



CAPE COD COMMISSION

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

DATE: July 25, 1996 #LDR-96008
TO: Mr. Jay Howland, Applicant
FROM: Cape Cod Commission
RE: Limited Discretionary Development of Regional Impact
Barnstable County Ordinance 94-10, Chapter A, Section 12(e)
APPLICANT: Mr. Jay Howland
54 Hartford Street
Suite 201
Westwood, MA 02090
PROJECT: Dennis Miniature Golf
BOOK/PAGE:

DECISION OF THE CAPE COD COMMISSION

SUMMARY

The Cape Cod Commission (Commission) hereby denies, without prejudice, the application of Mr. Jay Howland for a Development of Regional Impact qualifying under Section 12(e) of the Cape Cod Commission Act and Barnstable County Ordinance 94-10, Chapter A, as amended, for the proposed development of a restaurant and miniature golf course project.

PROJECT DESCRIPTION

The referral includes existing and proposed uses on the site: a retail strip shopping area, a boat slip rental business, a sight-seeing boat for cruises on the Bass River, a restaurant and miniature golf course. The existing miniature golf course is 10,102 square feet in size. The existing restaurant is described as a 44-seat building of 1,984 square feet. Based on plans and information submitted as part of the Limited Discretionary Referral from the Dennis Planning Board, alterations on the site as a result of the project included relocating and improving the miniature golf course; construction of a new restaurant building; building a second-floor security apartment as part of the new restaurant building; constructing a mounded septic system under the new, relocated miniature golf course; providing additional site landscaping and lighting and reconfiguring the existing site parking, circulation pattern and access/egress. The Limited Discretionary Referral information indicates the reconstructed golf course was proposed to be 13,600 square feet in size. The proposed new restaurant building would be 3,728 square feet in size.

PROCEDURAL HISTORY

On February 27, 1996, the project was referred to the Cape Cod Commission as a Limited Discretionary Referral under the Regional Policy Plan issue areas of Transportation and Historic Preservation/Community Character by the Dennis Planning Board. The Cape Cod Commission received the referral and additional plans and information on February 28, 1996. The Referral Form received on February 28th by the Commission indicated that the Dennis Conservation Commission had completed its review of the project but that Dennis Planning Board, Board of Health and Zoning Board of Appeals reviews were still pending. On March 5, 1996 the applicant's attorney and Town were informed in writing that the Commission had received the project referral and that a meeting of the Commission's Regulatory Committee had been scheduled. On March 7, 1996, a letter was received from the Dennis Town Planner, on behalf of the Dennis Planning Board, requesting a postponement of action on the project by the Commission's Regulatory Committee. On March 8, 1996, the Town and applicant's attorney were informed in writing that the Regulatory Committee would act on the referral on March 25, 1996. On March 25, 1996, the Commission's Regulatory Committee voted to recommend acceptance of the Limited Discretionary Referral of the project to the full Commission. On March 26, 1996, local permits were issued for demolition of the existing restaurant building and construction of a new restaurant building. The Construction permit specifically noted the "owner proceeds at own risk due to Cape Cod Commission regulations." On March 23, 1996 the Dennis Board of Health issued a permit to construct a raised septic system on the site. On March 28, 1996, the full Commission voted to accept the Limited Discretionary Referral of the project limited to the issue areas of Transportation Resources and Historic Preservation/Community Character. On April 1, 1996, the Town and applicant's attorney were informed in writing of the Commission's vote. On April 1st, the applicant's attorney was also provided a DRI application package and was informed that "the project will proceed under the standard DRI procedures and time frames." On April 9, 1996, Commission staff met with the applicant to discuss information needed for the project review. On April 23, 1996, the applicant requested a postponement of the public hearing and site visit. On April 29, 1996, Commission staff sent the applicant a copy of an Extension Agreement. On April 30, 1996, the Commission received a copy of an Extension Agreement signed by the applicant's representatives. On May 1, 1996, Commission staff received a letter from the applicant to the Dennis Planning Board requesting a withdrawal of the project. On May 10, 1996 a letter from Commission staff to the applicant's attorney noted that the existing restaurant building had been demolished. On May 10, 1996, Commission staff also informed the applicant's attorney in writing that the restaurant building continued to be under Commission review and that the applicant should refrain from work at the site until a DRI permit was issued or, in the alternative, the project was withdrawn from Commission and local review. On May 20, 1996, Commission staff sent another letter to the applicant's attorney informing him that any development work done on the site after the Commission's vote of March 28, 1996 was at the applicant's risk. A letter dated June 7, 1996 from the Commission staff to the Dennis Town Planner asked for clarification as to the scope of the Limited Discretionary referral of the project as it related to other uses and/or buildings, including the restaurant building, existing on or proposed for the site. On June 10, 1996, Commission staff received a letter from the Dennis Town Planner stating that the restaurant building was not part of the project referred to the Commission on March 28th for review. The Dennis Planning Board voted on June 10, 1996 to confirm that the restaurant building was part of the original Limited Discretionary referral made to the Commission for review with regard to transportation resources and historic preservation/community character. On June 11, 1996 Commission staff received a letter from the Dennis Town Planner noting a vote of the Planning Board on June 10, 1996 confirming that the restaurant building was part of the original Limited Discretionary Referral. On June 20, 1996 Commission staff informed the applicant's attorney in

PROCEDURAL HISTORY (Continued)

writing that the Dennis Planning Board voted on June 10, 1996 to confirm that the restaurant building was part of the original Limited Discretionary referral made to the Commission for review with regard to transportation resources and historic preservation/community character. The June 20, 1996 letter to the applicant's attorney also noted again that the project, including the golf course, restaurant building and other proposed uses on the site continue to be under limited DRI review by the Cape Cod Commission. The June 20th letter also notified the applicant that a public hearing was scheduled for July 29, 1996 and that a completed DRI application and project fee were needed. On July 8, 1996, Commission staff informed the applicant's attorney again that a completed DRI application and project fee were needed by July 10, 1996 or a procedural denial might result. The July 8th letter also noted that this information and a fee had not yet been received. On July 10, 1996, the applicant sent a letter to the Cape Cod Commission seeking a procedural denial of the project at the Commission's July 25, 1996 meeting. On July 12, 1996 a concerned member of the public provided Commission staff with a copy of a site plan filed with the Dennis Building Inspector's office. The second Site Plan differs from the Site Plan referred to the Cape Cod Commission in that it does not propose to relocate the miniature golf course or parking on site. Based upon the letter of July 10, 1996 from the applicant's attorney seeking a procedural denial of the project, the Commission notified the Town and applicant's attorney on July 12, 1996 that the hearing scheduled for July 29, 1996 had been cancelled and that the Commission was proceeding with a procedural denial of the project.

MATERIALS SUBMITTED FOR THE RECORD

A. Materials submitted by the Applicant:

Letter, Attorney Singer, to Commission, representing applicant	3/4/96
Letter, Attorney Singer, to Planning Board, abutters' concerns	3/8/96
Letter, Attorney Singer, to schedule meeting with Commission	4/3/96
Letter, Attorney Singer, to applicant, about hearing officer	4/5/96
Letter, Attorney Singer, to Commission, request postponement	4/23/96
Letter, Attorney Singer, to Commission, abutters list and size of restaurant	4/30/96
Copy, Extension Agreement	4/30/96
Letter, Attorney Singer, to Dennis Planning Board	5/1/96
Letter, Attorney Singer, to Commission, concerning demolition and Discretionary Referrals	5/10/96
Letter, Attorney Singer, to Dennis Zoning Board of Appeals	5/13/96
Letter, Attorney Singer, to Dennis Planning Board	6/28/96
Letter, Attorney Singer, to Commission, postpone action	7/3/96
Letter, Attorney Singer, to Commission, expects Commission denial of project	7/10/96
Letter, Attorney Singer, to Dennis Planning Board, withdrawal	7/12/96
Letter, Attorney Singer, to Commission, withdrawal	7/12/96
Copy of ZBA decision	7/12/96
Letter, to Dennis Planning Board	7/15/96
Letter, Atty. Singer, to Commission, comments on draft dec.	7/23/96
Letter, Atty. Singer, to Town Clerk, withdrawal	7/24/96
Letter, Atty. Singer, to Commission, comments on draft dec.	7/25/96
Letter, Dennis Administrator, to Dennis Planning Board	7/24/96
Letter, Dennis Town Planner, to Dennis Planning Board	7/22/96

B. Materials submitted by the State:

Letter, Reitsma to LEC Env. Consultants	6/12/96
Letter, Reitsma to Howland	4/29/96

C. Materials submitted by the Town:

Dennis Planning Board, DRI Referral cover letter	2/28/96
DRI Referral Form	2/28/96
Letter from traffic consultants, McDonough and Scully	2/28/96
Legal notice	2/28/96
Dennis Planning Board Special Permit Application	2/28/96
Copies of Plans as part of DRI Referral (see below)	2/28/96
-Plan and Profile, GAF Engineering, dated 2/26/96	
-Drawings of proposed restaurant, Donald Meyer, dated 2/26/96 (5 drawings)	
-Existing Parking Conditions Plan, GAF Engineering, dated 8/5/95	
-Site Plan/Proposed Conditions Layout, GAF Engineering, dated 4/28/95, revision #9	
-Landscape Plan, Out-On-A-Limb landscaping, dated 2/5/96	
-Landscape Plan, Out-On-A-Limb landscaping, dated 2/6/96	
Letter, Dennis Fire Department	3/25/96
Letter, Dennis Planning Board, postponement of Regulatory Committee meeting	3/7/96
Letter, Dennis Planning Board, information from Lisa Hendrickson and Harry Ives	3/7/96
Legal notice, Zoning Board of Appeals and Planning Board hearings	5/22/96
Copy of building demolition permit	5/15/96
Copy of building construction permit	5/15/96
Letter, Dennis Planning Board, clarify scope of referral	6/10/96
Letter, Dennis Planning Board, clarify scope of referral	6/11/96
Decision, Zoning Board of Appeals	6/26/96
Letter, Dennis Planning Board, to Attorney Singer	6/27/96
Letter, Dennis Planning Board, clarify vote	6/27/96

D. Materials submitted by the Public:

Letter, Harry Ives, to Selectmen, concerns	3/4/96
Letter, Charles Ewig, to Cape Cod Commission, concerns	3/4/96
Fax cover sheet, from Ives, Inc.	3/7/96
Letter, Harry Ives, to Dennis Planning Board, concerns	3/7/96
Article, REGISTER	3/14/96
Letter, Virginia Traube, to Cape Cod Commission, concerns	3/18/96
Petition, in opposition to project	3/22/96
Letter, Harry Ives, to Cape Cod Commission, concerns	3/22/96
Letter, Helen Kossifos, to Cape Cod Commission, concerns	3/28/96
Letter, Forrest White, Building Inspector, Yarmouth, to Ives	3/25/96
Letter, Aucoin Amusements, to Ives	3/25/96
Article, REGISTER	4/4/96
Article, REGISTER	5/16/96
Letter, Dennis Building Inspector, to Dennis Town Planner	5/24/96
Letter, Dennis Planning Board, to Dennis Building Inspector	5/24/96
Letter, Attorney Ford, to Dennis Building Inspector	5/24/96
Letter, Harry Ives, to Cape Cod Commission, concerns	6/7/96

D. Materials submitted by the Public: (Continued)

Copy, Minutes of Dennis Planning Board/ZBA of 2/26/96	6/26/96
Article, REGISTER	6/28/96
Article, CAPE COD TIMES	6/28/96
Letter, John Finney, to Cape Cod Commission, concerns	7/3/96
Fax cover, Attorney Ford	7/2/96
Information on site, high water line, site map, building permit	7/12/96
Letter, Harry Ives, concerns regarding Chapter 91	7/10/96
Letter, Attorney Ford, to Dennis Natural Resources Dept.	7/11/96
Letter, Attorney Ford, to Dennis Natural Resources Dept.	7/12/96
Letter, Attorney Ford, to Dennis Building Dept.	7/12/96
Plan of site	7/12/96
Letter, Attorney Ford, Building Department	7/12/96
Photos of site (four, in color)	Undated
Locus map and black/white photo showing site and relationship to current traffic conditions (two copies)	Undated
Brochure, Bass River cruises	Undated
Letter, Mid-Cape Ballet Co., to Commission	7/24/96
Letter, Janet Mariani, to Commission	7/24/96
Letter, Harry Ives, to Dennis Bd. of Selectmen	recv'd 7/24/96
Letter, Ives and Hendrickson, to Commission	7/24/96

E. Materials submitted by Cape Cod Commission:

Staff Form Q	3/1/96
Letter, to Attorney Singer, referral	3/5/96
Letter, to Dennis Town Planner, referral	3/5/96
Notes, phone conversation with Dennis Town Planner	3/6/96
Site photos (eight)	3/6/96
Memo to Regulatory Committee	3/6/96
Notes, phone conversation with Lisa Hendrickson	3/7/96
Memo to Subcommittee	3/7/96
Notes, phone conversation with Dennis Town Planner	3/7/96
Fax cover sheet	3/8/96
Fax cover sheet	3/8/96
Letter, to Dennis Town Planner, postponement of Regulatory Committee meeting	3/8/96
Notes, Dennis Town Planning Board hearing on project	3/11/96
Notes, local setbacks	3/13/96
Letter, to Harry Ives, parking	3/15/96
Memo to Regulatory Committee	3/22/96
Fax cover sheet	3/22/96
Fax cover sheet	3/22/96
Fax cover sheet	3/22/96
Staff Report	3/22/96
Site video	3/22/96
Minutes, Regulatory Committee meeting	3/25/96
Minutes, Cape Cod Commission meeting	3/28/96
Letter, to Lisa Hendrickson, DRI application package	4/1/96

E. Materials submitted by Cape Cod Commission: (Continued)

Letter, to Attorney Singer, Commission vote	4/1/96
Notes, phone conversation with Dennis Planning office, Rex	4/1/96
Memo to Subcommittee, project update	4/4/96
Notes, meeting with Attorney Singer, project review and issues	4/9/96
Draft letter to Attorney Singer, project fee estimate	4/10/96
Draft Extension Agreement	4/24/96
Fax cover sheet	4/24/96
Draft Extension Agreement	4/29/96
Fax cover sheet	4/29/96
Draft Extension Agreement	4/29/96
Memo to Subcommittee and local officials	4/30/96
Fax cover sheet	5/2/96
Letter, to Attorney Singer	5/2/96
Fax cover sheet	5/7/96
Fax cover sheet	5/7/96
Letter, to Attorney Singer	5/7/96
Copy, signed Extension Agreement	5/9/96
Notes, phone conversations with Dennis Town Planner, Attorney Singer's office and Dennis Building Inspector	5/9/96
Fax cover sheet	5/10/96
Letter, to Attorney Singer, restaurant demolition	5/10/96
Fax cover sheet	5/10/96
Fax cover sheet	5/10/96
Letter, to Attorney Singer, site work	5/20/96
Fax cover sheet	5/20/96
Memo to Subcommittee	5/20/96
Notes, phone conversation with Attorney Ford	5/24/96
Draft Minutes, hearing officer	5/24/96
Fax cover sheet	5/24/96
Fax cover sheet	5/30/94
Fax cover sheet	6/7/96
Letter, to Dennis Town Planner, clarification	6/7/96
Fax cover sheet	6/20/96
Fax cover sheet	6/20/96
Letter, to Attorney Singer, DRI application	6/20/96
Fax cover sheet	6/21/96
Letter, to Attorney Singer, site visit	6/24/96
Memo to Subcommittee	6/24/96
Fax cover sheet	6/26/96
Notes, phone conversation with Harry Ives	7/1/96
Letter, to Attorney Singer, DRI application	7/8/96
Notes, phone conversation with abutter	7/9/96
Fax cover sheet	7/10/96
Notes, phone conversation with Harry Ives	7/10/96
Letter, to Attorney Singer, DRI application	7/10/96
Notes, phone conversation with Dennis Town Planner	7/11/96
Notes, phone conversation with Harry Ives	7/11/96

E. Materials submitted by Cape Cod Commission: (Continued)

Notes, phone conversation with Lisa Hendrickson	7/11/96
Fax cover sheet	7/11/96
Notes, phone conversation with Lisa Hendrickson	7/12/96
Fax cover sheet	7/12/96
Site video	7/12/96
Memo, to Attorney Singer, applicant, local boards, Subcommittee	7/12/96
Memo, same as above, corrected spelling errors	7/12/96
Notes, local setback and parking requirements	Undated
Notes, phone conversation with Lisa Hendrickson	Undated
Hearing notice	Undated
Hearing notice	Undated
Locus map	Undated
Notes, phone conversation with Lisa Hendrickson	Undated

The referral form and notice of the public hearing relative thereto, the Commission's staff reports, exhibits, minutes of all hearings and all submissions received in the course of the proceedings, including materials submitted on file LDR-96008 are incorporated into the record by reference.

TESTIMONY

On May 24, 1996, a hearing officer opened and closed a hearing on this project. No testimony was taken. On July 25, 1996, the full Cape Cod Commission received proposed corrections to and comments on factual information contained in a draft written decision for a procedural denial without prejudice. The Cape Cod Commission voted to procedurally deny the project without prejudice on July 25, 1996.

JURISDICTION

The project was referred to the Cape Cod Commission as a Limited Discretionary Referral under Section 12(e) of the Cape Cod Commission Act, and Sections 2(b)(i) and 9(a)(ii)(a) of the DRI Enabling Regulations, Barnstable County Ordinance 94-10, Chapter A, as amended, for the issue areas of Transportation Resources and Historic Preservation/Community Character by the Dennis Planning Board on February 28, 1996. Section 12(e) of the Act states that "a proposed development which does not exceed one of the specific thresholds in the interim standards and criteria set forth in subsection (c)...may be referred to the Commission by a municipal agency in the municipality where the development is located...provided that the Commission accepts the referral as a development which may have regional impacts and which presents one or more of the concerns listed in subsection (b)."

FINDINGS

The Commission makes the following Findings subject to Sections 12 and 13 of the Cape Cod Commission Act:

1. The Cape Cod Commission accepted the project for DRI review as raising the following regional concerns as listed in subsection 12(b) of the Act:
 - i. "the location of the development near a waterway, public land or municipal boundary."
 - ii. "the impact of the development on existing capital facilities, including but not limited to transportation...".
 - iii. "the physical size of the development and the site to be developed."
 - iv. "the amount of pedestrian and vehicular traffic which the development would produce."
 - v. "other factors of regional concern as they may arise."

2. The project will have regional impacts under the Community Character section of the Regional Policy Plan based upon testimony taken at the Regulatory Committee meeting on March 25, 1996, the Commission meeting on March 28, 1996, and its location at the Bass River and between the historic villages of South Yarmouth and West Dennis.

3. The project will impact the regional transportation network based on the intensity of the proposed uses and its location on Route 28 at the Yarmouth/Dennis town line.

4. The original project application referred to the Cape Cod Commission on February 28, 1996 by the Dennis Planning Board states the project required Site Plan approval as well as one or more variances and Special Permits. The applicant's attorney also referred to the need for a Special Permit from the Dennis Planning Board in a letter received the Commission dated March 1, 1996.

5. Information in the project referral to the Cape Cod Commission on February 28, 1996 by the Dennis Planning Board includes a Site Plan and Profile, two proposed Landscaping Plans, drawings of the proposed new restaurant building, an Existing Parking Conditions Plan and a Site Plan/Proposed Conditions Layout showing relocation and upgrading of the miniature golf course and parking, upgrading the existing restaurant building and constructing a two-bedroom apartment in the restaurant building, and the extension, alteration and change of non-conforming uses and structures. Subsequent to this referral, on July 12, 1996, a concerned member of the public provided the Commission with a copy of a Site Plan filed with the Dennis Building Inspector showing changes and new construction on the site different than those detailed in the project referral and plans submitted to the Commission on February 28, 1996.

6. The project proponent decided not to pursue the application for a DRI approval of the proposed project. The applicant failed to submit information necessary to grant a DRI approval to the proposed project including a completed DRI application and project fee.

7. The applicant filed a letter with the Cape Cod Commission seeking to withdraw the project from DRI review. The Cape Cod Commission Enabling Regulations, Section 9(k) allow withdrawal "so long as the applicant provides documentation that the project has also been withdrawn from consideration at the local level." The applicant presented information documenting that the project was withdrawn from consideration by the Dennis Zoning Board of Appeals. The applicant did not provide satisfactory documentation evidencing that the project had been withdrawn from consideration by the Dennis Planning Board.

8. The applicant's legal counsel was present on March 25, 1996 when the Commission's Regulatory Committee voted to recommend that the project be accepted for Limited DRI review. The applicant's attorney was also present at the March 28, 1996 Commission meeting when the Commission voted to accept the Limited Discretionary Referral of the Dennis Planning Board under the Regional Policy Plan issue areas of Transportation Resources and Historic Preservation/Community Character. The applicant's attorney was subsequently informed in a letter dated April 1, 1996 of the Commission's March 28th vote and that "the project will proceed under standard DRI procedures and time-frames."

9. The building Construction permit issued by the Dennis Building Inspector on March 26, 1996 noted the "owner proceeds at own risk due to Cape Cod Commission regulations."

10. A letter dated May 10, 1996 from the Commission staff to the applicant's legal counsel noted "the applicant should continue to refrain from any further work on the project site until Commission review is completed and a DRI permit is issued."

11. A letter dated May 20, 1996 from Commission legal counsel to the applicant's legal counsel noted that "if for any reason the DRI withdrawal does not become effective, any development work conducted on the site after March 28, 1996...is at the applicant's own risk and the Commission may require changes in the location, design, and other aspects of the project consistent with its review standards."

12. Despite notifications listed in Findings #9, #10 and #11, above, the applicant razed the existing restaurant building and commenced with reconstruction of the building at his own risk.

13. Two letters dated July 8, 1996 and July 10, 1996 sent to the applicant's legal counsel referenced the Commission's Enabling Regulations and policy on Procedural Denials, dated August 19, 1995. The letters noted that a completed DRI application and project fee were needed by July 10, 1996 or a procedural denial might result.

14. On July 10, 1996, the Cape Cod Commission received a letter from Attorney Myer Singer representing the above-referenced applicant. The letter states that the project proponent has decided not to go forward with a relocation of his miniature golf course, and "[f]or that reason, he will not be filing a DRI application." The letter further states that the applicant "expects that at some point in time the Commission will issue a procedural denial without prejudice if his applications before the Dennis administrative authorities are not withdrawn."

15. On July 12, 1996, the Town and applicant's legal counsel were informed in writing that based on the letter from the applicant's attorney of July 10, 1996 setting forth his expectation of a procedural denial of the project, the hearing scheduled for July 29, 1996 had been cancelled and that the Commission was proceeding with a procedural denial of the project. The applicant was also informed that the Commission intended to proceed with a procedural denial of the project at its next regularly scheduled meeting on July 25, 1996 at 3:00 pm in the Assembly of Delegates Chamber, First District Court House, Barnstable, MA.

16. On July 22, 1996 the Dennis Planning Board considered a letter from Attorney Singer stating that the project is withdrawn with prejudice. The Planning Board did not act on this request and continued its discussion to await an opinion from town counsel regarding their options

concerning the requested withdrawal with prejudice.

17. On August 5, 1996 the Dennis Zoning Board of Appeals will consider an appeal of the Dennis Building Inspector's issuance of a construction permit for the restaurant building. The appeal alleges that the applicant must obtain a special permit to reconstruct the restaurant building.

CONCLUSION

Based on the applicant's failure to submit a complete DRI application, project fee and the above Findings, the Cape Cod Commission hereby procedurally denies the Development of Regional Impact application of Mr. Jay Howland for the proposed Dennis Miniature Golf project as described in the Dennis Planning Board referral received by the Commission on February 28, 1996 pursuant to Section 12 and 13 of the Cape Cod Commission Act without prejudice.

Greg Silverman
Greg Silverman, Chairman

8/8/96
Date

COMMONWEALTH OF MASSACHUSETTS

Barnstable, ss.

Subscribed and sworn to before me this 8th day of August, 1996.

Katharine G Peters
NAME, Notary

My Commission expires: 7/25/97