

NOTES OF JUNE 13, 2013 BEACH USE ORDINANCE COMMITTEE
Final Revision B – Provided by the Rye Civic League

Committee members present: Selectmen Musselman and Mills (arrived late), Members Del Record, Police Chief Kevin Walsh (ex officio), Tom Farrelly, Tyler McGill, Michael LaBrie, Bill Epperson, Fire Chief Skip Sullivan (ex officio), Katy Sherman.

Editor's note: For ease in finding particular sections using the archived video and audio on the Town website, the times associated with each section are indicated. These coincide with the times appearing in the black bar at the top of the screen.

Opening of meeting, new member (6:06:00 p.m.)

The meeting was called to order by Selectman Musselman, Selectman Mills being absent.

Chairman LaBrie introduced the new member Katy Sherman. Ms. Sherman stated that she had lived in Portsmouth and Rye her entire life, except for college in San Diego. She is a stay-at-home mother with two small children and her husband is an attorney. Previously she was a social worker. She lives on West Rd. She loves Sawyers and Cable beaches. She is replacing Jay Nadeau, who resigned prior to the first meeting.

Presentation by Joshua Carroll (6:08:10 p.m.)

Mr. Carroll stated that he had done a study of the beaches in 2010 for the New Hampshire State Parks. He said he had been invited to be on the Committee, but could not serve as he will be moving prior to the Committee completing its work. He has a PhD in natural resources, recreation and tourism.

The study had focused principally on Jenness and North Beaches. *Editor's note: North Beach is in Hampton.* It looked at swimmers, surfers and other beach users. They were looking at zoning options. Jenness and North have flag systems restricting surfing.

Del Record stated that the number one issue is the impact on public safety. The charge refers to regulations being established "if deemed necessary," he noted.

Beachgoers, surfers and swimmers were interviewed, including 275 at Jenness Beach and 180 at North Beach, Mr. Carroll said. Most surfers were local, with some from Massachusetts and some from Canada. The beachgoers had a mean age of 42, the surfers 36.

Mr. LaBrie stated that they have injury reports, but there are not many injuries from these activities.

Mr. Epperson noted the need to have a comprehensive, broad base of data.

Selectman Musselman asked about the findings. Mr. Carroll responded that there was not enough support for the State Parks making a change. People thought it was fine the way it was. Swimmers were not saying that decreasing the surf zone was a high priority.

Discussion ensued about how representative the data are. Chief Walsh stated that the mean age for surfers of 36 seemed accurate. Mr. LaBrie indicated that the

demographics vary by beach. Those using Wallis Rd. Extension are younger than those at Sawyers Beach, he said.

Mr. Record stated that the focus should be on surf lessons and camps, and not on surfers in general. Mr. LaBrie agreed. Selectman Musselman indicated that Mr. Carroll's data suggested that they have the right focus. There is not a big swim zone problem.

Someone noted that they thought that Jenness Beach was a State beach, where surfing was prohibited. Mr. Carroll agreed, but noted that surfers walk to the outside limit of that beach. *Editor's note: Only the portion of the beach directly across from the parking lot is a State beach.*

Fire Chief Sullivan suggested that the results might have been different if people at Sawyers, Cable Rd. and Wallis Ext. had been surveyed.

In response to a question from Selectman Musselman, Mr. Carroll stated that his 60-70 page report was publicly available. He will provide a copy to Town Administrator Mike Magnant.

General discussion on presentation and information gathered (6:37:20 p.m.)

Mr. LaBrie stated that he learned a lot by reviewing other ordinances. One of the reasons why there is so much surfing, and so many dogs, is that it is prohibited elsewhere.

Fire Chief Sullivan stated that Hampton has a full-time animal control officer while Rye's is part time. North of Boar's head to the North Hampton line is Town beach, south of that is State beach, with a small section of Town beach. There are 80 taxable lots in Hampton south of "the River," which is Town beach.

Tyler McGill described where surfing is allowed starting at "Rye on the Rocks" southward. *Editor's note: Rye on the Rocks is near the North Hampton town line.* Enforcement of no surfing is generally only along "the strip," in Hampton and only during two months of the year. Everything south of the bridge to Surfside Five is surfable, he said. The majority of the New Hampshire coastline outside of "the strip," Jenness Beach, and Wallis Sands is surfable, he said.

Mr. McGill stated that he does not view the surfers coming to Rye as the "excrement of other beaches." Mr. LaBrie stated that his comment referring to that was directed towards the dogs and their deposits.

Tom Farrelly stated that he had looked into this issue, and surfing is permitted from 14th St. to 21st St. There is 8000 ft. of beach with 700 ft. where surfing is allowed, although two zones are used in alternating fashion. *Editor's note: This is a dramatic disagreement with what Mr. McGill had stated.*

Mr. Epperson stated that these issues are collateral to the liability one.

Mr. McGill stated that surfing is almost always better at "the Wall." Maine also has better surfing. Rye on the Rocks and Fox Hill are also very good.

Mr. McGill stated that he had spoken with other shops. There are not a lot of others using the Rye beaches other than Summer Sessions and Cinnamon Rainbows. He also corrected the Summer Sessions maximum enrolment, stated at the last meeting as 25. He said that it is 30. They have 18 instructors, the ratio of instructors to students is 2:1 for 6-7 year olds, 5:1 for 14-15 year olds. The Surf Shack at Wallis Sands is mostly

doing paddle boards, with not much surfing. The maximum enrolment for Cinnamon Rainbows is 25. They come to Rye only at high tide, otherwise they are at “the Wall.”

Mr. McGill continued, stating that the original intent was to avoid liability. He has spoken with two attorneys and an insurance agent. Each shop has at least a \$2 million insurance policy. Adding Rye as an additional insured is simple to do. All shops also have waivers of liability.

Mr. McGill stated that they can distribute a safety and etiquette flyer, and add a copy of the Beach Ordinance for Rye. The Town can also be added to the release that individuals sign. All three shops (apparently referring to the Surf Shack, Summer Sessions, and Cinnamon Rainbows) are all willing to have their instructors CPR certified. This provides an additional lifeguard in the case of an emergency.

Based on consultations with his attorney, Mr. McGill stated that there would not be Town liability unless there was gross negligence. Selectman Musselman stated that that was not what the Rye Town Counsel would tell the Town.

Mr. McGill stated that the permits are a concern. Each season they would have to reapply. Each year it would be a different Board of Selectmen. It’s tough not to know year by year where they stand. Selectman Musselman noted that permits could be denied only in accordance with the ordinance. Fire Chief Sullivan noted that the Town Meeting would need to change the ordinance. It would not be the Selectmen deciding to do so. Selectman Musselman stated that the ordinance should be specific. Also, there may be three new surf shops next year.

Mr. LaBrie added that they could reject applications where two or more entities sought to use the same section of beach at the same time.

Police Chief Walsh noted that, at times, event permits need to be rejected due to conflicts between events, for example a clash of runners and bicyclists. Selectman Musselman stated that they had never turned down an event.

Mr. LaBrie stated that he liked the idea of CPR certification.

Mr. McGill stated that expansion into permitting would raise more contentious issues. Numbers of persons and times of use becomes stickier. Mr. LaBrie responded that a gatekeeper is needed. Mr. Farrelly stated that, all of a sudden there could be two groups of 30 people. Ms. Sherman stated that 3 camps with 30 participants at high tide would not work.

Mr. McGill stated that the problem with organizing things around the time of the tides is that it changes by 40 minutes each day. Having different drop of times for the parents would be almost unmanageable.

(7:03:40 p.m.)

Mr. McGill stated that he sees the need for regulations, but that he also needs to run a business. If there are too many restrictions and they start to affect the business, then there will be another Town Hall meeting like last time. *Editor’s note: He was apparently referring to the 2013 Deliberative Session, where his motion to amend Warrant Article 15 to call for a study rather than an ordinance, passed overwhelmingly.* The whole thing will get voted down, rather than common sense measures being put in place. Selectman Musselman asked whether that was a threat. Mr. McGill stated that it wasn’t but that there is a considerable community out there.

Mr. LaBrie stated that the permitting process protects responsible business owners out there. He raised the issue of a competitor who is not as responsible.

Mr. Record asked whether Town Counsel believed that the Town has liability. Selectman Musselman responded in the affirmative. Mr. Record asked whether there was case law to support that. Selectman Musselman stated that it was prudent and advisable to have the Town named as an additional insured. Mr. Record stated that he had used Justicia and other search engines and obtained no hits on this. Also, no permits are required in Hampton or Wells, Maine. Tom McCormick has told him that North Hampton has no permit requirement. *Editor's note: Mr. McCormick is a Rye resident, former Rye Planning Board member and Town Accountant for North Hampton.*

Mr. Record stated that they want a beach that everyone can enjoy that does not exclude surfers. Selectman Mills interjected "share the beach." Selectman Musselman stated that, for several decades, Rye has provided increased beach access. Mr. Epperson stated that the Master Plan reflects this.

Mr. LaBrie stated that he has been under pressure from the Selectmen to flip the surfing and swimming zones. Currently surfing is permitted everywhere except in selected swim zones. They haven't done what was requested.

Mr. Record stated that he shares Mr. LaBrie's concerns with respect to an annual permit.

Ms. Sherman referred back to Sawyers Beach. Mr. LaBrie stated that, with a 12 foot high tide there is no sand at Sawyers Beach. *Editor's note: Typical tidal range at Hampton is 8-10 feet.*

Mr. LaBrie stated that, based on Mr. McGill's comments, there is additional demand for lessons. Mr. Farrelly stated that they have enough problems without additional growth. He stated that the Master Plan provides that no business interest may supercede the interests of the enjoyment of residents. Mr. Epperson asked where that could be found. He was not familiar with that portion of the Master Plan, he said. *Editor's note: Mr. Epperson is Chairman of the Planning Board, which is currently in the process of updating the Master Plan. A search of the most recent 2006 Master Plan, as amended in 2009, reveals no use of language similar to that cited by Mr. Farrelly.*

Selectman Musselman stated that they should keep in mind that some surfers are residents. Ms. Sherman added that the surfers themselves do not want crowding.

Determination of need for the ordinance (7:21:50 p.m.)

Mr. LaBrie stated that he had had a discussion with Mr. Record and that it may be necessary to first determine that a permitting process is necessary. Mr. Record stated that he agreed. Before they move forward to the drafting phase it is necessary that they establish that there is an impact.

Police Chief Walsh referred to an accident where a cyclist went through an intersection. He believes that the Town paid money to settle that. They have never canceled an event, but dates have been changed due to conflicts. There needs to be an ability to say there are 60 kids already, and another 60 cannot be accommodated.

Selectman Mills indicated that they will get additional ideas once there is a public hearing.

(7:32:50 p.m.)

Mr. McGill noted that it is tough to tell who is using the beach for profit and who is using it for fun.

Mr. LaBrie stated that they needed to move the process along and that he would entertain a motion determining that a permitting process is needed.

Mr. McGill noted a distinction. Permits can be rejected, requirements can be met. He is concerned about being rejected by a board.

Mr. Epperson stated that if one was running a deli and started serving spoiled meat that the permit would not be renewed. He asserted that a permitting process is needed.

Ms. Sherman asked Mr. McGill why he was opposed to permitting. Mr. McGill responded that, if he served food at the beach it wouldn't matter what he served as long as the requirements of the health inspector are met. Selectman Musselman stated that he thought that a requirement could be drafted that says that.

Mr. McGill responded that the permit dies with the shop, however. Summer Sessions might cease business if surfing declines in popularity. If surfing later returned to popularity, and he sought to reenter the business, it could be determined down the line that there will be no new permits.

(7:36:40 p.m.)

Mr. LaBrie stated that the problem is that you have Town-owned property which is being used to make a profit. Mr. Epperson stated that the ordinance could prohibit surfing entirely. Selectman Mills referred to the Zederberg case, in which surfers were limited to a very small zone.

Fire Chief Sullivan asked whether there would be a right of appeal if a permit is revoked or denied.

Mr. McGill's motion (7:39:45 p.m.)

