



CAPE COD COMMISSION

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Applicant: Brookside Associates
c/o A.M. Wilson Associates, Inc.
911 Main Street
Osterville, MA 02655

Project #: JD96006
Project: Brookside Estates Development
Off McArthur Blvd. (Route 28), County and Waterhouse
Roads, Bourne, MA

RE: Jurisdictional Determination Request
Cape Cod Commission Act, Section 22

Lot/Plan: 4846 page 217
4846 page 219
8307 page 54

Owner: Daniel C. Hostetter and John A. Largay, Jr.

DECISION OF THE CAPE COD COMMISSION

SUMMARY

The Cape Cod Commission (Commission) hereby finds pursuant to §12(j) of the Cape Cod Commission Act (ACT) that the 1988 Brookside Estates development in Bourne, Massachusetts meets or exceeds a Development of Regional Impact (DRI) threshold, and is exempt from DRI review pursuant to §22(b) of the Act so long as the Bourne Building Inspector, after receiving the recommendation of the Bourne Planning Board, determines that the 1988 Special Permit is valid and so long as the development is built in substantial compliance with the plans dated 3/4/88. The decision is rendered pursuant to a vote of the Commission on March 28, 1996.

PROJECT DESCRIPTION

In 1988, the Bourne Planning Board issued a special permit for the project to construct 290 multi-family residential condominium units in 44 buildings, a golf course, and 28 commercial / office lots. An Environmental Impact Report for the project was prepared in January 1989.

PROCEDURAL HISTORY

The purpose of the Jurisdictional Determination request is to determine whether the 1988 Brookside Estates project qualifies for an exemption under Section 22 of the Act.

The Commission received a Development of Regional Impact referral from the Bourne Conservation Commission on February 5, 1996 for 27 multi-family residential units, 106 single family residential units, a golf course, a golf driving range and 9 commercial / office lots. The total acreage of the project is 172.32 acres. The applicant withdrew the Notice of Intent from before the Bourne Conservation Commission on February 22, 1996, thereby withdrawing the project from Commission review.

On February 26, 1996, the applicant submitted an application for a Jurisdictional Determination review seeking two determinations: (1) whether the project approved by the 1988 Special Permit is exempt from Commission review, and (2) whether the 1996 revised project is in substantial compliance with the 1988 Special Permit and is therefore exempt from Commission review. The application submitted on February 26, 1996 was withdrawn and resubmitted on March 6, 1996. Although more information was needed to determine traffic impacts, the application was deemed to be complete on March 14, 1996 for the purpose of holding the public hearings. Duly noticed public hearings pursuant to Section 5 of the Act were held on March 14, 1996 and March 25, 1996 in the Bourne High School Library, Bourne, MA. At the March 14, 1996 public hearing, the applicant submitted modifications to the proposed 1996 plan. At the March 25, 1996 public hearing, the applicant withdrew the request for a determination on the 1996 revised plan. Following the March 25, 1996 public hearing, a subcommittee meeting was held, and the Subcommittee voted to recommend to the Commission that if the Bourne Building Inspector, after receiving the recommendation of the Bourne Planning Board, determines that the 1988 Special Permit is valid, the previously approved project would be exempt from Commission review under Section 22 of the ACT so long as it is thereafter constructed in substantial compliance. At the final public hearing on March 28, 1996, the Commission voted to accept the recommendation of the Subcommittee.

