



CAPE COD COMMISSION

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Date: December 3, 1992

Applicant: Tina Balog, Conservation Administrator
Brewster Conservation Commission
2198 Main Street
Brewster, MA 02631

Project #: JD92077
Project: Cobb's Pond Condominiums
Wauquanesit Drive
Brewster, MA 02631

RE: Development of Regional Impact
Jurisdictional Determination Request
Cape Cod Commission Act, Section 12(j)

Lot/Parcel: Map 17/Lots 1-13 and 1-14
Owner: Bay Financial Corporation

DECISION OF THE CAPE COD COMMISSION

SUMMARY

The Cape Cod Commission (Commission) hereby finds that the proposed Cobb's Pond condominiums project in Brewster, MA is exempt from review under Section 22 of the Cape Cod Commission Act (Act), c. 716 of the Acts of 1989, as amended. The Commission also finds that the project would be subject to review under Section 12(c) of the Act if it were not exempt from Development of Regional Impact (DRI) review. The decision is rendered pursuant to the vote of the Commission on December 3, 1992.

PROJECT DESCRIPTION

The project consists of thirty-five (35) condominium units on an approximately 26-acre site. The linear-shaped site is located off Lower Road, just north of Route 6A and directly west of Cobb's Pond in Brewster, MA. Construction of the approximately 3000-foot entry road and associated drainage improvements are complete. A cul-de-sac terminates within 250 feet of the edge of a coastal bank facing Cape Cod Bay. The site ranges from flat to slightly rolling topography, with freshwater wetlands surrounding the entry to the site. The site is surrounded to the east, west and south by single-family residential and condominium development.

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PROCEDURAL HISTORY

The project received a special permit from the Brewster Planning Board on or about May 1, 1984. Said permit was appealed by a group of abutters. After several years of litigation an Agreement for Judgement was approved, affirming the special permit and setting forth covenants and conditions under which the project may proceed. The Agreement for Judgement reduced the number of units to be developed and restricted future development rights to Bay Colony Property Company, Inc. and/or any of its "wholly-owned subsidiaries and any mortgagees of the premises". The restrictions contained in the Agreement for Judgment raised the question of whether the project was exempt from Commission review under Section 22(d)(2) of the Act.

The Commission received a jurisdictional determination request from the Brewster Conservation Commission on November 4, 1992. The Commission determined that the application was complete on November 12, 1992. A duly noticed public hearing pursuant to Section 5 of the Act was held by an authorized subcommittee of the Commission on the jurisdictional determination request on November 30, 1992, in the Chamber of the Assembly of Delegates, First District Courthouse, Barnstable, MA. At the close of the public hearing the subcommittee held a public meeting where the subcommittee unanimously voted to recommend to the full Commission that the project is exempt from Commission review under Section 22(d)(2) of the Act.

Materials submitted for the record:

- Jurisdictional Determination application
- Site Plan of Land, prepared by Schofield Brothers, Inc., dated May 19, 1981, revised through September 14, 1988; September 14, 1988 revisions by Steven C. Hayes, architect
- Brewster Planning Board decision dated May 1, 1984
- Barnstable Superior Court decision filed June 22, 1984
- Agreement for Judgement, Barnstable Superior Court, July, 1991
- U.S. Bankruptcy Court Order, dated January 16, 1991
- U.S. Bankruptcy Court Appendix, dated December 31, 1990
- Form of Certificate of Incorporation of Bay Financial Corporation, undated
- Notice of Intent, dated May 19, 1992
- letter from Brewster Planning Board to Attorney Paul Benatti, dated August 25, 1992
- letter from Zisson and Veara, attorneys at law to Brewster Planning Board, dated September 2, 1992
- letter from Zisson and Veara, attorneys at law to William Henchy, Brewster Conservation Commission, dated August 17, 1992
- letter from attorney Myer Singer to Brewster Conservation Commission, dated August 11, 1992
- letter from Massachusetts Historical Commission to Brewster Conservation Commission, dated May 29, 1992
- letter from Tina Balog, Conservation Administrator, to William Henchy, dated October 29, 1992
- letter from Brewster Conservation Commission to Commission staff counsel, dated October 29, 1992
- letter with attachments from attorney Myer Singer to Commission staff counsel, dated November 13, 1992
- letter with attachments from attorney Myer Singer to Eric Wodlinger, Esq. Choate, Hall and Stewart, dated November 23, 1992

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- letter with attachments from attorney Myer Singer to Eric Wodlinger, Esq. Choate, Hall and Stewart, dated November 25, 1992
- letter from attorney Myer Singer to Eric Wodlinger, Esq. Choate, Hall and Stewart, dated November 25, 1992

Additional materials:

- Cape Cod Commission staff report dated November 24, 1992
- letter from Commission staff to Brewster Conservation Commission, dated November 12, 1992

The application and notices of public hearings relative thereto, the Commission's staff notes, exhibits and correspondence, the transcript and minutes of the hearing and all written submissions received in the course of our proceedings are incorporated into the record by reference.

TESTIMONY

The Commission received oral testimony at the November 30, 1992 public hearing from William Henchy, Co-Chairman of the Brewster Conservation Commission, and Tina Balog, Conservation Administrator. Mr. Henchy described the procedural history of the project, and stated that the project had been subject to a lengthy review at the local level and subsequent litigation in Superior Court due to its sensitive location. He noted that environmental issues related to the project included the proximity of the development to an eroding coastal bank, groundwater quality concerns and preservation of the Elijah Cobb House, an historic structure located on the site. He stated that the Conservation Commission referred the project to the Cape Cod Commission for a jurisdictional determination due to uncertainty as to the following: 1) whether the project was in substantial compliance with the special permit issued by the Brewster Planning Board; 2) whether the litigation was resolved in the proponent's favor; and, 3) whether Bay Financial Corp. is entitled to develop the property under the Agreement for Judgment.

Subcommittee members questioned whether the Elijah Cobb House was part of the proposed project, as well as whether a reduction in the project from 50 to 35 units and the inclusion of recreational amenities in a modified site plan constituted a change from what was approved in the special permit. Attorney Myer Singer testified on behalf of the project proponent, Bay Financial Corporation. He noted that litigation on the project was entered into prior to July 1, 1989, and resolved in 1991. Therefore, the project was exempt from Commission review under Section 22(d)(2) of the Act. He also stated that the proponent intended to construct the project in accordance with the special permit, and that the Elijah Cobb House, while owned by the proponent, was actually on a separate lot from the proposed development. He noted that recreational amenities were agreed to by both parties in the Agreement for Judgment.

Patty Daley, Commission staff counsel, stated that the project qualifies as a DRI under Section 12(c)(7) of the Act. However, staff recommended that the project was exempt under Section 22(d) based on the determination by legal counsel that the litigation was concluded in the proponent's favor, as well as the finding that Bay Financial Corporation is a wholly owned subsidiary and/or a mortgagee of Bay Colony Property Company, Inc. She also recommended that the Commission narrow its decision to require construction in accordance with the Agreement for Judgment, to limit the exemption determination to Bay Financial Corp., and to clarify that the Elijah Cobb House is

excluded from the Commission's decision on the jurisdictional determination request.

JURISDICTION

The purpose of the Jurisdictional Determination request is to determine whether the proposed Cobb's Pond condominium project in Brewster, MA is exempt from Commission review under Section 22(d)(2) of the Act, which states that "the provisions of this act shall not apply to a development which, as of July 1, 1989, had applied for and was entitled to [a special permit] but said approval or permit did not issue [because] the grant or denial of such a permit or approval was the subject of judicial review entered prior to July 1, 1989, and said judicial review is concluded in the applicant's favor and so long as the development is constructed thereafter in accordance with said permit or approval."

FINDINGS

The Commission has considered the applicant's request for a jurisdictional determination regarding the proposed Cobb's Pond condominiums in Brewster, MA, and based upon consideration of such request, upon information presented at the public hearing and submitted for the record, makes the following findings:

- 1). The proposed project would be subject to review under Section 12(c) of the Act as a proposed development that is planned to create or accommodate more than thirty dwelling units if it were not exempt from review under Section 22(d) of the Act.
- 2). The proposed project received a special permit prior to July 1, 1989. The special permit was the subject of judicial review entered prior to July 1, 1989. The judicial review resulted in an Agreement for Judgment. The Agreement for Judgment permits substantially the same uses as the original special permit at a lower density, and substantially reflects the property rights granted originally by the Brewster Planning Board. Therefore, the judicial review was concluded in the proponent's favor.
- 3). The original special permit was granted to Bay Colony Property Company, Inc. Under the terms of the Agreement for Judgment, the special permit "may not be transferred except to a wholly-owned subsidiary of Bay Colony, subject to that entity's assumption of all covenants and conditions set forth herein". Based upon information submitted for the record, including the Second Amended Plan of Reorganization of Bay Financial Corporation and Certain Subsidiaries, it appears that the subject property became vested in Bay Financial and that Bay Colony Property Company, Inc. was merged into the reorganized Bay Financial Corporation. It also appears that the applicable provisions of corporate and bankruptcy law suggest that Bay Financial Corporation is a wholly-owned subsidiary and/or mortgagee of Bay Colony Property Company, Inc. Therefore, Bay Financial Corporation is entitled to develop the property under the Agreement for Judgment.
- 4). The proposed project, including the property which was the subject of the 1984 special permit and excluding the Elijah Cobb House, is exempt from Commission review provided that the project is constructed in accordance with the Agreement for Judgment and provided that subsequent

permits and approvals are obtained by the Bay Financial Corporation.

CONCLUSION

Based on the findings above, the Commission hereby concludes that the proposed Cobb's Pond condominium project in Brewster, MA, is exempt from Commission review as a Development of Regional Impact under Section 22(d)(2) of the Act so long as it is constructed in accordance with the Agreement for Judgment by the Bay Financial Corporation. This conclusion is based on the finding that the property was the subject of a special permit issued prior to July 1, 1989, that the special permit was the subject of judicial review entered prior to July 1, 1989, that the judicial review was concluded in the proponent's favor, and that Bay Financial Corporation is entitled to develop the property under the special permit and the Agreement for Judgment. The Commission also concludes that the project would be subject to Commission review under Section 12(c)(7) of the Act as a proposed development that is planned to create or accommodate more than thirty dwelling units but for its exemption under Section 22(d)(2).

This decision is rendered pursuant to a vote of the Cape Cod Commission on December 3, 1992.

Alix Ritchie
Alix Ritchie, chair

12/3/92
Date

Commonwealth of Massachusetts

Barnstable, ss.

Subscribed and sworn to before me this 3rd day of Dec 19 92

Katharine X Peters
Name, Notary Public

My commission expires: 12/9/97

My Commission Expires December 3, 1997