Certificate of Compliance.

G11. The applicant shall demonstrate to the Commission that a copy of this decision has been provided to the general contractor and all tenants (if applicable) prior to the start of site work and/or construction.

G12. The applicant shall provide to the Commission a copy of the building permit or permits issued by the Town of Dennis within 30 days of issuance.

G13. All conditions of this decision shall be met prior to the issuance of a preliminary Certificate of Compliance, unless otherwise stated. A final Certificate of Compliance is required from the Cape Cod Commission when the applicant completes all remaining site work or other work not already required to be completed before the preliminary Certificate of Compliance.

Water Resources

WR1. The applicant shall continue to utilize a state-approved denitrifying septic system for treatment of wastewater on the site. Any increase in flow or major modification of the septic system shall be reviewed and approved by the Commission in accordance with Section 7 of the Cape Cod Commission *Administrative Regulations, Modifications to Approved DRIs* (as amended from time to time) prior to implementation.

WR2. Any site changes that could result in additional nitrogen loading (e.g., additional lawn area, additional impervious surfaces, increased wastewater flows or higher wastewater effluent concentrations) shall be reviewed and approved by the Commission in accordance with Section 7 of the Cape Cod Commission *Administrative Regulations, Modifications to Approved DRIs* (as amended from time to time) prior to implementation.

WR3. The parking area surfaces and stormwater system shall be built as indicated on the *Proposed Conditions Plan*, drawn by GAF Engineering, revision date December 23, 2002, received by the Commission on December 24, 2002.

Coastal Resources

CR1. The applicant shall maintain a portion of the delineated parking spaces for public access to the shore in compliance with the provisions of Chapter 91, consistent with review findings that may be issued by the Department of Environmental Protection's Waterways Program, and shall maintain signs and notices inviting public visitation and use of the site for coastal access including launching of non-motorized boats.

CR2. Prior to issuance of the preliminary Certificate of Compliance, the applicant shall submit a final design plan of the proposed public access pedestrian walkway and the dock and float design submitted for Chapter 91 permitting for approval by the Cape Cod Commission. The design shall use rollout plank and cable walkways on grade to convey pedestrian traffic over fragile resources to the commercial docking facilities. Said walkways shall be deployed at all times while commercial vessels are operating at the site, and they shall be removed and stored on the parking lot at all times when the floating docks are not deployed. All wooden walkways shall be constructed above grade in accordance with stipulations from the Dennis Conservation Commission, with a minimum of 1/4 inch spacing between decking boards to allow adequate penetration for sunlight and precipitation. All lumber used within or adjacent to coastal resources shall be copper chromate arsenic (CCA) free.

CR3. Initial realignment and maintenance of existing boulders adjacent to the boat ramp may be done if it is done by hand. No additional boulders shall be added adjacent to the boat ramp. Maintenance of the runoff retention berm and future realignment of existing boulders adjacent to the boat ramp shall be performed by hand on an as needed basis. Wetland restoration activities associated with the removal of the common reed *Phragmites australis* shall ensue as described in the Notice of Intent filed with the Dennis Conservation Commission.

CR4. Parking areas shall be constructed as pervious surfaces to reduce the flow of sediment and nutrient enriched waters into Bass River during severe storm events, and to provide for maximum onsite recharge. No hardener, stone dust, blue stone, pavement, or other impervious material may be used to repair or maintain the parking area. All areas adjacent to the coastal beach north of the structure must be maintained free of trash that could be transported to marine waters, and native vegetative ground cover shall be maintained to reduce potential sediment transport to the Bass River. Sufficient density of beachgrass (*Ammophila breviligulata*,) 12" on center maximum, between clumps) shall be maintained north of the existing revetment structure on the coastal beach to ensure the integrity of the beach feature.

CR5. Prior to the start of construction, siltation controls, including siltation curtains as described in the applicant's October 4, 1999 submittal shall be installed at the revetment at the base of the coastal bank, the boat ramp, and the wetland restoration site prior to the start of work and shall remain in place until the work on each feature is completed.

Natural Resources/Open Space

OS1. Prior to the preliminary Certificate of Compliance, the applicant shall provide the Cape Cod Commission with a draft conservation restriction and accompanying plan to be approved by Commission counsel which is consistent with Massachusetts General Laws Chapter 184, § 31 – 33. Said restriction and plan shall provide a total of 30,038 square feet located within the Dennis Filled Tidelands site and identified on the plan titled *Proposed Conditions/Open Space Plan, Route 28, Dennis, MA, prepared for Jay Howland, drawn by GAF Engineering, dated September 9, 1998 and revised May 1, 2002* to be preserved as permanent open space, but with the right to install/construct and maintain the landscaping, walkways and viewing area as shown on the above plan. The applicant shall also provide proof of submittal of the conservation restriction to the Executive Office of Environmental Affairs, Division of Conservation Services and to the Dennis Boards from whom approval is required prior to the preliminary Certificate of Compliance.

