

CAPE COD COMMISSION

3225 MAIN STREET
PO Box 226
BARNSTABLE, MA 02630
508-362-3828
FAX: 508-362-3136

DATE: July 18, 1991 #CCC TR 91032

TO: Mr. Frank Durante
Sandwich Stump Dump
P.O. Box 686
East Sandwich, MA.

FROM: Cape Cod Commission

RE: Development of Regional Impact
Cape Cod Commission Act, Section 12

Applicant: Mr. Frank Durante, Sandwich Stump Dump

Project: Sandwich Stump Dump
Route 6 Service Road, East Sandwich, MA.

DECISION OF THE CAPE COD COMMISSION

SUMMARY

The Cape Cod Commission (the Commission) hereby denies, without prejudice, the application of Mr. Frank Durante (Sandwich Stump Dump) for a Development of Regional Impact (DRI) under Sections 12 & 13 of the Cape Cod Commission Act (the Act), c. 716 of the Acts of 1989, as amended, for a change in use to a solid waste recycling and transfer station facility on a 30+ acre site off of the Route 6 Service Road in East Sandwich. The decision is rendered pursuant to the vote of the Commission on July 11, 1991.

PROJECT DESCRIPTION

The property is located on Discovery Hill south of the Mid-Cape Service Road and west of the Quaker Meeting House Road/Route 6 interchange (#3) in Sandwich. The abandoned Discovery Hill Road runs through the middle of the property.

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The thirty acre site is 3,825 feet in length and 350 feet in width. The property is presently used as a wood transfer station and stump dump. The site has been cleared except for seven acres (four in the front and three in the rear). The topography (150 to 230 feet above sea level) has been greatly altered by the previously permitted earth removal and stump dump operations. The general soil category for the area is Sandwich Moraine Deposits (Qsm) which is a veneer of sandy to silty till a few feet in depth underlain by well-sorted stratified sand and gravel. The Sandwich Moraine forms a distinctive ridge which contains many small kettle holes and knobs. The highest point (295 feet above sea level) in the ridge is the nearby Telegraph Hill.

The site presently contains a house with attached garage/repair shop, a small office structure (which is proposed to be removed), a large (214 feet X 100 feet) metal building and a 5.9 acre stump dump. The first 600 feet of the entrance driveway is paved. The remainder of the cleared area: parking, driveways, storage areas, mixing areas (exclusive of the buildings) is sand and gravel.

PROCEDURAL HISTORY

This project was referred to the Commission as a Development of Regional Impact (DRI) on April 22, 1991 by the Planning Board. A public hearing was scheduled for June 12, 1991. The applicant expressed concerns that the project is exempt from DRI review by virtue of a previously obtained special permit by telephone conversions with staff and a May 1, 1991 letter. On May 7, 1991 a joint meeting between the applicant, his representatives, Commission staff and town officials was held to discuss the question of whether or not the project is exempt from DRI review under Section 22(b) of the Cape Cod Commission Act. The staff reviewed the information presented by the town officials in support of the DRI filing. The staff reviewed information and minutes from the Sandwich Board of Appeals and a letter from the Sandwich Town Council. Based on the information presented, the staff determined the project is a DRI and not exempt under Section 22(b) of the Act. The applicant and town officials were informed of the staff determination. During a telephone discussion on May 17, 1991, Dorr Fox (Commission staff) informed the applicant's consultant of the possibility of fee waivers and the process required for such a waiver request. On May 20, 1991 the applicant submitted an incomplete DRI application. The applicant was informed by mail and fax on May 21, 1991 that the staff had reviewed the application and found it incomplete. The applicants were also reminded that failure to submit a complete application may result in delays or a denial of the project. Information on compliance with local zoning bylaws, plans and certification of the submitted abutter's list were received on May 23, 1991.

On June 6, 1991, a letter of extension prepared by the staff was faxed to the applicant's attorney as well as a reminder that a portion of the fee (\$ 5,847.50) was still due prior to the opening of the public hearing. On June 10, 1991, the applicant's representative proposed a redraft of the letter of extension prepared by staff. This redraft extended the public hearing time, not the decision time as allowed by the Act. The staff informed the applicant that this redraft was not acceptable under Section 13(a) of the Act. On June 11, 1991, a preliminary staff report was faxed to the applicant's representatives. On June 12, 1991, by phone to staff, the applicant requested a withdrawal from Commission review. The staff prepared a letter of withdrawal which was faxed to the applicant's representatives that morning. The applicant's representative appeared at the public hearing and informed the subcommittee that they would not sign the staff's letter of withdrawal and submitted their own letter of withdrawal. The applicant's letter of withdrawal was found to be unacceptable to the subcommittee.

MATERIALS SUBMITTED BY THE APPLICANT

1. A letter from Attorney Cleon H. Turner, regarding the DRI referral, received May 3, 1991.
2. An incomplete DRI application, prepared by Horsley Witten Hegemann, Inc., received May 20, 1991.
3. Supplemental DRI information, prepared by Horsley Witten Hegemann, Inc., (Master Plan and Zoning Information) received May 22, 1991.
4. Supplemental DRI Information (Certified abutters list) received May 23, 1991.
5. A letter from Attorney Cleon H. Turner, regarding a continuance and application fee, received June 6, 1991.
6. A letter from Attorney Cleon H. Turner, regarding a continuance and application fee, received June 10, 1991.
7. A letter from Attorney Cleon H. Turner, regarding a withdrawal from Commission review, received June 12, 1991.

MATERIALS SUBMITTED BY THE TOWN

1. The DRI Referral Form from the Sandwich Planning Board, received April 22, 1991.
2. A letter from the Sandwich Town Planner to Armando Carbonell, dated April 26, 1991, received April 29, 1991.
3. A letter to Cheryl Hoxie from the Sandwich Town Planner, dated May 1, 1991, received May 6, 1991.
4. A letter to Armando Carbonell from the Sandwich Town Planner, received May 6, 1991.
5. Board of Appeals Special Permit Decision, dated February 28, 1984, received May 6, 1991.
6. Board of Health Minutes for February 7, 1984, received May 7, 1991.
7. The application of Frank Durante to the Sandwich Board of Appeals, dated December 5, 1988, received May 7, 1991.
8. The minutes of the Sandwich Board of Appeals, dated January 10th (draft) and 24th 1989, received May 7, 1991.
9. A letter to the Sandwich Board of Appeals from the Sandwich Housing Authority, dated January 10, 1989, received May 7, 1991.
10. A letter to the Sandwich Board of Appeals from the Sandwich Board of Health, dated January 10, 1989, received May 7, 1991.
11. A letter to Norman and Brian Ayotte from the Sandwich Board of Health, dated May 3, 1984, received May 7, 1991.
12. Notice of failure to take final action by the Sandwich Board of Appeals, prepared by Attorney Jonathan D. Fitch, dated May 5, 1989, received May 7, 1991.
13. A Building Permit issued to Ernest Durante for a 100 ft.* 180 ft.* 29 ft. building with a 24-ft. * 30 ft. office wing, dated December 22, 1989, received May 7, 1991.

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14. EOE site assignment letter to the Sandwich Board of Health, dated February 21, 1991, received May 7, 1991.
15. A letter to Attorney Elizabeth A. Lane from the Sandwich Board of Health, dated April 10, 1991, received May 7, 1991.
16. A letter to the Board of Health from Attorney Elizabeth A. Lane, dated April 26, 1991, received May 7, 1991
17. A letter from the Sandwich Town Planner to the Sandwich Executive Secretary, dated May 7, 1991, Received May 10, 1991.
18. A letter from the Sandwich Board of Health to Frank Durante, dated May 9, 1991, Received May 13, 1991.
19. A revised letter from the Sandwich Town Planner to the Sandwich Executive Secretary, dated May 7, 1991, Received May 15, 1991.
20. A letter from the Sandwich Town Planner to Armando Carbonell, dated April 26, 1991, received April 29, 1991.

MATERIALS SUBMITTED BY THE PUBLIC

1. A letter from K. Figueiredo to Armando Carbonell, received April 16, 1991.
2. A letter from K. Figueiredo to Armando Carbonell, received April 22, 1991.
3. A letter from F. Kristy to the Cape Cod Commission, received May 13, 1991.
4. A letter from Susan V. Walker to the Cape cod Commission, received June 12, 1991.

MATERIALS SUBMITTED BY THE COMMISSION

1. A letter to Mr. K. Figueiredo, regarding the jurisdiction, dated April 18, 1991.

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2. A letter to Mr. F. Durante, notice of DRI Referral, dated April 30, 1991.
3. A letter to Mr. F. Durante, regarding jurisdiction, dated May 8, 1991.
4. A DRI checklist noting incomplete portions of the application, dated May 20, 1991.
5. A letter to Mr. F. Durante, regarding the completeness of the application, dated May 21, 1991.
6. A letter to Mr. F. Durante, regarding the calculations of fees, dated June 5, 1991.
7. A letter of extension to Mr. F. Durante, dated June 7, 1991.
8. Preliminary Staff Report, dated June 7, 1991.
9. A letter to Attorney Cleon Turner, regarding withdrawal dated June 12, 1991.
10. A letter to Attorney Cleon Turner from Patty Daley, regarding issues concerning the application, dated June 17, 1991.

TESTIMONY

A public hearing was held on June 12, 1991 at the Sandwich Human Services Building. No substantive testimony was heard on the project due to the procedural defect in the application filing.

Andy Young, Chairman of the Subcommittee opened the meeting at 3:02 pm.

Mr. Young began the meeting by explaining that a Development of Regional Impact Public Hearing was scheduled to be heard but the subcommittee members had just received a letter (dated June 12th) from the applicant's attorney requesting to withdraw from the Commission's review.

Mr. Young continued by explaining the normal course of action for a request for withdrawal is to have the applicant sign a letter of withdrawal stating that there is no reliance on the constructive grant period of the Development of Regional Impact Review process as established in the Cape Cod Commission Act.

Mr. Young also explained that there are questions regarding the applicants 1989 Special Permit and a suit filed by the applicant against the Board of Health's

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denial of a site assignment application. Mr. Young said that he felt that these questions could have a bearing on the Commission's review of the project. He asked the members what they wanted to do about the letter submitted by Cleon H. Turner, Esq., for the applicant Mr. Frank Durante. Mr. Young also stated that the applicant's attorney had informed him that they (applicant) would not sign the letter of withdrawal prepared by the Commission's Staff.

Alix Ritchie (Commission Member) stated that she was troubled by the letter prepared by Attorney Turner for it makes a number of statements which Ms. Ritchie would disagree with and there is no mention of waiving other rights or challenges.

Cleon Turner, Attorney for the Applicant, stated there is nothing to waive if there is no matter pending before the Commission.

Ms. Ritchie, said she was also concerned that the withdrawal as proposed by Attorney Turner might be construed as a constructive grant by a court. Ms. Ritchie felt the way to avoid this would be for the applicant and Commission to agree to a document accepting withdrawal of the project.

Attorney Turner, stated he believes the Commission's review is based on a 1986 special permit and that the referral was incorrect. He stated that they would like to withdraw now and let the court tell them (the applicant) if they would need to go to the Commission.

Greg Guimond (Commission staff) reminded the subcommittee that the town referral was on the Board of Health permit for site assignment, and not the special permit previously issued by the Board of Appeals. Mr. Guimond said the staff had expected the applicant to request an extension of the review time due to the court case pending against the Board of Health. Staff made it clear that the DRI review could be extended. In the application would have to be complete prior to accepting substantive testimony at the public hearing. Mr. Guimond then outlined the various procedural choices available to the applicant and the Commission to extend or complete the DRI process.

Richard Armstrong (Commission Member) asked the applicant's representative what the problem was with signing the extension or letter of withdrawal as prepared by staff.

Attorney Turner said that the problem with an extension is that the fee must be paid in full prior to opening the public hearing. The applicant did not want to pay the DRI application fee because if the Court upholds the Board of Health's denial of the site assignment, there would be no need for a DRI review. Attorney Turner further explained that the applicant did not want to sign the letter of withdrawal prepared by staff because it would confess to Commission jurisdiction to review

the project.

Mr. Armstrong asked what would need to happen in order to extend the DRI review period.

Mr. Guimond stated that the applicant would need to produce a check for the full application fee prior to the opening of the public hearing in order to have a complete application. Mr. Guimond said this had been told to the applicant from the start (in letters dated May 21st and June 5th and on the May 28th site visit).

Ms. Ritchie noted that the applicant could apply for a waiver of the fees through the Commission's Executive Committee. Alix Ritchie mentioned that the applicant had been made aware of the waiver but had never submitted a written request.

Attorney Turner stated that Ms. Ritchie's statement about the fee waiver process was absolutely false. *(Staff Note: The process for waivers of fees were discussed between Dorr Fox, Chief Regulatory Officer and a representative of the applicant from Horsley, Witten, Hegemann, INC., on May 17th prior to the submittal of the application).*

Ms. Ritchie mentioned that they could open and close the hearing or open at a later date pending the resolution of the fee question.

The subcommittee members then discussed the possible ways of handling the problems of extension, withdrawal and the payment of the full fees.

Attorney Turner stated he felt that because the Commission can extend the decision time period, the Commission could also extend the public hearing time period.

Mr. Guimond stated that the Commission's legal counsel have interpreted the Act to allow extension of the DRI decision time, and not the length of public hearing by mutual agreement with the applicant.

Attorney Turner stated that with the removal of the second sentence in the letter of withdrawal prepared by staff and the return of the application fee paid to date that the applicant would sign the letter of withdrawal.

Mr. Guimond stated that the sentence Attorney Turner is asking to remove from the letter of withdrawal is important due to the lawsuit between the Stump Dump and the Board of Health, he would not recommend it's removal by the subcommittee.

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Jonathan D. Fitch (partner to Attorney Turner) felt the Commission may not have jurisdiction and that the Commission would be heavy handed and unfair in requiring the applicant to sign such a document.

Mr. Young stated to the subcommittee that his own opinion would be to open the public hearing and deny the project based upon the procedural defect. He stated that this would preserve the applicant's ability to challenge the jurisdiction of the Commission.

Mr. Armstrong recommended that the motion to deny the project should include the language "without prejudice". The other subcommittee members all agreed to adding that language to a motion.

Don LeBlanc (Commission Member) read the public hearing notice.

Mr. Young then explained that no testimony would be heard at the public hearing because the application was deemed incomplete.

Mr. Guimond then explained that the application was found incomplete due to partial payment of the fee.

Attorney Turner stated that the applicant has withdrawn and therefore, the opening of the public hearing seems a little bizarre.

Dick McCloud, a resident, asked if the transfer station would involve BFI.

Mr. Young explained that was not a procedural question and therefore the subcommittee would not require an answer by the applicant.

Mr. LeBlanc made a motion to recommend to the full Commission a denial without prejudice of the application of Mr. Frank Durante for failure to pay the complete application fee.

All the subcommittee members voted infavor of the motion.

Mr. LeBlanc made a motion to close the public hearing.

All the subcommittee members voted infavor of the motion.

The public hearing was closed at 3:40 pm.

JURISDICTION

The Sandwich Stump Dump Development qualifies as a Development of Regional Impact under Sections 12 (c),(6) of the Act, which requires review of " Use change which have a floor area greater than ten thousand square feet; and outdoor area greater than 40,000 square feet;"

FINDINGS

The Commission makes the following finding subject to Sections 12 and 13 of the Act:

- 1). The Applicant failed to provide to the Cape Cod Commission with a fully completed application for DRI review. Specifically, the applicant failed to provide the full DRI review fee required by the Cape Cod Commission regulations.

CONCLUSION

Based upon the finding above, the Cape Cod Commission hereby denies the Sandwich Stump Dump as a Development of Regional Impact, without prejudice. This conclusion is supported by the finding that the proponent failed to comply with procedures of the Act and Commission regulations requiring submission of a fully completed application to the Commission, specifically, the applicant failed to provide a complete review fee as required by the Cape Cod Commission regulations.

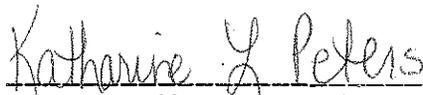
The Commission hereby denies the application of Frank Durante for the Sandwich Stump Dump proposal as a Development of Regional Impact pursuant to Sections 12 and 13 of the Act.



 Richard S. Armstrong, Chairman

7/25/91

 Date



 Notary

7/25/91

 Date

My Commission expires: 12/5/97