



CAPE COD COMMISSION

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Date: July 12, 1996

Applicant: Daniel J. O'Connor
41 Taylor Road
Acton, MA 01720

Project: O'Connor Lots 145 & 146
Tupelo Road - W. Falmouth, MA

Re: Jurisdictional Determination - JD 96016
Cape Cod Commission Act, Cod Commission Regulations of General
Application, Barnstable County Assembly of Delegates Black
Beach/Great Sippewissett Marsh District of Critical Planning Concern

Land Court
Certificate: 139381

DECISION OF THE CAPE COD COMMISSION

SUMMARY:

The Cape Cod Commission (Commission) hereby finds pursuant to Section 22 of the Cape Cod Commission Act (the "Act") and under the Cape Cod Commission Regulations of General Application, Chapter E, Barnstable County Ordinance 94-10, that the proposed development of lots 145 and 146 is not exempt under Section 22(e) of the Act and is therefore subject to the provisions of the Black Beach/Great Sippewissett Marsh District of Critical Planning Concern (the "DCPC") designation.

PROCEDURAL HISTORY:

The O'Connor Lots are located within the Black Beach/Great Sippewissett Marsh DCPC. The DCPC was designated by the Barnstable County Assembly of Delegates in January of 1996 through the adoption of Barnstable County Ordinance 96-1. Under the Act local officials may not issue development permits within the DCPC until the town adopts implementing regulations to govern development within the district, or until the district is terminated. Thus, due to the DCPC designation, Lots 145 and 146 are subject to a temporary moratorium on the issuance of local development permits. The town may issue local development permits after the implementing regulations are adopted and so long as the O'Connors' proposal complies with the newly adopted implementing regulations. The O'Connors seek an exemption determination from the Commission for Lots 145 and 146 under Section 22(e) of the Act to construct a single family home on each lot, notwithstanding the DCPC designation.

According to the county ordinance, "The Black Beach/Great Sippewissett Marsh District is of regional importance and controlled development of lands and waters within the ... proposed district is important to the protection of shellfish and wildlife habitat and in order to maintain the integrity of the Black Beach barrier beach system". The ordinance notes that the water quality and ecological values of the marsh/beach complex are threatened by increasing development and current management practices. In nominating the area to the Assembly of Delegates for designation as a DCPC, the Commission specifically found and voted that "The issuance of development permits ... for single family houses on lots held in common ownership or on lots in separate ownership may be substantially detrimental to the protection of public health, safety, and welfare, and would be contrary to the purposes of the Act and District of Critical Planning Concern."

Lots 145 and 146 are shown on a subdivision plan approved by the Falmouth Planning Board on April 6, 1965. Some of the lots of this plan were placed under a performance bond on April 22, 1965. On October 9, 1987 the Planning Board released the bond in recognition of the completion of required ways and services. Both lots are currently undeveloped.

MATERIALS SUBMITTED FOR THE RECORD:

1. A letter from Michael B. McGrath of Holmes and McGrath, Inc. to the Falmouth Conservation Commission 3/5/96
2. A letter from Commission staff member Kathy Sferra to the Falmouth Conservation Commission 3/6/96
3. A request for a jurisdictional determination by Daniel J. O'Connor 6/17/96
4. A letter from Commission Counsel, Eric Wodlinger, re: Section 22(e) 7/2/96
5. Staff Report 7/3/96
6. A letter on staff report/opinion of Commission's counsel by Attorney Kirk 7/9/96

The application and notice of the public hearing relative thereto, the Commission's staff reports, exhibits, minutes of all hearings and meetings and all submissions received in the course of the proceedings, including materials submitted on file #JD96016 are incorporated into the record by reference.

TESTIMONY:

At 7:30 pm, Ms. Bebout opened the public hearing for the O'Connor lots referenced above. Mr. Olsen read the public hearing notice. Ms. Bebout introduced the subcommittee and staff. Ms. Bebout asked the applicant to make a presentation.