Materials submitted for the Record:

- Letter, Dorr Fox to Bourne Planning Board dated 2/2/96 2/2/96
- Development of Regional Impact Referral Form dated 1/31/96 2/5/96
- Notice of Intent dated 1/9/96 2/5/96
- Letter, Tana Watt to A.M. Wilson dated 2/6/96 2/6/96
- Fax, Letter, Bourne Planning Board to Cape Cod Commission dated 2/8/96 2/12/96
- Fax, Letter, A.M. Wilson to Karen Sherman, Bourne Town Planner dated 2/9/96 2/12/96
- Copy, Letter, Bourne Planning Board to Cape Cod Commission dated 10/29/92 2/16/96
- Copy, Letter, Robert S. Troy, Bourne Town Counsel, to Bourne Board of Selectmen dated 11/14/96 2/16/96
- Copy, Letter, Roger Laporte, Building Inspector to Bourne Planning Board dated 11/16/96 2/16/96
- Copy, Letter, EOEА Dep. of Env. Protection to Daniel Hostetter dated 5/21/90 2/16/96
- Copy, Certificate of the Secretary of Environmental Affairs on the Environmental Notification Form dated 11/9/87 2/16/96
- Copy, Notice of Noncompliance from EOEА DEQE dated 2/29/88 2/16/96
- Copy, Enforcement Order from Bourne Conservation Commission to Brookside Associates dated 11/15/95 2/16/96
- Copy, Re-issued Enforcement Order from Bourne Conservation Commission to Brookside Associates dated 2/22/93 2/16/96
- Copy, Order of Conditions from Bourne Conservation Commission to Brookside Associates dated 9/21/88 2/16/96
- Copy, Commonwealth of Massachusetts Superior Court Agreement between Gardner S. Nightingale, Bay View Camp Grounds, Inc. and Brookside Associates 2/16/96
- Planning Board Minutes dated 7/13/95, 10/29/92, 9/19/91, 7/18/91, 6/20/91
- Copy, Letter, Stephen C. Jones, Atty., to Bourne Planning Board dated 7/16/91 2/16/96
- Copy, Letter, Stephen C. Jones, Atty., to Bourne Planning Board dated 4/10/96 2/16/96
- Copy, Special Permit #55 dated 2/9/88 2/16/96
- Copy, Certificate of Approval of a Definitive Subdivision Plan dated 12/30/87 2/16/96
- Copy, Letter, Mark Perry, CPA, to Bourne Planning Board dated 10/29/92 2/16/96

- Copy, Town of Bourne Covenant with Daniel C. Hostetter dated 7/31/86 2/16/96
- Copy, Soil Conservation Service Analysis of Sediment and Erosion Control for Brookside Development dated 8/10/88 2/16/96
- Fax, Withdrawal of Notice of Intent from A.M. Wilson to Bourne Conservation Commission 2/19/96
- Letter Withdrawal of Notice of Intent from A.M. Wilson to Bourne Conservation Commission 2/21/96
- Jurisdictional Determination Application 2/26/96
- Copy, Jurisdictional Determination Application fee 2/26/96
- Project History Outline 2/26/96
- Project Comparisons 2/26/96
- Legal Status of Special Permit 2/26/96
- Copy, 1988 Special Permit 2/26/96
- Copy, Bourne Planning Board Letter dated 1/8/96 2/26/96
- Copy, Landfill Closure Permit 2/26/96
- Copy, Nitrogen Loading Calculations 2/26/96
- Copy, Town Zoning/Water Quality District Map 2/26/96
- Copy, Cape Cod Commission Zones of Contribution Map 2/26/96
- Copy, ACEC Map 2/26/96
- Copy, ACEC Description 2/26/96
- Copy, DEM Map 2/26/96
- Copy, Cape Cod Commission Wetland, Wildlife and Plant Habitat 2/26/96
- Copy, NHP Wetland Wildlife 2/26/96
- Copy, NHP Exemplary Habitat 2/26/96
- Status of Pending Development Permits 2/26/96
- Proof of Filing with Bourne Town Clerk, Bourne Planning Board, and Bourne Conservation Commission, Bourne Board of Selectmen, Bourne Building Inspector 2/26/96
- Certification of Ownership, Recorded Deeds and other Documentation 2/26/96
- Copy, 1988 Master Plan 2/26/96
- Copy, 8.5" X 11" reduction of 1988 Master Plan 2/26/96
- Copy, 1966 Proposed Master Plan dated 11/9/95 2/26/96
- Letter, Robert F. Feeney, Atty., to Patty Daley dated 2/26/96 2/28/96
- Copy, letter Department of Environmental Protection to A.M. Wilson dated 3/4/96 3/5/96
- 2 Copies Final Environmental Impact Report, 1/89 3/6/96
- Copy, 11" X 17" reduction of Brookside Assoc. Condominium Site Plan 3/6/96
- Copy, letter Arlene Wilson to Bourne Conservation

