

Commission Votes To Accept Muddy Creek Subdivision Referral

[by William F. Galvin](#)

BARNSTABLE --- Citing the potential for regional impacts on water resources from additional development along Muddy Creek, the Cape Cod Commission voted unanimously to accept the Monomoy Landing subdivision off Church Street as a limited discretionary referral from the planning board.

For two hours last Thursday, town officials and proponents for the nine-lot subdivision filed by Marini Nominee Trust argued the need for review as a development of regional impact. Attorney Peter Feuerbach told the commission this is but one-third of the threshold for a DRI, and stressed that the project meets all applicable septic regulations.

Town Planner Susan Leven and Health Department Director Paula Champagne pushed for a cluster subdivision with a wastewater treatment facility to mitigate nitrogen loading in the river, which flows into Pleasant Bay. They cited results from the Massachusetts Estuaries Project study pointing out the need to drastically reduce nitrogen loading to restore the health of the embayment.

Cape Cod Commission Executive Director Margo Fenn recused herself from the hearing, explaining she is a member of the town's real estate and open space committee that proposed town purchase of the property for open space. Harwich Town Meeting voted funds for the acquisition, and the town also received a state Self-Help grant to assist in defraying the cost of the purchase, but the sale was never consummated.

The size of the development is not what is at issue, Leven told the commission. Rather, it is the environmental sensitivity. She said the 14-acre parcel is adjacent to the river and within the Pleasant Bay Area of Critical Environmental Concern, a water resource protection district and an area defined by the Massachusetts Estuaries Project as in need of "significant nitrogen reduction."

The town planner also said a Massachusetts Endangered Species Act filing will be required because new maps identify the site as a priority habitat for rare wildlife.

The board of health was precluded from commenting on the subdivision plan because of a “constructive grant” when the board took more than 45 days to act, Leven said.

Champagne said the health board fully supports the referral, based on the environmental sensitivity of the area. More importantly she said because of the findings of the MEP study. It is a nitrogen over-extended estuary, Champagne said. The report recommends reduction of nearly three-quarters of the nitrogen going into that river.

“At no point did the board of health say the development is inappropriate. We were trying to address the environmental sensitivity, the logarithmical progression of nitrogen,” Champagne told the commission.

Feuerbach said it may appear there was cooperation in this process, but it “has been directives the board has tried to impose upon us.” The attorney said the submission to the commission is unfair. The project is not of the scale of a development of regional impact. The proposal would have no significant impact on the regional resources, he said.

The acreage is less than a third of the land threshold. Even with three approval-not-required lots taken out of the subdivision through separate approval a few months ago, Feuerbach said 12 lots are only 40 percent of the threshold.

“These are local issues and can be handled locally,” Feuerbach said. “But there has not been an expressed, demonstrated interest to handle this properly.”

He called implications by town officials that they have not taken into account the sensitivity of the resources a “bunch of baloney.” They were examined and it was concluded a wastewater treatment facility was not necessary. He pointed out the local conservation commission approved the setbacks delineated on the plan.

Laura Schofield, a registered sanitarian with Schofield Brothers, Inc, which designed the subdivision, said they spent a lot of time in the field delineating resources. A professional was hired to delineate the bordering vegetative wetlands. A 100-foot buffer was laid out under the Wetlands Protection Act, and the 200-foot Riverfront Act buffer. The ACEC has also been delineated.

“We set aside that area from development,” Schofield said.

The proponents said that 900 feet along the river and 4.5 acres have been set aside as open space. They then determined the nine lots were suitable for four bedroom septic disposal systems.

Feuerbach said they took the project to Brian Dudley of the state department of

environmental protection, who is involved in the MEP study, and he said the total maximum daily limit calculations for nitrogen is a draft standard and has not been adopted by the state. The only state regulations in place mandate 10,000 square feet per bedroom, a Title 5 regulation which this project meets, the attorney said.

“The process needs to be fair and predictable. This has not been predictable,” Feuerbach argued. “The Cape Cod Commission is being asked to do the dirty work for a board that has not administered this in a way that requires cluster development.”

Commission planner Martha Hevenor told the commission it must find the development poses a regional impact to the water resources to be protected under the Cape Cod Commission Act. She said there would be an impact on the regional resources and recommended the commission accept the referral from the town.

Hevenor said the loading would likely exceed the five parts per million nitrogen loading limits under the act and pose a threat to the upper Muddy Creek watershed. She recommended use of denitrifying systems, reductions in lawns and facilities to reduce stormwater runoff.

There is the potential for habitat degradation from development due to changes in water quality, Hevenor told the commission. Leven also pointed out a portion of the Marini property is located in Chatham, which further defines the regional nature of the development.

Chatham commission representative Florence Seldin asked if the Chatham Planning Board had jurisdiction in this matter, given that one lot is located in that town. She said there is no application in Chatham.

Seldin cited a letter from the Pleasant Bay Resource Management Alliance, an intermunicipal organization, raising concerns about nitrogen impacts and urging denitrifying septic systems be used. Emphasizing the regional concern, she also said Chatham is concerned about the impacts of nitrogen in its ponds and rivers.

The Harwich town planner said the federal government, together with local conservation trusts and residents from towns around Pleasant Bay, have made major financial contribution to assist in purchasing the 42.5-acre Shea property for open space along the west side of the river.

“I agree studies have been done, but a loading rate has not been formally adopted,” Feuerbach responded. “If we were not staying back from the waterfront, I could understand the need for a limited discretionary referral. But we were aware of the sensitive nature of this land.”

The attorney also said the board of health provision requiring environmental study for projects generating greater than 2,000 gallons of septage per day had previously only been applied to commercial developments in town and never a residential subdivision.

“Don’t do their dirty work,” Feuerbach pleaded again.

“We’re here to protect resources that merit protection,” Truro commission representative Susan Kadar said.

“Our concern here is the effects on the watershed,” said Allin Thompson, the Harwich member of the PBRMA. “We’ve learned smoking is bad for your health and a lot of us quit smoking. We’re now learning the impact from nitrogen is compromising this whole area.

“Our concern is how can we control what we do from here on out. If we do this without nitrogen treatment it will take that many more years to clean it up. Look to the future and clean up what we missed and do it right.”

Dick Thomas of the East Harwich Community Association said this project posed a “serious threat to our community and the welfare of our area.”

“If an activity is not regulated should we have to abide by the non-regulation?” Feuerbach argued. “We’re being held to a standard that is not a law.”

Kadar offered a motion to have the commission accept the Monomoy Landing referral. The commission unanimously voted to do so.

Feuerbach said after the vote he was disappointed and did not think it was right. He also said he would have to confer with the property owners to determine how they will proceed.

3/15/07