OS2. Prior to the final Certificate of Compliance, the applicant shall execute and record the conservation restriction and site plan at the Registry of Deeds or Registry District of the Land Court, and proof of recording shall be provided to the Commission. The land subject to this conservation restriction shall remain undisturbed for conservation and wildlife habitat preservation purposes (though maintenance mowing - once a year, in the Fall - may occur outside of the 100-foot buffer area) and shall provide for public access.

Transportation

T1. Prior to issuance of a final Certificate of Compliance, the applicant shall close the existing driveways on Route 28 and install one centralized driveway to the development as shown on the plan titled *Proposed Conditions Plan*, drawn by GAF Engineering, revision date December 23, 2002 and received by the Commission on December 24, 2002.

T2. Prior to issuance of a final Certificate of Compliance, the applicant shall install a crosswalk and signage on Route 28 east of Uncle Barney's Road as shown on the plan titled *Proposed Conditions Plan*, drawn by GAF Engineering, revision date December 23, 2002 and received by the Commission on December 24, 2002, except that part of the note on the Plan that reads "crosswalk and walkway to be constructed as part of Packet's Landing link when completed" is not valid. If, at the time a final Certificate of Compliance is requested of the Commission, the applicant has been unable to accommodate the crosswalk and wheelchair ramp because an opening in the existing guardrail has not been approved by MassHighway, the applicant shall seek a modification of this decision to provide alternative pedestrian access. Such a modification shall be consistent with Section 7 of the Commission's *Administrative Regulations, Modifications to Approved DRIs*. Modifications in accordance with directives from MassHighway shall be considered as minor modifications #1 and may be approved by Commission staff.

Community Character

CC1. Prior to issuance of a final Certificate of Compliance, the applicant shall remove any structures associated with the partially constructed miniature golf course, including any exterior lighting, and restore the area consistent with the final landscape plan listed in condition G7.

CC2. Prior to issuance of a preliminary Certificate of Compliance, and submittal to the Town of Dennis of a building permit application, the applicant shall submit final construction plans and roof elevations for review and approval by Commission staff.

CC3. Prior to issuance of a final Certificate of Compliance, the applicant shall complete revisions to the existing restaurant building in accordance with the final plans as reviewed and approved by Commission staff.

CC4. Prior to issuance of a preliminary Certificate of Compliance, the applicant shall submit for Commission staff review and approval a draft landscape maintenance agreement for three (3) full growing seasons which follows guidelines established by Commission staff. Prior to issuance of a final Certificate of Compliance, the applicant shall submit documentation of a final maintenance agreement contract.

CC5. Plant materials specified by the final landscape plan listed in condition G7 may be substituted with prior written approval by Commission staff.

CC6. All signs on the site, including those for all buildings and for the site itself, shall be externally illuminated. Modifications to existing site signs, and addition of any new signs shall be completed prior to issuance of a final Certificate of Compliance. Prior to issuance of a final Certificate of Compliance by the Commission, Commission staff shall conduct a site visit to ensure compliance with this condition.

CC7. Prior to issuance of a final Certificate of Compliance by the Cape Cod Commission, in-the-field verification of light levels shall be conducted by Commission staff to verify conformance with the requirements of the Technical Bulletin 95-001 and MPS 6.2.7. Should unexpected conditions arise during construction that require redesign or adjustments to site exterior lighting fixtures, including substitutions of fixture heads, the applicant shall obtain written approval from Commission staff prior to the construction consistent with the Commission's *Administrative Regulations, Modifications to Approved DRIs*. Modifications made during construction that are in accordance with Technical Bulletin 95-001 shall be considered as minor modifications #1 and may be approved by Commission staff.

The Cape Cod Commission hereby approves with conditions the application of Jay Howland as a Development of Regional Impact pursuant to Sections 12 and 13 of the Act, c. 716 of the Acts of 1989, as amended for the proposed Dennis Filled Tidelands located in Dennis, MA.


Robert D. Deane, Commission Chair

1/17/03
Date


Commonwealth of Massachusetts

Barnstable, ss.

On this 17th day of January 2003, before me personally appeared

Robert Randolph, to me known to be the person described in and who executed

the foregoing instrument, and acknowledged that he executed the same as his free act and deed.


Notary Public
Commonwealth of Massachusetts

My Commission expires:

