

BARNSTABLE COUNTY

In the Year Two Thousand and Eight

Ordinance 08-02

Adjudicatory Hearings Ordinance

Purpose: To amend Barnstable County Ordinance 90-12, as amended through Barnstable County Ordinance 05-02, the Cape Cod Commission Enabling Regulations Governing Review of Developments of Regional Impact, to establish an Adjudicatory Hearings Procedure pursuant to Sections 6 and 7 of the Cape Cod Commission Act, Chapter 716 of the Acts of 1989 as amended.

Section 1. General Purpose

- (a) Source of Authority – This ordinance concerning establishment of an Adjudicatory Hearings procedure is adopted pursuant to Sections 6 and 7 of the Cape Cod Commission Act, Chapter 716 of the Acts of 1989 as amended through amendment of the Cape Cod Commission Enabling Regulations Governing Review of Developments of Regional Impact, Barnstable County Ordinance 90-12, as amended through Barnstable County Ordinance 05-02
- (b) Effective Date – This ordinance shall become effective immediately upon approval, pursuant to Section 2(w) of the Act.
- (c) Definitions –
- a. The definitions contained within section 2 of the Act shall apply to this ordinance.
 - b. As used within this ordinance, the following terms shall have the following meanings:

Act – Cape Cod Commission Act, Chapter 716 of the Acts of 1989, as amended.

Assembly of Delegates – Barnstable County Assembly of Delegates, created by Chapter 163 of the Acts of 1988.

Commission – Cape Cod Commission, created by Chapter 716 of the Acts of 1989, as amended.

DRI – Development of Regional Impact

Subcommittee – Subcommittee of the Cape Cod Commission

Section 2: Amendment of Barnstable County Ordinance 90-12

Barnstable County Ordinance 90-12, as amended through Barnstable County Ordinance 05-02, the Cape Cod Commission Enabling Regulations Governing Review of Developments of Regional Impact, is amended as follows:

Insert paragraph (d) after paragraph (c) in Section 6: DEVELOPMENTS OF REGIONAL IMPACT (DRI)/DISCRETIONARY REFERRALS:

(d) Adjudicatory Hearing Procedure for Energy Related DRIs

(i) Application These procedures shall apply to all DRI applications which concern proposed energy related facilities over which the Energy Facilities Siting Board (“EFSB”) asserts jurisdiction. Because the EFSB’s regulations at 980 CMR 6.03(1) provide that the Commission’s adjudicatory findings of fact, on appeal, will be reviewed on the basis of the record before the Commission, the Commission deems it appropriate to prepare an expansive record for such DRIs. (By contrast, other DRI decisions are reviewed *de novo* when appealed to the Land Court or the Superior Court).

(ii) Scope and Application

All DRI applications pending on the date of this ordinance which propose to construct, install, operate, alter or convert an energy related facility which is subject to review by the EFSB, and all DRI applications filed hereafter for such facilities shall be subject to the expanded hearing procedure defined herein. This expanded procedure shall be administered by the DRI Subcommittee or its duly appointed hearing officer as provided in section (iv)(d) of these procedures.

(iii) Intervention and Parties.

(a) The applicant shall be deemed a party as a matter of course, as also shall the town or towns in which a DRI is proposed. The applicant and the towns shall promptly file an appearance with the Subcommittee identifying one representative upon whom service may be made and stating the e-mail and mailing addresses of that person.

(b) Any other person who will be specifically and directly affected by the proposed DRI may file a written motion seeking to intervene as a party. Such motion shall describe the manner in which the movant anticipates the proposed DRI will specifically and directly affect the movant and/or the movant's property and the detailed factual grounds supporting that motion. Such motion shall also state (i) the nature and substance of the evidence the movant will offer and (ii) the identity and qualifications of the witnesses whose testimony the movant will proffer. For purposes of intervention, the term "person" shall be broadly construed in accordance with G.L. c. 214, § 7A, and may include a group of ten or more persons domiciled in the Commonwealth who seek to prevent "damage to the environment" as defined in c. 214, § 7A. Every motion to intervene shall state the name and address of the movant(s) and shall be signed by and bear the name, mailing address and e-mail address of the attorney representing the movant. Service of papers upon the attorney for each party and each person seeking intervention shall constitute proper service as to the respective party or person.

(c) A person seeking to intervene as a party shall serve a copy of his motion to intervene upon each party under subparagraph (a) and upon any other person who has been granted party status and shall attach a certificate of service to his motion to intervene reciting such service. Motions to intervene as a party shall be filed no later than one week before the commencement of the public hearing. Any party receiving such a motion may file an opposition thereto within two business days of receipt of the motion.

(d) The Subcommittee or its designee delegated to conduct the DRI hearing shall decide such motions on the papers and promptly notify the parties and the person seeking to intervene of its decision. A Subcommittee may appoint its chair, or any other Subcommittee member or members, or a staff member as its designee as provided in Section (iv)(d) to rule on motions to intervene and/or such other motions as the Subcommittee specifies. The Commission and its Subcommittees may distribute their decisions, rulings and orders to the Parties electronically, by e-mail and by first class mail or by hand.

(e) Any person not permitted to intervene as a party shall nonetheless enjoy the right to participate in the public hearing as a member of the public, which shall include the right to offer testimony, opinion and argument on such generally applicable terms as are established by the Subcommittee and by the Commission. Any person whose motion to intervene has been denied may participate in the public hearing without adversely affecting any right to judicial review of the denial of their motion to intervene.

(iv) General Procedures

(a) Filing Documents. Any document to be filed with the Commission shall be e-mailed to the address specified by the Subcommittee in pdf format and hand delivered or mailed first class to the main office of the Cape Cod Commission, which is presently 3225 Main Street, P.O. Box 226, Barnstable, Massachusetts 02630. The date the Commission receives and date-stamps a paper (hard copy) shall be the date of filing.

(b) Service. Any Party filing papers with the Commission shall also serve a properly addressed copy of such filings on all other Parties to the proceeding electronically, in pdf format, and by hand delivery or first class mail. Each filing must be accompanied by a

statement certifying the date and manner of service and the name and address of the Parties served.

(c) Time. Parties must file all papers within the time provided herein. Computation of any time period referred to herein shall begin on the first day following the act which initiates the running of the time period. The last day of the time period is included unless it is a Saturday, Sunday or legal holiday, in such case the period shall run until the close of the next business day. A Subcommittee may revise the timeframes in these procedures as it believes necessary to comply with the time limitations of the Cape Cod Commission Act ("Act"), in which event, the Subcommittee shall distribute the revised schedule to the parties and distribute copies thereof at its public hearings, on the Commission website, by posting and by mail to the town clerks of the towns where the DRI is proposed.

(d) Subcommittee. The Commission may appoint a DRI Subcommittee or Commission staff member to serve as hearing officers pursuant to §4(a)(8) of the Act to conduct the public hearing, to hear and report the evidence and testimony, and to assemble and report the record with a recommended decision for decision by the Commission. The Commission will hold a public hearing following receipt of the recommendations of the Subcommittee or its designee.

(e) Prehearing Conference. The Subcommittee or its designee may order the parties to attend a prehearing conference to narrow and define the issues, to determine what facts and issues can be agreed by the parties by stipulation or other agreement to establish time and other limits on cross-examination and argument and to consider any other matters that may aid in the orderly and efficient conduct of the public hearing and the disposition of the DRI application. Counsel for each party shall appear at the prehearing conference with full authority to act on behalf of their clients. Following the conference, the Subcommittee or its designee will issue a procedural order covering the matters resolved at the prehearing conference.

(v) Conduct of Public Hearing

(a) Evidence and Administrative Record. All Parties shall be represented at the public hearing sessions assigned for the parties by an attorney admitted to the practice of law in the Commonwealth. Parties shall have the right to introduce oral and documentary evidence in accordance with these regulations as permitted by the Subcommittee or its designee, to cross examine witnesses offered by other parties, to object to evidence offered by other parties, and to make written and oral arguments.. Parties shall submit exhibits and written direct testimony under oath one week prior to the hearing and simultaneously serve copies on every other Party. Every witness who submits pre-filed direct testimony shall be made available for cross examination unless excused there from at the discretion of the Subcommittee or its designee. At the discretion of the Subcommittee, or its designee, in extraordinary circumstances, a Party may proffer a witness who has not submitted pre-filed direct testimony. All witnesses offered by a Party shall testify under oath and be subject to cross examination by each other Party. The Applicant's witnesses shall be called first, unless the Subcommittee, in its discretion, adopts another order of evidence. The Subcommittee, the Commission and/or its designee shall be guided, but not bound, by the rules of evidence observed by the courts, and shall recognize the rules of privilege. The Subcommittee, the Commission and/or its designee may limit the time of each Party's cross examination and argument, and/or may require argument to be presented in writing.

(b) Record. The Subcommittee, the Commission and/or its designee shall make a record of their public hearings which shall consist of the pre-filed testimony, the pleadings filed by the parties, a stenographic transcript of the public hearing sessions assigned for the parties, exhibits admitted as evidence and such other filings as the Subcommittee, the Commission and/or its designee shall deem appropriate. Each party, except for the town or towns where the DRI is proposed, shall pay to the Commission its per capita share of the estimated cost of the transcript at the close of the public hearing.

(c) Motions. Any Party may request that the Subcommittee, the Commission, and/or its designee take action by filing a motion clearly stating the action and/or relief sought and the grounds therefor. Any Party may file a written response to any motion within five days after

such motion is filed. The moving Party may file a reply within two business days after such response is filed. Additional filings may only be made with the permission of the Subcommittee or its designee. All motions, except those seeking intervention, may be filed only by a Party. Motions will generally be decided on the papers unless the Subcommittee, the Commission or its designee believes that oral argument would be helpful, in which case the Subcommittee the Commission or its designee will notify the Parties and schedule a hearing.

(d) Post-hearing Briefs. At the close of the public hearing, the Subcommittee or its designee shall establish dates for the filing of briefs and other post-hearing proceedings in light of the statutory time limits in the Act.

(vi) Hearing

(a) Purpose. Hearings will be held when required by law or at the discretion of the Subcommittee the Commission or its designee in order to allow the Subcommittee or its designee and parties to examine witnesses with respect to their pre-filed testimony and to receive evidence from non-parties. Any person may offer evidence at a public hearing, but only parties may cross-examine the witnesses whose pre-filed testimony has been offered by another party. The Subcommittee, the Commission, or its designee may limit the time for presentations of evidence, comments and/or argument by parties and members of the public in order to conduct an orderly and efficient hearing.

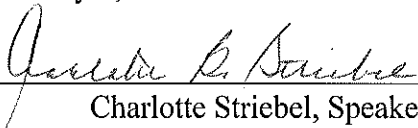
(b) Schedule, Location, and Public Access. The Subcommittee the Commission or its designee shall notify all parties, any persons with pending motions to intervene and the public of the schedule for public hearings. All hearings shall be held at the offices of the Commission, unless otherwise stated and shall be open to the public. Notice of public hearings shall be provided pursuant to Section 5 of the Act.

(vii) Decision and Appeal

(a) Decisions. Following the public hearing, the Subcommittee or its designee will provide the Commission and the parties with its recommended decision, clearly setting forth its factual findings and the reasons for its recommendations. The parties and the public may file comments on the Subcommittee's recommended decision within seven days of the Clerk's receipt of the recommendations. The Commission will hold a public hearing, and after the close thereof, will deliberate and vote. The Commission shall promptly provide all parties with a copy of the Commission's decision. Every decision shall be in writing and shall contain a statement of the reasons therefore, including determinations of fact or law necessary to the decision.


(b) Appeal. All appeals of Commission decisions shall be made in accordance with Section 17 of the Act.

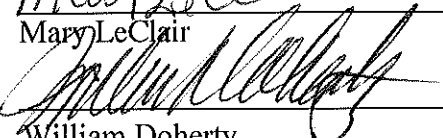
Adopted by the Assembly of Delegates on February 6, 2008.


Charlotte Striebel, Speaker
Assembly of Delegates

Approved by the County Commissioners on _____ at _____
Date Time

Lance Lambros, Chair


Mary LeClair


William Doherty