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CAPE COD
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**Cape Cod Commission
Subcommittee Procedures**
(Revised January 2013)

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1. Authority for use of Subcommittees

Subcommittees may be formed pursuant to sections 4(a)(12) and 13(c) of the Act. Section 13(c) states:

The chairman of the commission may at his or her discretion establish subcommittees to review specific developments of regional impact and report to the full commission. Such a panel or subcommittee shall be composed of at least five commission members and shall make decisions by a majority vote.

Subcommittees shall be initially comprised of five or more voting members. A quorum equals a majority of the voting members of the subcommittee. Without a quorum a subcommittee hearing, meeting or vote may not take place.

Where quorum is present, subcommittees act validly upon a like vote of the majority of the their voting members present. The chair of the subcommittee can choose whether or not to vote. However, in cases of a tied vote the chair must vote to break the tie. Alternates may not vote on a subcommittee recommendation unless empaneled by the subcommittee chair, a member is absent and the alternate has attended all substantive public hearings.

2. Purpose of Subcommittees

The Commission authorizes the use of subcommittees to gather facts and to make recommendations to the full Commission on any regulatory application submitted to the Commission. Subcommittees conduct public hearings and public meetings in the course of regulatory proceedings. Subcommittee members participate in an on-site visit to ensure that they have a first hand perspective of the site and proposed project. Unless otherwise authorized by the Commission, subcommittees shall make a formal recommendation to the full Commission, which is the ultimate decision-making authority. Due to the short time frame for decisions in the case of Jurisdictional Determinations, the Commission may authorize subcommittees to hear the testimony and make a final determination in accordance with Section 10 of the *Enabling Regulations*.

Subcommittee members should weigh the evidence presented at the hearing(s) and in the record and formulate a recommendation to the full Commission as to whether an application should be approved, approved with conditions, or denied.

3. Selection of Subcommittees and Member Attendance

Subcommittee members are selected at random by the Clerk of the Commission unless the Commission chair specifies another method. Additionally, the Commission member representing the town in which a development is proposed is automatically placed as a member of the subcommittee, but that member may decline if they choose. After they are selected, the subcommittee members and the subcommittee chair are confirmed by the chair of the Commission. There shall be at least five subcommittee members and two alternate members selected for each subcommittee. The alternate members are encouraged to attend all hearings and meetings. At the time of selection, if a Commission member has a conflict of

interest, he or she should raise this with Commission staff and request that another subcommittee member or alternate be selected.

Subcommittee members or alternates who cannot attend an initial subcommittee public hearing should contact Commission staff at least one week in advance of the hearing. If any of the assigned subcommittee members cannot attend the initial public hearing, the Clerk of the Commission shall randomly select, and the Commission chair shall confirm, an alternate to serve on the subcommittee to ensure that a full subcommittee hears the project.

In order to vote on the subcommittee recommendation, a subcommittee member must have attended all of the substantive public hearings and subcommittee meetings on a project. An alternate member(s) who has attended all public hearings may become a voting subcommittee member if a subcommittee member has missed a public hearing or if a vacancy on the subcommittee occurs during the course of the public hearing process.

For projects where an Environmental Impact Report (EIR) is required and the applicant agrees to participate in joint MEPA/Commission review, a scoping session/public hearing is held. Because an EIR is also considered to be a DRI, a DRI subcommittee is selected. Both the DRI subcommittee and MEPA officials will conduct the initial scoping hearing on the Environmental Notification Form (ENF). Following the scoping hearing, the DRI subcommittee will meet to decide on comments to be sent to MEPA. The same procedures are followed when the applicant files the Draft EIR and the Final EIR (FEIR). Following the Executive Office of Energy and Environmental Affairs (EEOEA) Secretary's certification of the FEIR, the DRI review process begins. The chair may appoint a new subcommittee at that time.

4. Staff Role in DRI Review

The role of Commission staff is to identify issues arising from a proposed development in relation to the values and resources protected under the Cape Cod Commission Act and to address a project's compliance with the goals and standards of the Regional Policy Plan (RPP). Staff will present such information and analysis to the subcommittee members through staff reports, memoranda, and presentations.

Staff will work throughout the course of a regulatory review to provide the subcommittee members with information and analysis in order that the subcommittee may make an informed decision about a project. In general, staff will not recommend approval, approval with conditions or denial of a project, but may identify bases for approving, conditioning or denying a project.

Prior to the initial substantive public hearing, the staff will coordinate the dates and locations for the proposed hearing with the subcommittee, applicant, and DRI liaison for the town in which the development is located.

Once a hearing date has been set, the Commission staff will assemble a packet of information to be distributed to the subcommittee approximately one week in advance of the hearing. The packet will include all application materials, a staff report, correspondence submitted for the record, as well as any other relevant information. The staff report will identify issues arising from the proposed development in

relation to the values and purposes to be protected under the Act and highlight the project's consistency with the applicable minimum performance standards of the RPP.

Commission staff will arrange a site visit in accordance with Section 5 below. Staff will provide minutes of previous hearings and meetings to subcommittee members and other interested persons and will maintain the project file and public record.

When so instructed by the subcommittee, staff will draft a decision including appropriate conditions for consideration by the subcommittee prior to being presented to the full Commission.

5. Site Visit

Commission staff will arrange with town officials and the applicant a time for the subcommittee members to tour the site so they may see first hand the various components of a project in relation to the site and its surroundings. These site visits are usually scheduled for the day of the public hearing, but may be scheduled at another appropriate time.

The site visit is intended as a time when subcommittee members can become oriented to the features, constraints, location, and/or special circumstances of the site on which the development is being proposed.

The site visit is not a time at which the applicant, Federal, State, town officials, opponents or other parties may present new information. Discussion of the project should be reserved for during public meetings and public hearings. A site visit is not public meeting. (M.G.L. c. 30A, § 18.)

6. Subcommittee Public Hearings

The purpose of a public hearing is to hear the applicant's presentation of their proposed project, hear the staff analysis of the project's compliance with the RPP, and impacts, receive input from relevant federal, state, regional and local officials, and hear testimony from interested members of the public. Subcommittee members should approach all hearings impartially.

During the pendency of the DRI review as well as during the appeal period on each DRI, subcommittee members should not express any personal opinions on the project, nor should they make any statements which may be construed to show any prejudgment or bias on the project itself in accordance with the Cape Cod Commission's *Communications Policy*, June 2008.

The subcommittee should hold the first public hearing in the town in which the project is located. Continued hearings may be held at the discretion of the subcommittee and should be held when additional information is presented. The chair should allow new information to be presented at subsequent hearings, and provide all interested persons with an opportunity to rebut information presented. Subcommittee hearings should be continued as needed until all information is presented and issues requiring discussion are resolved.

A. General Public Hearing Procedures / Guidelines for Chairing Hearings

1. **Open hearing** – Note the time and request that a member read the applicable hearing notice out loud.
2. **Introductions** – Introduce all subcommittee members, alternate members, and Commission staff.
3. **Swearing in of all individuals (Applicable only to Development of Regional Impact applications over which the Energy Facility Siting Board asserts jurisdiction)** - All individuals who will present information to the subcommittee during the public hearing will be sworn in by the chair. The chair may swear in all individuals collectively at the outset of the public hearing.

Written record – Reference for the record any written materials received after the application materials and record were distributed to subcommittee members. The chair may elect to read or summarize such materials.

4. **Presentations** – Generally, testimony is taken in the following order (see Section B, *Receiving Testimony* below):
 - a) Applicant or their representative to present their development plan and project;
 - b) Commission staff for their analysis and staff report;
 - c) Federal, state, regional or municipal officials;
 - d) General public or other interested persons.

Invite the subcommittee members to ask questions after each presentation.

5. **Closing remarks/rebuttal** - Ask the applicant and the staff for final comments.
6. **Motion(s)** – Entertain and act on a motion including closing the hearing, or continuing the hearing to a date, time and place.
7. **Deliberation** – Subcommittee deliberations should generally occur at scheduled subcommittee meetings, however, the subcommittee may also deliberate prior to the close of the hearing.
8. **Adjourn** – Announce any known future subcommittee meetings. Make it clear that no written material or oral testimony will be allowed after the close of the hearing.

B. Receiving Testimony

1. **Identify speaker** - People providing public testimony to the subcommittee should always identify themselves before speaking.
2. **Credentials** - Anyone intending to testify about a matter of a technical nature should provide the Commission, verbally or in writing, with the credentials qualifying them to make such technical statements. (For example, a lawyer is not necessarily qualified to make a technical

determination about a traffic impact issue. If the attorney is speaking about a technical issue based upon a report prepared by someone else, then you may inquire as to the qualifications of the preparer.) This is particularly important during the applicant's testimony. An abutter does not need technical expertise to testify about a project.

