Minutes of the Meeting of the TOCI Planning Board, Thursday December 8, 2011 at 7:00 at the Hall

Present: Ernie Burgess, Mabel Doughty, Jane Frizzell, Charles Hall, Beth Howe (Chair).
Absent: Sam Birkett, Louise Doughty.
Also present, Ron Tozier, CEO and 10 to 12 other people

1. Minutes
Jane moved, seconded by Charles to accept the minutes of the meeting of November 17, 2011. Passed unanimously.

2. Public hearing on a request for a Shoreland Zoning Permit by Jerry Johnston for bluff stabilization at 41 Island View Road (Map 107 lot 08)
Beth indicated that Barney Baker, the project engineer would provide a description of the project. Then there would be questions by the Planning Board and then by the audience.

Barney said his background is as an engineer specializing in marine projects. This project deals with stabilizing the bluff at the end of Island View Road. The water there is shallow and there is a large mudflat at low tide. The bank is quite exposed. The Johnston’s own 240 feet of frontage. Their house is now only 25 feet from the receding edge of the bluff. There is a remnant of an old sea wall on the beach, about 10 feet out from present bank. There are trees and bushes that have fallen down the bank.

In addition to erosion due to the waves, there is groundwater coming over and through the bank that erodes the Presumpscot clay that makes up the bank. The toe of the slope – the bottom part – erodes away and then the clay above it slumps down.

Barney has surveyed the slope and then applied computer modeling to analyze the forces that cause the erosion. During the summer he held preliminary meetings about the project with Maine DEP and the Army Corps of Engineers. There was a site walk in July attended by a representative of DEP as well as Beth Howe and Ron Tozier.

The proposal is to protect the base of the bank with rip-rap up to the base flood elevation. The base flood elevation on the FEMA maps is 10 feet. About 5 feet is in the normal tidal zone and storm waves will go 5 feet more up the bank, so the rip-rap will go about 5 feet up the bank. It will be made of stones that average 18” in diameter.

Above the base flood level there are some very steep areas and some with a more shallow slope. DEP is requiring that the treatment of the slope be “surgical” in the sense that in areas where the vegetation on the bank is intact, it will be left, but thinned a little to allow sunlight to reach the groundcover. Where the bank is bare, it will be replanted by clearing any remaining vegetation, spreading loan which will be seeded with conservation mix, which contains many kinds of grasses, at least some of which will take root in this clay. That will be covered with turf reinforcement mats. Then rosa rugosa and bayberry will be planted through holes in the mats. These plants are hardy in this climate, but it is also expected that over time other bushes and vegetation will grow up on the stabilized bank. There will also be a 5-foot un-mowed buffer at
the top of the slope to absorb and filter water that may run over the edge. Where there are springs or drainage coming out of the bank the plan calls for drains in the slope. The water from them will be dissipated by the rip-rap.

The work will be done in the winter when the ground is frozen, the flow of water is slowed down and the plants on the bank and on the beach are dormant.

The result is that the wave energy will be dissipated by the stabilized 1:1.3 slope. Now the waves come in and hit a nearly vertical bank and bounce back. The purpose of the project is to protect the house. DEP considers that the presence of a house within 100’ of the edge of a bluff to be in sufficient danger to allow armoring of the bank. The project will also protect the two access points to the beach that are on the Johnston’s property. The result should be attractive looking in the end.

How will the project be done? A contractor has not been chosen yet, although preliminary discussions have been held with one. The work will be done from the beach. Project materials – stone, geo-textile, plants—and equipment will be brought by barge to Bennett Cove and brought to the site by truck. They will be stockpiled on the east side of the Johnston’s lot. Since the work will be done in winter, the field where the materials will be stored is expected to be frozen. The project will not involve bringing any materials directly onto this beach by barge because the water is too shallow.

The work will be done from the beach. There is about a 10-12 foot largely unvegetated, sand and cobble space between the bank and the remains of the old seawall. Where there is vegetation it will be covered by geo-textile and gravel as protection. The access point will be the path at the east end of the Johnston property. The work will begin at the west end and work back. If the winter is really cold and the bank is really frozen, some of the work could be done from the top of the bank, but this would depend on specific conditions.

The work will obviously have some impact on the beach. This will be temporary, but time will be needed for it to heal.

Beth asked for questions from the Planning Board. Ernie asked why this project does not involve the use of baskets filled with stones like the project at Hamilton Beach? Barney said that one reason was that the Johnstons had liked the look of the rip-rap project on Cousins Island. In addition the site is different from Hamilton Beach in several ways. The bluff is not as high and it is more stable. In addition, the force of the waves is less on this side of the island. This means that less strength is needed. Both projects use toe stones at the bottom, but otherwise the treatments are somewhat different.

Jane asked why they are planting grey rather than white birch trees. Barney said it is because there are grey birch trees there now.

Beth asked where the Johnston’s septic system is. Jerry said it is behind the house, away from the shore. Ron asked how old it is? It is relatively new. The old septic system was much closer to the shore.
Beth also asked whether the north-west facing slope would make it difficult for the bushes and other plants to grow. Barney said that the makeup of conservation mix is designed so that some seeds will germinate. The contractor for the project may have landscaping experience. He also has a list of species made up by Maine Audubon for revegetating ocean-facing slopes. These will be used at the top of the bank at Hamilton Beach where Terry deWan is working with the individual home owners. Beth asked if this would be done with the Johnstons. Barney said they have worked with BJ Abrahamson over the years with plantings on the bank and would continue with this.

Jerry and Kit said that rosa rugosa does ok on their slope, and so would bayberry. These will be dwarf plants since the Shoreland Zoning requires that plants not be trimmed to less than three feet high. Barney said that there will also be areas of existing vegetation that will be saved. He said that if the plantings don’t do well, they will be redone.

None of the other members of the Planning Board had questions.

Pat Festino asked whether the concentration of the water coming through the bank into drains would increase erosion of the beach. Barney said that the water will come out of the drains at the toe of the slope in the rip-rap. This will operate like a French drain and spread the water out.

Ron Tozier, CEO, asked what the distance is between the bank and the high tide line. DEP requires that they not work below the high tide line or in the water. Barney said the distance is about 10 feet at the west end of the beach and 15-20 feet at the east end. But the astronomical high tides do come right up to the bank and they will not be able to work in them.

Someone asked whether there is any ledge in the area. Barney said that none is apparent.

Donna Damon asked whether the access to the shore would be changed? Barney said that Island View Road is not a Town road. Donna said she understood that but people have used it for many years and it may be public by prescriptive right. In addition other people in the area have the road on their deeds. Barney talked about the legal research that had been done for the application about the ownership of the road. This mentioned two indentures from the 1946. Donna asked if he had research back further than that. He said it was not his research and that they had not gone further back. He said that the project will not change the access, in fact, it will improve it. Ron will not let them put back a structure as rickety as what is there now. Once the construction vehicles are finished using the access-way, it will be restored. There will be a new ramp at the beach end.

John Ash asked whether part of the access for the project will be the Johnston’s driveway. Barney said no. John asked whether if there is damage to the road by the trucks, will the road be repaired at the end of the project? Kit said that hopefully the road would be better at the end. Donna asked whether they would keep working if there is a thaw in the winter. Barney said it depends, but that if the road is damaged by the construction it has to be reinstated. Kit said there are no people who use the road in the winter. Barney said that the Johnstons had arranged a meeting last summer of all the neighbors and the road was discussed.
Beth asked if there were other questions. There were not, so she closed the public hearing. She explained that the Planning Board’s role is to decide whether a project is in conformance with a specific set of criteria for Shoreland Zoning Permits. She read off the criteria. So the next part of the meeting will review a draft set of statements about whether this project meets them. Most people left.

Beth read the draft findings of fact which had been given to members of the Board at the beginning of the meeting. There was discussion on some of the items, noted in those sections:

Shoreland Zoning Permit Findings of Fact for
Johnston Bluff Stabilization Project (Map 107 lot 8)

Shoreland Zoning Permit Criteria for Review

a) Will maintain safe and healthful conditions.
The gradual erosion of the bluff along the back shore in this area is gradually creating a safety hazard. An old seawall has been washed out. The Johnston’s house is now 27 feet from the bank, and trees are washed out in storms, taking chunks of the bluff with them. Stabilizing the bank would reduce this hazard to life and property.

Based on the application, the site walk, and the public hearing, the standards of this section have been met.

b) Will not result in water pollution, erosion, or sedimentation to surface waters.
The purpose of the project is to reduce the bank’s erosion significantly by armoring it with geotextile and rip-rap, planting it with vegetation, and controlling groundwater seepage from behind the bank.

During construction, erosion will be controlled. Some areas of the bank will not have their vegetation removed. In other areas, the bank will be stripped of vegetation in stages to reduce the amount of exposed soil at any given time. The work will be done from a 10’ wide cobble area in the upper inter-tidal area of the beach to reduce the stress at the top of the bank of using large equipment and of handling the heavy stone rip-rap. If work needs to be done in vegetated areas, they will be temporarily covered with geotextile balasted with gravel.

Based on the application, the site walk, and the public hearing, the standards of this section have been met.

c) Will adequately provide for the disposal of all wastewater.
The project does not involve building any new buildings or septic systems, so it will not generate wastewater. The septic system of the house is on the far side of the house from the shore.

Based on the application, the site walk, and the public hearing, the standards of this section have been met.
Beth said she had wanted to make sure that the Johnston's septic system would not be hit by the project and was convinced that it was in no danger.

d) Will not have an adverse impact on spawning grounds, fish, aquatic life, bird or other wildlife habitat.
This was one of the issues examined by the DEP permitting process and their findings were:

"There is Tidal Waterfowl and Wading Bird Habitat in the coastal wetland along the shore frontage of the project site. Tidal Waterfowl and Wading Bird Habitat is a Significant Wildlife Habitat as defined in the Natural Resources Protection Act Chapter 335. Because the project is located adjacent to the highest annual tide line, and not within the habitat, it is not anticipated to have any direct impact on Tidal Waterfowl and Wading Bird Habitat. The Department finds that the activity will not unreasonably harm any significant wildlife habitat . . . "

Based on the application, the site walk, the public hearing and the DEP review, the standards of this section have been met.

e) Will conserve shoreland vegetation.
There are areas along the bank that are severely eroded and have little vegetation. These areas will be armored with rip-rap, loamed and seeded, with turf reinforcement mats over the loam. Shrubs will then be planted through the reinforcement mats. Other areas have existing shrub cover. This will be thinned somewhat to expose and encourage the ground cover. There will be a five-foot wide un-mowed strip at the top of the bank to help stabilize it. Three new birch trees will be planted to replace ones that need to be removed by the project.

Based on the application, the site walk, and the public hearing, the standards of this section have been met.

f) Will conserve shore cover and visual as well as actual points of access to inland and coastal waters.
The project is designed to cover the upper part of the armored bank with vegetation so that the view from the water will not be one of rip-rap. There is a large, shallow, vegetated inter-tidal area along the shore which will minimize the visual impact of the rip-rap.

In terms of physical access to the beach, a set of granite steps with a wooden ramp at the bottom will be built down to the beach on the west side of the property. On the east side, the existing access at the end of Island View Road will be rebuilt after being used as access to the beach for the project. Then a new wooden ramp will replace the existing one, which will be removed during construction.

Based on the application, the site walk, and the public hearing, the standards of this section have been met.

g) Will protect archaeological and historic resources as designated in the Comprehensive Plan.
The Maine Historic Preservation Commission 2008 map of Areas Sensitive for Prehistoric Archaeology on Chebeague Island shows no Indian shell middens in this area. This map is incorporated into the TOCI’s 2011 Comprehensive Plan.

Based on the application, the site walk, the public hearing and the TOCI Comprehensive Plan, the standards of this section have been met.

h) Will not adversely affect existing commercial fishing or maritime activities in a Commercial Fisheries/Maritime Activities Overlay District.
The properties owned by the applicants are not in an CFMA district.

Not Applicable

The original draft had said that access to clammers would be retained. Jane asked whether, by mentioning clammers, would the assumption be made that other kinds of fishing access would not be retained. Beth said that was not her intent. Ron said that any fishermen have access to the shore by law. Barney said that he thought that meant they had to come by boat. Several members of the Board said that State law requires landowners to allow fishermen to pass over their land. Beth said it might be better to strike the language about clammers, and this was done.

i) Will avoid problems associated with flood plain development and use.
The beach is in the A2 floodplain zone. The Base flood elevation is 10 feet, meaning that it would be 4-5 feet up the bank. The purpose of the project is to reduce storm damage to the bluff. No buildings, which might be considered “development,” are being built as part of the project.

Based on the application, the site walk, and the public hearing, the standards of this section have been met.

j) Is in conformance with the provisions of this Article.
The project has followed the review process spelled out in this article, and has met the stated criteria.

Based on the application, the site walk, and the public hearing, the standards of this section have been met.

k) Is not in a floodplain adjacent to tidal waters (RP/FP Overlay District), and that an approved Letter of Map Amendment has been issued by the National Flood Insurance Program.
The properties owned by the applicants are not in a Resource Protection/Floodplain Protection Overlay District.

Not Applicable

Conditions of approval:
Beth said that she had put in the draft the conditions of approval for the Hamilton Beach project where there had been a lot of discussion about conditions, and where we now have some experience. The group worked through the conditions and ones that were not relevant to this project were removed. The remaining conditions were:

Listed below are the relevant conditions.

1. The project engineer will provide the specifications he develops for the contractor to the Town CEO as well.

2. The Town CEO is authorized to contact the engineer directly if he has questions about the nature of the work being done.

3. If it is deemed necessary by the CEO, beach protection will be provided.

4. If the state and/or federal permits for this project are modified, the revised plan must be reviewed by the Planning Board.

Beth asked Ron if this set of conditions would meet his needs, since he is the person who has to enforce the Planning Board’s decisions. He said yes.

Beth asked if anyone had any other conditions to suggest. Ernie said this is not a condition but simply a request or suggestion for Barney. He said that once the project is completed, it would be useful to monitor whether the remains of the old sea-wall, which runs about 10 feet out from the bank for part of the length of the eroded area, serves over time to protect the riprap. This beach has quite a fetch from the north-east. Barney said that this would be interesting to watch.

Ron said he did have one issue, though he could not see how a condition would deal with it. This fall has been quite warm; there is no frost in the ground yet. What if it continues this way and we have an open winter and the ground does not freeze or only the top 6” freezes. This plan assumes that the ground will freeze. What happens if it doesn’t?

The group went around on this issue for a while. Would it make sense to have a condition that the contractor will make every effort to do the heavy work of bringing out and moving the stone and using the heaviest equipment during the middle part of the winter? Beth asked how long it would take to barge out the equipment and materials. Barney said maybe two weeks. Coley can bring 4 trucks on his largest barge.

Then Ron said that maybe it would be sufficient to rely on not working when the roads are posted. Beth said this is only in the spring and people can get exceptions. Barney said that at Madeline Point there were days when the nights had been freezing and they were allowed to come in the morning only. In the end, the Board agreed not to have an additional condition to deal with this issue but to use the road-posting as a cut-off in the spring.

Charles moved, seconded by Mabel to accept the findings of fact. Approved unanimously.
Jane moved, seconded by Ernie, to accept the conditions of approval. Passed unanimously.

Ernie moved, seconded by Mable to approve the project. Approved unanimously.

3. Report from Ron Tozier on code enforcement on Hope Island
When Ron and DEP went out early in November, they were not allowed to come onto the island. Then there were several efforts to arrange a time to come out, but it kept being put off. Finally Ron talked to John Cacoulides who invited him to come by himself on the day after Thanksgiving. Ron went, he was met at the dock and taken around the island to inspect all of the new buildings for any code violations. Ron said they are very well built and he found only one code violation. He did not look at possible areas that would be in DEP’s jurisdiction. He had coffee with them during the morning and was still there for lunch. Mr. Cacoulides was very nice to him. He thought he made some progress with Mr. Cacoulides, though Mrs. Cacoulides thinks they are being harassed.

Tomorrow he will go over with DEP’s Mike Morse and ??? MacMillan as well as David Stevens of the Board of Appeals. He thinks there may not even be major issues for DEP since most of the building activity is outside the shoreland zone. They do want to create a pond. Beth said it would raise DEP issues if they wanted to change an existing pond, but maybe not build a new one. Ernie asked about the rip-rap on the shore. Ron said he thought that could be done by permit.

The Hahns asked about the noise of mining rock for roads and for changing the landscape. Ron said the sound has changed slightly, is more muffled, because the Cacoulides have bought a new machine that is quieter. Maricel said she did think the sound was somewhat different but it is still there and goes all the time during the day, every day.

Beth said we have no noise ordinance. She asked Ron about State regulations. He said the State limit is 65 decibels, but that is not much help and hard to enforce.

Ron said that the only provision he knows about in our ordinances that might cover this activity is the Mineral extraction provisions of the Zoning Ordinance (sec. 412). These require a yearly, renewable permit. Getting the permit requires doing a detailed site plan explaining the extraction operation. There are standards that must be met for buffering and dealing with water on the site, but nothing about noise. They are clearly intended to cover businesses in industrial areas selling things like gravel and sand. The permit process would involve two public hearings. The Board of Adjustment and Appeals makes the decision. The Planning board must make an advisory recommendation to them.

Ron said that a process like this would require Cacoulides to come to the committees and would give residents a chance to voice their objections too; and problems with the work he is doing. The permitting process would enable the Town to put some conditions on his activity – times of day and days of the week, for example -- though the standards in the ordinance are rather skimpy for this. He did suggest this to the Board of Appeals but they were not interested in taking it on.
Maricel asked if he has gotten any permits at all. Ron said he has gotten permits for buildings, though maybe not for all the buildings. He said there is no requirement to get a permit for building a road or a pond. And there are plenty of other people who are doing mineral extraction on Chebeague who have no permits. If we are going to enforce these provisions on Hope, we would need to do it equally on Chebeague. Beth said there are lots of provisions in the Zoning Ordinance where people do things that are supposed to be regulated but never get any permit. Many island people take a "live and let live" attitude about activities like this. Maricel said that then the Town is not doing its job.

Maricel and Jeff said that in the case of Hope, the extraction noise makes the lives of all the people on Deer Point miserable. Jeff said he is losing hope that there will ever be an end to the noise. Cacoulides will be able to continue doing what he has done for ten years. He would only accept conditions that he agreed with, and he would not agree to end this work. Jeff said he has been in the same position that the members of the Planning Board are in on this issue, with little they can do to address a problem. But this leaves him hopeless.

Ernie suggested adopting a light pollution ordinance to use as a bargaining chip in dealing with Cacoulides. Mabel objected to this kind of hard-nosed approach. She said it would be better to be polite and deal with him as a person, not an enemy. Ron also said he was hoping that a softer approach would bear fruit. He said he was also sure that there were two camps on Chebeague when it comes to regulating something like this noise. One would like to have strong regulations. The other thinks that people have a right to do whatever they want on their property. Jane asked if Ron really thought that people would allow Cacoulides to do this kind of noisy extraction if he lived on Chebeague. Charles said that this is industrial scale noise, entirely out of proportion to a residential area.

John Ash said that as a fireman, he thinks that building a pond on the island would be a good idea for fire protection. The Chebeague fire department would answer a call out there but they could only take people, not machines, so having resources out there would be a help. Ron said Mrs. Cacoulides is afraid of fire and of whether rescue service would be available to them. Beth said it would come from Long Island because their rescue boat is on that side. Ron said that it would be better if Chebeague really provided them with some services, given the taxes they pay. Beth said that if there was some way to arrange to have a boat on the south side of the island, that might be possible. Someone suggested giving them our extra fire truck. Ron said that they had said that they could get their own.

John also said that the problem with the noise is not the decibel level, but the objectionable nature of the sound. Maricel agreed and said she had been looking at studies of noise and why it bothers people and that this is exactly the case.

Beth and Ron suggested that maybe it would be better to explore developing a nuisance ordinance. Ron said such an ordinance would have to be "clean" meaning that it would provide clear and measurable enough criteria that it could be enforced and stand up to any court challenge. Beth said it would be possible to look at this kind of ordinance in other towns to see if any would work.
Ernie said that the noise certainly decreases the property values and saleability of houses on Deer Point – that is probably a measurable effect. He said he thinks that Cacoulides has lots of money and can usually get away with murder. He will not be willing to give any ground on this issue and would be quite willing to sue us.

Ron said that we should try to expand the options we have for dealing with him and try the carrot before the stick.

Beth asked Maricel if she could write a memo on what she has found out about noise and its regulation. Maricel said she would be willing to work on a nuisance ordinance.

John said he thinks part of the upset over Hope Island is because the island has changed so much. It now has much more development and people don’t like that. But Jeff said that for him the development is not the problem. He doesn’t care about the red barns, only the noise.

Ernie made a motion, seconded by Jane, that the Planning Board explore developing an ordinance to control nuisances in the Town. Approved unanimously.

Respectfully submitted,

Beth Howe
Hi Beth, This land is off Artist point. They are asking some important questions, just want your input. Thanks, Ron

------------------------ Original Message ------------------------

Hi Ron

Thanks so much for all your input last week. It has helped us get a sense of the parcel we are looking at. We are still looking for a little clarification about the issue of combining the properties with our existing property.

If we acquire the two parcels and join them with our existing land would that allow us to expand an existing cabin on our property into a dwelling.

Given that our property would now be split by a "public" road, we wonder if that will preclude us from doing anything on the water side.

Thanks for your help.

Pam Sharp Hulme

h 508 872-4717

1
Hi Ron,
Thanks for your email. Let's talk as soon as possible. We are at a critical stage of the work and want to avoid stopping the work. The first sections of marine mattress will be installed next week at the South west end of the project. Once this section is complete we will be in the best position to tweak the construction process to better match field conditions if necessary.

In the meantime, I have provided some notes below in response to your observations based on periodic site visits that included a beach walk yesterday.

Despite challenging conditions to get access to the southern end where the slope armoring will start, I feel the disturbance has been kept to a minimum. The route does hug the slope to the extent possible and there is a seaweed rack that provides a high tide buffer on the beach side of the access. The clay material that you see is indigenous material (soft clay) that has been encountered in sections along the route. Slope vegetation has been cut, but not grubbed at this time with the exception of a short section at the southern end where vertical drains have been installed and marine mattress placement will start.

I have discussed the use of timber mats with Anderson, but do not believe they would mitigate the temporary disturbance that is occurring as the soft clay would pump up through and around them. As constructed, the route is stable, although the surface is currently inundated by continuous water coming through the bank. Per the original plan, tracked vehicles have been used. No material has been imported to the beach other than geotextile and stone. As the access route has advanced, a separation geotextile is placed and overlaid with smaller stone to distribute the weight and to limit pumping of fines from soft areas below. The stone will be reused in the reconstructed slope and the fabric removed as the work retreats back to the Town ROW.

I appreciate your observations. Please call me at your convenience. I will plan to give you a call on Friday. We can also get Christine Woodruff at DEP involved if I am not able to address your concerns. I will be on site next Tuesday and Friday in the AM and can meet with you or we can arrange another time at your convenience.

Regards,
Barney

Barney Baker, PE
Baker Design Consultants
11 Stony Brook Lane
Yarmouth Maine 04096
phone.207 846-9724
fax. 207 846-3620
Hi Barney,

Last Friday I did a site walk with Beth Howe and we were surprised at the method they are using to get access to the shore. It was my understanding that nothing was to happen below high tide, and that minimal disturbance was to happen to the area below the bank. I was concerned about the disturbance in this area as was the board, I talked about planks, nothing was said about building a road. The material used is very clayish and sloppy. Where did this materials come from?

I sunk down 4" on my boots and it was a beautiful day. We talked about an island, per say for the equipment but not a road. We also talked about building an access to the shore in an emergency but not as a regular means of egress. Please help me understand how we got where we are now, which I feel is different from what you presented at the meetings. I am not going to issue a stop order at this time but we need to be convinced that this clayish road is O.K. with D.E.P. and is not hurting the environment.

Thanks for addressing our concerns, I will be working on the island Friday. Ron Tozier

C.E.O. Chebeague Island