

CAPE COD COMMISSION  
21<sup>ST</sup> CENTURY REVIEW TASK FORCE  
ATTENDANCE  
August 10, 2006

TASK FORCE MEMBERS:

Keith Bergman	Absent
Elliott Carr	Present
Larry Cole	Present
Michael Cole	Present
Lindsey Counsell	Present
Thomas Evans	Present
Hank Farnham	Present
Maggie Geist	Present
Henry Kelley	Present
Tom Keyes	Absent
Vicky Lowell	Present
Ed Mangiafico	Present
Spyro Mitrokostas	Present
Tom Moccia	Present
Wendy Northcross	Present
Paula Peters	Absent
Henri Rauschenbach	Absent
Mark Robinson	Present
Tony Shepley	Present

OTHERS ATTENDING:

Mark Zielinski	Scott Horsley
Dave Willard	Patrick Butler
Margo Fenn	Andrew Singer
Nancy Hossfeld	Dave Michniewicz
Greg Smith	Sue Rohrbach
William Scully	Ann Canedy

21<sup>ST</sup> CENTURY TASK FORCE  
ON THE CAPE COD COMMISSION  
MEETING MINUTES  
August 10, 2006

The Task Force appointed by the Barnstable County Commissioners to review the Cape Cod Commission, met on Thursday morning, August 10, 2006 in Rooms 11 & 12 of the Barnstable Superior Courthouse on the hill on Route 6A in Barnstable Village. Those people in attendance can be seen on the attached list. Chairman Elliott Carr called the meeting to order at 7:49 a.m.

- 1) **MINUTES-** The Task Force had two sets of minutes to vote on. On a motion made by Tom Evans and seconded by Mike Cole, the Task Force voted unanimously to approve the minutes of the meetings of July 27, 2006 and August 1, 2006.
- 2) **DRI COMMENTS-** Chairman Carr, facing a busy agenda, said he would try to keep things flowing. Before introducing attorney Pat Butler, he said he wanted to make a few personal comments about DRIs. He said that clearly the DRI process has gone in ways not anticipated. This is impeding the Commission's other activities. The 10,000 square foot threshold has created a Leavittown of 9,990 square foot building around Cape Cod. How can the DRI process be retooled and improved for everyone's benefit?

3) **PAT BUTLER-** Attorney Pat Butler had appeared earlier in the Task Force's Commission Review process with some of his barrister colleagues. After stating their thoughts, concerns and suggestions, Pat promised to take the list of decisions made by the Commission over a period of time and with the help of his associates and other consultants, analyze these results and come back to the Task Force with a report. That is why he is back, with some of his professional colleagues, to offer their opinions based on their lengthy review, which are outlined in a sixteen page report, copies of which were circulated to each Task Force member. Pat thanked the Committee for the opportunity to return. He said that from reading the minutes of their meetings, he realizes they have been dealing with a lot on their plate. He said that other attorneys and consultants were involved in creating this report. Pat said he would like to make some preliminary points and explanations.

**PROCESS-** Rather than bring in a lot of people to tell their war stories to the Task Force, he took the stories off-line and synthesized them. He said that between him and his associates, they had several meetings with people who represent 65% to 70% of the people who actually participated in the process. They swapped stories.

- Pat emphasized that this is not a statistical, but a feeling analysis.
- No one was paid.
- He and his colleagues all volunteered their time as they feel they are part of the community. This is one way they can give back by contributing to this review process.
- This report is only talking about the DRI process. Nothing to do with planning, but part of the regulatory process.
- He said they all found their work and exploration educational. They learned things that they didn't know, and confirmed some other things

- This is a candid, honest, forthright appraisal. They didn't pull any punches, but neither did they sling any arrows.
- This report is intended to be a blanket summary. It is only generic, as no names or specific projects are mentioned.
- Pat admitted that not every consultant or applicant involved agreed with everything in the report.
- These written observations are offered to help the Task Force in its process.

**4) FOCUS ON INTENT-** Pat wanted to elaborate on the intent of the work and report that he and his colleagues have produced. They want to give the Task Force the full spectrum of the experience of applicants over the last fifteen years. This is not meant to be an indictment of the Commission, its staff or Commission members. Recently he reread the "State of the Cape" published by APCC in 1994, which helped him focus on the real mission of the Commission and why it was created. It reaffirmed his belief that the Task Force has an opportunity to think of constructive change. Pat's group revisited the types of projects they have represented and put forth before the Commission. He said there tends to be a mythology and polarization of who we represent. But he offered a litany of diverse applicants including schools, the Hospital, Women's Work Out, software companies, etc. Recently they have been focussing on redevelopment. On Pages fifteen through seventeen of the report to the Task Force, Pat pointed out these were areas that his group recommend the Task Force review. He reiterated that not every one of his colleagues who participated agreed with all the issues and recommendations.

**5) ISSUE AREAS-** The format of the report that Pat and his friends cobbled together identifies nine key, specific issue areas and suggests action items or recommendations. He explained that the fundamental key question that drives most of these issues is "What is the purpose of the Cape Cod Commission's regulatory review process?"

**1) TIME-** There needs to be a project tracking system, demonstrating a greater sensitivity to time, and how time impacts projects. He feels the process could be improved by working with the staff. Pat unveiled a large, homemade, time tracking system he created to show the importance and impact of time from an applicant's perspective. It tracked the process for his client IFAW. From the Commission's perspective it looked at the application when it was checked it in and it looked as if they approved it in an appropriate amount of time. However, what Pat's chart shows is from the applicants viewpoint, there was much more time in the pre-application phase that made the process much longer than the days the Commission logs. He is not sure the Commission sees the importance of the time issue. They don't focus on it.

**2) COST-** The Commission's fee structure went up exponentially a couple of years ago. He knows that many prospective applicants drop below the 10,000 square foot threshold to avoid the \$10,000 filing fee.

**3) MITIGATION-** This is net of fees. Mitigation results in funds that are paid to simplify the process. He suggests the Commission adopt the Boston Redevelopment Authority (BRA) approach. Publish a square foot cost for housing, open space and traffic mitigation. Everyone understands up front, the costs. So much time is now spent on fighting over traffic area, how many trips, etc. Having an up-front linkage fee to replace mitigation fee would make more sense. The linkage fee would offset the costs of the project, offset traffic and provide job opportunities.

**4) RELATIONSHIP WITH TOWNS-** Applicants get caught in the tug of war between the town and the Commission, which causes delay. In deference to the towns if they have the

technical capabilities, he would combine the two steps. Or defer to the towns with the staff and the capability, so they might handle those issues.

5) **REGIONAL ISSUES**- Their recommendation is that a weighted vote be considered when the full Commission votes. They also feel that where possible, Subcommittee members should be made up of representatives from the town where the project is located and towns either adjacent to the project or representatives from towns of similar size

6) **SILOS**- The RPP and its Minimum Performance Standards are created with specific delineated resource areas. Each such resource area is in its own silo and can't be mixed with another silo. Pat's group recommends an amendment to the RPP and Technical Bulletins to allow for flexibility in providing mitigation transfer or trade off between silos.

7) **MANAGEMENT & ADMINISTRATION**- The Cape Cod Commission staff is doing its job. The Act and the RPP forces them to look at things in silos and thus they can't get out of that approach. There are also attitudinal issues which hinder effectiveness. The Commission should take a more business-like approach to the DRI process, which is its core regulatory product. His group thinks it would be healthy and helpful to have a review by an outside consultant to look at Commission process, managerial leadership, operations, organization and to suggest improvement and/or innovations, especially as it relates to the DRI review process.

8) **REDEVELOPMENT**- Pat's group was unanimous in their feeling that there needs to be more incentives within the RPP to encourage redevelopment, as opposed to new development. There will be growth, you can't stop it. But the more the RPP and Minimum Performance Standards can be changed to incent redevelopment, streamline and simplify the process, the better growth will follow.

9) **SIMPLIFICATION**- There was a healthy debate throughout to incentivize Smart Growth. Many of the applicants felt there was a substantial need to overhaul and/or simplify the Commission regulatory review process. Adopt specific mitigation formulas. Look at the standards and criteria the BRA utilizes. This is no surprise that applicants consistently lament that there is no consistency or certainty in the Commission's process.

6) **PAT'S WRAP UP**- Before introducing his colleagues who came to the meeting with him to express their views and answer Task Force member's questions, Pat provided his own wrap up of the exercise they had completed and the thoughts it produced. Again he talked about the impact that rereading the "State of the Cape" had on him. That was published twelve years ago. The Commission has been in existence for fifteen years. It helped him put things in perspective. Especially a piece he read from the ending chapter, written by Janice Walford which says that if ordinary citizens step away, they are shirking their responsibility. There must be a reasonable balance between the environment, the economy and growth. He also read a phrase that there is a lot in between "tree hugging environmentalists and land raping developers." Back then Janice said that "reaching consensus will take new political skills." Pat sees parallels between then and now. He said that he was not here to destroy the political process. He and his colleagues care about Cape Cod and the process. They just wanted to present the perspective from the applicants' side. Pat then introduced a couple of his colleagues who worked on this report.

**DAVID MICHNIEWICZ**, Coastal Engineering Co- He spoke to a consultant who took a redevelopment project through a DRI process. His experience was that satisfying requirements was a moving target. Once the initial review items were addressed by the applicant, new issues cropped up. What is needed is a complete list of issues up front. The Commission asked for things that weren't requirements of the RPP. Then the applicant was pressured to address these

unrequired items. They didn't think it was fair. From his own perspective, David said that sometimes as an engineer, he is submitting civil drawings which are not then reviewed by another registered engineer. It is hard for staff to understand.

**SCOTT HORSELY**, Horsley Witten Group - His firm works 50% of the time for governmental clients. He agrees with some of the Butler & Others recommendations, and disagrees with others.

**Time is a critical issue.** Scott's firm advises clients to utilize Smart Growth principles. He gives them to prospective clients and tells them to read them first. He advises his clients to give the Commission everything they will need up front. Some developers say no, let's go in with the bare minimum. This does extend the time, but this is the developers' fault, not the Commission's.

**The process is overly costly, time consuming and burdensome.** He feels that we need this kind of a procedure on Cape Cod to protect the resources, even if it takes longer and costs more. He doesn't think we need a faster process on Cape Cod. We are unique down here, so we should expect to pay more and take longer. The overall goal shouldn't be to eliminate the comprehensive review process.

**P. Burley**- *Some developers won't put all the mitigation up front, because they are afraid the Commission will ask for more. This talks to the need for a formulaic way to know the costs of mitigation for open space, traffic, etc.*

**W. Northcross**- *Alternate Dispute Resolution (ADR) offered by the Commission. What is it?*

**P. Butler**- *An applicant can appeal a decision and the Commission can encourage mediation, facilitation. They have tried to use it once or twice. He thinks the use of mandatory ADR before going to court would be mediation.*

**E. Carr**- *There is a proposal to move mitigation fees to the towns.*

**V. Lowell**- *Instead of a case-by-case analysis, you would have one formula. But there would be quite a difference from Truro to Hyannis.*

**P. Butler**- *Yes. There should be workshops to work out with the staff and others how it would work. You would still have the RPP. Don't scrap it all. But give incentives to redevelop.*

**V. Lowell**- *Instead of having the applicant suffer through each time there is a DRI review, the only debate and battle would be over the setting of the schedules.*

**P. Butler**- *Trying to reach consensus with the staff is just as frustrating to them as it is to us. Those uncertainties drive the cost.*

### **MISSING MANAGEMENT**

**S. Mitrokostas**- *These are management recommendations. Shouldn't there be a place where people invested in the process can go and make recommendations.*

**P. Butler**- *He has always found Margo and John's doors open. He doesn't always agree with them of course. What's missing is they are forced by law to look at things in a non-business perspective.*

**E. Carr**- *You propose an ombudsman?*

**S. Mitrokostas**- *You should be able to go to a Board of Directors and management. Management has been eliminated.*

**P. Butler**- *There is a big fear from a legal perspective from the Commission members over ex parte talk. We have to get around this. He noted that there is no public participation in the Commission Review Committee report and results chaired by Susan Kadar. It would be helpful if Commissioners get involved in regulatory discussions. He thinks the staff is in a tough*

situation, obligated by the Act. The Assembly of Delegates is the most powerful legislative body in the State. Maybe they will get more involved.

### **TIME LINE**

**L. Cole-** *On the time line, up until the applicant approaches the Commission, all the work the applicant does is beyond the Commission's control. Is it Pat's experience that most applications are complete?*

**P. Butler-** *For the last five years he has tried to make sure clients have complete applications. The Commission works as a project team. Simplification process of going to linkage would avoid this.*

### **MITIGATION**

**L. Cole-** *Clients have to trade off something with "customized mitigation." If they disagree, they have to be charged more.*

**P. Butler-** *When you ask clients if they would rather pay consultants \$1 million or pay the Commission \$1 million up front, they wouldn't mind the latter if they could have certainty of time and cost. The toughest part is to decide which areas cost what. There would still have to be a way to seek relief through an appeals process. He estimates 99% of his clients wouldn't want waivers. They would just pay the money, not flinch and move on. If they had a choice to pay Pat \$500K to fight for three years or pay \$500K to mitigate up front, the change in time and applicants would be substantive.*

### **INTERPRETER**

**T. Shepley-** *You are our translator. The process is vague enough so that the applicant doesn't know where it will go. He then said to Elliott that they both shared the construction of under 10,000 square foot buildings.*

**E. Carr-** *He defended himself by saying that any time anyone came in from the Bank staff to talk about Bank buildings, he opted for the maximum square footage.*

**T. Shepley-** *Some interpreter, someone in the design process probably made the decision, made the choice to stay under the threshold.*

### **PAGE 3**

**T. Shepley-** *He asked if Page 3 of the report which asks the purpose of the Commission's regulatory review process, is it something to create a road map or a road block?*

**P. Butler-** *It is not intended to criticize. This was not in their minds in drafting the report. But it is their perspective from having gone through the process.*

**P. Butler-** *What Janice Walford said was true, that we have to get out of the two opposing poles and into the middle.*

### **PRE-APPLICATION**

**M. Cole-** *Using the time line, with pre-application defined by filling out the application, there are soft costs in the pre-application as well as the DRI. How different would this look in your suggestion of providing a regulatory system that incentivizes appropriate growth?*

**P. Butler-** *When he walks into a Subcommittee meeting asking for concessions and mitigation negotiation seeking clarity and certainty, they treat him like a "Boogie Man."*

**M. Cole-** *He is concerned about the pre-application.*

**P. Butler-** *In pre-application you always need to know the basic information. What the Commission is looking for. The staff has been good about meeting in pre-application mode. This is good. But then things change when you come back in. It is a managerial issue. You need clarity and certainty. With a valid pre-meeting with the staff you could cut the issues of the Subcommittee in half.*

### **OUTSIDE CONSULTANTS**

**L. Cole-** *Questions up front are interesting. Ordinary citizens at the hearing in Eastham said they wanted to see development slowed down. They feel the Commission is there to manage development and stop bad development. If you bring in a consulting firm to look at the process, you could look at not only the Commission's internal process, but look at the State, County and town level requirements.*

**P. Butler-** *There are legal and legislative issues surrounding it. He has spoken to officials in Lake Tahoe and South Carolina. They found a lot of creative ways to go about this. He believes the Commission is caught in this issue of bad development. If you talked to people in Eastham, they would define it differently from Barnstable and Bourne. Pristine Truro is a big difference between industrial in the Mid-Cape.*

*The Task Force thanked Pat profusely as he and his two colleagues departed.*

7) **GAME PLAN-** While there was an item on the agenda to discuss this evening's meeting with town officials, Elliott rightfully concluded that the die is cast for whatever will happen. It is more important to talk about what the Task Force will do from here on out. We will have a week off to follow up from the towns. Then from August 20<sup>th</sup> to the end of the month, we will be looking for intensive work towards conclusion. Since we know we will lose some Task Force members after August 31<sup>st</sup>, maybe we should have two, four-hour sessions, over the next couple of weeks? Chairman Carr is scared of discussions. Everyone has issues, but we jump around. How can we put the 61 "possible Task Force recommendations" in order? Not listing them 1 through 61, but by groups. After today's meeting he will send out a straw poll. It will eliminate the 19-0 recommendations and work on down. Then we can write a report which can be finally reviewed in September.

**E. Mangiafico-** *Hopefully the straw poll will precede the two, four-hour sessions.*

**E. Carr-** *Yes, indeed it will.*

**H. Kelley-** *Pat's document seems to be the most meaty and comprehensive of anything we've received. It just came in. Is it equitable to all those outside this Committee to review it and make their own responses.*

**E. Carr-** *It is a good document. But it only adds about one fifth to our list of 61. It hardly covers the waterfront. There will be another week to comment.*

### **COMMISSION RESPONSE**

**M. Fenn-** *She received Pat's reports two days ago. There is a lot of characterization she doesn't agree with. She would like time to respond in writing. Some things on his list need to be explained and discussed. We need to talk about them.*

**E. Carr-** *He would welcome her comments in writing. He's not sure we want to carry out the process of bringing the Commission back for response. He's not sure the best way is to have another meeting with us versus them.*

**M. Fenn-** *She would like time to respond in writing, not to have a meeting.*

**W. Northcross-** *If you had two weeks to write a response, would that be adequate?*

**M. Fenn-** *Yes.*

**M. Geist-** *Margo should respond in writing as the first step. Some things are no brainers. Others we should hold for discussion. How do those taking a straw vote understand?*

**M. Robinson-** *If the Commission responded, it would help us to come to consensus on some of the 61.*

**E. Carr-** *We don't know what is going to happen tonight. We will get responses from towns on some of these, like joint linkage. This could go on forever with back and forth. We have to ultimately make a decision.*

### **JOINT MITIGATION**

**H. Farnham-** *He asked John Lipman where he stands on getting the Task Force a response on joint mitigation. Will it take another week to sit down with attorneys?*

**J. Lipman-** *The problem is that there are different legal interpretations from different legal sources. Towns differ. He can come up with a general consensus but not the specifics. It will take him at least another week.*

### **STRAW POLL**

**L. Cole-** *Will the straw vote have three choices, "yes," "no" and "need more info?"*

**E. Carr-** *Yes, it is built in.*

**T. Evans-** *We have to strive for economy of motion and process. The temptation is to be overly prescriptive. Our job is to just identify headings. It is not our job to say how many square feet in the threshold. Straw polls are not perfect but it helps to winnow the list. We have to move on or we'll never finish otherwise.*

**M. Cole-** *He is behind the straw poll. He is waiting for the Selectmen's meeting tonight. Pat's document is hot off the press. There ought to be an opportunity between now and the straw poll to revise the straw poll questions.*

**E. Carr-** *Absolutely. We will never stop migrating.*

**L. Cole-** *After the straw poll will we have a discussion and try to sway people how to vote on the final recommendations?*

**E. Carr-** *Absolutely. Some people are irrepressible.*

**T. Moccia-** *Tom Evans said it was not our role to determine square footage thresholds. Who would make that decision? How can we recommend?*

**T. Evans-** *It seems to him that if a Committee of nineteen tried to determine the square footage, it would never agree.*

### **PORTAL FOR CHANGE**

**T. Moccia-** *Where is the portal for change. The staff, Commission members, Legislature?*

**E. Carr-** *The County does have zoning and regulations. They don't call it that. The RPP refers to Minimum Performance Standards. But applicants don't know it. They see it as negotiable. So every five years the RPP is reviewed. That's good, because the County can change its zoning every five years rather than the towns stuck in perpetuity. A lot of this poor process of having the Commission controlling the Cape development by development. We should have County zoning.*

**V. Lowell-** *A lot of plans need things open-ended. Consider linkage mitigation. She wouldn't be for it now because everyone would go for variances She would consider joint hearings after the Commission came back and made a report.*

**E. Carr-** *We have no power. We are just making recommendations to the County Commissioners.*

**W. Northcross-** *She agrees with Tom Moccia. It would be nice if we could say how to implement.*

### **LINKAGE**

**E. Carr-** *The more the process becomes clear, it gets away from case-by-case determinations. The more we hear rules and linkage, the better off for the Cape. We should be discouraging appeals. The attitude that everything is negotiable, has gotten us in trouble.*

**E. Carr-** *There was a lot of talk moving mitigation to the towns, and how to formularize it.*

**V. Lowell-** *There is a lot of mitigation you want to get done. She cautioned not to let linkage get in the way of it happening.*

**E. Mangiafico-** *The more the structure of linkage is introduced, the more time and cost is reduced for the developer and the Commission. That's a good direction. All the testimony we've heard keeps going back to time, money and complication.*

**E. Carr-** *Cape Cod's problem is that control is renegotiated every time a DRI decision is made.*

**M. Geist-** *You can't just base thresholds on the square footage, when you talk about retail versus warehouse, and traffic, etc. At some point it is case-by-case.*

**M. Fenn-** *Linkage is not a panacea but it's worth looking at. We could revisit it as we have done internally before. It is good for traffic, but not for waste water, design and open space. Some things are site specific.*

**S. Mitrokostas-** *Either a project is beneficial to the community or it is not. Just arguing the amount of mitigation institutionalizes it and creates a disincentive. He disagrees with Elliott. He thinks this should be decided project-by-project, and not on a one-size-fits-all basis.*

### **BASIS FOR DECISION MAKING**

**H. Kelley-** *He is increasingly comfortable with what he is hearing in this discussion. Will what we make be a specific recommendation or as specific or general as we make it? Dependent upon how much of a consensus in this group when we get into discussion?*

**E. Carr-** *True. We have to make decisions on whether to make recommendations based on, 10-9, votes versus, 18-1, votes.*

**T. Evans-** *As a practical means to jump into the pool, we have 61 recommendations. Can we establish a date next week by which we agree all recommendations will be submitted to Elliott and then decide on them?*

**E. Carr-** *If we put it out tomorrow and get it back soon, we can start the procedure.*

**T. Evans-** *All he is trying to do is to have a date to get the list back.*

**E. Carr-** *If he can have all the recommendations in by noon tomorrow, he will send them out in the afternoon. We can deal with the stragglers.*

**T. Moccia-** *We are appointed by the County Commissioners. When making our report can we reflect and be conscious of the public debate, and not just a report to the Commissioners?*

**E. Carr-** *It gets back to whether we deal with, 10-9, or unanimous votes. The Commissioners might want us to continue on to help them with the popular ones.*

**L. Counsell-** *There are a lot of interesting ideas. He proposes that the whole list be an addendum to the report, prioritizing the ones we will deal with. We shouldn't limit our presentation to the top twenty.*

**8) NEXT MEETINGS-** It was agreed that each of the next two meetings will be for four hours, to hammer out decisions on the ultimate recommendations. These four hour meetings will be August 24<sup>th</sup> and August 29<sup>th</sup>, starting at 7:45 a.m. right back here in Rooms 11 & 12 of the Barnstable Superior Courthouse.

**9) MEETINGS IN TOWNS-** Mark Robinson asked Elliott how he would characterize the meetings held in the three towns. Elliott thought they were all good. In Mashpee there were only five citizens, who were outnumbered by official people. Barnstable had fifteen folks attending beyond the officials and members of the Task Force. It was good. Eastham was heavily into their local beach issue and was an angry crowd. He summarized that all three were very different and all were useful.

**10) TONIGHT-** Maggie Geist wondered if at tonight's meeting there was a tactful way to engage town representatives in this push-pull between the regional authority and the towns? The towns' perspective is about turf battles.

**V. Lowell-** *Town Planner Tom Fudala in Mashpee said he loves to have the Commission involved.*

**E. Carr-** *The discussion tonight will bring out a lot.*

**L. Cole-** *One of the comments by the Assembly of Delegates brought up the potential for dispute resolution. Pat was favorable towards that, but he brought up a lot of conditions that applicants found burdensome. The question remains is there an intermediate process before having to go to Land Court? It arose out of the Eastham beach decision, but what ways can you appeal?*

**E. Carr-** *Some mediation may make sense but energy should be focused on changing the RPP, which would be dealing with the real problem.*

David B. Willard, Scrivener