



Town of Barnstable Town Council

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Councilors:

Frederick Chirigotis
President
Precinct 4

Janice L. Barton
Vice President
Precinct 10

Ann B. Canedy
Precinct 1

Tom Rugo
Precinct 2

Michael P. Hersey
Precinct 3

James H. Cote
Precinct 5

Janet S. Joakim
Precinct 6

Jessica Rapp Grassetti
Precinct 7

Dr. Debra S. Dagwan
Precinct 8

James M. Tinsley
Precinct 9

June Daley
Precinct 11

John T. Norman
Precinct 12

Jennifer L. Cullum
Precinct 13

Acting Administrator:
Barbara A. Ford

Administrative
Assistant:

TOWN COUNCIL MEETING AGENDA

March 01, 2012

7:00 PM

- 1. ROLL CALL**
- 2. PLEDGE OF ALLEGIANCE**
- 3. MOMENT OF SILENCE**
 - **Americorps – an update**
- 4. PUBLIC COMMENT (May be limited to 2 minutes)**
- 5. COUNCIL RESPONSE TO PUBLIC COMMENT**
- 6. ACT ON MINUTES (Includes Executive Session)**
- 7. COMMUNICATIONS FROM ELECTED OFFICIALS, BOARDS, COMMISSIONS, STAFF, CORRESPONDENCE, ANNOUNCEMENTS AND COMMITTEE REPORTS**
- 8. ORDERS OF THE DAY**
 - A. OLD BUSINESS**
 - B. NEW BUSINESS**
- 9. TOWN MANAGER COMMUNICATIONS**
- 10. ADJOURNMENT**

NEXT REGULAR MEETING: March 15, 2012

A. OLD BUSINESS

2012-065	Authorization to engage in the process to change health insurance benefits in accordance with MGL C. 32B §§21-23 (May be acted upon)	3 - 4
2012-066	Appointments to a board, committee, or commission (Second reading)	5
2012-067	Reappointment to a board/committee/commission (Second reading)	6

B. NEW BUSINESS

2012-068	Resolution - that the Taunton State Hospital remain open (May be acted upon)	7 - 8
2012-069	Extension to the appointment of Thomas K. Lynch as acting town manager (May be acted upon)	9
2012-070	Adopting the Town Manager Search Subcommittee recommendation in conducting the search for a town manager (May be acted upon)	10 – 11
2012-071	Appropriation \$72,452 to pay for the additional costs associated in the Town Manager personnel FY12 budget (Refer to public hearing 03/15/12)	12 – 13
2012-072	Appropriation order-\$210,000 for additional asbestos abatement monitoring services and removal at the old Barnstable Municipal Airport Terminal, generator building and tower (Refer to public hearing 03/15/12)	14 – 15
2012-073	Appointments to a board, committee, or commission (First reading)	16
2012-074	Authorizing the town manager to execute an amendment to the regulatory agreement between the Town of Barnstable and Alan Granby and Janice Hyland (May be acted upon)	17 - 18
2012-075	Authorizing the town manager to accept a conservation restriction with a ninety-nine year term covering a portion of property located on 153 Freezer Point Road, Barnstable (May be acted upon)	19 - 25
2012-076	Authorizing the town manager to accept a Declaration of Restrictive Covenant with a term of ninety-nine years covering the entire property located on 153 Freezer Point Road, Barnstable (May be acted upon)	26- 29

Approve Minutes —February 2, 2012; February 16, 2012

Please Note: The list of matters, are those reasonably anticipated by the council president, which may be discussed at the meeting. Not all items listed may in fact be discussed and other items not listed may in fact be discussed and other items not listed may also be brought up for discussion to the extent permitted by law. It is possible that if it so votes, the Council may go into executive session. The Council may also act on items in an order other than they appear on this agenda.

Persons interested are advised that in the event any matter taken up at the meeting remains unfinished at the close of the meeting, may be put off to a continued session of this meeting, and with proper notice.

Anyone requiring hearing assistance devices please inform the Town Clerk at the meeting.

A. OLD BUSINESS (May be acted upon)

BARNSTABLE TOWN COUNCIL

ITEM# 2012-065
INTRO: 02/16/12, 03/01/12

**2012-065 ORDER TO ENGAGE IN THE PROCESS TO CHANGE HEALTH INSURANCE
BENEFITS UNDER MGL C.32B, §§ 21-23**

ORDERED: The Town of Barnstable elects to engage in the process to change health insurance benefits under M.G.L. c. 32B, §§ 21-23.

SPONSOR: Acting Town Manager Thomas K. Lynch

DATE	ACTION TAKEN
_____	_____
_____	_____

- ___ Read Item
- ___ Rationale
- ___ Council Discussion
- ___ Move/Vote

BARNSTABLE TOWN COUNCIL

ITEM# 2012-065
INTRO: 02/16/12, 03/01/12

SUMMARY

TO: Town Council
FROM: Thomas J. Lynch, Acting Town Manager
DATE: February 7, 2011
SUBJECT: Implement Health Care Reform Process

BACKGROUND: Chapter 69 of the Acts of 2011 enacted the process to follow in order to implement municipal health care reform changes. The Act created three new sections of law under M.G.L. c. 32B; sections 21 through 23. Section 21 outlines the process, which must be followed when electing to change health insurance plan design under sections 22 or 23. Section 22 outlines the changes that can be made by the appropriate public authority to cost-sharing plan design features and the limitations thereto. Section 23 provides the option for the appropriate public authority to provide health insurance coverage to subscribers by transferring its subscribers to the Group Insurance Commission.

ANALYSIS: The Town of Barnstable is a member of the Cape Cod Municipal Health Group (CCMHG) a Joint Purchase Group (JPG). The JPG has made changes to plan design features in accordance with the new legislation under Chapter 69 of the Acts of 2011. These changes include new front-end deductibles; increased co-pays on office visits and prescription medications as well as new and increased co-pays for emergency room visits, inpatient admission, outpatient surgery and radiology. Changes to percentage contribution rates cannot be made under this legislation.

The adoption of this order will allow the Town to follow the expedited collective bargaining procedures under Section 21. This includes implementing a strategy whereby up to 25% of the estimated savings from the plan design changes will be shared with subscribers to help mitigate the financial impact on certain subscribers including retirees, low-income and those with high utilization rates. Otherwise, traditional collective bargaining practices would have to be followed to negotiate the impacts of these changes.

FINANCIAL IM PACT: The changes to cost sharing plan design features implemented by the CCMHG has resulted in health insurance premium rate decreases for FY13 that are 9.3 percent less overall in comparison to the FY12 premium rates. Using the Town's subscriber population from January 2011 the estimated savings from the premium rate reductions is approximately \$1.6 million. Since the Town's contribution rate is shared with subscribers on a 50/50 basis, one-half of the estimated savings will be realized by subscribers and the other half by the Town. Up to 25% of the overall savings (\$1.6 million) must be shared with the subscribers and must come from the Town's share of the savings, resulting in a net budget savings of \$400,000 to the Town.

TOWN MANAGER RECOMMENDATION: The Town Manager recommends approval of this order.

STAFF ASSISTANCE: Mark Milne, Director of Finance
William Cole, Director of Human Resources

A. OLD BUSINESS (Second reading)

BARNSTABLE TOWN COUNCIL

ITEM# 2012-066
INTRO: 02/16/12, 03/01/12

2012-066 APPOINTMENTS TO A BOARD/COMMITTEE/COMMISSION

RESOLVED, that the Town Council appoint the following individuals to a multiple-member board/committee/commission:

COMPREHENSIVE FINANCIAL ADVISORY COMMITTEE

Laurie K. Young, 142 Great Bay Road, Osterville as a member, to a term expiring 6/30/2014

CULTURAL COUNCIL

Mary Carolla-Allen, 312B Pleasant Pines Avenue, Centerville as a member, to a term expiring 6/30/2013

HISTORICAL COMMISSION

Laurie K. Young, 142 Great Bay Road, Osterville as a member, to a term expiring 6/30/2014

HOUSING COMMITTEE

Sue W. Davenport, 148 West Main Street, Hyannis as a member, to a term expiring 6/30/2014

PUBLIC WORKS COMMISSION

Robin C. Young, 142 Great Bay Road, Osterville as a member, to a term expiring 6/30/2013

WATERWAYS COMMITTEE

Paul J. Everson, 21 Wren Lane, Marstons Mills as a member, to a term expiring 6/30/2014

YOUTH COMMISSION

Rose Silva, c/o BHS 744 W. Main Street, Hyannis as a member, to a term expiring 6/30/2012

SPONSOR: Appointments Committee

DATE	ACTION TAKEN
_____	_____
_____	_____

- ___ Read Item
- ___ Rationale
- ___ Council Discussion
- ___ Move/Vote

A. OLD BUSINESS (Second Reading)

BARNSTABLE TOWN COUNCIL

ITEM# 2012-067
INTRO: 02/16/12, 03/01/12

2012-067 RE-APPOINTMENTS TO A BOARD/COMMITTEE/COMMISSION

RESOLVED, that the Town re-appoint the following individual to a multiple-member board/committee/commission:

BOARD OF HEALTH

Dr. Paul J. Canniff, 106 Hayes Road, Centerville, as a member to a term expiring 6/30/2014

SPONSOR: Appointments Committee

DATE	ACTION TAKEN
_____	_____
_____	_____

- ___ Read item
- ___ Council discussion
- ___ Move/vote

B. NEW BUSINESS (May be acted upon)

BARNSTABLE TOWN COUNCIL

**ITEM# 2012-068
INTRO: 03/01/12**

2012-068 RESOLVE IN SUPPORT OF TAUNTON STATE HOSPITAL REMAINING OPEN

RESOLVED: That the Barnstable Town Council in recognition of the positive impact and the critical need of adequate treatment for mental health patients in crisis on Cape Cod, the Islands, and Southeastern Massachusetts, forward this resolution to State Senator Marc R. Pacheco:

WHEREAS, the Patrick Administration is considering closing the Taunton State Hospital; and

WHEREAS, that closing the Taunton State Hospital would put a tremendous strain on the Massachusetts mental health care system; and

WHEREAS, that closing the Taunton State Hospital would create a shortage of appropriate mental health care for its Cape Cod and Islands residents in need; and

WHEREAS, closing the Taunton State Hospital will require moving some patients to the Worcester facility, causing hardship for patient's families that may not have transportation, or access to transportation to be able to visit their family members.

NOW THEREFORE BE IT RESOLVED, that the Barnstable Town Council does hereby support and requests its elected officials of the Commonwealth of Massachusetts, to ensure that this most important mental health hospital remain open for the people of Cape Cod, the Islands, and Southeastern Massachusetts.

Date

Frederick Chirigotis, President
BARNSTABLE TOWN COUNCIL

SPONSOR: Councilor Janice L. Barton

BARNSTABLE TOWN COUNCIL

ITEM# 2012-068
INTRO: 03/01/12

SUMMARY

TO: Town Council
FROM: Councilor Janice L. Barton
DATE: February 23, 2012
SUBJECT: Patrick Administration's plan to close Taunton State Hospital

RATIONALE: In order for a comprehensive community-based mental health system to work, the Commonwealth must maintain an appropriate capacity of inpatient beds meeting this critical need of Cape Cod, the Islands, and Southeastern Massachusetts.

Continuing to have a shortage of inpatient beds and services, places the lives of people at risk and endangers the effectiveness of the mental health care system, putting an increased strain on local services as well as on hospitals and emergency rooms that are not equipped to adequately treat mental health patients in crisis.

State Senator Marc Pacheco is leading an initiative to convince the legislatures of how critically important it is that the Hospital remain open and funded.

B. NEW BUSINESS (May be acted upon)

BARNSTABLE TOWN COUNCIL

ITEM# 2012-069

INTRO: 03/01/12

2012-069 EXTENSION TO THE APPOINTMENT OF THOMAS K. LYNCH AS ACTING TOWN MANAGER

ORDERED, that the Town Council, acting under the provisions of Section 4-5 of the Charter of the Town of Barnstable, hereby extends the appointment of Thomas K. Lynch with an address of 95 Phinneys Lane, Centerville, MA, 02632, as Acting Town Manager to perform the duties of the Town Manager as outlined in Sections 4-2 and 4-3 of the Charter for the Town of Barnstable, until June 16, 2012

SPONSOR: Councilor Frederick Chirigotis

DATE	ACTION TAKEN
_____	_____
_____	_____

- Read Item
- Rationale
- Council Discussion
- Move/Vote

B. NEW BUSINESS (May be acted upon)

BARNSTABLE TOWN COUNCIL

**ITEM# 2012-070
INTRO: 03/01/12**

**2012-070 ADOPTION OF TOWN MANAGER SEARCH SUBCOMMITTEE'S
RECOMMENDATION TO CONDUCT AN INTERNAL SEARCH FOR A
PERMANENT TOWN MANAGER**

RESOLVED: That the Town Council hereby adopts the recommendation of the Town Manager Search Subcommittee to conduct an internal search for candidates qualified to be appointed to the position of town manager under Section 4-1 of the charter of the town of Barnstable.

SPONSOR: The Town Manager Search Subcommittee

DATE	ACTION TAKEN
_____	_____
_____	_____

- ___ Read Item
- ___ Rationale
- ___ Council Discussion
- ___ Move/Vote

BARNSTABLE TOWN COUNCIL

ITEM# 2012-070
INTRO: 03/15/12

SUMMARY

TO: Town Council
FROM: Town Manager Search Sub-committee
DATE: February 21, 2012
SUBJECT: Recommendation of the process in search of a permanent town manager

RATIONALE: Town Council President Frederick Chirigotis formed a search sub-committee charged with providing its recommendation to the full council, the process to follow in the search for a town manager.

The search sub-committee met on February 7th and February 14th and received input on procedure and policy of the town in conducting a search. After discussions, the sub-committee voted to recommend to the full council that the process begin with an internal search for qualified candidates.

B. NEW BUSINESS (Refer to public hearing 03/15/12)

BARNSTABLE TOWN COUNCIL

**ITEM# 2012-071
INTRO: 03/01/12**

**2012-071 APPROPRIATION ORDER - \$72,452 TO FUND FY12 TOWN
MANAGER PERSONNEL COST BUDGET**

ORDERED: That the sum of \$72,452 be appropriated for the purposes of funding the fiscal year 2012 Town Manager Personnel Cost budget and to meet this appropriation that \$72,452 be transferred from the general fund surplus.

SPONSOR: Thomas K. Lynch, Acting Town Manager

DATE	ACTION TAKEN
_____	_____
_____	_____

- _____ Read Item
- _____ Motion to Open Public Hearing
- _____ Rationale
- _____ Public Hearing
- _____ Close public hearing
- _____ Council discussion
- _____ Move/vote

BARNSTABLE TOWN COUNCIL

ITEM# 2012-071
INTRO: 03/01/12

SUMMARY

TO: Town Council
FROM: Thomas K. Lynch, Acting Town Manager
DATE: February 17, 2012
SUBJECT: \$72,452 appropriation to the town manager personnel cost budget for FY12

BACKGROUND: The severance package for the former town manager included a payment for all of his unused vacation time and he is eligible for unused sick time upon retirement. These amounts were not included in the original fiscal year 2012 budget. In addition, the Town Council has contracted with the former assistant town manager to perform the role of acting town manager through March 15, 2012, with compensation higher than originally included in the FY12 salary budget.

ANALYSIS: The former town manager will continue to receive his weekly pay through the end of the current fiscal year, so there is no vacancy savings to draw from to cover the unused vacation, sick leave buyback or the increase in pay associated for the acting town manager. A total of \$72,452 is required to cover these additional associated costs. This includes an assumption that the acting town manager will continue to receive compensation through June 30, 2012 at the current rate of pay so as to avoid have to seek another appropriation if his appointment is extended.

Vacation time payout to the former town manager	\$45,748
Sick leave buyback	\$ 5,013
Funding for Acting Town Manager (12/16/11 to 6/30/12)	<u>\$21,691</u>
Appropriation requested	\$72,452

FISCAL IMPACT: Funding will be provided from general fund surplus, which was certified at \$12.3 million by the State Division of Local Services in November 2011. No additional appropriation for FY12 is necessary if this is approved.

ACTING TOWN MANAGER RECOMMENDATION: The Acting Town Manager Thomas K. Lynch recommends approval of the appropriation order.

B. NEW BUSINESS (Refer to public hearing 03/15/12)

BARNSTABLE TOWN COUNCIL

**ITEM# 2012-072
INTRO: 03/01/12**

**2012-072 APPROPRIATION-\$210,000 FOR ADDITIONAL ASBESTOS
ABATEMENT MONITORING AND REMOVAL OF ASBESTOS-AIRPORT**

ORDERED: That the sum of Two Hundred Ten Thousand Dollars and No Cents (\$210,000.00) be appropriated for the purposes of funding the costs associated with asbestos abatement monitoring services, and the removal of additional asbestos containing materials (ACMs) identified within the old Airport Passenger Terminal and Generator buildings; and that to meet this appropriation, \$210,000.00 be transferred from available funds within the Airport Reserve Fund and that the Barnstable Municipal Airport Commission is authorized to contract for and expend the Appropriation made available for this purpose.

SPONSOR: Acting Town Manager Thomas K. Lynch

DATE	ACTION TAKEN
_____	_____
_____	_____

- ___ Read Item
- ___ Motion to Open Public Hearing
- ___ Rationale
- ___ Public Hearing
- ___ Close public hearing
- ___ Council discussion
- ___ Move/vote

BARNSTABLE TOWN COUNCIL

ITEM# 2012-072
INTRO: 03/01/12

SUMMARY

TO: Town Council
FROM: Thomas K. Lynch, Acting Town Manager
THROUGH: (1) R. W. Breault, Jr., Airport Manager; (2) Barnstable Municipal Airport Commission
DATE: February 21, 2012
SUBJECT: Asbestos Abatement Monitoring Services, & Removal of Additional Asbestos Containing Materials (ACMs) Identified within the Old Airport Passenger Terminal and Generator Buildings

BACKGROUND: (1) The new Barnstable Municipal Airport Terminal and Tower project began its scope and design process in June 2005 with the hiring of an architectural firm; part of the design process included the completion of a detailed Asbestos Survey and Inspection Report for the old Terminal, Generator Building and the old Tower; recommended Response Actions; and the estimated resources required to perform the removal of all accessible asbestos containing materials (ACMs). The inspection and report was completed in September 2005 and delivered to the selected architectural firm. The inspection report was included in the ATCT and Terminal construction bid documents; and the identified ACMs were included in the construction manager at risk's guaranteed maximum price proposal. (2) Commencing in December 2011 with the exploratory demolition activities and abatement process for the old Airport Passenger Terminal and Generator building, additional suspect materials not identified in the 2005 inspection and report were discovered and must be properly removed in compliance with Massachusetts and Federal regulations.

ANALYSIS: (1) The estimated costs to complete the asbestos abatement monitoring services, and the removal/disposal of the additional asbestos containing materials identified within the old Airport Passenger Terminal and Generator buildings is estimated at \$210,000.00. Additional ACMs have been found throughout the building and includes mastic/paper and waterproofing, masonry (concrete and brick), roof deck, steel building components, footings and foundations, and sub-surface transite pipe. The Massachusetts Department of Environmental Protection (DEP) is requiring these items to be abated prior to demolition, in lieu of demolishing the entire building and disposal of the entire building. (2) The Terminal construction project was put out to bid and we contracted with the construction manager at risk for a "guaranteed maximum price" of \$15,063,147.00 for the Terminal construction costs in July of 2010. Since that time there have been \$786,415.00 in approved change orders in the Terminal project; and there are other potential change orders in the queue as we complete the project. At this point, we only have a potential surplus of \$73,000.00 in our Terminal budget to cover all of these costs. (3) The Barnstable Municipal Airport Enterprise Fund Reserve balance, as approved by the Department of Revenue for FY2012, is \$6,520,729.00. (4) At this point all additional costs associated with Terminal construction project will be paid for by the use of Airport Enterprise Fund Reserves, with no FAA or MassDOT Aeronautics Division grant funds available.

FISCAL IMPACT: This appropriation of funds should be sufficient to meet all anticipated asbestos abatement expenses, with no FAA or MassDOT Aeronautics grant funds available. There are adequate airport enterprise reserve funds available.

ACTING TOWN MANAGER RECOMMENDATION: The Acting Town Manager recommends approval of this appropriation order.

COMMISSION ACTION: The Barnstable Municipal Airport Commission approved this request on February 21, 2012

STAFF ASSISTANCE: R. W. Breault, Jr., Airport Manager

B. NEW BUSINESS (First Reading)

BARNSTABLE TOWN COUNCIL

ITEM# 2012-073
INTRO: 03/01/12

2012-073 APPOINTMENTS TO A BOARD/COMMITTEE/COMMISSION

RESOLVED, that the Town appoint the following individual to a multiple-member board/committee/commission:

CULTURAL COUNCIL

Marlene Weir, 80 Pond Street, Osterville, as a member to a term expiring 6/30/2015

SPONSOR: Appointments Committee

DATE	ACTION TAKEN
_____	_____
_____	_____

- Read item
- Council discussion
- Move/vote

B. NEW BUSINESS (May be acted upon)

BARNSTABLE TOWN COUNCIL

**ITEM# 2012-074
INTRO: 03/01/12**

2012-074 AN AMENDMENT TO THE REGULATORY AGREEMENT BETWEEN THE TOWN OF BARNSTABLE AND ALAN GRANBY AND JANICE HYLAND

ORDERED: That the Town Manager is authorized pursuant to Section 168-5, General Ordinances of the Code of the Town of Barnstable, to enter into and execute an Amendment to Regulatory Agreement between the Town of Barnstable and Alan Granby and Janice Hyland, for the property shown on Barnstable Assessor’s Maps 327 Parcels 145, 146 and 257, and located within the MS zoning district and the Downtown Hyannis Growth Incentive Zone including but not limited to the following: Paragraph 4 is hereby deleted in its entirety and is hereby replaced by the following new Paragraph 4:

- 4. The development rights granted hereunder shall be exercised and development permits may be obtained hereunder on or before February 28, 2015. Upon receipt of necessary development permits construction shall proceed continuously and expeditiously, but in no case shall construction exceed three years from receipt of necessary development permits. The development rights granted under this agreement shall not transfer to another owner without the prior written permission of the Planning Board and the Town Manager.

The Town Manager shall execute the Regulatory Agreement on behalf of the Town within seven (7) days of the Town Council vote authorizing the execution of the Regulatory Agreement in accordance with Section 168 of the Code

SPONSOR: Acting Town Manager Thomas K. Lynch

DATE	ACTION TAKEN
_____	_____
_____	_____

- Read Item
- Rationale
- Council Discussion
- Move/Vote

BARNSTABLE TOWN COUNCIL

ITEM# 2012-074
INTRO: 03/01/12

SUMMARY

TO: Town Council
FROM: Growth Management Department
DATE: February 17, 2012
SUBJECT: Amendment of Regulatory Agreement -- 37, 49, 53 School Street, Hyannis

RATIONALE: This is a request for an amendment to paragraph number 4 of the Regulatory Agreement between the Town of Barnstable and Mr. Alan Granby and Ms. Janice Hyland entered into August 28, 2008 for property located on School Street, Hyannis, Massachusetts. Regulatory Agreements are authorized by Chapter 168 of the Barnstable Code. The ordinance allows the Town to enter into agreements with private property owners to allow development in a manner that varies from local ordinances when it is deemed beneficial to the community.

The Agreement authorized retaining and improving to code, 8 existing apartment units located in two historic buildings at 37 and 53 School Street and the construction of 8 new townhouse units to be built in 4 duplex buildings to be situated behind the existing structures. The Agreement provided zoning relief to the maximum density permitted (unites and bedrooms per acre) and to several minimum development dimensional requirement.

Paragraph 4 of the Agreement requires that the development rights authorized be executed by obtaining development permits within three (3) years of the effective date of the contract. That paragraph also authorized one 6-month extension of the Agreement. The proposed amendment to paragraph 4 would extend the time to execute the development rights authorized by the Agreement by obtaining development permits an additional three years to February 28, 2015.

The amendment to the Agreement is beneficial to the community because the 37, 49 & 53 School Street project redevelops an existing property, the developer will contribute to public capital facilities by making payment of \$92,700, \$80,000 of which is to be used for the rehabilitation of sewer pipe liner on School Street with the remainder retained for additional infrastructure improvements which will benefit the area in and around School Street and will provide 8 Units of workforce housing in the existing buildings at 37 and 53 School Street.

REGULATORY AGREEMENT AMENDMENT PROCESS: On August 25, 2011, Attorney John W. Kenney, on behalf of Alan Granby and Janice Hyland made a request to the Town Manager for the 6-month extension. The extension was granted and a copy of the signed extension by the Town Manager was entered into the Planning Board file on September 13, 2011. With this extension, the existing Development Agreement is valid to February 28, 2012.

Also on August 25th Attorney Kenney filed an application at the Town Clerk's Office and the Planning Board's Office seeking an amendment to the Agreement to extend it an additional three (3) years. All other conditions enumerated in the original Agreement are to remain. The only change would be to amend paragraph 4 of the Agreement to provide an additional three (3) years, or to February 28, 2015, to exercise the development rights.

The proposed amendment was negotiated by the Barnstable Planning Board over the course of two public hearing held on October 24, 2011 and November 14, 2012. The proposed amendment to the Agreement was approved by the Planning Board for recommendation to the Town Council by a vote of the board on November 14, 2011.

If the Town Council approves the amendment to the Regulatory Agreement, it is endorsed by the Town Manager and recorded at the Registry of Deeds.

Copies of the full size plans are available for viewing at the office of the Town Clerk.

FISCAL IMPACT: Positive

STAFF ASSISTANCE: Jo Anne Miller Buntich, Director, Growth Management

B. NEW BUSINESS (May be acted upon)

BARNSTABLE TOWN COUNCIL

**ITEM# 2012-075
INTRO: 03/01/12**

2012-075 AUTHORIZING A CONSERVATION RESTRICTION – 153 FREEZER ROAD, BARNSTABLE

RESOLVED: That the Town Manager is hereby authorized to accept on behalf of the Town of Barnstable a Conservation Restriction having a term of ninety-nine (99) years covering the portion of the property located at 153 Freezer Road, Barnstable, MA containing 5.05 ± acres and being shown as Parcel A on a plan entitled “81-X Plan of Land 153 Freezer Road In Barnstable, Massachusetts dated October 27, 2011 drawn by BSC Group”.

SPONSOR: Councilor John T. Norman

BARNSTABLE TOWN COUNCIL

ITEM# 2012-075
INTRO: 03/01/12

SUMMARY

TO: Town Council
FROM: Councilor John T. Norman on behalf of the Land Acquisition and Preservation Committee
DATE: February 17, 2012
SUBJECT: Conservation Restriction - 153 Freezer Road, Barnstable

RATIONALE: Stuborn Limited Partnership (“Stuborn”) owns the property located at 153 Freezer Road, Barnstable. On October 26, 2011, Stuborn was granted a Variance by the Zoning Board of Appeals to allow for the construction of one single-family house with accessory structures and a private dock on said property. The Variance was recorded in the Barnstable Registry of Deeds on December 5, 2011 in Book 25893, Page 157 (see copy attached). Condition Number 20 of the Variance requires the owner to record a Conservation Restriction covering an area of land delineated as Parcel A on a plan to be approved by the Town Council.

The purpose of the Conservation Restriction is to require that the area (i.e. Area A on the plan attached hereto) remain undeveloped for a term of at least 99 years; that no structure be erected, constructed, or moved on the subject area; and that the area shall be used for purposes consistent with preservation and conservation purposes.

The Conservation Restriction is beneficial to the community for the following reasons:

First, Goal 2 of the Town of Barnstable 2010 Open Space and Recreation Plan seeks the coordination and execution of open space protection measures that complement community efforts to protect water supply, protect fresh and marine surface waters, preserve historic, scenic and cultural resources, and provide opportunities for farming and agriculture.

Second, Objective 2.3 of the Town of Barnstable 2010 Open Space and Recreation Plan seeks the coordination of open space protection measures with efforts to protect fresh and marine wetlands and surface waters.

Third, the Town of Barnstable 2010 Comprehensive Plan contains a general land use policy against development in areas most vulnerable to flooding.

CONSERVATION RESTRICTION PROCESS: The Conservation Restriction and plan were submitted by the legal department for review by the Land Acquisition and Preservation Committee over the course of three public meetings held on November 7, 2011, December 5, 2011 and January 9, 2012. The proposed Conservation Restriction and plan were approved by the Land Acquisition and Preservation Committee for recommendation to the Town Council by a 4-2 vote of the Committee on January 9, 2012.

The Conservation Commission reviewed the conservation restriction and plan over the course of two public meetings held on November 15, 2011 and December 13, 2011. The proposed Conservation Restriction was approved by the Conservation Commission for recommendation to the Town Council by a unanimous vote on December 13, 2011.

If the Town Council approves the Conservation Restriction and 81X plan, the Conservation Restriction will be executed by the property owners and will be recorded, along with the plan, at the Barnstable Registry of Deeds.

FISCAL IMPACT: Positive

CONSERVATION RESTRICTION

STUBORN LIMITED PARTNERSHIP, a Massachusetts limited partnership, Stuart Bornstein, General Partner, of 297 North Street, Hyannis, MA 02601, its successors and assigns holding any interest in the Premises as hereinafter defined, ("Grantor") for and in consideration of the mutual covenants contained herein and the conditions in a use variance, grants to **THE TOWN OF BARNSTABLE, a Massachusetts municipal corporation with principal offices at 367 Main Street, Hyannis**, Barnstable County, Massachusetts, 02601-3907, its successors and permitted assigns, ("Grantee"), FOR A TERM OF 99 years and exclusively for conservation purposes, the following described CONSERVATION RESTRICTION, comprising approximately 5.05± acres, located at 153 Freezer Road in the Village of Barnstable, Town of Barnstable, County of Barnstable, Commonwealth of Massachusetts, said parcel being shown as "Area A" on a plan of land entitled 81-X Plan of Land 153 Freezer Road In Barnstable, Massachusetts dated October 27, 2011 drawn by BSC Group and recorded in the Barnstable Registry of Deeds in Plan Book _____, Page _____. and hereinafter referred to as the Premises. The Grantor and Grantee, their successors and assigns, are bound by and subject to the terms and conditions of this Conservation Restriction. For Grantor's title, see deed recorded in the Barnstable County Registry of Deeds in Book 12037, Page 257.

Purpose: The purpose of this Conservation Restriction is to retain the Premises substantially in its natural, scenic and open condition; and to prevent any use of the Premises that will significantly impair or interfere with the conservation values thereof. The conservation and protection of the Premises will yield a significant public benefit for the following reasons.

First, Goal 2 of the Town of Barnstable 2010 Open Space and Recreation Plan seeks the coordination and execution of open space protection measures that complement community efforts to protect water supply, protect fresh and marine surface waters, preserve historic, scenic and cultural resources, and provide opportunities for farming and agriculture.

Second, Objective 2.3 of the Town of Barnstable 2010 Open Space and Recreation Plan seeks the coordination of open space protection measures with efforts to protect fresh and marine wetlands and surface waters.

Third, the Town of Barnstable 2010 Comprehensive Plan contains a general land use policy against development in areas most vulnerable to flooding.

Preservation of the Premises satisfies each of these objectives enumerated above because they border on marine surface waters and are vulnerable to flooding.

NOW, THEREFORE, in consideration of the above, and the mutual covenants, terms, conditions and restrictions contained herein, the Grantor and the Grantee voluntarily agree that the CONSERVATION RESTRICTION described herein is an appropriate means to achieve the town's open space goals and objectives which thereby represents a significant public benefit.

The terms of this Conservation Restriction are as follows:

A. Prohibited Uses. Except as to reserved rights set forth in paragraph B. Reserved Rights and Obligations below, neither the Grantor nor its heirs, devisees, successors or assigns will perform or permit others to perform the following acts or uses, which are prohibited, in, on, over or under the Premises:

1. Construction or placing of any temporary or permanent building, structure, facility or improvement on, over or under the Premises, including but not limited to any dwelling unit or habitable living space, landing strip or helipad, mobile home, boats, trailers, swimming pool, tennis court, active recreational facility, dock, bulkhead, jetty, parking area, fence, shed or storage box, utilities, fuel storage tank, wells, asphalt or concrete pavement, antenna, satellite receiving dish, tower, windmill, sewage or septage disposal system, or other temporary or permanent structure or facility, on, under or above the Premises;
2. Construction of any roads, driveways, docks, piers, rafts or floats through or on the Premises;
3. The clearing of vegetation, or the addition, removal or movement of soil for such purpose except in the course of the exercise of the reserved rights set forth in paragraph B and in compliance with all regional and local permits and approvals;
4. Mining, excavating, dredging or removing from the Premises of soil, loam, peat, gravel, sand, rock or other mineral resource or natural deposit, and constructing, bulldozing, excavating or drilling of dikes, ditches, holes, swales or other alterations in the natural topography of the Premises;
5. Placing, filling, storing or dumping on the Premises of soil, refuse, trash, vehicle bodies or parts, rubbish, debris, junk, wood chips, tree cuttings, waste or other substance or material whatsoever;
6. Planting or otherwise introducing or nurturing any non-native tree or woody vegetation on the Premises;
7. Creation of a cultivated lawn or formal or cultivated gardens except in the course of the exercise of the reserved rights set forth in paragraph B and in compliance with all regional and local permits and approvals
8. Any commercial or industrial use; any animal husbandry or horse paddocking or stables, paddocks, grazing areas

or other enclosures and the storage or dumping of manure or other animal wastes; any use or storage of water craft;

9. Cutting, removing or otherwise destroying trees, grasses or other vegetation except in the course of the exercise of the reserved rights set forth in paragraph B and in compliance with all regional and local permits and approvals
10. Activities detrimental to drainage, flood control, water or soil conservation, erosion control or the quality of surface or ground water; any removal of soil off-site;
11. The use, parking or storage of motorized trail bikes, all-terrain vehicles, snowmobiles, or any motorized vehicle except as necessary for emergency police and fire vehicles in pursuit of official duties on the Premises; and as minimally necessary for the rights delineated in Paragraphs B.5, B.6 and B.7 herein;
12. Hunting or camping;
13. Conveyance of a part or portion of the Premises alone, or division or subdivision of the Premises (as compared to conveyance of the Premises in its entirety which shall be permitted); and,
14. Any other use of the Premises or activity thereon which is inconsistent with the purposes of this Conservation Restriction or which would materially impair its conservation interests.

In addition, Grantor, its successors and assigns, agree that all development rights in the Premises are suspended during the term of this Conservation Restriction, and that the Premises may not be used during the term of this Conservation Restriction for the purpose of calculating the amount of Grantor's or any other land available for additional subdivision or calculating the building requirements on this or any other land owned by the Grantor or any other person.

B. Reserved Rights and Obligations. Notwithstanding any of the prohibitions set forth in sections A(1) through (13) inclusive, the Grantor, its heirs, devisees, successors or assigns reserve and retain their residual rights as owners of such land, and are permitted to perform the following uses and activities on the Premises provided such uses and activities do not materially impair the conservation values or purposes of this Conservation Restriction, subject to any limitations noted below:

1. All work, including the installation, maintenance, repair, and replacement of mitigation measures authorized under the Order of Conditions dated April 21, 2010 recorded in Book 24592, Page 167 and any amendments, modifications or future Orders of Conditions subject to and in compliance with any other applicable conditions in such Order, amendments, modifications, future Orders of Conditions, regional or local permits and approvals;
2. Maintenance, repair and replacement of the riprap wall located primarily along the shore of Maraspin Creek at the time of recording of this Conservation Restriction in compliance with all applicable regional or local permits and approvals;
3. The right to install temporary or permanent boundary monuments delineating the Premises;
4. The right to take active measures in order to prevent unauthorized vehicle entry and dumping;
5. The right to take active measures allowed by the Order of Conditions to prevent erosion on the site and to replace mitigation measure plantings allowed by the Order of Conditions which are damaged or killed by natural causes in compliance with all applicable regional or local permits and approvals;
6. The creation, maintenance and use of walking trails and maintenance trails by mowing and power tool trimming in compliance with all applicable regional or local permits and approvals;
7. The erection and maintenance of small signs identifying ownership of the Premises, its boundaries, its status as conservation land, work pursuant to Orders of Conditions, the restrictions on the use of the Premises, the identity or location of natural features or other characteristics of the Premises, or for providing other like information. Signage will be consistent with the purposes of this Conservation Restriction and subject to any applicable regional or local approvals;
8. The right to convey the Premises in its entirety.

Any work undertaken in conjunction with the reserved rights mentioned above in Paragraph B shall seek to minimize disturbance on the Premises. Upon completion of any site work performed in conjunction with Paragraph B, any disturbed areas shall be restored substantially to match the conditions with respect to soil material, grade, and vegetated ground cover that existed prior to said work.

The exercise of any right or obligation reserved by the Grantor under this paragraph B shall be in compliance with all permitting requirements, the then-current Zoning Ordinance of the Town of Barnstable, and all other applicable federal, state and local law. The inclusion of any reserved right in this Paragraph B requiring a permit from a public agency does not imply that the Grantee or the Commonwealth takes any position on whether such permit should be issued, except Grantee will confirm, in writing, to such agency, if requested, the existence of such reserved right under this Conservation Restriction.

C. Notice and Approval. Whenever notice to or approval by the Grantee is required under the provisions herein, excepting any provisions wherein a different time frame specifically is prescribed, the Grantor shall notify the Grantee in writing not less than sixty (60) days prior to the date the Grantor intends to undertake the activity in question. The notice shall describe the nature, scope, design, location, timetable and any other material aspect of the proposed activity in sufficient detail to permit the Grantee to make an informed judgment as to its consistency with the purposes of this Conservation Restriction. Where the Grantee's approval is required, the Grantee shall grant or withhold its approval in writing within sixty days (60) days of receipt of the Grantors' written request therefore.

D. Extinguishment. If circumstances arise in the future such as to render the purpose of this Conservation Restriction impossible to accomplish, this Conservation Restriction can be terminated or extinguished, whether in whole or in part, only by judicial proceedings in a court of competent jurisdiction, and after review and, if required, approval, by the Massachusetts Secretary of Energy and Environmental Affairs. If any change in conditions ever gives rise to extinguishment or other release of the Conservation Restriction under applicable law, then the Grantee, on a subsequent sale, exchange or involuntary conversion of the Premises, shall be entitled to a portion of the proceeds in accordance with Paragraph D(1) below.

D.1 Proceeds. The Grantor and the Grantee agree that grant of this Conservation Restriction gives rise for purposes of this paragraph D to a property right, immediately vested in the Grantee, with a fair market value that is equal to \$100,000.00 . For the purposes of this and the preceding paragraphs, said fair market value shall remain constant.

D.2. Grantor/Grantee Cooperation Regarding Public Action. Whenever all or part of the Premises or any interest therein is taken by public authority under power of eminent domain or other act of public authority, then the Grantor and the Grantee shall cooperate in recovering the full value of all direct and consequential damages resulting from such action. All related expenses incurred by the Grantor and the Grantee under this paragraph shall first be paid out of any recovered proceeds, and the remaining proceeds shall be distributed between the Grantor and the Grantee in shares equal to their then proportionate value, as determined by an appraisal at the time of the taking.

E. Access. The Conservation Restriction hereby conveyed does not grant to the Grantee, to the public generally, or to any other person any right to enter upon the Premises, except as follows:

- (1) to the Grantee and its representatives the right to enter the Premises (a) after reasonable notification, at reasonable times and in a reasonable manner, for the purpose of inspecting the same to determine compliance with the provisions of this Conservation Restriction; and (b) after thirty (30) days prior written notice, to take any and all actions with respect to the Premises at the then fee owner's cost as may be necessary or appropriate, with or without order of court, to remedy, abate or enforce any violation hereof unless the Grantor has prior to the expiration of said thirty (30) days given written notice to the Grantee reasonably addressing all alleged violations and setting forth a reasonable plan to remedy any such alleged violation.

No provision of this Conservation Restriction provides or shall be construed to provide any limitation on the exercise by the public of public trust rights or any public rights arising pursuant to G. L. c. 91.

Neither the Grantor nor the Grantee assumes any obligation to maintain the Premises for public use. Grantor and Grantee claim all the rights and immunities against liability for injury to the public to the fullest extent of the law.

F. Legal Remedies of the Grantee. The rights hereby granted shall include the right to enforce this Conservation Restriction by appropriate legal proceedings and to obtain injunctive and other equitable relief against any violations, including without limitation relief requiring restoration of the Premises to its condition at the time of this grant (it being agreed that the Grantee will have no adequate remedy at law), and shall be in addition to, and not in limitation of, any other rights and remedies available to the Grantee. If Grantee prevails in any action to enforce the terms of this Conservation Restriction, the Grantor, successors and assigns, as the case may be, shall reimburse the Grantee for all reasonable costs and expenses (not including attorney's fees) incurred in enforcing this Conservation Restriction or in taking reasonable measures to remedy or abate any violation thereof. If Grantor prevails in any action brought by Grantee to enforce the terms of this Conservation Restriction, the Grantee, successors and assigns, as the case may be, shall reimburse the Grantor for all reasonable costs and expenses (not including attorney's fees) incurred in defending such action to enforce this Conservation Restriction.

The Grantor, its successors and assigns shall each be liable under this paragraph for only such violations of this Conservation Restriction as may exist during its or their respective periods of ownership of the Premises. By its acceptance, the Grantee does not undertake any liability or obligation relating to the condition of the Premises, including with respect to compliance with hazardous materials or other environmental laws and regulations, or acts not caused by the Grantee or its agents.

In the event of a dispute over the boundaries of the Premises, Grantor shall pay for survey and permanent boundary markers delineating the Premises.

Enforcement of the terms of this Conservation Restriction shall be at the discretion of the Grantee, and any election by the Grantee as to the manner and timing of its right to enforce this Conservation Restriction or otherwise exercise its rights hereunder shall not be deemed or construed to be a waiver.

G. Acts Beyond Grantor's Control. Nothing contained in this Conservation Restriction shall be construed to entitle the Grantee to bring any action against the Grantor, its successors and assigns for any injury to or change in the Premises resulting from causes beyond the Grantor's, its successors' and assigns' control, including, but not limited to, fire, road drainage, flood, storm, natural erosion, and acts caused by trespass on the Premises not contributed to by acts or omissions of the Grantor, its successors and assigns, or from any prudent action taken by the Grantor, its successors and assigns under emergency conditions with the prior written approval of the Grantee to prevent, abate, or mitigate significant injury

to the Premises resulting from such causes. Grantor and Grantee agree that in the event of damage to the Premises from acts beyond Grantor's control, that if Grantor and Grantee mutually agree that it is desirable that the Premises be restored, Grantor and Grantee will cooperate in attempting to restore the Property if feasible.

H. Duration and Assignability. The burdens of this Conservation Restriction shall run with the Premises for a term of ninety-nine (99) years and shall be enforceable against the Grantor, and its successors and assigns holding any interest in the Premises. The Grantee is authorized to record or file any notices or instruments appropriate to assuring the enforceability of this Conservation Restriction; and the Grantor on behalf of its successors and assigns, may appoint the Grantee as their attorney-in-fact to execute, acknowledge and deliver any such instruments on their behalf. Without limiting the foregoing, the Grantor and its successors and assigns agree themselves to execute any such instrument upon request.

The benefits of this Conservation Restriction shall be in gross and shall not be assignable by the Grantee, except in the following instances from time to time:

1. Grantor gives its prior approval to such assignment in writing, which approval shall not be unreasonably withheld;
 2. as a condition of any assignment, the Grantee requires that the purpose of this Conservation Restriction continue to be carried out;
 3. the assignee, at the time of assignment, qualifies under Section 170(h) of the Internal Revenue Code of 1986, as amended, and applicable regulations thereunder, and under Section 32 of Chapter 184 of the General Laws if applicable as a donee eligible to receive this Conservation Restriction directly; and,
 4. the Grantee complies with the provisions required by Article 97 of the amendments to the State Constitution, if applicable.
- I. Subsequent Transfers. The Grantor, its successors and assigns agree to incorporate by reference the terms of this Conservation Restriction in any deed or other recordable legal instrument by which Grantor, its successors and assigns convey any interest in all or a portion of the Premises, including, without limitation, a leasehold interest. Grantor, its successors and assigns, further agree to give written notice to the Grantee of the voluntary transfer of any interest at least thirty (30) days prior to the date of such transfer. Failure of the Grantor, its successors and assigns to do so shall not impair the validity of this Conservation Restriction or limit its enforceability in any way.
- J. Termination of Rights and Obligations. Notwithstanding anything to the contrary contained herein, the rights and obligations under this Conservation Restriction of any party holding an interest in the Premises terminate upon transfer of that party's interest, except that liability for acts or omissions occurring prior to the transfer, and liability for the transfer itself if the transfer is a violation of this Conservation Restriction, shall survive the transfer.
- K. Estoppel Certificates. Upon request by the Grantor, its successors or assigns, the Grantee shall, upon thirty (30) days prior written notice, execute and deliver to the Grantors any document, including an estoppel certificate, if appropriate, which certifies the Grantor's, its successors' and assigns' compliance with any obligation of the Grantor contained in this Conservation Restriction, and which otherwise evidences the status of this Conservation Restriction as may be requested by the Grantor, its successors and assigns.
- L. Amendment. If circumstances arise under which an amendment to or modification of this Conservation Restriction would be appropriate, the Grantor, its successors and assigns and the Grantee may by mutual consent amend in writing any term or provision hereof provided that this Conservation Restriction as thus amended complies with the then-applicable requirements of Article 97 of the Amendments to the Constitution of the Commonwealth of Massachusetts; the then-applicable requirements Massachusetts General Law, Chapter 184, Sections 31-33; Internal Revenue Code of 1986 Section 170(h), as amended; any gifts, grants or funding requirements; and any conservation restriction program of the Town of Barnstable, or any successors thereto, and provided that any such amendment, together with any approvals necessary to its effectiveness, including that of the Massachusetts Secretary of Energy and Environmental Affairs, shall be recorded with the Barnstable County Registry of Deeds. Any amendment shall be consistent with the purposes of this Conservation Restriction, shall not diminish the conservation values of the Premises, and shall not affect its perpetual duration.

In addition, the Grantee is not obligated to consider any amendments to this Conservation Restriction and shall not consider any amendment UNLESS all of the following conditions are met:

1. The minimum amount of amendment, as to terms, land area or structural dimensions, activity, or level of use, is proposed to accommodate the proposal;
2. Whenever possible, mitigation measures of like kind be proposed and the substitution be more advantageous to the cause of conservation;
3. There will be a net gain to conservation values offered through mitigation to the affected parcel or its immediate vicinity; and,
4. Cash values of items or areas proposed for release, amendment or mitigation may be disregarded by Grantee in the equation to determine net gain to conservation values; and,
5. The then-Grantor agrees to pay all costs involved in the amendment process.

M. Non-Merger: The parties intend that the doctrine of merger shall not apply to this conveyance, and that no transfer of Grantor's or Grantee's interest in the Premises and no acquisition of any additional interest in the Premises by Grantor or Grantee shall cause this Conservation Restriction to merge with the fee or have the effect of causing any of the terms hereof to be rendered unenforceable by reason of the so-called doctrine of merger. If it is determined that a transfer or assignment of any interest will result in a merger, no deed shall be effective until this Conservation Restriction has been assigned or other action taken to avoid a merger and preserve the terms and enforceability of this Conservation Restriction. It is the intent of the parties that the Premises will be subject to the terms of this Conservation Restriction for the term set forth in Paragraph H, notwithstanding any merger.

N. Subordination of Mortgage: Grantor shall record at the Barnstable County Registry of Deeds simultaneously with this Conservation Restriction all documents necessary to subordinate any mortgage, promissory note, loan, equity credit line, refinance assignment of mortgage, lease, financing statement or any other agreement which gives rise to a surety interest affecting the Premises.

O. Miscellaneous Provisions.

1. Controlling Law. The interpretation and performance of this Conservation Restriction shall be governed by the laws of the Commonwealth of Massachusetts.
2. Construction. Any general rule of construction to the contrary notwithstanding, this Conservation Restriction shall be liberally construed in favor of the grant to effect the purposes of this Conservation Restriction and the policies and purposes of the Grantee. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the purposes of this Conservation Restriction that would render the provision valid shall be favored over any interpretation that would render it invalid.
3. Severability. If any provision of this Conservation Restriction shall to any extent be held invalid, the remainder shall not be affected.
4. Entire Agreement. This obligation sets forth the entire agreement of the parties with respect to the Conservation Restriction and supersedes all prior discussions, negotiations, understandings, or agreements relating to the Conservation Restriction, all of which are merged herein.
5. Joint Obligation. The obligations imposed by this Conservation Restriction upon the parties that together comprise "Grantor" shall be joint and several.
6. Captions. The captions in this instrument have been inserted solely for convenience of reference and are not a part of this instrument and shall have no effect upon construction or interpretation.

P. Effective Date. This Conservation Restriction shall be timely recorded. Grantor and Grantee intend that the restrictions arising hereunder take effect on the day and year this Conservation Restriction is registered in the official records of the Barnstable County Registry of Deeds.

No Massachusetts deed excise tax stamps are required by Chapter 64D, Section 1, as a municipality is a party to this instrument.

Executed under seal this _____ day of _____, 2011.

Grantor:

Stuborn Limited Partnership

COMMONWEALTH OF MASSACHUSETTS
Notary, etc.

B. NEW BUSINESS (May be acted upon)

BARNSTABLE TOWN COUNCIL

ITEM# 2012-076
INTRO: 03/01/12

2012-076 AUTHORIZING THE TOWN MANAGER TO ACCEPT A DECLARATION OF RESTRICTIVE COVENANT – 153 FREEZER ROAD, BARNSTABLE

RESOLVED: That the Town Manager is hereby authorized to accept on behalf of the Town of Barnstable a Declaration of Restrictive Covenant having a term of ninety-nine (99) years covering the entire property located at 153 Freezer Road, Barnstable, MA and being shown on a plan of land entitled “81-X Plan of Land 153 Freezer Road in Barnstable, Massachusetts dated October 27, 2011 drawn by BSC Group”.

