

**TOWN OF PROVINCETOWN – BOARD OF SELECTMEN**

**EXECUTIVE SESSION – MONDAY – JUNE 11, 2012 5 PM**

**TOWN HALL – CONFERENCE ROOM**

Chair Austin Knight called the meeting to order at 5:06 PM noting the following Board of Selectmen members: Austin Knight, Elaine Anderson, David McChesney, John Santos and Erik Yingling.

Other Attendees: Town Manager Sharon Lynn, Assistant Town Manager David Gardner and Attorney John Giorgio of Kopelman & Paige.

Recorder: Elaine Anderson

The following are meeting minutes, in brief.

**1. GENERAL REVIEW OF PENDING LITIGATION MATTERS**

(MGL C30A Sec 21 Clause 3)

**MOTION**: *Move that the Board of Selectmen vote, pursuant to MGL C. 30A, §21, Clause 3, to go into executive session to meet with Town Counsel John Giorgio of the firm Kopelman & Paige for a general review of the status of pending litigation matters if an open meeting may have a detrimental effect on the litigation position of the public body; and the Chair so declares, and not to convene in open session thereafter. (Roll Call Vote)*

*David McChesney - Yes      Austin Knight – Yes      Elaine Anderson - Yes  
John Santos - Yes      Erik Yingling - Yes*

**Motion by**: Elaine Anderson      **Seconded by**: John Santos      Yea 5    Nay 0

Attorney John Giorgio went over pending litigation matters. (See attachment #1)  
No action taken and no motions made.

*John Santos recused himself and left the meeting at 5:50 PM as an upcoming discussion on a case involved him and an abutter.*

**Motion**: *Move that the Board of Selectman vote to adjourn at 5:55 PM. [Roll Call Vote]*

*David McChesney - Yes      Austin Knight – Yes  
Elaine Anderson - Yes      Erik Yingling - Yes*

**Motion by**: David McChesney      **Seconded by**: Erik Yingling      Yea 4    Nay 0

Submitted by: Elaine Anderson, Vice-Chair

Minutes transcribe by: Vernon G. Porter, Secretary to Board of Selectmen  
June 14, 2012

*Bos Executive Session Attachment #1*



**KOPELMAN AND PAIGE, P.C.**  
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June 6, 2012

**John W. Giorgio**  
jgiorgio@k-plaw.com

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**EXECUTIVE SESSION MATERIAL**

**CONFIDENTIAL**

Ms. Sharon Lynn  
Town Manager  
Provincetown Town Hall  
260 Commercial Street  
Provincetown, MA 02657

Re: Litigation Status Report

Dear Ms. Lynn:

Enclosed please find an updated Litigation Status Report. As you know, I am scheduled to meet with the Board of Selectmen in Executive Session on Monday, June 11, 2012 to discuss the attached report.

Very truly yours,

  
John W. Giorgio

JWG/bp  
Enc.  
452170/prov/8888

**RECEIVED**  
BOS - Vernon  
**JUN - 6 2012**  
CC: BOS/TM/ATM

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**TOWN OF PROVINCETOWN**  
**LITIGATION STATUS REPORT**  
**MATTERS PENDING WITH TOWN COUNSEL**

**June 6, 2012**

1. ✓ 158 Bradford, LLC v. Provincetown Zoning Board of Appeals  
Barnstable Superior Court C.A. No. BACV2012-00163  
(24200-0340-IMQ)

This is an appeal from the February 21, 2012 final action of the Zoning Board of Appeals to deny the owner of 158 Bradford Street a special permit to extend a nonconforming guest house/lodging house use to add an additional guest unit under Zoning By-law §§3110 and 4120. The Town Clerk received the notice of appeal on March 8, 2012. A notice of appearance was filed March 8, 2012. The parties are discussing the terms of a potential remand of the matter to the Board for further findings of fact regarding the special permit.

2. ✓ Anderson v. Provincetown Board of Appeals, et al.  
Barnstable Superior Court C.A. No. BACV2011-00521  
(24200-0335-IMQ)

This is an appeal by an abutter from the August 26, 2011 final action of the Zoning Board of Appeals to affirm the decision of the Building Commissioner to deny zoning enforcement regarding storage racks at 131A Commercial Street, in the TCC Zoning District, pursuant to the Commissioner's determination that storage racks are not structures and that, therefore, they do not violate the yard setback required on the easterly property line or violate lot coverage requirements. The private parties have engaged in discovery. Since the ultimate determination was favorable to Mr. Santos, he is actively defending the matter.

3. ✓ Brahm, et al. v. Provincetown Historic District Commission  
Barnstable Superior Court C.A. No. BACV2009-00411  
(24200-0314-IMQ)

This is an appeal from the May 20, 2009, action by the Historic District Commission to deny permission to allow construction of a roof deck at 91 Bradford Street. After a trial took place on August 17 and 18, 2011, the Barnstable Superior Court ruled in favor of the plaintiff. The Town filed an appeal. Appellate briefs have been filed and the Appeals Court will schedule the matter for oral argument in the near future.

4. ✓ Martin v. Town of Provincetown, et al.  
✓ Barnstable Superior Court C.A. No. BACV2010-00572  
(60700-0925-JMA)

In this case, which was filed in September 2010, the plaintiff alleges that the Town is liable for the drowning death of the decedent as a result of its negligent maintenance of outfall pipes at the beach front and the alleged failure to rescue the decedent after he drowned. Town Counsel has been appointed by the Town's insurer to defend this matter. The complaint also alleges claims against Old Colony Tap, Inc., the bar which the decedent patroned before his death. Old Colony Tap has filed cross-claims against the Town for contribution and indemnification. We filed a motion to dismiss all claims against the Town; in response, the Court permitted the plaintiff to conduct limited discovery to ascertain if sufficient facts exist to support the claims against the Town. Following this discovery, we filed a motion for summary judgment, again seeking dismissal of all claims against the Town. We are awaiting the scheduling of a hearing date on the motion.

5. ✓ Provincetown Board of Trade Land Court Registration  
✓ Land Court Misc. No. 43338  
(24200-0210-JDE)

This is a Land Court registration petition seeking to register land at 307 Commercial Street owned by Provincetown Board of Trade. The Town filed an answer and opposition to the petition on October 4, 2002 because the land proposed for registration appears to include land owned by the Town and used as part of the municipal parking lot next to Manual Lopes Square, and because the petition includes land beneath the Historic High Water Mark to which the petitioner cannot show record title. The petitioner has indicated he would amend the plan to address the Town's objections, but he has taken no further action in the matter.

6. ✓ Russo v. Historic District Commission of the Town of Provincetown  
✓ Barnstable Superior Court C.A. No. BRCV2010-00533  
(24200-0322-IMQ)

This is an appeal filed in August 2010 by abutter Catherine Russo, acting pro se, who resides at 5 Fishburn Court, from the Historic District Commission's July 28, 2010 decision to grant a Certificate of Appropriateness to allow the owners of 8 Fishburn Court to expand and renovate a house. An answer has been filed and we requested the owners of the property, as the real parties in interest, to intervene and actively defend the relief granted. On June 17, 2011, the property owners served a motion to intervene, which has been allowed. The parties have stipulated that no costs are sought against the Commission. A trial date was scheduled for February 15, 2012, but was postponed. There was not an express claim for attorneys' fees and costs, however, out of an abundance of caution, we obtained a stipulation from the parties in the pre-trial conference memorandum that no fees or costs are being sought in this matter. We are leaving the active defense of this matter to the successful property owner who received the Certificate of Appropriateness.

7. ✓ Schreyer v. Provincetown Historic District Commission  
Barnstable Superior Court, C. A. No. BACV2011-00775  
(24200-0337-IMQ)

This is an appeal by the owner of 14B Center Street from the Historic District Commission's December 14, 2011 decision to partially grant and partially deny a Certificate of Appropriateness to allow expansion of structures as 12 Center Street. The appeal seeks an annulment of the decision in so far as the Certificate of Appropriateness allows the owner to construct an 8' x 10' addition and deck and to re-shingle a mansard roof for the main guest house at the subject property. We will leave the active defense of this matter to the property owner who obtained the Certificate of Appropriateness.

8. ✓ Schreyer v. Provincetown Zoning Board of Appeals  
Barnstable Superior Court, C. A. No. BACV2011-00733  
(24200-0328-IMQ)

This is a December 8, 2011 appeal by Mr. James D. Schreyer, who owns property at 14B Center Street, from the November 21, 2011 final action taken by the Zoning Board of Appeals to grant special permit relief to allow construction of a second story addition to an existing single-family cottage up and along pre-existing, nonconforming rear and sideline setbacks at 12 Center Street in the TCC Zoning District. There was a claim for attorneys' fees and costs; however, on April 30, 2012, we obtained and filed a stipulation of dismissal regarding this claim. We will leave the active defense of the litigation to the property owner who obtained the special permit.

9. ✓ Thompson v. Zoning Board of Appeals of the Town of Provincetown  
Barnstable Superior Court C.A. No. BACV2010-00676  
(24200-0324-IMQ)

This is a November 9, 2010 appeal by abutter Thomas Thompson, who resides at 3 Fishburn Court, from the Zoning Board of Appeals' October 21, 2010 final action to grant a special permit under Zoning By-law Article 3, §3110, 1, to allow the owner of 8 Fishburn Court to remove, reconstruct and extend a pre-existing non-conforming structure up and along a non-conforming setback by adding a second story. We requested the owners, the real parties in interest, to intervene and actively defend the relief granted. On July 28, 2011, the intervention was allowed. This appeal involves the same project partially approved by the Historic District Commission in Russo v. Historic District Commission. There was a claim for attorneys' fees however, on May 10, 2012, we obtained and filed a stipulation of dismissal regarding that claim. We will leave the active defense of the litigation to the property owner who obtained the special permit.

10. ✓ Three Harbour Drive, LLC v. Zoning Board of Appeals of the Town of Provincetown  
Barnstable Superior Court C.A. No. BACV2011-00135-A  
(24200-0327-IMQ)

This is an appeal by Three Harbour Drive, LLC, the owner of 3 Harbour Drive, from the February 23, 2011 final action by the Zoning Board of Appeals to grant a special permit to Bay Harbour, LLC II, under Zoning By-law §2450, to allow a swimming pool at 5 Harbour Drive in a Residential 1 Zoning District. On June 21, 2011, co-defendant Bay Harbour, LLC II served a motion for summary judgment, asserting that the action must

be terminated because plaintiff Three Harbour Drive, LLC lacks the necessary standing or legal interest to maintain the appeal. A hearing on the motion was scheduled for February 7, 2012. There was a claim for costs and attorneys' fees; however, on May 10, 2012, we obtained and filed a stipulation of dismissal regarding that claim. We will leave the active defense of the litigation to the property owner who obtained the special permit.

11. ✓ Turkowitz, et al. v. Town of Provincetown, et al.  
USDC C.A. No. 10-CV-10634-NMG  
(60700-0944-JLT)

In this action, the plaintiffs allege civil rights and tort violations against several current and former police officers arising from the arrest of plaintiff Turkowitz, and the placing of plaintiff Richardson into protective custody, after the officers responded to a noise complaint regarding a party at 4 Holway Avenue. Town Counsel was appointed by the Town's insurer to defend the action, and insurance is paying the costs of litigation (defendant Bova is being represented by separate counsel). Mediation proved unsuccessful, and the parties undertook discovery, including written discovery and depositions, the last of which concluded on May 21, 2012. Town Counsel is now in the process of preparing partial motions for summary judgment, which are due on August 15, 2012, and for trial which is set for November 2012.

12. ✓ Westmark, et al. v. James M. Lombard (Town of Provincetown)  
Orleans District Court, Docket No. 11-CV-336  
(24200-0334-JDU)

The Condominium Trust has filed a complaint against an individual unit owner to foreclose on lien held by Trust pursuant to G.L. c.183A, §6. The Town has been named as a Party-in-Interest insofar as it holds a tax lien on the subject unit. There has been no activity in this case since the Town filed its Answer on September 9, 2011.

— *Conservation law Foundation (Clean Water Act) Sewers/  
Wastewater*  
MATTERS CLOSED

1. Trustees of the Hensche Lane Condominium Trust v. White, et al.  
(Town of Provincetown)  
Barnstable Superior Court C.A. No. 2012-006  
(24200-0339-KLK)

This action involved the plaintiffs' attempt to collect condominium fees on a unit subject to an affordable housing restriction held by the Town and Department of Housing and Community Development. The Town's answer was filed January 27, 2012. The condominium fees were paid by the mortgagee and the case has been dismissed, with the Town's consent.