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- Commission dated 12/12/95 3/6/96
- Copy, letter Sam Park Assoc., Inc. to Daniel Hostetter dated 3/5/96 3/6/96
- Letter, A.M. Wilson to Tana Watt dated 3/6/96 3/7/96
- Copy, Brookside 1988 Development Phasing Plan from FEIR 3/8/96
- Letter, E.J. Boch to Armando J. Carbonell dated 3/8/96 3/12/96
- Letter, V. Douglas Errico, Atty., to Cape Cod Commission dated 3/12/96 3/14/96
- Letter, A.M. Wilson to Cape Cod Commission dated 3/13/96 3/14/96
- Copy, Letter, Daniel C. Hostetter to Bourne Planning Board dated 4/27/89 3/14/95
- Letter, Sam Park Associates, Inc., to Tana Watt dated 3/13/96 3/14/96
- Copy, Table II-I Development Data Summary 3/14/96
- Modified Site Plan dated 3/11/96 3/14/96
- History of Brookside, documentation of project development 3/14/96
- Letter, Tana Watt to A.M. Wilson dated 3/14/96 3/14/96
- Letter, Karen Sherman, Bourne Town Planner to Cape Cod Commission dated 3/14/96 3/14/96
- Letter, Robert M. Gray, Bourne Conservation Commission, to Cape Cod Commission dated 3/14/96 3/14/96
- Letter, Robert F. Feeney, Atty., to Patty Daley dated 3/18/96 3/19/96
- Fax, Bourne Planning Board to Cape Cod Commission dated 3/22/96 3/22/96
- Letter, Bourne Planning Board to Cape Cod Commission dated 3/22/96 3/25/96
- Letter, Sam Park Assoc., Inc., to Tana Watt dated 3/25/96 3/25/96
- Nitrogen loading analysis submitted by A.M. Wilson dated 3/25/96 3/25/96

Additional Materials:

- Cape Cod Commission Staff Report dated 3/8/96
- Cape Cod Commission Staff Report dated 3/20/96
- Definition of Substantial Compliance dated 4/1/92
- Hearing Notices for 3/14/96 and 3/25/96
- Minutes for Public Hearings held on 3/14/96 and 3/25/96

The application and notice of the public hearing relative thereto, the Commission's staff reports, and exhibits, minutes of the hearing and all submissions received in the course of the proceedings, including materials submitted on file JD#96006 are incorporated into the record by reference.

TESTIMONY

March 14, 1996 Public Hearing:

Richard Driscoll, Attorney, and Arlene Wilson, Consultant, presented the applicant's project to the Subcommittee. It is Mr. Driscoll's opinion that the 1988 Special Permit is still valid, and therefore the original project is exempt under Section 22 of the ACT. Ms. Wilson described the project and addressed impacts of the project. Rick Bryant, Traffic Consultant, presented information on expected traffic impacts of the project.

Tom Barlow, Bourne Selectman, believes that the project would be exempt from DRI review if the Special Permit is still valid, however, the revised plan should be a DRI. Hayden Coggeshall, Bourne Selectman, believes that the 1988 project as well as the 1996 project are under the jurisdiction of the Cape Cod Commission. Roger Laporte, Bourne Building Inspector, stated that the project is currently not in compliance with the original Special Permit. Robert Gray, Bourne Conservation Commission Chairman, believes that the Cape Cod Commission should review the project.

Robert Feeney, attorney for the abutting campground, explained that the applicant and the campground are currently in court regarding ownership and rights of use of a portion of the property.

Karen Sherman, Bourne Town Planner, noted that the project is not in compliance with the special permit. Roland Dupont, Bourne Selectman, believes the project should be reviewed as a DRI.

March 25, 1996 Public Hearing:

Clement Del Favero, Bourne Planning Board Chairman, believes that Special Permit is still valid and that the 1996 proposal is consistent with the special permit. Gerry Ellis, who was Chairman of the Planning Board that issued the 1988 Special Permit, reviewed the history of the Special Permit and originally approved project, and believes that the project was a good one that can be adequately reviewed on a local level. He noted that the 1996 project requires an additional special permit.

Arlene Wilson presented revised nitrogen loading calculations, and believes the 1996 project will have fewer impacts on the wetlands than the old project. Rick Bryant, Sam Park Associates, noted that there are no greater traffic impacts from the new project as compared to the previous project. Mr. Driscoll stated that as long as the new plan does not go outside of the "footprint" of the old plan, it does not require DRI review. On behalf of Brookside Associates, he then withdrew the 1996 plan from consideration, and requested a determination only for the 1988 plan.

Melvin Holmes stated his concern about the Jurisdictional Determination process.

March 25, 1996 Subcommittee Meeting:

The Subcommittee discussed the 1988 project and voted unanimously to recommend to the Commission that the 1988 project is exempt from Commission Review provided that the Planning Board holds a public hearing and determines that the special permit is still valid; the Building Inspector, as the zoning enforcement officer, concurs; and that the project is built as approved.

FINDINGS

The Subcommittee has considered the applicant's request for a Jurisdictional Determination regarding the validity of the 1988 Special Permit for Brookside Estates, MA. Based upon information presented at the public hearings and submitted for the record, the Subcommittee makes the following findings:

1. Special Permit #55 for the Brookside Estates project was issued by the Bourne Planning Board on February 8, 1988. That permit allows 290 multi-family residential condominium units in 44 buildings, a golf course, and 28 commercial / office lots.
2. The project approved in 1988 meets or exceeds a threshold for DRI review as a development that proposes to create 30 or more residential dwelling units.
3. The municipality, or a court of competent jurisdiction, is the proper entity to determine whether there has been substantial construction, and to determine the validity of the 1988 Special Permit.
4. The Cape Cod Commission makes no finding as to the ownership of the property that is the subject of the ongoing litigation between Daniel C. Hostetter & John A. Largay, Jr. and Gardner S. Nightingale & Others.
5. If the 1988 Special Permit is deemed valid by the Town of Bourne and so long as it is not subsequently reversed on appeal by a court of competent jurisdiction, and the project is built in substantial compliance with the Special Permit, then the 1988 project qualifies for an exemption under Section 22 of the ACT. The substantial compliance determination is made by the Cape Cod Commission.

6. If the Special Permit is deemed invalid by the Town of Bourne or by a court of competent jurisdiction, then the 1988 project does not qualify for an exemption under Section 22 of the ACT.

7. Only the residential and golf course portions of the Brookside site, as shown in the plan dated 3/4/88, are the subject of the 1988 Special Permit. This area is outlined by a thick dashed line on the plans dated 3/4/88. Only those portions of the project are the subject of this decision.

CONCLUSION

If the Bourne Planning Board, after a public hearing, votes that substantial construction has occurred and the special permit is still valid, and the Bourne Building Inspector, as the zoning enforcement officer, concurs with that vote, and if the project is constructed in substantial compliance with the 1988 Special Permit, then the project is exempt under Section 22(b) of the Cape Cod Commission Act.

The project shall be referred by any town board before whom a permit is pending if development is not in substantial compliance with the 1988 Special Permit and approvals.

Sumner Kaufman

Sumner Kaufman, Chairman

3/28/96

Date

Commonwealth of Massachusetts

Barnstable, ss.

Subscribed and sworn to before me this 28th day of March 1996

Katharine G. Peters

Name, Notary Public

My commission expires: