

From: Gregg J. Corbo [<mailto:GCorbo@k-plaw.com>]
To: harry.terkanian@wellfleet-ma.gov [<mailto:harry.terkanian@wellfleet-ma.gov>]
Cc: Elizabeth Lane [<mailto:ELane@k-plaw.com>]
Sent: Thu, 01 Aug 2013 08:40:47 -0500
Subject: FW: Herring River Restoration

Hi Harry. It was a pleasure speaking with you yesterday. To confirm our telephone conversation, at this point I have only conducted a cursory review of the proposed Memorandum of Understanding between the Town, Truro and the CCNS. Based on that cursory review, I have identified the following issues that, in my opinion, should be followed up on before the Town goes further:

1. The proposed MOU contemplates the creation of a private non-profit corporation to manage the construction and initial operations of the project. In my opinion, to ensure that it can accomplish the parties' objectives, such an entity would have to have the ability to raise and expend funds, acquire property interests, enter into contracts and sue and be sued in its own name. Although I have not researched this issue, I am concerned that the parties lack the legal authority to create such an entity in the absence of special legislation. I am also concerned that the use of a private corporation for this purpose will raise issues under the Conflict of Interest and Procurement laws. Therefore, before expending Town resources on this issue, I recommend that you follow-up with representatives of the CCNS to see if its legal counsel has provided an opinion on these issues.
2. In 2012 I attended several meetings of the various stake holders to examine the potential liabilities associated with the project, with particular emphasis on potential liability as a result of flooding low lying private properties. As a result of those meetings, as well as my own independent research, I am unaware of any clearly established immunity that would shield the Town from such claims. In my opinion, the proposed MOU does not adequately address the issue of which party or entity is going to be responsible for funding the defense of any such claims and any judgments resulting therefrom. Therefore, I recommend that you discuss this with the other parties to ensure that the Town will be sufficiently indemnified.
3. In my opinion, the proposed MOU does not adequately define the financial responsibilities of the parties. Section 8 of the MOU states that it "shall not be construed as binding the Towns to commit their resources beyond what is financially and managerially possible within the limits of their municipal budgets." In my opinion, this language is too vague to protect the interests of the Town. Rather, it is my opinion that, at this stage, the Town requires an agreement that clearly spells out its financial responsibilities with respect to permitting and construction of the project and operations upon completion.

Please do not hesitate to contact me if you would like me to follow-up on any of these issues or any other issues arising from this project.

-Gregg

Gregg J. Corbo, Esq.

Kopelman and Paige, P.C.
101 Arch Street
12th Floor
Boston, MA 02110
(617) 556-0007
(617) 654-1735 (fax)
gcorbo@k-plaw.com

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From: Elizabeth Lane
Sent: Monday, July 29, 2013 3:07 PM
To: Gregg J. Corbo
Subject: Fw: Herring River Restoration

Gregg, can you take a look at this and let me know what issues you see there? Thank you.

Connected by DROID on Verizon Wireless

-----Original message-----

From: Harry Terkanian <harry.terkanian@wellfleet-ma.gov>
To: Elizabeth Lane <ELane@k-plaw.com>
Cc: Dennis Murphy <capeliz10@hotmail.com>
Sent: Mon, Jul 29, 2013 18:47:16 GMT+00:00
Subject: Herring River Restoration

Betsy:

I don't know how involved you have been in this project in the past, so excuse me if this lengthy email covers familiar ground.

The planning for the restoration of the Herring River estuary has been in process since about 2007. Essentially, the project proposes reconstructing the Herring River dike to allow significantly greater tidal flow than at present as well as some improvements to additional structures. Prior to the construction of the dike in 1909 the Herring River estuary consisted of about one thousand acres of salt marsh. Currently, the existing tide gates restrict the tidal action so that the existing salt marsh encompasses about 85 acres. The project goal is to restore the salt marsh to about 875 acres. A draft EIR has been prepared and a final EIR is due this fall. There have been two previous MOU's between the Town, Truro and the Seashore which culminated in the draft EIR. A third MOU (MOU III) is in progress and needs to accompany the final EIR this fall. It will identify the preferred alternative (alternative D which is the most extensive restoration) and will define the structure of the entity to be created to

manage the design, permitting, construction and initial operation of the flood control structures. (The expectation is that once the system reaches a steady state this entity may dissolve and the infrastructure will then to be maintained and managed by the owners of the assets.)

This may be the largest salt marsh restoration project in New England.

The Town's concerns include possible liability associated with flooding or damage to low lying properties and the (possibly mutually exclusive) concern of insuring that the principal stakeholders (Wellfleet, Truro, CCNS and possibly the Commonwealth) retain control of the project.

Attached is the most recent draft of MOU III and the meeting notes from the last meeting. Let me know if you need more documents or information. (The draft EIR itself is massive). I'd like your comments and recommendations in time to include them in a review of this draft and any related issues with the Selectmen at their August 13th meeting (the working group will be meeting again the following week.)

Harry

Harry Sarkis Terkanian, Town Administrator
Town of Wellfleet
300 Main Street
Wellfleet, MA 02667
(508) 349-0300

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