

Board of Selectmen

Charles R. Cunningham - Chairman
Steven Lewis – Vice Chairman
Dale Harmon
Kristina Ford
Michael Tomacelli

Town Manager

Daniel Bryer Jr.



**Town of Boothbay
Board of Selectmen Meeting
Wednesday, March 28, 2018
7:00 PM
M I N U T E S**

Present: Steven Lewis, Dale Harmon, Michael Tomacelli, Chuck Cunningham, Kristina Ford, Town Attorney Sally Daggett, Town Manager Dan Bryer

Pledge of Allegiance:

Public Hearing: Dan Bryer presented the Selectmen with a list of Republican and Democratic volunteers to work during the upcoming election. Steve Lewis made a motion to approve the list of volunteers as presented and Mike Tomacelli seconded the motion. Vote: 5-0 in favor.

Decks LLC dba Lobsterman's Wharf, Map U16-001, located at 224 Ocean Point Road, Boothbay, ME for renewal of a Restaurant/Lounge Liquor (class I, II, III, IV) license, and for a Special Amusement Permit. Dan Bryer said this is a renewal with no problems and everything is in order. Dale Harmon made a motion to approve this application as presented and Kristina Ford seconded the motion. Vote: 5-0 in favor.

Public Comment: Bill Pearson asked who is Decks LLC and was told this was Ocean Point Marina, owned by Mr. & Mrs. Miller.

Approve Minutes: Mike Tomacelli made a motion to approve the minutes of 02/28/2018 and 3/14/2018 as presented and Dale Harmon seconded the motion. Vote: 5-0 in favor.

Reports: Dan Bryer reported that the Landscape Committee has held two meetings, there were only five people in attendance but they were good meetings with a lot of good conversation.

The Business Office is busy putting together the Town Report Andy and Lynn are taking the lead on this project.

The Code Enforcement Office is busy with a number of various permits.

The Public Works is working on float repair and would like to start pulling and repairing some of the plow equipment.

Old Business: None scheduled.

New Business:

A proposed resolution to three court cases brought against the Town of Boothbay

**Coastal Maine Botanical Gardens (CMBG) vs. Town of Boothbay in US District Court,
Docket # 211-CV-493**

**Coastal Maine Botanical Gardens vs. Town of Boothbay in Lincoln County Superior Court,
Docket # WISSC-AP-2018=1**

**Vaughn Anthony, et al's. Vs. The Town of Boothbay in Lincoln County Superior Court,
Docket # WISSC-AP-2048=2**

Steve Lewis started by saying that he wanted it on the record that his wife works at CMBG but he does not feel it is a conflict.

Sally Daggett asked Mr. Lewis if he felt he could be fair. Mr. Lewis said he felt he could make a fair and unbiased decision if allowed to participate in this decision. Dale Harmon said he believes Steve Lewis can be impartial and he has no concerns. Kristina Ford said she did not see a problem, Mike Tomacelli and Chuck Cunningham agreed with Kristina Ford and Dale Harmon's statements. Kristina Ford made a motion that there was no conflict and that Steve Lewis should be allowed to participate in this decision and Dale Harmon seconded the motion. Vote: 4-0 in favor. Steve Lewis abstained from the vote.

Sally Daggett said she would give an overview of what has happened so far to get to this point, an overview of the proposed Consent Decree. Ms. Daggett said that next a consultant, Ken Wood would talk about the project, specifically the Storm Water Management Plan, then there would be time for public comments and input after which the Board would deliberate and vote on whether or not to accept the Consent Decree.

What has happened so far - CMBG filled a development application in 2016, which the Planning Board approved in December 2016

An appeal was filed and CMBG submitted a new plan which relocated the septic system outside of the Watershed Overlay Zone.

The Planning Board approved the amended application in April 2017 with a long list of conditions imposed.

The Anthony Family filled an Administrative appeal with the Board of Appeals.

The Board of Appeals reviewed the Planning Board approval De Novo in November 2017 and overturned the Planning Board's decision and granted the Anthony's appeal.

Three different lawsuits were filed against the Town of Boothbay in December 2017

**Coastal Maine Botanical Gardens (CMBG) vs. Town of Boothbay in US District Court,
Docket # 211-CV-493** this case stated due process violations and challenged the Board of Appeals decision and asked for Attorney fees.

**Coastal Maine Botanical Gardens vs. Town of Boothbay in Lincoln County Superior Court,
Docket # WISSC-AP-2018=1** this case also stated due process violations and challenged the Board of Appeals decision and asked for Attorney fees.

**Vaughn Anthony, et al's. Vs. The Town of Boothbay in Lincoln County Superior Court,
Docket # WISSC-AP-2048=2** this case also challenged the Board of Appeals decision but for different reasons.

There was a meeting on how to handle the cases and it was suggested that all parties go to mediation to look and see if there was a way to resolve the issues.

At the end of February 2018 the involved parties went to a meeting with Jerry Crowder at a Law Firm in Portland to work on a way to resolve the issues. The Town of Boothbay was interested in talking with CMBG on how to resolve the issues but the Anthony's did not agree with the Town.

A tentative agreement was worked out between the Town of Boothbay and CMBG on how to resolve this issue.

The Town of Boothbay Administrative Code allows for the Board of Selectmen to settle matters such as this, on behalf of the Town, but they have to settle it and vote in a Public Meeting. The Board of

Selectmen can meet in a private Executive Session with their attorney to discuss the issue but the vote must take place in Public.

A proposed Consent Decree was agreed upon that the Selectmen need to vote on. A Consent Decree is a fancy term for a settlement agreement that gets approved by the Court. (The terms of this proposed decree are available as handouts and have been made public).

If the Selectmen agree with the proposed Consent Decree then the next step would be for the Town of Boothbay and CMBG to file a motion in court, a motion for a Consent Decree hearing.

The court will want to hear from CMBG, The Town of Boothbay and the Anthony's. The Court will hear any objections and review the Decree. The Court does its own review to make sure it is appropriate and that it doesn't violate any State or Federal law.

Sally Dagget next reviewed the proposed Consent Decree paragraph by paragraph and explained some of the details.

Current construction would be allowed to proceed under the terms of the plan approved by the Planning Board in April 2016 vacating the Board of Appeals decision.

Any further development beyond what was approved by the Planning Board on Dec. 15, 2016 will need to comply with the existing law. This means that if Boothbay Zoning ordinances change in the future then CMBG will need to comply with what the law is when they come back for anything that has not already been approved.

Parking lots located in the Watershed Overlay will be monitored pursuant to the stormwater monitoring plan. These parking lots will be allowed to remain but will be under a more rigorous monitoring plan

The Board of Appeals use designation will be undone. The Town of Boothbay agrees that CMBG is going to be treated as an Educational Facility going forward which is allowed with Planning Board approval.

CMBG agrees to limit what they do in the future. CMBG agrees that no additional construction will happen east of the 2016 Watershed line except as shown on exhibit A. This allows CMBG to construct pedestrian trails or walkways east of the Watershed line subject to any limitations imposed by a Conservation Easement.

All parties agree that all structures depicted on exhibit A and east of the 2016 Watershed line have been approved by DEP permits, which takes in all phosphorus calculations and additional structures even those not yet approve by the Planning Board.

CMBG has agreed to place about 75 acres located in the Watershed Overlay Zone (exhibit B) in a Conservation Easement to permanently preserve them from development. CMBG plans to ask the Boothbay Region Land Trust to hold the easement. The Selectmen have tentatively negotiated third party enforcement rights for this Conservation Easement. This would mean that if the Land Trust (or whoever holds the easement) doesn't follow through with the terms then the Town of Boothbay would be able to step into their shoes and make sure the terms are enforced. This agreement would need to be approved at Town meeting.

CMBG will implement and comply with a Storm Water Monitoring program (exhibit C). This Storm Water Monitoring Plan will become part of the Court Order and CMBG will have to comply with it or risk being taken to court by the Town for contempt of court.

The Code Enforcement Office will rescind the Stop Work Order that was issued in November 2017 and amended in December 2017. CMBG will be allowed to proceed according to the Planning Board approved plan issued in April 2017.

All claims against the Town of Boothbay, including attorney fees will be dismissed with prejudice, which means they cannot be brought again. The Town of Boothbay will not be paying anyone including attorney fees. CMBG will drop all lawsuits.

The Anthony family still has a lawsuit out there and may want to pursue it. The Anthony family did not participate in the proposed Consent Decree. The Town of Boothbay is going to allow CMBG to defend and indemnify all claims. The Town of Boothbay is done with litigating matters and CMG will have to step into the Town's shoes to resolve and pay for matters not resolved. CMBG cannot agree to anything that would require the Town of Boothbay to do anything further or to pay for anything further.

If either party, The Town of Boothbay or CMBG breaks the terms of this Consent Decree the other party can seek attorney fees.

The Town of Boothbay and CMBG have both read this entire agreement and agree to its terms although it still needs to be voted on by the Selectmen.

Sally Daggett next gave an overview of why the Town of Boothbay should sign this Consent Decree.

Ms. Daggett said that no one at the front table, the Board of Selectmen, Town Manager nor herself would be able to answer specific questions or give specific reasons as anything they say could be used in court if this matter does not get settled.

Ms. Daggett said that court outcomes are inherently uncertain and this settlement provides certainty of the results.

With this agreement Boothbay knows what will happen and they will not be subject to three more years of litigation. Court outcomes can add wrinkles, they can be expensive and time consuming.

The parties involved have a better sense of how to resolve the issues, the court cannot stand in the shoes of either party.

If the Town lost the lawsuits then they could have to pay for CMBG's attorney fees.

This consent places additional restrictions on top of the ones already imposed by the Planning Board.

Dan Bryer wanted on the record correspondence he recently received and shared with the board:

Letter from Paula Arsenault 3/27/2018

Email from Dan and Margaret Skles 03/27/2018

Email from Sue Mellow 03/27/2018

Email from Nancy Lindbergh 03/27/2018

Letter from Paula Arsenault 3/28/2018

Email from Jason Anthony 3/28/2018

Letter from Bruce Bowler 03/28/2018

Email from Bruce Bowler 03/28/2018

Ken Wood, consultant from Penwood Company next spoke about the Storm Water Monitoring Plan.

Mr. Wood said CMBG has a permit from DEP for this project, they have met the standards, specifically the phosphorus standard. He talked about how the calculations are done from the Maine Storm Water design manual. Mr. Wood said he drafted the first Storm water manual in 1992 and he has worked in this field for 30 years. Mr. Wood said it is important to protect the water and that it is best to be proactive.

Mr. Wood talked about chapter 500 from the State's manual and how the lakes are at risk. He talked about keeping nutrients including phosphorus out of the water as too much increases the algae growth and this is not good for the water.

Mr. Wood reviewed the Storm water monitoring plan done by Wright Pierce and said it was a very good plan.

Mr. Wood went into details about how the state values are calculated and what the acceptable values are and what based on those calculations CMBG can export per year to Knickerbocker Lake.

Mr. Wood talked about best management practices and how to remove phosphorus and sediment particles that transport the phosphorus to the lake. Mr. Wood talked about the several treatments that will be in place. It is required to treat 95% of impervious surfaces and 80% of developed are by known approved practices before it is discharged to the lake. There will be a third party inspector/engineer on site to monitor this.

The storm water monitoring plan developed by CMBG goes over and above the usual process for such plans, they have a plan, a permit, a third party inspector and are subject to a five year review.

CMBG has a plan that ensures the system as designed is doing what it is supposed to do and protecting the lake. If at any time the quality is not up to standard then CMBG has to figure out how to fix it and fix it.

Mr. Wood said he has visited the site as well as reviewed the plan. Mr. Wood feels the Storm water management plan is a good plan and will ensure water quality of the lake will not be impaired by phosphorus and that if an issue arises CMBG will alert the Town of Boothbay and the DEP and they will both do a review.

Public Comments:

Jason Anthony, a resident of Bristol but part of the Anthony family said his parents have been taxpayers in Boothbay for fifty years and they are now being driven off their property by a company who does not pay any taxes. Mr. Anthony said this all could have been prevented if CMBG had just removed four parking lots. Mr. Anthony said he has watched CMBG push the town, the Planning Board, the Board of Appeals around and now it is clear that the Selectmen will be the next victims of CMBG and their attorney's bullying tactics. It is obvious the Town is willing to settle because it is being bullied. CMBG is winning because of money. In Mr. Anthony's opinion CMBG is being awarded the right to contaminate the drinking water. Mr. Anthony feels time is required to study this decree and urged that a vote be delayed, he feels agreeing with the consent means that you do not care about the process and the time that board members have put in on this do not matter. Mr. Anthony said agreeing that CMBG is not a Museum is not legal and referenced several sources defining Botanical Gardens as museums. Mr. Anthony said CMBG never referred to itself as an educational facility until it had to for this purpose. Mr. Anthony said the DEP permit is not finalized yet and he does not agree with updating to the 2016 Watershed line. Mr. Anthony feels the Conservation Easement is not a concession, the land could not be developed anyway as it is in the Watershed zone and pedestrian paths should be allowed in certain areas. Mr. Anthony said he still has concerns with the Storm Water monitoring plan. He feels that testing must be consistent and long term, what happens if it fails needs to be looked into. Mr. Anthony said this Decree does not take into account the health of his parents or their well and there is not a plan of action for once the well is ruined. Mr. Anthony also said this plan does not protect Knickerbocker Lake.

Ken Wood responded to Jason Anthony's questions about the Storm water monitoring plan. Mr. Wood said it is a 15 year plan and he felt a plan for 15 years was acceptable. Mr. Wood said the plan has checks and balances and has to be recertified every 5 years according to the chapter 500 Storm Water Management Plan. Mr. Wood said there is also an inspection and maintenance plan.

Vaughn Anthony said he has lived on Gaecklein Road for 50 years and his well is close to the aquifer. Mr. Vaughn Anthony had questions for Mr. Wood to clarify concerning the calculations and how they are done. Mr. Anthony also had questions for Mr. Wood on phosphorus and the amount allowed.

Kevin Anthony a resident of Boothbay said the Anthony family was not at the meetings on the Consent Decree because they were not told about it. Mr. Anthony talked about the Septic System and an alternate

site. Mr. Anthony said the storm water monitoring system will need more monitoring in the future not less, the problem will get worse over time and annually is not enough monitoring. Mr. Anthony asked if the Consent Decree approves what is drawn on the plans, the structures that have not yet been built and if so why the Town is entering into an agreement that breaks their own ordinances. Mr. Anthony said CMBG is clearly a museum and entering it not being so in this agreement declares something that is not true. Mr. Anthony said this decree does not protect Knickerbocker Lake, he talked about the phosphorus and the problems he saw with the calculations. Mr. Anthony referred to CMBG as a bully and said they could be beat in court. Mr. Anthony feels it would cost less to fight this in court than it will to fix the water supply after the fact. He feels this agreement allows multiple zoning ordinances to be broken. Mr. Anthony urged the Board of Selectmen to spend more time researching before making and decision. He said signing this Consent Decree would be an unwise act.

Jean Reese Gibson, a resident of East Boothbay said there are vague references in the document that need to be fixed. Ms. Gibson said there is no way to monitor and comply with the agreement, there are areas that need to be more specific. Ms. Gibson talked about the toxic elements from cars in the parking lots and said this has not been specifically addressed. She feels there needs to be a time frame from start of project to finish. She feels the data collection needs to be more specific, the time of year could be significant. Ms. Gibson said the document has too many vague terms and it needs more details. If something is not in the document then it doesn't exist and the document has to be self-explanatory and she feels this document has serious issues.

Paula Arsenault a Boothbay resident said she has been attending these meeting for the past two years and she wanted to thank the board members for all of the work they have put in on this. Speaking for the Knickerbocker Lake Association she asks that the board reject this decree. She feels this gives special privileges to the few with financial means. Ms. Arsenault said approving this decree sets a negative precedent by vacating the Board of Appeals decision. She feels the Board of Appeals made the right decision and believes this plan threatens the quality of the public water. According to Ms. Arsenault signing this agreement will put the priority of financial gain over the safety of the people.

Mary Ann, a resident of Barters Island said the Planning Board approved the application because it had met all the conditions and the Board of Appeals felt it met all the conditions except for the Museum designation.

Tom Tiller of West Boothbay Harbor talked about all the people that CMBG brings to this area especially in the off season. Mr. Tiller acknowledges the Anthony's are unhappy but feels this is really a case of "not in my back yard".

Claire Hunt a resident of Boothbay and one of the founders of CMBG said she could not speak for all the founders, but only for herself. Over the past 25 years she has worked with people who have donated their time, efforts and financial support to CMBG. Not all of the people were wealthy and it has not been an easy ride, many of them have worked real hard. Ms. Hunt said it is past time for the Town of Boothbay to support the gardens.

Mary Neal a resident of West Boothbay Harbor said she drinks the Town Water and has worked for CMBG. She feels the plans have been scrutinized by the Planning Board, the Board of Appeals, the Selectmen, various engineers etc. and this plan could be a model to use for other plans. CMBG is all about conservation and quality water is important. She suggested looking at other small non-compliant properties around the lake as well. She believes that CMBG is a Stewart of water quality and conservation and encouraged the board to vote for this decree.

Rhoda Weyr a resident of Boothbay said she was stunned at the last few talks in support of this decree. Ms. Weyr said the gardens were founded by people who risked their own homes to make them possible and that this past year she heard someone say how beautiful the gardens aglow was and that this was an incredible miracle for the area but she feels that it is ruining itself and the town.

Joyce Sirois, a resident of Back River said she was involved in Knickerbocker Lake Association when it was first founded to protect the essential water supply for the whole area. She said the water needs to be carefully monitored and she is worried about what is happening with CMBG. Ms. Sirois feels the gardens are getting more dangerous to resources as they grow.

Joe, a resident of East Boothbay said he has lived in East Boothbay for 30 years. He said the Planning Board approved this plan as it met the conditions and the Board of Appeals said it met most of the conditions. It is never easy to make these types of decisions, you have to look at the facts, what CMBG has tried to do to resolve the issues. Have the standards been met? What has CMBG done to be good neighbors? It is time to move on, the Town does want to go to court. It is time to look at facts and not emotions and move on.

Leigh Sherrill a resident of Southport said she volunteers at CMBG in the children's garden and the children just love it. She said it is wonderful to see the smiles and delights, it is a wonderful thing her and let's keep it going.

Julie Roberts lives in East Boothbay and owns a business in Boothbay Harbor and said she is a supporter of CMBG. She said her child loves it and it has done a lot for the town. It has helped to spread out the seasons which means a lot to businesses in the area. She said she cannot stand the negativity and the personal assaults that are happening.

Gary Arnold who lives at West Harbor Pond said he stood here two years ago with the Planning Board and talked about water problems and problems with West Harbor Pond and the water quality. He said he agrees with people on both sides. He agreed the original founders of CMBG would not do this to the Anthony's. Mr. Arnold talked about the 4 parking lots, he said if the gardens had stopped and not put in those parking lots then we would not be here. He said you cannot compare the gardens to other owners around Knickerbocker Lake. Mr. Arnold talked about the fluids and chemicals that would result from so many cars in the parking lots. Mr. Arnold thinks the calculations are not correct and there will be problems with the impervious surfaces, the parking lots need to be gotten rid of. Mr. Arnold feels the Anthony's well is toast and he feels the Town should be responsible for the well if they go ahead with this agreement. He talked about there not being enough water since CMBG did not tie into the town water system and what will happen when there is a fire and how this will make the phosphorus worse. He feels CMBG is good at gardening but not at handling sewer plans.

Kim Horstman said she is a Boothbay Tax payer and grew up in this area. She loves the gardens but feels they are very different than when they started. She feels there is enough to still be discussed that maybe there should be more public meetings before any decisions are made. She said we are talking about the water quality for future generations.

BREAK – a five minute break was taken

Sally Daggett answered a question that had been asked earlier about structures east of the 2016 Watershed line. Ms. Daggett said no structures have been approved by the Planning Board east of the 2016 Watershed line and this decree was not permitting them, only allowing CMBG at a future date to bring an application before the Planning Board.

Public Hearing closed.

Board Deliberations:

Kristina Ford said this was almost like talking about two different project, one in and one out of the Watershed. Ms. Ford talked about the conservation easement and if the Water System would be interested in holding the easement if the Land Trust did not want to. Ms. Ford also had questions on the monitoring program and asked if the language can be changed so it doesn't sound like the gardens are doing their own monitoring.

Sally Daggett said this is decree is the one CMBG has agreed to and if the language was changed CMBG would have to agree to that changed decree. Ms. Daggett said the holder of the Easement has to be a qualified person on entity and she does not know if the Water System is qualified to do so but that according to the decree CMBG would have to have a qualified holder and the Town would still have the third party rights. Ms. Dagget said per the consent decree CMBG would have to notify the town before sampling, at least four hours in advance and when possible twenty-four hours, allowing the town the opportunity to observe the sampling.

Dale Harmon said he did not want to prolong things but did all the questions get answered as promised.

Sally Daggett said she thought they had answered all questions.

Dale Harmon said this was not an easy decision. He has heard a lot of information, a lot of emotions and is not sure the correct thing to do. No matter how the board votes, it is not an easy decision.

Kristina Ford said she understood the reasons of why to settle but because of the questions brought up tonight is there a way to keep abreast of things troubling to people.

Steve Lewis said he doesn't think the board should have been involved with what the Planning Board or the Board of Appeals decided, it might have just clouded his judgement. Mr. Lewis said no matter what this is not an easy decision but the board has to make the decision they think is best for the residents of the Town of Boothbay.

Steve Lewis made a motion to approve the proposed Consent Decree that will authorize the resolution of the pending litigation and to authorize the Town's attorney to take the necessary action to make this happen. Mike Tomacelli seconded the motion. Vote: 4-1 in favor. Kristina Ford cast the one negative vote.

Public Comment: Bill Pearson said if the Anthony's bought their house in 1966 and then had a tourist attraction move in next door, how does this decree protect their rights as property owners? The board said they were unsure how to answer this question.

Bill Pearson next asked if the Anthony's well is destroyed, who is responsible and Sally Daggett said no one was going to answer that question and suggested an end to this line of questions.

Dale Harmon said this was the toughest decision he has had to make sitting as a Selectmen and it was not an easy decision but he felt it was the right thing for Boothbay.

Review Warrants and sign: Dale Harmon made a motion to review the warrants and sign them and Kristina Ford seconded the motion. Vote: 5-0 in favor.

Adjourn meeting: Kristina Ford made a motion to adjourn the meeting and Dale Harmon seconded the motion. Vote: 5-0 in favor.