SPONSOR: Councilor John T. Norman

DATE	ACTION TAKEN
_____	_____
_____	_____

- Read Item
- Rationale
- Council Discussion
- Move/Vote

BARNSTABLE TOWN COUNCIL

ITEM# 2012-076
INTRO: 03/01/12

SUMMARY

TO: Town Council
FROM: Councilor John T. Norman
DATE: February 17, 2012
SUBJECT: Declaration of Restrictive Covenant on the entire property located at 153 Freezer Road, Barnstable

RATIONALE: Stuborn Limited Partnership (“Stuborn”) owns the property located at 153 Freezer Road, Barnstable. On October 26, 2011, Stuborn was granted a Variance by the Zoning Board of Appeals to allow for the construction of one single-family house with accessory structures and a private dock on said property. The Variance was recorded in the Barnstable Registry of Deeds on December 5, 2011 in Book 25893, Page 157 (see copy attached). Condition Number 21 of the Variance requires the owner to record Reciprocal Private Covenants (hereinafter “Declaration of Restrictive Covenant” or “Restrictive Covenant”).

The purpose of the Restrictive Covenant is to make certain that the entire property shown on the plan entitled “81-X Plan of Land 153 Freezer Road in Barnstable, Massachusetts dated October 27, 2011 drawn by BSC Group” will remain a single family use for a period of ninety nine (99) years.

The Restrictive Covenant is beneficial to the community for the following reasons:

First, Goal 2 of the Town of Barnstable 2010 Open Space and Recreation Plan seeks the coordination and execution of open space protection measures that complement community efforts to protect water supply, protect fresh and marine surface waters, preserve historic, scenic and cultural resources, and provide opportunities for farming and agriculture.

Second, Objective 2.3 of the Town of Barnstable 2010 Open Space and Recreation Plan seeks the coordination of open space protection measures with efforts to protect fresh and marine wetlands and surface waters.

Third, the Town of Barnstable 2010 Comprehensive Plan contains a general land use policy against development in areas most vulnerable to flooding.

The Restrictive Covenant helps to meet these goals by limiting development of the property to one single-family residence as approved by the Zoning Board of Appeals for a period of ninety nine (99) years.

CONSERVATION RESTRICTION PROCESS:

The Town of Barnstable Legal Department reviewed the proposed Restrictive Covenant and plan.

If the Town Council approves the Restrictive Covenant, the Restrictive Covenant will be executed by the property owners and will be recorded at the Barnstable Registry of Deeds.

FISCAL IMPACT: Positive

STAFF ASSISTANCE: Ruth Weil, Town Attorney
Charles McLaughlin, Assistant Town Attorney

Declaration of Restrictive Covenant

This is a Declaration of Restrictive Covenant by Stuborn Limited Partnership, Stuart Bornstein, General partner, of 297 North Street, Hyannis, MA 02601 (hereinafter, "Grantor"), and

Whereas, the Grantor is the owner of real estate described in a certain deed recorded in the Barnstable County Registry of Deeds in Book 12037, Page 257, and said property is shown on a plan of land entitled "Plan of Land in Barnstable United Cape Cod Cranberry Co.", recorded at said Registry in Plan Book 220, Page 85 and is also shown on a plan entitled "81-X Plan of Land 153 Freezer Road in Barnstable, Massachusetts dated October 27, 2011 drawn by BSC Group" recorded in Plan Book _____, Page _____ (hereinafter, the "Property"), and

Whereas, the Grantor petitioned the Town of Barnstable Zoning Board of Appeals ("ZBA") for certain zoning relief related to the Property in case no. 2011-008, the requested relief was approved by the ZBA on October 26, 2011, and the decision has become final and is now recorded at said Registry in Book 25893, Page 157, and

Whereas, the Grantor intends to utilize the property as a single-family home and to develop a private dock with floats, and related supporting equipment and infrastructure as part of the conceptual development plan for the property, and

Whereas, the Town seeks assurance that the property will remain in single family use for a period of at least 99 years, and

Whereas, after consultation with his Counsel, the Grantor has volunteered to offer this Restrictive Covenant as an inducement to grant the zoning relief requested and as an assurance to the Town that the property will be used in accordance with the decisions of both the ZBA and the Order of Conditions solely for personal use, and not commercial use.

Now, therefore, the Grantor does hereby make and declare the Property subject to the following restrictive covenant and provisions:

1. RESTRICTION.

The Grantor may only construct one single-family home with the delineated accessory structures and a private dock development that are in all respects in substantial, material conformity with the final plans submitted to and approved by the ZBA and which are incorporated by reference in the decision referenced above. Further, the property shall not be divided, or sub-divided, or otherwise converted into a condominium form of ownership or used for other than one single-family residence.

Notwithstanding any subsequent decision of any local, state or federal board or agency having jurisdiction over any structures, uses, or activities on the property, including, without limitation, the ZBA and the Conservation Commission, the single-family home and private dock development shall be used solely for personal, non-commercial use to accommodate the personal needs of and equipment owned by the Grantor. Neither shall be materially changed in any respect and the footprint to be occupied by the home and structures shall be confined at all times to the footprints set forth in the plans accompanying the decision of the ZBA referenced above. In addition to commonly understood construction and meaning of such words, "Non-commercial use" shall mean the express prohibition at any and all times of renting or use of such facilities in exchange for any monies or other consideration, except that the entire property may be rented for use as a single-family residence in accordance with any Rental Ordinance of the Town of Barnstable as may be in effect from time to time.

Declaration of Restrictive Covenant (Continued)

2. Benefit.

The provisions contained herein shall run with the land and shall bind the Grantor and the Grantor's heirs, devisees, legal representatives, successors, and assigns.

These provisions contained herein are intended to benefit the Town's abutting land, adjacent waters, and all Town land now or hereafter fronting on Barnstable Harbor, including that area known as Sandy Neck.

3. Duration.

This restrictive covenant shall expire ninety-nine (99) years from the date of execution of this covenant, and shall have legal significance pursuant to, be governed by and interpreted under the provisions of Massachusetts General Laws, Chapter 184, § 26.

4. Extension, Amendment, or Termination.

This restriction shall be held by the inhabitants of the Town of Barnstable, acting by and through its chief executive officer. It may only be extended, amended, or terminated with the express approval of the Barnstable Town Council or its successor.

5. Enforcement.

The Town shall have the option of seeking enforcement of these restrictive covenants via all remedies available to it in law and in equity in any forum of competent jurisdiction. In the event that the Town is successful in prosecuting or defending any actions relating to this covenant, the Town shall be entitled to recover all attorney's fees and costs associated with the prosecution or defense of such actions.

6. No Waiver.

In the event that the Town shall fail to enforce any provision hereof on any one or more occasions either intentionally or through oversight, or elects to waive enforcement thereof in any one or more instances, such action or failure to act shall not invalidate nor prejudice the Town's right to do so in the future with respect to the same or different rights created by these covenants and such failure or waiver shall not invalidate any other provision hereof which shall remain in full force and effect.

7. Severability.

In the event that any provision of this restrictive covenant shall be deemed void and/or unenforceable for any reason by a forum of competent jurisdiction, all other provisions hereof shall remain in full force and effect.

Witness my hand and seal this ____ day of _____ 2012.

, Grantor

COMMONWEALTH OF MASSACHUSETTS

Notary, etc.