Mr. McGill stated that the motion he suggested was that anyone operating a for-profit business on the beach would be required to submit to the Town (1) proof of insurance (2) waiver of liability (3) proof of CPR training for instructors (4) other requirements to be determined. Mr. Record seconded the motion.

Ms. Sherman asked whether that wasn't what a permit does. She said that a permit would be protecting his business. Mr. McGill acknowledged that an ordinance could benefit his business. However, supporting one would go against his belief in others' rights to use the beach. Mr. Record, stating that he knew how the vote was going to go, moved the question.

Mr. LaBrie stated that Mr. McGill was trying to establish that a permitting process is not required. Mr. McGill stated that he was specifically establishing requirements, not a permitting process.

Selectman Mills suggested that the motion be tabled. If a permit requirement is not included, he will not vote for it.

Mr. McGill asked how many supported a permitting process. Only Messrs. McGill and Record indicated no. Mr. McGill then appeared to withdraw his motion.

A break was then taken.

Mr. Epperson's motion (7:57:15)

The Committee then reconvened (prior to this, members could be observed discussing a motion to be made). Mr. Epperson then made a motion:

“Any organization, whether for profit or not for profit, intending to make use, or to provide equipment that may be used on any of Rye’s town beaches for any activity or purpose, must be granted a permit by the Board of Selectmen of Rye.”

Selectman Mills stated that this could apply to a church group of eight people. It should be limited to those charging a fee. Fire Chief Sullivan asked about water sports. Selectman Musselman stated that boogie boards should not be covered.

After additional discussion, the motion was changed by Mr. Epperson:

“In order for any organization to use Rye town beaches for any activity or purpose, to be defined, must be granted a permit by the Board of Selectmen of Rye.” Mr. Farrelly seconded.

Mr. McGill asked how the permit limited the Town’s liability. Selectman Musselman stated that it would, if structured to require a limitation of liability. Mr. Record read from the Selectmen’s charge which asks the Committee “[t]o assess the current and future impact with respect to public safety, the public’s use of Rye beaches and potential Town liability...” He suggested that the motion went beyond that.

Mr. Epperson cautioned Mr. McGill that someone else could take the other 40-50 people who will not fit in the Summer Sessions classes, obtain liability insurance, and go into business as a competitor. He indicated that the camps should be scheduled so that there are not three on the beach at the same time.

Mr. LaBrie stated that he has anecdotal evidence of problems. Mr. Record responded that that’s all it is. “Something almost happened,” was how he characterized it. He asked whether it was true that there were only two injuries last year. Mr. LaBrie appeared to confirm, stating that these were to surfers. Mr. Record clarified that these were not surfers running into swimmers. Mr. McGill stated that there had not been safety or Town liability issues.

Ms. Sherman stated that they were talking about the same process as the one that applies to the roadways. The beaches would be treated just like the roads.

Selectman Mills stated that the single file bicycling ordinance was put in for safety reasons. They are not against biking.

Mr. Epperson reread his motion. All voted in favor except Mr. McGill and possibly Mr. Record (he is not observed raising his hand on the video tape). Mr. LaBrie stated that there were two no votes.

Mr. Record stated that it was clear from the Deliberative Session that the Town has stated that we do not want to restrict surfing. Now we are saying by governing that we do, he said.

Next steps (8:19:30 p.m.)

Mr. LaBrie indicated that the next step would be to get into drafts. This would be the issue for the entire next meeting.

Selectman Musselman asked about Foss Beach. Mr. LaBrie said that he grew up there. There is no break there. Selectman Musselman stated that he believes that it is a Town beach. Mr. LaBrie stated that there are no lifeguards there. Mr. Musselman stated that he believes that, under the shale pile is Town land. *Editor’s note: Little if any of*

Foss Beach is above water at high tide. Apparently, Mr. Musselman was saying that Town land extends only to the high water mark.

Mr. Epperson moved that they suspend item C until the next meeting and adjourn. All were in favor.

The next meeting was scheduled for July 2 at 6:00 p.m.

In response to a question from Ms. Sherman, Selectman Musselman stated that something could be done this summer in terms of a Selectmen's ordinance, pending Town Meeting.

Whereupon the meeting adjourned.