3. **Time allocation for each presentation/speaker** - Subcommittee chairs should strive for balance in all public hearings, providing the applicant and other proponents, Commission staff, public officials, and opponents an opportunity to speak. The chair should use their discretion and impose time limits when needed. Time allocations will vary depending on the size and complexity of the project as well as the number of persons wishing to provide testimony. The applicant should be afforded an adequate opportunity to present their case, but not at the expense of having enough time to receive all public testimony. Generally, staff and the applicant are each afforded 20 minutes for their opening presentations.
4. **Written testimony** - If many people wish to speak about a project, it may be that they cannot all be heard within a reasonable amount of time. In this case, the chair may limit each speaker to a specified amount of time and require that further testimony be submitted in writing. The chair should provide a time frame for submission and the Commission's address.
5. **Addressing the Chair** - All persons testifying before a subcommittee should address the subcommittee members only. Discussions between persons testifying before the subcommittee and non-subcommittee members should only occur as authorized by and through the subcommittee chair.

C. Continuing or Closing the Hearing or Record

1. **Continuations** - After the subcommittee has completed its deliberations, the members will vote a recommendation to the full Commission. If announcing a hearing continuation, whenever possible the chair should announce the date, time, and place certain in order to avoid the need for an additional public noticing process.
2. **Closing the hearing and/or record** - The record shall be closed by the subcommittee when the public hearing is closed. The subcommittee shall close the hearing and notice the full Commission public hearing for the Commission meeting. After closing the public hearing, the subcommittee should not receive or consider any new evidence. Additional testimony and evidence may be received at the full Commission hearing by the full Commission. The full Commission shall close its hearing record prior to making a final determination on a project.

7. Subcommittee Meetings and Deliberations

Subcommittee meetings allow the members to deliberate on the information presented to them and provide them with an opportunity to question the Commission staff and applicants. Subcommittee meetings are the subcommittee members' opportunity to be sure that they understand all aspects of the development proposal and can establish the project's consistency with the criteria for DRI approval, including the goals, policies and standards of the RPP, consistency with local development bylaws and

local comprehensive plans, Districts of Critical Planning Concern, and probable benefits and probable detriments.

Subcommittee meetings may be held at any time, but are most often held after the subcommittee's hearing(s) are concluded to deliberate on all evidence presented. Subcommittee meetings must be posted 48 hours in advance under the state Open Meeting Law, unless they take place as part of a noticed public hearing on the same matter (*i.e.* immediately after or during a public hearing that was noticed).

At subcommittee meetings, no new testimony is generally taken, but subcommittee members may ask clarifying questions at the chair's discretion. The applicant and staff may provide information to the subcommittee to assist in their deliberations on the project. The subcommittee may decide to hold a new public hearing if significant new information is presented at a meeting.

In order for subcommittee meetings to be productive, applicants are required to provide any requested information in a timely manner. According to the *Enabling Regulations*, information must be submitted to the Commission at least 14 calendar days in advance of a meeting or hearing. Failure by the applicant to provide information according to this "14-day rule" may result in cancellation of a subcommittee meeting or hearing.

8. Subcommittee Recommendations

Subcommittee members should weigh all the evidence in the record and collectively deliberate to formulate the subcommittee's recommendation to the full Commission. As part of this process, the subcommittee should discuss substantive issue areas and make findings for the record. Conditions should be crafted after substantial testimony is received and deliberations are held and it is clear what the anticipated impacts from the proposed development are likely to be.

The subcommittee should direct staff to draft a decision incorporating the subcommittee recommendations and appropriate findings and conditions. The subcommittee will then review the draft decision before it is sent to the full Commission for a final public hearing. Once the subcommittee finalizes the draft, Commission staff forwards it to the full Commission along with all relevant application materials, minutes, reports and correspondence.

9. Presentation of Subcommittee Recommendation to the Full Commission

The purpose of the final public hearing before the full Commission is to allow for the taking of any new testimony and evidence, consider proposed corrections to and comments on factual information contained in the draft written decision recommended by the subcommittee, and for the Commission to vote on the draft decision presented by the subcommittee. It is generally conducted as follows:

1. Speaking on behalf of the subcommittee, Commission staff will present the project and the draft decision to the full Commission.
2. The applicant then has the opportunity to address the full Commission.

3. Testimony shall be open to all interested parties but subject to a time limit determined by the chair.
4. Commission members may ask questions of applicant, subcommittee, staff, town representatives, and other persons testifying.
5. Prior to the Commission vote, the subcommittee may conclude any administrative subcommittee business, such as approval of minutes.
6. On conclusion of the public hearing process, the Commission shall close the hearing and the record and vote on the project before them. Provided there is sufficient time in the decision period, they may choose to:
 - 1) Accept the draft decision as written or with minor modifications; or
 - 2) Direct staff to amend the draft decision for review at a subsequent meeting; or
 - 3) Refer project back to the subcommittee.

The full Commission may decide that further study and/or reconsideration by the subcommittee is warranted, for example if it is determined that new issues requiring deliberation were presented or if an issue was not addressed by the subcommittee that substantially affects the outcome of the decision.

10. Processing Multiple Requests

Occasionally, an applicant will seek simultaneous regulatory determinations from the Commission, and these matters may generally be heard at the same public hearing. For example, it is not uncommon for a DRI Hardship Exemption and a DRI review to be noticed for the same public hearing.

Should this occur, the subcommittee chair may in effect proceed through a “mini hearing” on each matter. Deliberations at a subcommittee meeting will determine which regulatory path the subcommittee recommends for a project.

11. Ex Parte Communications

Cape Cod Commission members and subcommittee members shall not discuss projects undergoing regulatory review outside a public meeting or hearing nor have direct contact with applicants, opponents, proponents, or their representatives outside of the public hearing/meeting process in accordance with the Cape Cod Commission’s *Communications Policy*, June 2008. If contacted by an applicant, opponent, proponents or representative, members shall explain that such communications must only occur during a public hearing/meeting. Mailings received by subcommittee members directly from applicants or representatives should not be opened or read, but should be forwarded to staff for distribution to all subcommittee members. (See the full text of the Cape Cod Commission’s *Communications Policy*, June 2008).

12. Sample Motions for use by Subcommittee Members

The Subcommittee chair may entertain motions made by other subcommittee members at either subcommittee meetings or hearings. Some general examples of commonly used motions are:

Sample Motion to Continue:

I move to continue this public hearing until (date) at (time) at (place) for the purpose of accepting further testimony on this DRI application.

Sample Motion to Close a Hearing:

I move to close this public hearing.

The following language may be added to the motion if necessary:

The staff is further directed to come to an agreement with the applicant to extend the 60-day time limit for a Commission decision on this application

Sample Motion to approve a project with Conditions:

I move to recommend approval of this project to the full Commission and to direct staff to draft an approval decision with conditions, which will then be brought before this subcommittee for review and final approval.

13. DRI Process Outline

The following process generally outlines the typical DRI review that an applicant and a subcommittee can expect to occur, from application filing to final hearing before the full Commission. Specific project circumstances will dictate the overall DRI review and it may deviate from this general outline. However, the following 13 steps are generally what can be expected during a DRI review:

1. Pre-application meeting with staff.
2. Applicant prepares and files a DRI application. Staff technical review begins.
3. Subcommittee selected to review DRI project.
4. Substantive public hearing scheduled (when application is deemed complete) in town where DRI is proposed.
5. Staff report generated after receipt of a completed application and analysis of the proposal by Commission technical and planning staff. Discussions with town and other stakeholders are critical at this point. A staff report and the project file will be sent in advance of the hearing to the subcommittee, town DRI liaison, applicant, and requestors.
6. Site visit with subcommittee, local officials, applicant and Commission staff.
7. Public hearing(s) opened by subcommittee within 60 days of receipt of the DRI referral, and closed within 90 days of the opening.

7. A. If an applicant filed an Environmental Notification Form with MEPA, but no Environmental Impact Report (“EIR”) is required, the subcommittee shall open the public hearing within 90 days of the Secretary of EOEEA’s certification that no EIR is required.
7. B. If an EIR is filed, the subcommittee shall open the public hearing within 45 days after the Secretary of EOEEA certifies its adequacy.
8. Subcommittee deliberation at public meeting(s). Subcommittee will review project materials and any staff reports, request and receive additional information, and ultimately vote on a recommendation to the full Commission. Subcommittee will direct staff to draft a decision (approval, approval with conditions, or denial).
9. Staff prepares draft decision.
10. Subcommittee, or its designee, reviews and approves the draft decision.
11. Distribution of “record” and draft decision to the full Commission.
12. Public hearing before full Commission.
13. If the full Commission votes to approve a DRI, a written decision, approved and signed by the Commission chair, within 60 days after the close of the subcommittee hearing shall be filed with the Registry of Deeds and/or Land Court Registry District by the Commission Clerk after the appeal-period expires and if no appeal has been filed. (This 60 day period may be extended by agreement between the applicant and the Commission.)

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