Edward Kirk, attorney for the applicant, stated that the question before the subcommittee tonight is a legal question. Section 22(e) of the Cape Cod Commission Act contains a specific exemption. He read this language and noted that he believes that this provision applies to these lots. He noted a conversation that he had with Patty Daley of staff. She provided her view on this issue and he has since received Choate Hall & Stewart's opinion which states on p. 2 that enactment of the DCPC brings development on these lots under the jurisdiction of the Commission. He submitted a letter taking exception to this position. He said that the Commission's argument is circular. The jurisdiction of the Commission is a creature of the statute.

The DCPC is a creature of the statute. He believes that the statute exempts the lots from anything that the Commission does. The DCPC does not change the language of the statute.

He said that he knows that Boards are reluctant to give up jurisdiction. He knows that it will be hard for the Commission to ignore the advice of counsel, but doesn't agree with Mr. Wodlinger's argument. These lots have been exempt from the outset. The language "the Act shall not apply" means the Act shall not apply.

Ms. Bebout asked for staff comments.

Patty Daley, staff counsel, supported Choate Hall & Stewart's opinion regarding the Section 22(e) exemption. She noted that the exemption states that the Act shall not apply to a lot or lots. The staff's opinion is that the exemption pertains to the creation of lots and roads under Chapter 41 (the Subdivision Control Law), it does not exempt subsequent development of those lots. This is evident by looking at the rest of the exemptions contained in Section 22 of the the Act; only 22(e) is specific to the creation of lots, the rest of the exemptions pertain to development. The DCPC can't affect lots and roads, but does cover subsequent permits such as building permits, orders of conditions, etc.

Steve Haddad, realtor, said that DCPC has raised a lot of questions. The town subcommittee is not that far along in developing its implementing regulations. There is an August deadline for the November town meeting warrant. There is great concern that they may not meet the time frame. The next town meeting is not until April. This is a significant hardship for anybody in that area. Waiting till November is not bad, but if you wait until April it gets to be quite long.

Attorney Kirk stated in closing that Ms. Daley's remarks would suggest that there is language in Section 22(e) that just isn't there. The language is not qualified as suggested. He wanted to clarify that the preceding exemptions in Section 22 are narrower, applying to developments or lots with certain permits. Section 22(e) is not so qualified.

FINDINGS:

1. Section 22(e) of the Act states: *This act shall not apply to a lot or lots shown on a subdivision plan endorsed by a planning board prior to July first, nineteen hundred and eighty-nine, in accordance with section eighty-one V of chapter forty-one of the General Laws, if the planning board has released the security held by it to ensure completion of construction of ways and the installation of municipal services, as required by section eighty-one U of said chapter forty-one, prior to the effective date of this act.*

2. The O'Connor Lots are shown on a subdivision plan endorsed by the Falmouth Planning Board prior to July 1, 1989 in accordance with section 81V of Chapter 41 of the Massachusetts General Laws.

3. Lot 146 was the subject of a performance bond which was released prior to March 27, 1990, the effective date of the Cape Cod Commission Act. Lot 14 was specifically exempt from the performance bond.

4. The O'Connors have not obtained any development permits for subsequent construction of Lots 145 or 146.

5. Section 22(e) of the Act differs in its terms from the exemptions described in sections 22(a) through (d). Sections 22(a) through (d) relate to a "development" which is generally defined as the doing of some work on the land, as defined in the Act. Section 22(e) provides an exemption for a "lot or lots shown on a subdivision plan" and does not relate to any particular development work on the lot. Thus, only the particular layout of the lots within the subdivision, and necessarily the roads and utilities which serve those lots, are exempted from Commission review.

6. The size and configuration of Lots 145 and 146, as shown on the April 6, 1965 plan, are exempt and may not be altered pursuant to the DCPC.

CONCLUSION:

Based on the findings above, the Commission concludes that the proposed development of lots 145 and 146 is not exempt from the Black Beach/Great Sippewissett Marsh DCPC designation under Section 22(e) of the Act, and the Cape Cod Commission Regulations of General Application, Chapter E.

Vicky Bebout
Vicky Bebout, Subcommittee Chair

July 16, 1996
Date

Commonwealth of Massachusetts

Barnstable, ss.

Subscribed and sworn to before me this 16th day of July, 1996.

Katharine L. Peters
Katharine L. Peters, Notary Public

My commission expires: